

**Inclusivity and equality in the quest for transformation in
employment opportunities.**

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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own work, except for instances indicated otherwise, that I am the author thereof, and that the work, in its entirety or in part, has not been previously submitted for the purposes of obtaining an academic qualification.

Sign: _____

Date

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LIST OF ACRONYMS

AA	Affirmative Action
ACJ	Acting Chief Justice
BEE	Black Economic Empowerment
BEEA	Broad-Based Black Economic Empowerment Act
CC	Constitutional Court
DCS	Department of Correctional Services
EAP	Economically Active Population
EEA	Employment Equity Act
EEAA	Employment Equity Amendment Act
EEP	Employment Equity Plan
LC	Labour Court
LAC	Labour Appeal Court
SAPS	South African Police Service
SCA	Supreme Court of Appeal

TABLE OF CONTENTS

Cover Page.....	i
Declaration.....	ii
Acknowledgement.....	iii
List of Acronyms.....	iv
Table of Contents.....	v

CHAPTER ONE: INTRODUCTION

1.1 Title.....	1
1.2 The Purpose of the Research.....	1
1.3 Methodology.....	2
1.4 Background.....	2
1.5 Sequence of Chapters.....	6

CHAPTER TWO: AFFIRMATIVE ACTION IN SOUTH AFRICA

2.1 Introduction.....	8
2.2 The South African Context.....	8
2.3 Definition of Affirmative Action.....	9
2.4 The Notion of Equality and the South African Approach.....	11
2.4.1 Formal Equality.....	12
2.4.2 Subjective Equality.....	13
2.4.3 Equality of Opportunities.....	14
2.4.4 The South African Approach.....	15
2.5 The Legislative Requirement for Equal Employment Opportunities.....	17
2.5.1 Section 2 of the EEA.....	17
2.5.2 Section 15 of the EEA.....	18
2.5.3 Section 42 of the EEA.....	20

2.6 The Legal and Practical Effects of the EEAs Provisions for Representivity.....	21
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CHAPTER THREE: THE TENSION BETWEEN INCLUSIVITY AND EQUAL OPPORTUNITY

3.1 Introduction.....	22
3.2 Arguments for Affirmative Action.....	22
3.3 Arguments against Affirmative Action.....	23
3.4 Can the Tension between Inclusivity and Equal Opportunity be bridged in Our Interpretation of Affirmative Action?	25

CHAPTER FOUR: HOW THE COURTS LOOK AT AFFIRMATIVE ACTION

4. Introduction.....	29
4.1 Facts.....	29
4.2 Issue.....	30
4.3 Labour Court Decisions.....	30
4.4 Labour Appeal Court Decisions.....	30
4.5 Supreme Court Appeal Decisions.....	31
4.6 The Constitutional Court Decisions.....	32
4.6.1 Commentary on the <i>Van Heerden</i> Judgement.....	32
4.6.2 The Protection Provided in Section 9(2) of the Constitution.....	33
4.6.3 The rationality standard.....	33
4.6.4 The Interpretation of Section 9(2) of the Constitution.....	36
4.6.5 The Appropriateness of the Rationality Standard.....	37
4.7 <i>Solidarity and Others v Department of Correctional Services and Others</i>	39
4.7.1 Facts.....	39

4.7.2 Issues.....	40
4.7.3 Labour Court Decision.....	40
4.7.4 Labour Appeal Court Decision.....	41
4.7.5 Constitutional Court Decision.....	41
4.8 Commentary.....	42

CHAPTER FIVE: RECCOMMENDATIONS AND CONCLUSION.....45

BIBLIOGRAPHY.

1. Text books.....	50
2. Journal articles.....	51
3. Reports.....	52
4. Table of statutes.....	53
5. Table of cases.....	53
6. Thesis.....	54
7. Internet Sources.....	54

CHAPTER ONE

INTRODUCTION

1.1 Title

Inclusivity and equality in the quest for transformation in employment opportunities.

1.2 The Purpose of the Research

The purpose of this research is to bridge the tension between the two voices diverging in society. It follows that this research intends to investigate the possibility of having an interpretation of affirmative action that is inclusive and at the same time providing equal opportunities for all. Moreover, the research aims to investigate whether affirmative action is working and whether South Africa should continue with it. To achieve what this research intends to do, it will look at the history of affirmative action and the reasons why it was created. Furthermore, the research will look at the arguments for and against affirmative action. The purpose of this research is to try and manage the tension between the racial nature and racial exclusivism of affirmative action and also to meet the Constitutional¹ requirement of equal opportunities for all.

As mentioned above the main issues to be investigated in this study will be whether the tension between the racial nature and racial exclusivism of affirmative action and the requirement for equal opportunities for all can be managed. Apartheid laws favoured white people, this has resulted in the crisis of a major gap in employment opportunities as white people still occupy top key positions.² Policies and legislation implemented to try and bridge that gap seem not to have achieved that goal³. The intention is not to have a situation where the coin is flipped, and South Africa finds itself in a position where the majority of black South Africans occupy all the top positions and have the white minorities jobless. However, this research imagines a situation where, as required by the legislation and policies, and the Constitution, equal

¹ Constitution of the Republic of South Africa, 1996.

² Sapa "Most top managers still whites – report" available at <http://www.fin24.com/Economy/Whites-still-top-management-posts-report-20140409-2> , accessed on 25 August 2017.

³ Hermann D "The current position of affirmative action" available at <https://navorsing.solidariteit.co.za/the-current-position-of-affirmative-action/> , accessed on 25 August 2017.

opportunities are made available to all and at the same time have no sense of oppression directed towards white minorities.

1.3 Methodology

This is a desktop study and the literature will be based on primary and secondary data. Various sources will be utilized in writing this dissertation. Relevant South African and international sources will be used; including primary sources i.e. Bills, Statutes and secondary sources i.e. Books, Journal Articles and Conference papers (local and international), Policy Documents and recommendations, South African and international law reports. As a result of this methodology being desktop, SAFLI, Sabinet, Google Scholar, Juta, HeinOnline and other online database have been used. The research data will mostly come from legislation and case law available on the issue of the interpretation of South African affirmative action, and in-depth perspectives will be covered by literature in journal articles and other legal writings.

1.4 Background

Black people are the majority in South Africa⁴. Post-apartheid South Africa finds itself in a place where it has to manage two complex processes. On one hand the Constitution calls for inclusivity, due to unjust laws of apartheid and on the other hand the same Constitution calls for equal opportunities. Two sides are diverging, on one hand the ‘black’ majority are calling for speeding up the process of transformation in employment opportunities, holding the view that it is too slow⁵ and on the other hand ‘white’ minorities are of the view that the call for transformation and implemented policies is reversed racism⁶. Statistics from reliable sources have shown that white minorities still occupy top or managerial positions, this in itself is a concern.⁷ When President Cyril Ramaphosa addressed the State of the Nation Address he

⁴ Brand South Africa “South Africa’s population” available at <https://www.brandsouthafrica.com/people-culture/people/south-africas-population> , accessed on 25 August 2017.

⁵ Khoabane P “Radical Economic Transformation not a re-invention of the wheel but speeding-up existing programmes” <https://uncensoredopinion.co.za/radical-economic-transformation-not-re-invention-wheel-speeding-existing-strategies/> , accessed on 25 August 2017.

⁶ Gumede M “What is the reverse discrimination like in South Africa?” available at <https://www.quora.com/What-is-the-reverse-discrimination-like-in-South-Africa> , accessed on 25 August 2017.

⁷ The 17th Annual Commission for Employment Equity Report Available at: <http://www.labour.gov.za/DOL/documents/annual->

highlighted that says ‘data indicated that young white people still do better than their black peers in social development indicators’.⁸ In addition, a major concern is that women are not employed in key positions. Furthermore, statistics show that women are sitting way below the number of top positions they should be occupying.⁹

The study shows that the implementation of affirmative action in South Africa seems to have not reached the goals to which it was intended for. Literature shows that the issue of affirmative action and employment opportunities for all is an area of research that is widely debated.¹⁰ Reasons being the unavoidable debate of racism and reversed racism that seems to always be at the centre of the diversity within South Africa. Commentators highlight that race is at the core of this debated issue, as it is said that one cannot talk about affirmative action and employment opportunities for all and leave out the issue of race given the historical background of this country. Few studies conducted in developing countries reveal that the presence of the legal provision for affirmative action does not guarantee that opportunities will be available to people who according to legislation like the Employment Equity Act¹¹, ought to have jobs or employment with the intention of addressing the imbalances created by the past governing bodies. Instead further implementation mechanisms are said to be needed.

The Labour Relations Act¹², The Basic Conditions of Employment Act¹³, Promotion of Equality and Prevention of Unfair Discrimination Act¹⁴, Employment Equity Act and all other labour and transformative statutes give effect to the principles of the Constitution. Given the superiority of the Constitution, most of the legislation dealing with the issues of transformation and addressing inequalities arise from the Constitution itself. This research focusses more on the Constitution and the EEA¹⁵. The main purpose of the EEA is to provide for employment equity through measures like affirmative action which will redress the imbalances of the past.

reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/commission-for-employment-equity-report-2016-2017 Accessed on 08 March 2018.

⁸ Zulu M “It is not true that young white people are disadvantaged – Ramaphosa” available at: <https://citizen.co.za/news/1827739/it-is-not-true-that-young-white-people-are-disadvantaged/> accessed on 08 March 2018.

⁹ Van Wyk A “Are 37.5% of jobless young S. Africans black women, and 31.5% white men?” available at <https://africacheck.org/reports/do-black-women-make-up-37-5-of-unemployed-south-africans-aged-15-34/>, accessed on 25 August 2017.

¹⁰ Debatepedia “Is affirmative action good public policy?” available at: http://debatepedia.idebate.org/en/index.php/Debate:_Affirmative_action accessed on 19 October 2017.

¹¹ Act 55 of 1998.

¹² Act 66 of 1995.

¹³ Act 75 of 1997.

¹⁴ Act 4 of 2000.

¹⁵ Note 8 above.

This Act seeks to bring an end to decades of inequalities that are as a result of both apartheid policies and societal prejudices and stereotypes. The EEA seeks to ensure that the people of South Africa enjoy equality of opportunities in employment that were hitherto denied to them.

The mandate given by EEA and the Constitution has attracted different reactions in our country. Statistics have shown that there has not been much change in employment opportunities considering that South Africa's population is dominated by black people.¹⁶ However, that seems not to be the case in top positions as research has shown that the white people still occupy the very position that they occupied during the apartheid era.¹⁷ For example the BMF¹⁸ report shows that BMF continues to keep Corporate South Africa's transformation record in check by advocating for the appointment of black professionals to meaningful positions within companies. The statistic provided by the BMF report shows how far behind black people are when it comes to the occupation of top managerial positions in which itself is proof that black people have lesser employment opportunities than white people. The reports are a reflection of the fact that when Apartheid laws were removed there was no automatic equal society that was created. The Jack Hammer Executive Report¹⁹ which was released in 2015, revealed that the proportion of CEOs who are black South African has fallen from 15% in 2012 to 10% in 2015. The study of this report will answer some of the questions from this research. The study has also shown that women are still not employed in top positions. This study not only focuses on the private sector but also the public sector. Oppenheimer's research reveal that some women and black staff feel that their contributions are not always valued and that career and professional development plans for them are non-existent.²⁰ Another view is that 'black' people are forced to carry the stigma of having been appointed to meet a racial quota.²¹

Moreover the study provides this research with statistics, such as, for example; nationally in 2007, 62.6 per cent of all students (476 770) in the public higher education system were Black African, 23.7 per cent (180 461) were White, 6.9 per cent (52 596) were Indian/Asian, and 6.4

¹⁶ Brand South Africa "South Africa's Population" available at: <https://www.brandsouthafrica.com/people-culture/people/south-africas-population> accessed 20 October 2017.

¹⁷ Sesant S "Affirmative Action isn't going anywhere, says minister" <https://www.iol.co.za/capeargus/affirmative-action-isnt-going-anywhere-says-minister-9053610> accessed 20 October 2017.

¹⁸ Black Management Forum *40 Years of changing the Transformation Landscape* Annual Report (2016).

¹⁹ Jack Hammer Executive Report available at: <http://www.jhammer.co.za/wp-content/uploads/2016/03/JackHammer-ER3.pdf> accessed 20 October 2017.

²⁰ Oppenheimer, M and Kok, C 'Non-Racial Affirmative Action in Employment' 2014 16 South African Institution of Race Relations available at <http://irr.org.za/reports-and-publications/atLiberty/files/irr-liberty-non-racial-affirmative-action-november-2014-16.pdf>, accessed on 25 February 2017.

²¹ Ibid.

per cent (49 066) were Coloured²². The 2007 University intake statistic will help this research assess the progress of transformation in 2017 which is 10 years later. Statistics from the BMF report show that white people are still holding on to key positions after 23 years of democracy. As a result, the enjoyment of the new era seems to be only limited to the hands that enjoyed the old era (Apartheid). Reversed racism is said to be used as a shield by white people when the black majority call for speeding up of the transformation. Deane's research reveal that some people whole heartedly believe that the principles of affirmative action are reversed racism. Responding commentators argue that there is nothing in section 15 of the EEA that establishes an absolute barrier to people who are not from designated groups.²³ According to the EEA, 'Designated Groups' refer to the following people: Black people (in other words, Africans, coloureds or Indians), women, and people with disabilities.²⁴ Chinese people are also considered members of the 'designated group'. It is important to highlight that there are actual differences in disadvantages of the members within the identified 'designated group'. This means that although they (black women, white women, black men, disabled people and the rest of the members) all form part of the members of 'designated groups', their struggles are not the same and as a result their recruitment to employment opportunities will not be the same as some will be preferred over the others, depending on circumstances.

The study then shows, after evaluation of the two diverting views above, the issue of merits that come into play. With some commentators holding the view that race is not an accurate proxy for disadvantage.²⁵ The question whether or not in employment opportunities merits should be taken into account is posed, with some views for, and some against the inclusion of merits. There are also conflicting views, ones for, and the other against. However, the latter seems to be correct. Bodenner argues that affirmative action, logically, should be a temporary measure and that it could be argued that if affirmative action were to continue indefinitely its results could have negative economic and social consequences holding the view that once substantive equality has been attained, the affirmative action policy should end.²⁶ The EEA and the Constitution has called for equal employment opportunities for all, as a result our

²² Van Wyk B 'the Affirmative Action Debate: A Critical Reflection' (2010) 24 *SAJHE* 358 366.

²³ Deane T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998' (2006) 18 *SAMJ* 381 388.

²⁴ Section 1 of the EEA.

²⁵ Nconco M "substantive equality and affirmative action in the workplace" LLM, Nelson Mandela Metropolitan University, 2012

²⁶ Bodenner C "The End of Affirmative Action?" Available at: <https://www.theatlantic.com/notes/all/2015/12/the-end-of-affirmative-action/420042/> Accessed 27 August 2017.

interpretation of affirmative action should reflect on the mandate of the legislature. The research will also look at the recent Constitutional judgements of *South African Police Service v Solidarity obo Barnard*²⁷ and *Solidarity and Others v Department of Correctional Services and Others*²⁸, focussing on how this cases impacted the application of affirmative action measures in the country. Other cases will be looked at as well, including the first case which directly dealt with affirmative action the *Minister of Finance and Another v Van Heerden*'s²⁹ case.

As noted above, it cannot be that black people in South Africa are a majority and South Africa having achieved democracy 23 years ago, still face the same issues of inequalities in employment opportunities. As statistics show that white people are still holding on to the key positions, which they enjoyed during the apartheid time³⁰. It is therefore a concern that, having all the policies and legislation in place which are trying to rectify the issue of inequalities in employment opportunities, yet the country has not achieved the goal of equal opportunities for all after 23 years. This study is worth doing because the focus of the study is to assess whether or not there is a need to continue with the policies and legislation that was passed to address this issue of inequality, and at the same time look at other jurisdictional policies and legislation that have achieved the goals which were meant to be achieved. This research will help in changing the practices of such as: 'men occupying the top positions' especially in government. Moreover, the intention of the study is to provide transformation in employment opportunities, whilst avoiding reversed racism. The study will also help in assessing the issues of merits when it comes to employment opportunities, and provide a clear guide as to how merits are balanced against the basic principles of affirmative action. The study aims to achieve an interpretation of affirmative action that is inclusive, and that provides equality and transformation in employment opportunities.

1.5 Sequence of Chapters

This dissertation contains five chapters. The first chapter sets out the introduction which includes the intended aim, methodology, purpose and background of this dissertation.

²⁷ [2014] 11 BLLR 1025 (CC).

²⁸ 2016 (5) SA 594 (CC).

²⁹ *Minister of Finance and another vs Van Heerden* 2004 (12) BLLR 1181(CC).

³⁰ Note 17 above.

The second chapter defines affirmative action. This chapter will look at affirmative action in a South African context, the notion of equality and the South African approach will be discussed and lastly it will look at the legislative requirement for equal employment opportunities.

The third chapter looks at how the racial nature of affirmative action can be managed whilst meeting the requirement for equal employment opportunities for all and discusses arguments for and against affirmative action. This chapter seeks to examine the question of whether the tension between inclusivity and equal opportunity can be bridged in our interpretation of affirmative action.

The fourth chapter looks at the current legal position regarding affirmative action and how it is applied in South Africa. In order to do this, the *South African Police Service v Solidarity obo Barnard*³¹ and *Solidarity and Others v Department of Correctional Services and Others*³² and other current and relevant cases are discussed and analyzed. The *Barnard's* case is used in this analysis because it the current leading case in issues involving the application of affirmative action.

The final chapter contains the conclusion to the dissertation. This chapter answers the question of: How South Africa can continue with affirmative action that is not inclusive but at the same time still believing in equal opportunity for all. Lastly the chapter provides recommendations.

³¹ Note 27 above.

³² Note 28 above.

CHAPTER TWO

AFFIRMATIVE ACTION IN SOUTH AFRICA

2.1 Introduction

This chapter is a discussion on affirmative action. It is therefore important to firstly give a clear understanding of the concept and the principles that underpin it. It introduces and defines affirmative action, and discusses the different types of equality attached to affirmative action. Moreover it looks at the brief history of affirmative action. As stated in the previous chapter, this chapter will look at how the racial nature of affirmative action can be managed whilst meeting the requirement for equal employment opportunities for all.

2.2 The South African Context

The major changes in the South African workplace towards attaining equality began in July 1977 when a commission chaired by Professor NE Wiehahn was established.³³ The establishment of the commission was aimed at solely addressing the ‘changing needs of time’ and for this reason it investigated the labour dispensation.³⁴ The reason for transformation was expressed as follows:

‘It took as points of departure the use of the labour field in South Africa as the conflict area for the acquisition of social, political and other rights for the workers of the country and the fact that changes in labour laws would have a ripple effect on other spheres of society. It viewed change over a broader front in society as essential’³⁵

As a result, preferences of absolute attributes of race, gender, and colour were established and influenced the granting of more favourable terms and conditions of employment and promotions.³⁶ The 1980s saw the first step towards promoting such practices, though in a limited *ad hoc* manner. Discrimination on the basis of race, gender and colour in industrial council agreements was outlawed in 1981.³⁷

³³ NE Wiehahn “*Commission of Enquiry into Labour Legislation: The Complete Wiehahn Report*” Parts 1-6.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ By amendments s 24(2) of the Labour Relations Act 28 of 1956 and by Wages Act 5 of 1957.

South Africa is made up of one of the most diverse societies. To mention a few, South Africa has 11 official languages, different ethnic groups, races, religion and cultures. The unjust laws governing the country during the apartheid era were designed to create disadvantages among races and gender. African, Coloured and Indian people had limited access to amenities, this included getting different education and less employment opportunities under the apartheid regime. The democratic era is represented by the progressive South African Constitution which is founded on defined values of “human dignity, the achievement of equality and the advancement of human rights and freedom”³⁸. What distinguishes the South African Constitution from other Constitutions is that it acknowledges the injustices perpetuated against certain classes of people and necessitated restorative measures be put in place to redress the disadvantages those classes of people suffered.³⁹

2.3 Definition of Affirmative Action

A universal definition of affirmative action does not exist.⁴⁰ The term ‘affirmative action’ was firstly introduced in the United States in 1961 by the executive order 10925⁴¹ of U.S President J.F Kennedy.⁴² The concept of affirmative action develops over time and adapts to the change of time. The definition and implementation of affirmative action differs due to the differences in culture and political structure of countries using it.⁴³

According to Tomei⁴⁴ ‘Affirmative action means the deliberate use of race- or gender-conscious criteria for the specific purpose of benefiting a group which has previously been disadvantaged on grounds of race or gender. Its aim ranges from providing a specific remedy for invidious discrimination to the more general purpose of increasing the participation of groups which are visibly under-represented in important public spheres such as education, politics or employment.’⁴⁵

³⁸ Section 1 (a) of the South Africa Constitution, 1996.

³⁹ Ibid, Section 9 (2).

⁴⁰ Elaine Kennedy-Dubourdieu (ed), *Race and Inequality: World Perspective on Affirmative Action* (Ashgate Publishing, 2006) 173.

⁴¹ *Executive Order 10925* (EO 10925) s 301 (1) prohibits discrimination in government contracting on basis on ‘race, creed, colour or national origin’.

⁴² Terry H Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (Oxford University Press, 2004) 60.

⁴³ Matthew J Lindsay, ‘How Anti-Discrimination Law Learned to Live with Racial Inequalities’ (2006) 75 *University of Cincinnati Law Review* 93-5.

⁴⁴ Ms Manuela Tomei is the Director of the International Labour Organization’s Conditions of Work and Employment Programme.

⁴⁵ M Tomei ‘Discrimination and equality at work: A review of concepts’ (2003) 142: 4 *International*

Faundez⁴⁶, states that ‘affirmative action involves treating a sub-class or a group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion of certain goods’⁴⁷, Smith⁴⁸ states that ‘affirmative action is preferential access to social resources for persons who are members of groups which have been previously disadvantaged by adverse discrimination’.⁴⁹

According to Anderson⁵⁰ ‘affirmative action is referred to as any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through “outreach” (targeting the group for publicity and invitations to participate) or “preference” (using group membership, or proxies, as criteria for selecting participants in the opportunity).’⁵¹

Fredman⁵² also states that ‘affirmative action denotes the deliberate use of race- or gender-conscious criteria for the specific purpose of benefiting a group which has previously been disadvantaged on grounds of race or gender. Its aims range from providing a specific remedy for invidious discrimination to the more general purpose of increasing the participation of groups which are visibly under-represented in important public spheres such as education, politics or employment.’⁵³

Section 15 (1) of the EEA defines affirmative action as:

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

It is clear from this definition that the intention of the legislature was to give a purposive meaning to affirmative action. The concept of affirmative action is goal oriented. The Constitution and the EEA are the legal instruments which affirmative action roots its purpose. The Constitution provides that:

Labour Review 401 at 407.

⁴⁶ Julio Faundez is a Professor of Law at University of Warwick Coventry, United Kingdom.

⁴⁷ J Faundez *Affirmative action international perspectives* 1 (ed) (1994) at 34.

⁴⁸ Louise N. Smith is an attorney in the United States of America and represents clients in a wide range of employment and business law matters, including class and collective action litigation.

⁴⁹ N Smith “*Affirmative action under the new Constitution*” 1995 *SAJHR* 84 at 234.

⁵⁰ Elizabeth Anderson is a University Professor and teaches courses in ethics, social and political philosophy, political economy, philosophy of the social sciences, and feminist theory.

⁵¹ E Anderson *The Imperitive integration* (2010) at 135.

⁵² Sandra Fredman is Rhodes Professor of the Laws of the British Commonwealth and the USA at Oxford University.

⁵³ S Fredman “*Reversing discrimination*” (1997) 113 *Law Quarterly Review* 575 at 576.

“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”.⁵⁴

This Constitutional provision can be interpreted to mean that the people prejudiced by discrimination (persons from designated groups) are to be uplifted by affirmative action. The nature of affirmative action is designed to ensure that steps to correct the imbalances in social standings between people from different groups fully enjoy their rights and freedoms. To put emphasis on the point made above, Moseneke J in *Minister of Finance and another vs Van Heerden*⁵⁵ laid a test to determine whether affirmative action measures target persons or categories of persons who have been disadvantaged by unfair discrimination is Constitutional. The test is:

“...to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality”.⁵⁶

The wording of the affirmative action provision in the EEA seems to pass this Constitutional test, as the first requirement has been addressed under the heading “designated group” and also the second and the third requirements addressed in the Act.

2.4 The Notion of Equality and the South African Approach

Explanation of the concept of formal equality and substantive equality and also equality of opportunities will be discussed below.

2.4.1 Formal Equality

⁵⁴ Section 9(2).

⁵⁵ Note 28 above, para 37.

⁵⁶ Ibid.

Affirmative action is viewed as reverse discrimination in this perspective.⁵⁷ Formal equality views the use of race, gender or disability as discriminatory, even in circumstances where it is used to classify individuals in need of compensation.⁵⁸ Formal equality is procedural in nature and has no remedial intent at all.⁵⁹ All members of society are deemed to be equal bearers of rights. Society could rid itself from inequality by extending the same rights and privileges to all in a neutral manner by not discriminating between socioeconomic differences between groups. This is also known as a proportioned view of equality. This idea contends that it is in order for a disadvantaged group to contest affirmative action as a violation of the principle of equality.⁶⁰ This model favours individual rights instead of group rights⁶¹. With this model, cases are not dealt with on their own merits but are treated alike and does not identify instances when it is justified to treat unequal cases differently.⁶² The principle of individual merit, over group status is also favoured and merit is viewed as a function of disadvantage rather than an objective characteristic.⁶³ With this approach, the state acts as a neutral force between its citizens, favouring no one above any other.

However this approach has its own shortcomings. This approach does not consider social context and circumstances as it favours equal treatment. Unfortunately equal treatment could perpetuate and even exacerbate existing inequalities.⁶⁴ 'Equality is also viewed as a relative concept under the notion of formal equality, which means that it could be attained by treating everyone equally bad or by removing benefits to bring all in line with the worse-off'.⁶⁵ The existence of systematic and structural inequalities in societies is ignored by this approach as formal equality fails to recognise deeply entrenched patterns of rooted disadvantaged groups.⁶⁶ This could be positive in the sense that it prevents those distinctions on the basis of status

⁵⁷ S Fredman 'Reversing discrimination' (1997) 113 *Law Quarterly Review* 575 at 576.

⁵⁸ S Fredman 'Providing equality: substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 163 at 164.

⁵⁹ M Fineman 'Equality across legal cultures: the role for international human rights' (2004) 27 *Thomas Jefferson Law Review* 1 at 2.

⁶⁰ C Albertyn *et al* 'Substantive equality, social rights and women: a comparative perspective' (2007) 23 *SAJHR* 209 at 209.

⁶¹ S Fredman 'Redistribution and recognition: reconciling inequalities' (2007) 23 *SAJHR* 214 at 233.

⁶² J Faundez *Affirmative action international perspectives* 1 (ed) (1994) at 3.

⁶³ S Fredman 'Facing the future: Substantive equality under spotlight' in O Dupper & C Garbers '*Equality in the workplace reflections of South Africa and beyond*' 1 (ed) (2009) at 16.

⁶⁴ Note 46 above, at 163.

⁶⁵ Note 51 above.

⁶⁶ C Cooper 'The boundaries of equality in labour law' (2004) 25 *ILJ* 813 at 817.

affiliations, such as race and gender. A situation where formal equality application could be useful is in situations where equal pay for equal work is challenged.⁶⁷

2.4.2 Substantive Equality

On the other hand, substantive equality was developed from the failings of formal equality. Albertyn views substantive equality as having four characteristics namely concern with impact of a measure on society, acceptance of difference, purposive and value based approach to rights to achieve equality.⁶⁸ Substantive equality can be approached in four different ways, namely “equality of results, equal opportunities; substantive rights and a broad value driven approach”.⁶⁹

Equality of results was conceived out of the realization that identical treatment does not result in equal positions.⁷⁰ In other words, anti-discrimination laws are not sufficient to achieve the transformational goal as envisaged in the Constitution and EEA. On the other hand, equality of opportunities is an acknowledgement of the fact that persons of different social groups are positioned differently and cannot compete equally.⁷¹ This contextual approach to equality is the symbol of substantive equality as it takes into account the effect of history on people’s capacities.⁷² It therefore makes it essential that proactive measures be taken to counter the effect of historical factors on the realization of full human potential. Such action is allowed to the extent that it corrects the inequality of those being compared.⁷³

The purpose of substantive equality is to eradicate socio-economic inequalities and the structures that cause them. Social inequality refers to situations where exclusion from a benefit is based on a person’s social identity whereas economic inequality refers to “unequal access to, and distribution of, basic needs, opportunities and material resources”.⁷⁴

Under-representation in the workplace is a manifestation of economic inequality in employment law. Such underrepresentation means that there is an uneven dispersal of resources such as employment opportunities. It therefore is important to have legislation such as the EEA

⁶⁷ M Fineman ‘Equality across legal cultures: the role for international human rights’ (2004) 27 *Thomas Jefferson Law Review* 1 at 2.

⁶⁸ C Albertyn “Substantive equality and transformation in South Africa” (2007) 23 *SAJHR* 253, 258.

⁶⁹ C Barnard and B Hepple “Substantive Equality” (2000) 59 *Cambridge Law Journal* 562, 564.

⁷⁰ Mhangu V *Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed its Welcome?* (Unpublished LLM thesis, University of KwaZulu-Natal, 2013).

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Note 60 above at 255.

that will have measures taken to redistribute such resources. However, this does not mean that differences should be eliminated. Substantive equality requires the removal of difference which is tied to disadvantage.⁷⁵ Thus if being underrepresented in the workforce means unequal access to economic benefits of being in a job, such a scenario needs to be rectified. This, however, needs to be done in accordance with the Constitution.⁷⁶ Both individual worth and dignity are recognised by substantive equality. Primarily, substantive equality stresses that the interpretation of rights should take into account both the context in which violation of rights takes place and the purpose for which the right was created.⁷⁷ This nuanced approach ensures that measures taken and decisions made remain in line with the precepts of the Constitution.⁷⁸

2.4.3 Equality of Opportunities

Equality of opportunity is a mixture of the two approaches, formal and substantive equality, using arguments from both, to allow positive action with strict limits.⁷⁹ For this approach, the consideration of distributive factors is crucial for the attainment of equality.⁸⁰ For equality to be achieved in terms of this approach, role players cannot start the race at different starting points and cannot depart from the principle of individualism.⁸¹ This approach disregards historical factors impacting negatively on an individual's life chances.⁸²

In terms of this approach, when the starting point is equal, individualism will reassert itself when the point of neutrality and symmetry is reached. To be more specific, this notion acknowledges that the individual's opportunities are influenced by structural discrimination based on group characteristics as a result this notion is in favour of preferential treatment based on race, gender and even disability, until the purpose of equalising the starting point is met. A strong dependence is also placed on merit, which is detrimental in our understanding of disadvantage.⁸³ The institutional discrimination issue can be said to have been resolved when

⁷⁵ Ibid, at 260.

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

⁷⁷ Note 60 above, at 260.

⁷⁸ Ibid.

⁷⁹ Charles S A *Critique of the Concept of Disadvantage in relation to the Identification of Affirmative Action Beneficiaries: Race as Proxy for Disadvantage* (Unpublished LLM thesis, University of Cape Town, 2013) 21.

⁸⁰ Note 45 above at 576-579.

⁸¹ S Medjuck 'Taking Equality into the 21st Century: Commentary' (2001) 12 *National Journal of Constitutional Law* 49 at 49-50; Equal Rights Trust „The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality“ at 3. Available at <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Nondiscrimination,%20Formal%20and%20Substantive%20Equality.pdf> [Accessed 26 June 2012].

⁸² Note 70 above.

⁸³ Ibid.

individuals enjoy equality of opportunities and get to be treated on the basis of their qualities and not on race or other status-based criteria.⁸⁴ For individuals to compete on a fair footing, human rights will allow for individuals with lesser qualifications belonging to a certain group, to receive preferential treatment for employment and this would be in line with the fair play principle.⁸⁵ Removing obstacles in the recruitment process would be a practical application of this approach. However, the problem with this approach is that it does not guarantee that the disadvantaged groups would be in a position to take advantage of the available opportunities.⁸⁶

For example, when man and woman with the same qualifications compete for an employment opportunity, the woman ought to be favoured if they are underrepresented at this grade. This policy would be a temporary measure and once the goal of woman's representivity has been reached, the individual merit principle would be the determining factor.⁸⁷ This model can be criticised on the basis that it is merely procedural and the outcomes are not necessarily guaranteed.⁸⁸ By increasing the requirements for an entry level job would still exclude poorly qualified black employees, posing barriers to the employment of these employees.⁸⁹ "This model is applied in the European Union countries, where specific measures are in place to ensure positive action, preventing current and compensate for past discrimination, as well as promoting equality".⁹⁰

2.4.4 The South African Approach

The South African Constitution prescribes to the substantive notion of equality.⁹¹ Mosenke J in the *van Heerden*⁹² case explained what substantive equality should mean in the South African context. The following was held:

"This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation

⁸⁴ Note 45 above, at 579.

⁸⁵ Note 69 above, at 51.

⁸⁶ Note 50 above, at 167.

⁸⁷ O Dupper 'Affirmative Action and Substantive Equality: The South African Experience' 2002 *SAMLJ* 275 at 279.

⁸⁸ J Waldron in S Guest and A Milne *Equality and Discrimination* (1985) at 97.

⁸⁹ Note 50 above, at 580.

⁹⁰ Council Directive 2000/78/EC of 27 November 2000, (the Employment Directive), Article 7. <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML> [Accessed 13 July 2012].

102 Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] E.C.R. I-3051; [1996] I.C.R. 314 (E.C.J).

⁹¹ Equal Rights Trust "The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality" Available at: <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Nondiscrimination,%20Formal%20and%20Substantive%20Equality.pdf> [Accessed 13 July 2012].

⁹² Note 28 above.

and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantages in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable, because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society"⁹³

The above acknowledgement of contextual factors refers to the transformative role which substantive equality could and should play in bringing about equality, by rooting out systemic inequality.⁹⁴ This approach uses the individual status of race as the dominant norm of disadvantage but does not attempt to disregard group differences. Fredman holds the view that substantive equality does not disregard the categorisation by race or gender or on status grounds, but actions to find supplemental criteria to identify who should benefit from redress measures.⁹⁵ The government has a positive duty to intervene and eradicate discrimination, and because of this reason government cannot take a neutral position, for such a stance will be regarded as support to societal discrimination. The results of this measure will ultimately bring about a more egalitarian society.⁹⁶

In South Africa, the focus is on groups to receive redress for the legacy of systemic discrimination they suffered under apartheid. Institutionalised racial discrimination was the order of the day prior to 1994. In as much as there is a strong support for this approach, this is not easy in the South African context as in many instances, race still acts as the identifying criteria for disadvantage. Put differently, it acts as a proxy for disadvantage and is the main reason for conflict between the beneficiaries and non-beneficiaries.⁹⁷

⁹³ Ibid, para 27.

⁹⁴ Note 70 above, at 24.

⁹⁵ Note 46 above.

⁹⁶ Note 49 above.

⁹⁷ Note 67 above.

2.5 The Legislative Requirement for Equal Employment Opportunities

The Employment Equity Act as the name of the Act suggest, gives effect to the Constitutional requirement which provides that equality includes the full and equal enjoyment of all rights and freedoms.⁹⁸ The EEA has as a result provided for representivity. The specific sections in the EEA that provide for representivity are sections 2, 15 and 42. The principle of representivity in South Africa is generally considered to be important for social order.⁹⁹ The Constitution itself calls for representivity.¹⁰⁰ Above all, the primary tool for representivity and transformation can be seen from the provisions of the EEA.¹⁰¹ The provisions will be discussed below.

2.5.1 Section 2 of the EEA

The EEA's purpose is to achieve employment equity in the labour market by:

- a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) implementing affirmative action measures to redress the disadvantages in employment experienced by 'designated groups', in order to ensure their 'equitable representation' in all occupational categories and all levels in the work force.¹⁰²

The provision of 'equitable representation' in terms of the EEA has the same effect as the concept of demographic representivity.¹⁰³ This can be explained to mean that the racial diversity of the national population needs to be reflected on each designated employer's workforce.¹⁰⁴ From the onset, section 2 of the EEA states that affirmative action measures are solely based on the concept of demographics representivity. This concept uses race and gender to identify its beneficiaries. Section 2 further uses the term 'equitable representation', a term

⁹⁸ Note 45 above.

⁹⁹ K Malan "Observations on representivity, democracy and homogenisation" (2010) 3 *TSAR* 427.

¹⁰⁰ See sections 174(2), 193(2) and 195(1)(i) of the Constitution.

¹⁰¹ Note 87 above, 430.

¹⁰² Section 2 of the EEA.

¹⁰³ Note 87 above, 430.

¹⁰⁴ Note 87 above, 430

which is not used in section 9(2) of the Constitution. The general notion of ‘equality’ as discussed above requires people to be afforded equal opportunities.¹⁰⁵

Although the Constitution as a whole does not have ‘equitable representation’ in it, the EEA refers to it. The use of this term by the EEA can be seen as a deviation from the known criteria for one to qualify as an affirmative action beneficiary.¹⁰⁶ For a person to benefit under section 9(2) of the Constitutional (the affirmative action clause) it is a requirement that such person must have suffered from past discrimination. Race and gender are considered to be the major factors in terms of section 2 of the EEA for determining who should benefit under affirmative action measures. It is imperative to point out that the use of race and gender in terms of equitable representation has potential of leading to the unfair differentiation of people in terms of section 9(3) of the Constitution. Therefore ‘equitable representation’ can be said to be contrary to the principles of ‘equality’ and human dignity.¹⁰⁷

2.5.2 Section 15 of the EEA

Section 15(1) of the EEA reads as follows:

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

Affirmative action measures are defined in section 15(1) of the EEA. To increase representation of historically disadvantaged groups in all units and levels of employment the above mentioned measures of affirmative action are designed to promote and advance qualified people from the said groups.¹⁰⁸ As discussed above, ‘equitable representation’ necessitates that the labour force of a designated employer reflect the national demographics of the population.

¹⁰⁵ Lloyd Ramutloa “RE: Chinese Association of South Africa” Department of Labour 24 June 2008, available at <http://www.labour.gov.za/DOL/media-desk/media-statements/2008/re-chinese-association-of-south-africa>, accessed on 5 March 2015.

¹⁰⁶ See section 9(2) of the Constitution.

¹⁰⁷ Section 1(a) of the Constitution.

¹⁰⁸ Section 15(1) of the EEA.

This notion of ‘equitable representation’ as a result goes further than what section 9(2) of the Constitution permits and certainly results in quotas.¹⁰⁹

Quota driven remedial measures also ignores merit.

Section 15(2)(d) of the EEA provides that:

“Affirmative action measures implemented by a designated employer must include ...subject to subsection (3), measures to ensure the ‘*equitable representation*’ of suitably qualified people from ‘designated groups’ in all occupational categories and levels in the workforce.”¹¹⁰

The way of advancing the concept of demographic representation is supplemented by section 15(2)(d) of the EEA. Section 15(2)(d) measures are numerical goals which should be used to allocate employment quotas per each race group. These numerical goals are informed by demographic statistics, making it difficult to execute those measures without implementing quotas. However, section 15(3) of the EEA provides that affirmative action measures “include preferential treatment and numerical goals, but exclude quotas.”¹¹¹ Section 15 of the EEA offers a vague safe-guard against quotas because the implementation of numerical goals has little difference to the concept of demographic representivity.¹¹² Numerical goals only use a flexible criterion but with similar repercussions.¹¹³

Section 15(4) of the EEA provides the following:

“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’.”

¹⁰⁹ Section 9(2) of the Constitution provides that “equality includes the full and equal enjoyment of all rights and freedoms that “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

¹¹⁰ Section 15(2)(d) of the EEA.

¹¹¹ Section 15(3) of the EEA.

¹¹² Tapanya G *The constitutionality of the concept of demographic representivity, provided for in terms of the Employment Equity Amendment Act 47 of 2013* (Unpublished LLM thesis, University of KwaZulu-Natal, 2015).

¹¹³ Ibid.

People from non-‘designated groups’ are protected by this Act. Section 15(4) of the EEA disallows an employer from adopting employment policies that creates absolute barriers for the advancement, promotion or employment of people from non-‘designated groups’. Without the lack of authority, section 15(4) could have been a good section. This is because the lack of an authoritative term in section 15(4) means that all the other sections that are authoritative outweigh it - for example section 42 of the EEA which creates demographic representivity requirements to which section 15(4) must surrender to.¹¹⁴ The decision of the CC in *Barnards*¹¹⁵ case is one of the decisions in which the issue of absolute barriers was considered, with the CC ruling that Barnard’s exclusion did not create an absolute barrier to her appointment, regardless of the fact that she was not appointed to salary level 9 based on representivity.¹¹⁶

2.5.3 Section 42 of the EEA

To determine whether a designated employer is complying with the EEA’s employment equity obligations section 42 of the EEA provides an assessment indicator that must be used by the Director-General or any persons or juristic persons applying the Act for this purpose.¹¹⁷

Furthermore, to add to the factors mentioned in section 15 of the EEA, it is a requirement in terms of section 42 that members from ‘designated groups’ are equitably represented in every unit and level of employment to be determined in relation to the:

“demographic profile of the national and regional economically active population; pool of suitably qualified people from ‘designated groups’ from which the employer may reasonably be expected to promote or appoint employees; economic and financial factors relevant to the sector in which the employer operates; present and anticipated economic and financial circumstances of the employer; and the number of present and planned vacancies that exist in the various categories and levels, and the employer’s labour turnover.”¹¹⁸

¹¹⁴ Ibid.

¹¹⁵ Note 27 above.

¹¹⁶ Note 100 above, page 38.

¹¹⁷ *Fourie v South African Police Service* (2004) 25 ILJ 1716 (LC) para 1732, 1735.

¹¹⁸ Section 42(a) of the EEA.

The implication of section 42 of the EEA is that the prohibition against quotas is applicable to its factors because it states that those factors mentioned in section 15 of the EEA may also be considered in the assessment of compliance process. As a result the assessment factors listed in section 42 of the EEA in line with section 15(4), which prohibits designated employers from adopting employment policies or practices that create absolute barriers for hiring, promotion, and professional advancement of members from non-'designated groups'.¹¹⁹

Though, as mentioned above, section 15(4) of the EEA lacks authoritative wording to make it authoritative, the effect of this is that only if a designated employer recognizes underrepresentation of a designated group is it allowed to apply the section 42 factors to set numerical targets directed at remedying the shortage in their representation.¹²⁰ However, this type of demographic representivity would be one that is concealed in numerical goals. When a designated employer pursues goals that are informed by section 15 and 42 factors, such affirmative action measures would be legitimate for the purposes of section 15 of the EEA.¹²¹ A measure that does not take cognisance of or deviates from the standard set in section 15 and section 42 factors would operate the same way as quotas.¹²² The problems with regard to the application of the Act are still there, particularly with the provision of affirmative action benefits in spite of the clear standards of affirmative action measures that were displayed in the EEA's abovementioned provisions for representivity.¹²³

2.6 The Legal and Practical Effect of the EEAs Provision for Representivity

As discussed above, the application of the concept of demographic representivity in the EEA often promotes unfair discrimination which the Act purports to combat. Divisions in employment in the South African labour market is worse off with the implementation of quotas. There are legal and practical effects posed by the implementation of demographic representivity in terms of the EEA, however this will not be discussed in this research.

¹¹⁹ Note 87 above, 430.

¹²⁰ AM Louw "Extrapolating 'equality' from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998" (2006) 18 *SAMLJ* 341.

¹²¹ *Ibid*, 342.

¹²² *Ibid*.

¹²³ Note 87 above, 430.

CHAPTER THREE

THE TENSION BETWEEN INCLUSIVITY AND EQUAL OPPORTUNITY

3.1 Introduction

As discussed in the previous chapter, there are legal and practical effects posed by the implementation of demographic representivity in terms of the EEA. Thus, how one interprets the EEA has far-reaching legal and practical implications. Just like any other policy that benefits some people and excludes others from benefiting, affirmative action beneficiaries are ‘for’ it whilst the excluded are ‘against’ it. The arguments ‘for’ and the arguments ‘against’ affirmative action will be discussed below. Lastly the question of whether the tension between inclusivity and equal opportunity can be bridged in our interpretation of affirmative action will be examined.

3.2 Arguments for Affirmative Action

It is without doubt that people who are benefiting from affirmative action will favour the policy. People who advocate for affirmative action consider it as a very important tool for social change. Affirmative action is regarded as a necessity to overcome a society that is far from being racially, sexually or economically just.¹²⁴ James P Sterba differentiates between different types of affirmative action according to its various goals: outreach affirmative action¹²⁵, remedial affirmative¹²⁶ action and diversity affirmative action¹²⁷. The differences between the above types of affirmative action can be used to clarify the terms in debates about affirmative

¹²⁴ James P Sterba, *Affirmative Action for the Future* (Cornell University Press, 2009) 32-3.

¹²⁵ Outreach affirmative action is defined as the attempt to search out ‘qualified woman, minority or economically disadvantaged candidates who would otherwise not know or apply for the available positions, but then hire or accept only those who are actually the qualified’. See James P Sterba, *Affirmative Action for the Future* (Cornell University Press, 2009) 32-3.

¹²⁶ Ibid. (Remedial affirmative action is divided into two subtypes: the first subtype focuses on the elimination of ‘existing discrimination’ practices to create, possibly for the time in a particular setting, a truly non-discriminatory playing field’).

¹²⁷ Ibid. (Diversity affirmative action is also divided into two types: the first subtype is supposed to achieve ‘educational benefits’, ‘a more effective workforce in such areas as policing or community relation’ and the second subtype attempts to ‘more fully achieve equal opportunities’).

action policies.¹²⁸ Particularly in employment opportunities, affirmative action has been regarded as an important tool to redress racial and gender based discrimination. This view is supported by the following scholars Elaine Kennedy-Dubourdieu, Penelope E Andrews, and Barbara Bergmann.

3.3 Arguments Against Affirmative Action

Affirmative action targets discrimination by providing preferential treatment to disadvantaged groups in society. Discrimination is therefore targeted by affirmative action. Disadvantaged groups in society are given preferential treatment. It is important to highlight that preferential treatment is a form of positive discrimination. As a result, people who oppose the idea of affirmative action hold the view that affirmative action worsens discrimination, rather than contributing to its end.¹²⁹ The question that remains is whether affirmative action be justified as an exception to the principle of non-discrimination? The answer to this question is debatable.¹³⁰

Thomas Sowell argues that the discrimination involved in preferential treatment for minorities is no more tolerable than the discrimination it targets to address. He articulated this by saying,

“Often the claim is made that ‘benign’ preferences (affirmative action) are very different from kind of racial discrimination found in the American South during the Jim Crow era or apartheid in white-ruled South Africa or the anti-Semitism of the Nazi era. But all group preferences are benign to those who benefit-and malign to those who pay the price.”¹³¹

Affirmative action is said to be burdensome to those individuals of the non-beneficiary groups and according to Nicholas Laham this is an unjustified burden. For this reason, those who benefit from affirmative action policies are subjected to racist stereotyping and this enhances racial divisions.¹³² This view supported by Terry Eastland who believes that affirmative action causes more tension between the majority and the minority groups because it sets the legal

¹²⁸ Thomas Sowell, *Affirmative Action Around the World* (Yale University Press) 160.

¹²⁹ Glen C Loury, *The Anatomy of Racial Inequality* (Harvard University Press, 2002) 95-6.

¹³⁰ Collen Sheppar, ‘Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law’ (2012) 151 (1-2) *International Labour Review* 11.

¹³¹ Note 87 above, 183.

¹³² Nicholas Laham, *The Reagan Presidency and the Politics of Race: in Pursuit of Colorblind Justice and Limited Government* (Praeger Publishers, 1998) 202, John H McWhrter, *Losing the Race: Self-Sabotage in Black America* (Free Press, 2000).

grounds for discrimination which is problematic.¹³³ Thomas Sowell¹³⁴ is regarded as one of the leading scholars and has written extensively on affirmative action and is therefore regarded as an authority on affirmative action. He supports the arguments presented by Laham and Eastland above. He claims that the experimental results¹³⁵ of affirmative action proves that it is more harmful than helpful. He further argues that it is a ‘creation of new evils’ to give preferences to disadvantaged groups today as he believes it is not possible to remedy evils of the past by giving such preferences.¹³⁶ In his view, “it is wrong to use group preferences and quotas as a remedy for the past discrimination”.¹³⁷

Nathan Glazer¹³⁸ shared a similar view. At first he questioned the usefulness of affirmative action policies and claimed affirmative action would be damaging for race relations. However, more than 10 years later Glazer changed his opinion about affirmative action, and stated that ‘without affirmative action, hardly any blacks would gain admission to top colleges, which undermines the legitimacy of American democracy’.¹³⁹ Another agreement presented as to why affirmative action is not an appropriate tool for supporting disadvantaged groups in that liberal democracies enable all groups to decide their own destinies. Another argument against affirmative action is based on the fact that liberal democracies enable all groups to decide their own destinies. To expand on this argument Sowell uses this factual illustration:

‘The successful economic rise of African Americans, Jews and Chinese Americans from the beginning of 20th century until the beginning of affirmative action in the 1970s in the United States is taken as evidence that affirmative action is not needed to help disadvantaged groups today.’¹⁴⁰

¹³³ Terry Eastland, *Ending Affirmative Action* (Basic Book, 1997) 195-204.

¹³⁴ A conservative African American economic scholar who wrote one of the most important comparative international studies about affirmative action. Sowell compared affirmative action policies in various countries – United State, India, Malaysia, Sri Lanka and Nigeria. He assessed and outlined the consequences of affirmative action, but did not focus primarily on implementations and limits of these policies.

¹³⁵ “His findings draw a rather bleak picture of the so called beneficiary groups of affirmative action, which in his opinion, are very likely to face ‘escalating intergroup violence’ sooner or later.

¹³⁶ Ibid. See also Alan H Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979) 229.

¹³⁷ Fredman, note above 53, 183.

¹³⁸ An influential sociologist, who was convinced about the disadvantages of affirmative action and promoted the urgent need to end affirmative action in the 1980s. See Nathan Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy* (Basic Books, 1987, Reprint); Nathan Glazer, *We are Multiculturalists now* (Harvard University Press, 2003, Reprint) 151-8.

¹³⁹ James Traub, ‘Nathan Glazer Changes his Mind, Again’, *The New York Times* (New York), 28 June 1998, 23.

¹⁴⁰ Above note 116, 96-3.

On the basis of ‘principles of individual autonomy and freedom of association’ Richard Epstein supports the above claim by arguing that affirmative action policies violate principles of individual autonomy and freedom of association.¹⁴¹ He further adds that it is not only the autonomy and freedom of non-beneficiaries that is affected, but also that of the supposed beneficiaries, who are unavoidably marked as not being able to prosper similarly without the support of the governments through affirmative action policies.¹⁴²

Notwithstanding the fact that there are criticisms of affirmative action, this research continues on the basis that affirmative action is an appropriate response to discrimination. However, this is the case only if the policy of affirmative action is designed in a way that properly addresses the causes of discrimination. This is because the way affirmative action is designed must take into account consideration not only the different forms of discrimination, but also different ways to address them.¹⁴³

3.4 Can the Tension between Inclusivity and Equal Opportunity be Bridged in Our Interpretation of Affirmative Action?

The concepts and ideas discussed above explain and give a clear picture of what affirmative action is all about. However, the question that remains is whether it is possible to manage the tension between the racial nature and racial exclusivism of affirmative action and also to meet the Constitutional requirement opportunities for all? Put differently, is it possible to have an interpretation of affirmative action that is inclusive and at the same time providing equal opportunities for all.

The desirability of a measure on a particular society can be determined by looking at its effect after implementation of that particular measure.¹⁴⁴ Interpretation of affirmative action has been such that groups previously disadvantaged have been categorised.¹⁴⁵ As a result groups that have been previously disadvantaged do not benefit equally from affirmative action.¹⁴⁶

¹⁴¹ Richard A Epstein, *Forbidden Ground – The Case against Employment Discrimination Laws* (Harvard University Press, 1995) 505.

¹⁴² Ibid.

¹⁴³ Lederer N *Affirmative Action: A Never-Ending Story?* (Unpublished PHD thesis, University of Adelaide, Australia, 2013).

¹⁴⁴ Moseneke J in *Van Heerden* (note 24 above) para 44.

¹⁴⁵ *Fourie v Provincial Commissioner of the SA Police Service (North West Province)* 2004 (25) ILJ 1716 (LC).

¹⁴⁶ *Henn v SA Technical (Pty) Ltd* 2006 (27) ILJ 2617 (LC).

The basis for such different treatment of the previously disadvantaged groups is that apartheid had racial hierarchies therefore it would be an undue disregard of the suffering experienced by different groups.¹⁴⁷ Mosenke J in *Van Heerden*¹⁴⁸ held that “differentiation among members of the designated groups requires that social, historical and legal evidence be led before the court can depart from according similar treatment to members of designated groups”.¹⁴⁹

As mentioned above, the *Van Heerden* case was the first case decided in the CC dealing directly with affirmative action. The CC in this case decided to follow a contextual approach. The *Barnard* case, also a CC judgment will be discussed below. In *Van Heerden* the court pointed out that the resolution of this difficult question (the possibility of having an interpretation of affirmative action that is inclusive and at the same time providing equal opportunities for all) is not an abstract one, but one that is dependent on each country’s constitutional design, history and social context. The court further stated that if one takes South Africa’s constitutional design, history and social context into account, the Constitution calls for an adoption of an approach that goes beyond equal treatment and an understanding of social and economic equality between individuals and groups. Put differently, courts are directed to go beyond formal equality and more towards substantive equality.¹⁵⁰

The reasoning behind the substantive approach is entrenched in South Africa’s past. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*¹⁵¹ the CC explained it in the following terms:

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and

¹⁴⁷ Note 58 above, 31.

¹⁴⁸ Note 28 above.

¹⁴⁹ However in *Stoman v Minister of Safety and Security and others* 2002 (3) SA 468 para 483 it was held that eligibility for affirmative action is not dependable on personal circumstances.

¹⁵⁰ Nconco M *Substantive Equality and Affirmative Action in the Workplace* (Unpublished LLM thesis, Nelson Mandela Metropolitan University, 2012).

¹⁵¹ (1998) 12 BCLR 1517 (CC).

unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied”.¹⁵²

It is incorrect to look at affirmative action measures as presumptively unfair if they are essential to our understanding of equality.¹⁵³ A complete defence to claim that positive measures constitutes unfair discrimination is provided by section 9(2) of the Constitution. It is however a requirement that for one to succeed in this defence, they must prove compliance with internal conditions established in section 9(2).

In determining whether a measure is in line with the ambit of section 9(2) the courts have initiated a new venture and have established a pattern for the consideration of all future affirmative action claims, including claims under the EEA. The general approach can be labelled as one of restraint and deference:

“Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere. Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged”.¹⁵⁴

This approach has been followed and confirmed by the Labour Court in *Alexandre*¹⁵⁵ the level of enquiry of positive measures is for that reason lower than that which applies to unfair discrimination. Above all there is less emphasis on the negative effect. The measure which would generally be on an advantage group and more attention is placed on the disadvantaged group. Regardless of this tranquil level of scrutiny of affirmative action measures, the court nevertheless made it clear that overindulgences or abuse will not be tolerated:

¹⁵² Ibid, Para 60.

¹⁵³ Note 145 above, 28.

¹⁵⁴ *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC). Para 152.

¹⁵⁵ *Alexandre v Provincial Administration of the Western Cape* [2005] 6 BLLR 539 (LC).

“if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere”.¹⁵⁶

There is a proposed two stage test. Affirmative action programmes must be subjected to this test. The first is whether there was unfair discrimination and whether it falls foul of section 9(3) of the Constitution. On passing this test the programme would then have to be judged as to whether it complies with provisions of the Constitution.¹⁵⁷ It is submitted that the approach followed in the *Van Heerden* case seems to be the answer to the question raised in this research. ‘If one takes South Africa’s constitutional design, history and social context into account, the Constitution calls for an adoption of an approach that goes beyond equal treatment to some understanding of social and economic equality between individuals and groups’. South Africa affirmative action measures should be interpreted to reflect the point made in this case.

¹⁵⁶ Note 154 above, Para 152.

¹⁵⁷ Note 138 above, 30.

CHAPTER FOUR

HOW THE COURTS LOOK AT AFFIRMATIVE ACTION

4. Introduction

As said above, if one takes South Africa's constitutional design, history and social context into account the protection provided by the Constitution must be for all South Africans.¹⁵⁸ The jurisprudence on the concept of affirmative action in South Africa is developing rapidly and this is illustrated by the history of the seven year-long litigation of Barnard's case¹⁵⁹. This case is considered a leading case because of its significant contributions to the jurisprudence and affirmative action principles. Most importantly, this case confirms that affirmative action is a proper defence to the charge of discrimination, by laying down the test for lawfulness of the implementation of affirmative action. This case points out that the EEA in mandating affirmative action which requires the exercise of a discretion that comprehends a balancing of all the factors relevant to the decision.¹⁶⁰ A critical analysis will be attempted of this leading Constitutional Court judgment on the concept of affirmative action measures and their standard of review in this chapter.

4.1 Facts

Ms Renate Barnard a white female police officer was denied promotion to a level 9 post of Superintendent on two different instances besides the fact that she was found to be the most suitable candidate for the post. This was because the commissioner wanted to ensure the effective pursuit of the numerical goals for racial representivity set out in the South African Police Services (SAPS) affirmative action policy. The commissioner (who had the discretion to appoint or not) defended his decision by saying it was in line with efforts to attain equitable representivity in its workforce regime. Ms Renate Barnard however challenge the commissioner's decision on the basis that it constituted direct discrimination because the only

¹⁵⁸ *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132 para 9.

¹⁵⁹ Note 27 above.

¹⁶⁰ Harkoo R *Has affirmative action become an illusionary right for certain designated groups?* (Unpublished LLM thesis, University of KwaZulu-Natal, 2014).

reason she was denied promotion was her racial identity (ground of race in terms of section 6(1) the EEA). She argued that to deny her promotion infringed her right to equality as well as an affront to her dignity. The second best candidates (black males) were not appointed. The situation was worsened when the post was left vacant simply because a suitable candidate could not be found from the designated group.

4.2 Issue

The issue in this case was whether Ms Barnard had been unfairly discriminated against on the ground of race. It is important to highlight that this issue could only be adjudicated upon by determining the lawfulness of the way the SAPS commissioner had implemented the department's Employment Policy and Plan (EEP).

4.3 Labour Court Decision¹⁶¹

The Labour Court decided that the commissioner's decision not to promote Ms Barnard did not comply with the provisions of the EEA. The decision was said to have been based on race and constituted unfair discrimination. It held that the EEP which the commissioner relied on had to be applied in accordance with the Constitutional principles of equality and fairness. Furthermore the Labour Court found that the strict application of numerical goals was too rigid. The court concluded that the commissioner had failed to discharge the onus of fairness of its prima facie discriminatory decision considering that the reasons given for its decision were insufficient, and therefore found in favour of Ms Barnard. The Labour Court came to this decision after balancing the interests that were in conflict that is, weighing up 'need for representivity 'against' the individual's rights to equality. The commissioner appealed this decision to the Labour Appeal Court.

4.4 Labour Appeal Court Decision¹⁶²

The Labour Appeal Court firstly highlighted that the purpose of having restitutionary measures would be defeated if the implementation of the very same restitutionary measures could not be made subject to an individual's right to equality. Moreover, the Court stated that the fact that

¹⁶¹ 2010 (10) BCLR 1094 (LC).

¹⁶² *South African Police Services v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC).

there would be persons from non-designated groups who would be adversely affected was a reality. As the post had been left vacant, the Labour Appeal Court found on this basis that no discrimination had occurred and set aside the order made by the Labour Court. According to Fredman ‘Discrimination can occur where a person’s aspirations have been barricaded on the basis of an immutable character like race’.¹⁶³ The basis for this Court’s decision was the absence of a comparator. While a comparator is an essential factor when deciding whether there has been discrimination, it cannot on its own dissuade an outcome of discrimination. The requirement for an allegation of discrimination is that it needs to be a determination of the impact that is on the individual complaining. As a result the finding of the Labour Appeal Court can be said to be ‘cherry-picked’ as only a part that enabled it was able to get to a desired decision.¹⁶⁴ Ms Barnard appealed to the Supreme Court Appeal.

4.5 Supreme Court Appeal Decision¹⁶⁵

The Supreme Court of Appeal followed the decision of the Labour Court and found that Ms Barnard had been unfairly discriminated against when the commissioner denied her promotion. Similar to the Labour Court’s reasoning, this Court based its decision on the insufficiency of the commissioner’s reasons for failing to appoint Ms Barnard. In reaching its decision, the SCA relied on section 9(3) of the Constitution (the mistake of relying on this section was later addressed by the Constitutional Court) and this reliance confirmed what the LAC had incorrectly held, (specifically that the Labour Court had subjected affirmative action to the equality of an individual right). It overturned the decision of the LAC. Affirmative action measures were held to be a compromise of the right to be treated equally and therefore needed to be subject to an exacting scrutiny in *PSA v Minister of Justice*.¹⁶⁶ The judge further 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 a vacuum, but with due regard to the rights of others, and to the possible disadvantage that the targeted persons or groups might suffer’. This is the same approach followed by the LC and later the SCA. The commissioner took the decision further to the Constitutional Court.

¹⁶³ S Fredman ‘*Providing equality: Substantive equality and the positive duty to provide*’ (2005) 21 SAJHR 163 at 182–5.

¹⁶⁴ Note 48 above.

¹⁶⁵ *Solidarity obo Barnard v SAPS* (165/2013) [2013] ZASCA 177

¹⁶⁶ *PSA v Minister of Justice* (1997) 18 ILJ 241 (T).

4.6 The Constitutional Court Decision

The outcome of the Constitutional Court was not only eagerly awaited by the parties who had direct interest in case but the South African community nationwide. The reason for this was that the South African Constitution embraces an equality-driven concept of affirmative action¹⁶⁷ which raises questions with regards to the suitability and appropriate judicial standard for the implementation of such affirmative action measures. The central issue raised in this case relates to the appropriate and applicable judicial standard in determining Ms Barnard's grievances which falls within the bounds of affirmative action measures. The Labour Court, Labour Appeal Court and the Supreme Court of Appeal had opposing judgments. All judgments were expected to bring understanding and direction on the determination of the appropriate and applicable judicial standard for the implementation of affirmative action measures. However, uncertainty on the ongoing question of the appropriate and applicable judicial standard for the implementation of affirmative action measures resulted in the litigants not getting the relief sought. As a result, the critical evaluation of the judicial standard had to be determined by the Constitutional Court.

The established principles laid down in the *Van Heerden* case regarding the appropriate and applicable judicial standard for the implementation of measures were confirmed by the Constitutional Court in a majority judgment. The Constitutional Court however arrived at this decision using a different route as there were different opinions expressed from the majority and the minority in reaching their conclusions. Moseneke DCJ in the majority judgment wrote that the judicial standard for review is the rationality standard and, while it is the bare minimum requirement, it suffices and there is no need to define the standard finally. The precision of this decision will be evaluated by a critical analysis of this judgment.

4.6.1 Commentary on the *Van Heerden* Judgement

The Constitutional Court's confirmations of the *Van Heerden* legal principles makes it necessary for this research to firstly look at the *ratio* of the case. In short, the failure of this judgment to incorporate fairness into its standard which led to it been criticised.¹⁶⁸ Section 36 of the Constitution sets out the general standard of review. However, according to Rautenbach the approach taken in this judgment pays deference towards the state actors involved in drafting

¹⁶⁷ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T).

¹⁶⁸ McGregor 'Affirmative Action on Trial — Determining the Legitimacy and Fair Application of Remedial Measures' (2013) 4 TSAR 650 - 655.

and implementing affirmative action measures which consequently is out of line with the general standard of review set out by the drafters of the Constitution.¹⁶⁹ Malan's contribution is that the "rationality standard may also implicate a separation of power when one considers the role of the courts in respect of constitutional adjudication (and their discrete oversight over the conduct of the executive)"¹⁷⁰ In contrast, other commentators have emphasised the fact that Moseneke DCJ in this case, aside from his inflexible choice of the rationality standard, in fact applied a form of fairness review.¹⁷¹ The views of this commentators can be considered enough to invite opposing judgments in the abovementioned courts.

4.6.2 The Protection Provided in Section 9(2) of the Constitution

Moseneke DCJ's submission that "our state must direct reasonable public resources to achieve substantive equality for full and equal enjoyment of all rights and freedoms"¹⁷² was well intended. As opposed to his view that affirmative action measures cannot be presumed to be unfair in their impact on members of the non-designated groups¹⁷³ because holding such a view can be counterproductive. McGregor on the other hand believes that "any denial that legitimate restitutionary measures can be unfair in its application would be facetious".¹⁷⁴ Regardless of the fact that legitimate restitutionary measures can be unfair in their application Moseneke believes such application must be lawful.¹⁷⁵

4.6.3 The rationality standard

According to Moseneke DCJ affirmative action measures and their implementation are subject to judicial scrutiny.¹⁷⁶ For this reason he is correct when he says that 'the measures that are directed at remedying the past discrimination must be formulated with due respect not to impact unfairly the dignity of all concerned.'¹⁷⁷ It is correct that we need to be cautious of the remedial

¹⁶⁹ C Rautenbach "Employment Equity Act (and other myths about the pursuit of equality, equity and dignity in the post-apartheid South Africa)" 4th edition of 2015 PER eISSN 1727-3781 <http://www.nwu.ac.za/p-per/index.html> 30 January 2015.

¹⁷⁰ K Malan "Constitutional perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*". 2014 De Jure 118

¹⁷¹ Note 161 above, 134-135.

¹⁷² *Barnard* note 23 above, 18 para 33.

¹⁷³ *Ibid*, 19 para 37.

¹⁷⁴ C Rautenbach (note 157 above) 35 par 2; see for example McGregor, M "Blowing the whistle? The Future of Affirmative Action in South Africa" (Part 1) 26, 2014, *Mercantile Law Journal* 60-92 at 88.

¹⁷⁵ *Barnard* note 23 above 19 par 38.

¹⁷⁶ Note 23 above para 19 'The mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people.'

¹⁷⁷ JL Pretorius "Deliberative democracy and constitutionalism: the limits of rationality review:" (2014) 29

measures under the Constitution so as to prevent them from becoming an end in themselves, as they are not meant to be punitive and retaliatory.¹⁷⁸ The judge in *Du Preez*¹⁷⁹ confirmed that the enactment of the national legislation in the form of two measures: firstly, the EEA and, secondly, the Equality Act¹⁸⁰ was a compliance by parliament to the mandate of section 9 (4) of the Constitution and further stated that these Acts flowed from and continue to give effect to section 9(3) of the equality clause in the Constitution.¹⁸¹

Section 6(2) of the EEA provides that it is not unfair to take affirmative action measures consistent with the purpose of EEA, which is as follows:

‘The purpose of this Act is to achieve equity in the workplace by -

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.’¹⁸²

The minority judgment viewed Ms Barnard’s claim (of unfair discrimination which is a contravention of the EEA) as one which required an additional standard to rationality.¹⁸³ In addition to that, the implementation of affirmative action measures can result in tension or conflict between Constitutional values, therefore courts are expected to scrutinize and examine implementation with a more thorough level.¹⁸⁴ There is a gap for an additional standard to a rationality standard. The call for an additional standard of fairness by the minority seems to be a step in the right direction.

The Constitutional Court looked into section 15 and 13 of the EEA. The enquiry looked at the preferential treatment, numeral goals and exclusion of quotas as well as the compliance as to whether there was a plan or not, and the legitimacy of that plan. These provisions were looked

SAPL 420 par 30.

¹⁷⁸ Note 27 above, para 30.

¹⁷⁹ *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE).

¹⁸⁰ 4 of 2000.

¹⁸¹ Note 175 above, para 13.

¹⁸² Section 2 (a) (b) of the EEA.

¹⁸³ Note 23 above, 40 para 1, 2-3.

¹⁸⁴ *Ibid.*

at in conjunction with section 2 and 6(2) of the EEA. The results of the inquiry showed that the plan or the racial and gender targets it embodied were not challenged in Ms Barnard's claim.¹⁸⁵ Accordingly, the Constitutional Court could not challenge the decision-maker's stated reasons on this point as there was the absence of a proper challenge and argument.¹⁸⁶ The formulation and implementation of affirmative action measures were not challenged on the basis of fairness, validity or legitimacy as they were in accordance with section 13 obligations and section 15 read with section 2 of the EEA.¹⁸⁷

The findings of the minority in this judgment established that the facts of the case pointed that the commissioner's decision not to appoint Ms Barnard passes the fairness standard.¹⁸⁸ For the minority, the decisive factor was the evidence of over-representation of white women at the salary level to which Ms Barnard was applying.¹⁸⁹

Ngcobo J appealed that transformation ought to be carried out in line with the Constitution.¹⁹⁰ This is followed by Moseneke DCJ in his judgment.¹⁹¹ It is as a result a requirement that in order for a measure to avoid being constitutionally invalid, it must comply with the protection test standard provided in section 9(2).¹⁹² As soon as the measure passes the foregoing test, Moseneke DCJ notes, it is neither unfair nor presumed to be unfair.¹⁹³ He makes the allegation that this statement is given expression by the Constitution.¹⁹⁴ However, Moseneke DCJ's interpretation when read into section 9 (2) finds expression in section 6(2) of EEA, and not section 9 (2) of the Constitution. His claim puts measures beyond the purview of the EEA, irrespective of their content and effect on others.¹⁹⁵ The extent and nature of protection here is according to Erasmus J questionable. The question raised here is "if the provisions of subsection (2) of section 9 were to be interpreted as constituting an exception to the unfair discrimination proscribed by subsection (3), then persons disadvantaged by affirmative action

¹⁸⁵ Ibid, para 51.

¹⁸⁶ Ibid.

¹⁸⁷ Mbutho S *The Judicial defense for Affirmative Action Measures: A critique of the rationality standard of judicial review* (Unpublished LLM thesis, University of KwaZulu-Natal, 2015).

¹⁸⁸ Note 27 above, 69 para 52.

¹⁸⁹ Ibid.

¹⁹⁰ Note 69 above, para 74.

¹⁹¹ Note 69 above para 76.

¹⁹² Note 27 above, 20 para 36.

¹⁹³ Ibid, also see *Van Heerden* (note 28 above) para 33.

¹⁹⁴ Note 174 above.

¹⁹⁵ Note 167 above, para 16.

measures would have no protection under the equality rights guaranteed by the Constitution?”¹⁹⁶

Van der Westhuizen J clarifies this confusion of whether or not affirmative action measures are an exception by explaining that section 9 and the measures provided for in section 9(2) form part of the right to equality and they are not an exception to them.¹⁹⁷ Moreover he notes that the suitable assumption under our Constitutional framework is that restitutionary or affirmative measures should be applauded rather than viewed with doubt.¹⁹⁸

4.6.4 The Interpretation of Section 9(2) of the Constitution

The Constitution is the supreme law of South Africa. When interpreting a statute or looking at its ambit and tenets the Constitution ought to be the starting point.¹⁹⁹ Section 39 provides that courts must ‘promote the spirit, purport and object of the Bill of Rights when interpreting any legislation’. Ngcobo J understood this section to mean: ‘firstly, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights and, secondly, the statute must be reasonably capable of such interpretation.’²⁰⁰ He further says that the Bill of Rights is the cornerstone of our Constitutional democracy and this interpretation is an attribute of that fact as it upholds the democratic values of human dignity, equality and freedom.²⁰¹ Therefore the promotion of the values of our Constitutional democracy must be seen when one interprets a provision.²⁰²

Interpreting affirmative action measures to mean they cannot be presumed to be unfair (in reading the equality rights) is an intra- textual approach, which is foreign in our law as it is quite far out of the target of subsection 2 of section 9 of the Constitution.²⁰³ Applying this interpretation to the implied double test set out by Ngcobo J above. Test: firstly, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights (in this case this interpretation does not advance at least identifiable value enshrined in the Bill of Rights, therefore it will be bound to fail). Secondly, the statute must be reasonably capable of such interpretation (in this case

¹⁹⁶ Ibid, para 18.

¹⁹⁷ Note 27 above, 77 para 65.

¹⁹⁸ Ibid.

¹⁹⁹ Note 69 above, para 70.

²⁰⁰ Ibid, para 72.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Note 161 above, 5 para 1.

this interpretation is not reasonably capable of being sourced from the reading of the equality right).

The concern pointed out here is valid because by saying that affirmative action measures cannot be presumed unfair means there is no regard to the effect of the measure on the individual members of non- designated groups. In an instance where one presumes that this reading advances at least an identifiable value enshrined in the Bill of Rights, the presumption fails because this interpretation is not realistically capable of being sourced from the interpretation of the equality right of the Constitution.

The mandate by s 9(2) of the Constitution is given effect to by the EEA. It is important however that when courts apply the Bill of Rights, they must promote all the values that are fundamentally protected in the Bill of Rights. The results of this is that courts cannot allow the barring or reduction of a fundamental right even by another Constitutional right, and especially not by any other statute.²⁰⁴ As a general rule, the Constitution is not subjected to rules that govern the interpretation of the ordinary law, for this reason it is convincing to call for an approach that is ‘acutely sensitive to all Constitutional values and objectives.’²⁰⁵ putting this in context, ‘an interpretation of s 9(2) of the Constitution that sees its implicit approval of affirmative action measures as excluding or negating the right to equality, will therefore offend constitutional principle.’²⁰⁶

4.6.5 The Appropriateness of the Rationality Standard

The question of how affirmative action measures were to be properly adopted and further whether they could be challenged was addressed by Moseneke DCJ. His evaluation findings were in the affirmative.²⁰⁷ His conclusion found no legal reason ‘why courts are precluded from deciding whether a valid employment equity plan has been put into practice lawfully’.²⁰⁸ Without doubt he expressed that ‘a validly adopted employment equity plan must be put to use lawfully’.²⁰⁹ A simple comment on this would be to point out the fact that this statement disagrees with his debatable statement that ‘measures cannot be presumed unfair’.

²⁰⁴ Note 167 above, para 18.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Note 27 above, 21 para 38.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

This statement is however seen in a different light by Rautenbach, as she says “the only logical implication is that the determination of the lawfulness of the implementation of affirmative action measures otherwise rational measure must be its fairness and or the impact of such implementation on the right of those disadvantaged by it”.²¹⁰ Moseneke DCJ is found to have uncovered the unsuitability of the rationality standard of review when he chose a bare minimum standard, and with regards to the legality principle, the ‘implementation of measures would require to be rationally related to the terms and objects of the measure.’²¹¹

The application of measures must reflect nothing else but their legitimate purpose. Unlawfulness is attracted by irrational conduct when a lawful project is being implemented. Furthermore, the position that it is not necessary to define the standard (as much as this rationality standard is the bare minimum requirements) was repeated by Moseneke DCJ, and further that the implementation of corrective measures must be rational.²¹² It appears that this definite statement on the lawfulness implementation would suggest that a flawlessly rational measure can be abused.²¹³ The point raised by Rautenbach here is that if the rationality standard “in terms of *Van Heerden*’s interpretation of the internal test for compliance as found in section 9 (2) is truly sufficient to mark such measure as constitutionally compliant, then this consideration regarding the implementation of measures must be surely irrelevant”.²¹⁴

Despite the deference showed by the other Constitutional Court judges in Moseneke DCJ’s main judgment, the judicial standard cannot be said to be sufficient and appropriateness of the rational standard remains debatable. This is further supported by the fact that three judges (Cameron J, Froneman J and Majiedt AJ) implied that they were against this judicial standard.²¹⁵ Their approach to this was that the case required them to apply a less deferential standard than mere rationality.²¹⁶ This approach confidently stresses the unsuitability of the rationality standard. In *Van Heerden* Moseneke DCJ stated that “a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened”.²¹⁷

²¹⁰ C Rautenbach “*Employment Equity Act* (and other myths about the pursuit of equality, equity and dignity in the post-apartheid South Africa)” 4th edition of 2015 PER eISSN 1727-3781 <http://www.nwu.ac.za/per/index.html> 30 January 2015.

²¹¹ Note 27 above, 21 para 39.

²¹² *Ibid.*

²¹³ Note 196 above, 6.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, 10.

²¹⁶ *Ibid.*, also see (note 27 above) para 95.

²¹⁷ Note 28 above, para 44.

Rautenbach seems to be correct when she says a “reference to the substantial harm to those excluded from benefits simply cannot refer merely to the lawfulness of implementation of a measure being measured with reference to rationality; it must require interrogation of the fairness of such implementation”.²¹⁸

It is submitted that this research agrees with Rautenbach in terms of this decision as one cannot not be fair in implementing affirmative action. Ms Barnard fell within the designated group of women. Her being a white woman did not change the fact that she was still a woman yet they still refused to fill the position. Yes affirmative action was in play but in implementing it there was no other candidates for the position from that group. The question one has to ask is for how long were they going to leave the position vacant whilst there was an individual from a designated group who qualified for the post. This means they were willing to sacrifice service delivery for affirmative action. It is submitted that this is not how affirmative action was supposed to be implemented. It is submitted that as Rautenbach puts it, it is fairness that counts.

4.7 Solidarity and Others v Department of Correctional Services and Others²¹⁹

Having looked at the Barnard’s case, which focussed more on the appropriate judicial standard for the implementation of legitimate affirmative action measures it is important to also look at this Constitutional Court judgment which applied the principles established in the Barnard case and focusses more on demographic targets.

4.7.1 Facts

The Department adopted the 2010 Employment Plan which was to be in operation for the year 2010 to 2014. The target set in the Plan were based on the demographic profile of the national population issued by Statistics South Africa in 2005. Levels of representation of a number of racial and gender groups within the Departments workforce were assessed using that demographic profile, with the Department finding that Coloured persons and women were overrepresented at certain occupational levels. The Department assessed its level of racial and gender group representation solely on national demographics. In 2011 vacant posts were advertised in the Western Cape by the Department of Correctional Services. Ten members of Solidarity (union) were among those individuals that applied for the posts. This included five

²¹⁸ Note 196 above, 7.

²¹⁹ 2016 (5) SA 594 (CC).

coloured women, four coloured men and one white male. Out of the ten individuals, nine were recommended for appointment however the Department refused to appoint them to the positions they were recommended for due to gender and race considerations which according to the Department were ‘overrepresented’.²²⁰

4.7.2 Issues

The court was required to consider whether the Barnard principle’s (which says that an employer may refuse to appoint a candidate who falls within a category of persons that is already adequately represented at a certain occupational level) application is limited to white people only and whether this principle may also be applied in respect of gender. The court had to also look at whether there was unfair labour practice and unfair discrimination.

4.7.3 Labour Court Decision²²¹

Solidarity had three main arguments for their case. Firstly, it argued that the 2010 Employment Plan did not comply with among others section 42²²² of the Employment Act and was therefore invalid. Secondly, it argued that the targets contained in the 2010 Employment Plan were not numerical targets but quotas which are outlawed by the EEA. Lastly it argued that the Department’s decision not to appoint the individual applicants constituted unfair labour practices and acts of unfair discrimination based on race and gender and should be set aside and the individual applicants should be appointed to their recommended posts.

The Department also had three counter arguments. Firstly, it argued that it was authorised to only use the demographic profile of the national population because it is a national department. Secondly, it argued that its 2010 Employment Plan did comply with the EEA. Lastly, it argued that based on the Bernard’s principle it was entitled to have refused to appoint the individual applicants because they all belonged to categories of people that were already overrepresented at the occupational levels to which they had sought to be appointed.

Having looked at both the applicant’s and the respondent’s submissions, the Labour Court ruled in favour of Solidarity after finding the DCS to have failed to comply with the EEA with regards to its numerical targets and its failure to take into considerations of the demographic

²²⁰ Ibid.

²²¹ *Solidarity v Department of Correctional Services and Others* (2014) 35 ILJ 1647 (LC).

²²² Before it was amended, section 42 obliged a designated employer to take into account the demographic profile of not only the national but also the regional economically active population in assessing whether the designated groups were equitably represented and in setting the targets for its employment equity plan.

profile of the regional economically active population. The Employment Plan was found to be valid and the Solidarity claim of invalidity was rejected. Regardless of the fact that the Labour Court found that the DCS should have taken into account the demographic profile of both the national and regional economically active population in setting its numerical targets, it did not grant the individual applicants any individual relief. The applicants further appealed this decision to the Labour Appeal Court.

4.7.4 Labour Appeal Court Decision²²³

The appeal was based on the Labour Court's decision not to grant the individual applicants any relief and also the failure of the LC to declare the EEP invalid because of its not compliance with section 42. This appeal was dismissed by the LAC after finding that the EEP passed the test set in terms of EEA, read together with the Constitution.

4.7.5 Constitutional Court Decision

This is a judgment by Justice Zondo. Moseneke DCJ, Jafta J, Khampepe J, Nkabinde J and van der Westhuizen J also agree with it. With regards to the second argument made by the applicant, the CC firmly disagreed with Solidarity's claims that the targets contained in the 2010 Employment Plan were quotas, and only finding the targets to be numerical targets which were applied with flexibility.²²⁴ The CC also addressed the question of whether the Barnard principle's application is limited to white people only and whether this principle may also be applied in respect of gender. The CC held that candidates from designated groups were also subject to the so-called Barnard principle therefore 'an employer may refuse to appoint a candidate who falls within a category of persons e.g. women, Coloured or Indian or African persons who are already adequately represented at a particular occupational level'.²²⁵

In answering the question of whether or not the EEP was invalid Justice Zondo concluded that, since the 2010 Employment Plan had run its course, there was no need for it to be held to be invalid.²²⁶ However, the CC's final finding was that failing to take into account the demographic profile of the regional and national economically active population and only using the demographic profile of the national population in assessing the level of representation of the various groups and in setting the numerical targets for its 2010 Employment Plan the DCS

²²³ *Solidarity and Others v Department of Correctional Services and Others* (2015) 36 ILJ 1848 (LAC).

²²⁴ Note 210 above, para 114.

²²⁵ *Ibid*, para 40.

²²⁶ *Ibid*, para 35.

breached obligations under section 42 of the EEA. On the basis that section 42 does not exclude national departments from its application the CC rejected the DCS's argument that because it is a national department, it is excluded from the requirement to consider both national and regional demographics.

This judgment was also supported by Nugent AJ (Cameron J concurring) in a separate judgment. Nugent AJ's reasoning was that 'even without the requirement of that section, the relevant profile of the population included its distribution, not merely its racial proportions, and the failure to bring that to account was irrational and thus unlawful'.²²⁷ He also added that 'the 2010 Employment Plan imposed quotas on appointments, which is prohibited by the Act, and on that ground, too, the 2010 Employment Plan was unlawful'. The DCS was therefore found to have used a wrong benchmark – one that was not authorised by the EEA.²²⁸ As a result, the DCS had no justification for using race and gender to refuse to appoint the individual applicants and that, therefore, the decisions not to appoint most of the individual applicants constituted acts of unfair discrimination and also acts of unfair labour practices.²²⁹

The CC's final order was the following: the coloured applicants, who were recommended for appointment, be appointed to the relevant posts, to the extent that those posts were vacant and be paid the remuneration attached to those posts with retrospective effect. Concerning the applicants whose posts were currently occupied, the court ordered that the DCS pay the applicants the remuneration attached to those posts with retrospective effect.

4.8 Commentary

Evidence points to the fact that the rationality standard of review fails to balance competing interests, rights and values protected by the Constitution. This was also exposed by Moseneke DCJ in the majority judgment of the Constitutional Court. For this reason, it would not be unreasonable for one to call for a fairness test as a judicial standard of review having considered the concerns by Moseneke DCJ in *Van Heerden* and *Barnard*, along with Van der Westhuizen J that 'measures are understood as equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory'. Considering our constitutional context, what seems to

²²⁷ Ibid, para 132.

²²⁸ Ibid, para 80.

²²⁹ Ibid, para 82.

be appropriate is that restitutionary or affirmative measures should be applauded rather than viewed with doubted. .

Our Constitution is designed in such a way that it is able to deal with issues such as Ms Barnard's. When there are competing interests, rights and values section 36 (limitation clause) is the tool to be used to resolve those issues. Section 36 limitation clause is the best judicial standard of review. Therefore the continuing legal issue about the appropriate judicial standard for the implementation of legitimate affirmative action measures can also be dealt with perfectly using the section 36 formula.

Moving on to the *Solidarity* judgment , what Justice Zondo highlights in the this judgment should serve as a reminder to employers who fall within the requirements of section 42 that their obligations in conducting their workplace analysis as per section 19 of the EEA, and in setting numerical goals and targets in their EEP that they have to take into account both the national and the regional or provincial demographics of EAP as per section 42 because as we have seen in this case that if employers only consider the national and leave out the provincial or the regional demographics of EAP then this could lead to unfair discrimination and unfair labour practise. What is important about this judgment is that it give us clarity with regards to the requirements, procedurally, to achieve a 'transformed' workplace which is compliant with the EEA. Moreover the point that Justice Zondo makes here is that it is very important for employers to be very cautious before rejecting an applicant's appointment because it does not fit in with their targets in their EEP.

The importance of adhering to EEP's is demonstrated in the *Unisa v Reynhardt*²³⁰ case. The Labour Appeal Court judges demonstrated that there is a lifecycle in an affirmative action policy which employers must be mindful of. The judgment gives us an indication of the instances when affirmative action can cease to be applied, however it is clear that in an instance that is specific to a particular employer and the wording within that employer's EEP the employer is obligated to have a comprehensive EEP that is able to withstand constitutional scrutiny. Moreover, this case also points out to the reality that the legacy of apartheid and the disparity it created will take time to eradicate through the application of affirmative action.²³¹

²³⁰ [2010] 12 BLLR 1272 (LAC).

²³¹ Mushariwa M 'UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): does affirmative action have a lifecycle?' (2012) 15 *Potchefstroom Electronic Law Journal* 412

Our Constitution is set up in a way that racial dominance is eliminated as all races are recognised as equal. Having said that, the Constitutional Court in this case emphasizes this point in that it makes it positively flawless that there is no room for racial domination in South Africa. Once again the South African judicial body has showed that it is outstanding when it comes to promotion and protection of our long fought for democracy. Among other things the Constitution is based on values of ‘non-racialism’²³², further the Constitution prohibits the State from among other things directly or indirectly unfair discrimination on ‘race’²³³ and Freedom Charter stated that “The rights of the people shall be the same regardless of race, colour or sex”. All the above can be said to have been re-affirmed in this judgment and this judgment can be seen as a defeat for non-racism. George Devenish correctly predicted that this Constitutional Court judgment ‘will have a major effect on other government departments both at national and provincial level as Solidarity has already indicated that it will be using the judgment against the SAPS where a number of posts have been frozen, pending the decision of the Constitutional Court in relation to a Correctional Services case (*Solidarity obo Members v South African Police Service*²³⁴)’.²³⁵ Statistically in South Africa Africans dominate as a majority by approximately 80% and the rest of the population is made up of a 20% minority.²³⁶ However if one looks at the regional demography of the Western Cape coloured people make up approximately 50% of the population.

According to De Vos²³⁷ this judgment “is a text of its time and goes further than previous Constitutional Court judgments in insulating redress measures from constitutional attack. The judgment would make it difficult to invalidate employment equity measures unless they allow for the appointment of unqualified candidates or are implemented in a corrupt or nepotistic manner. In this sense, it may well be far less of a victory for the litigants than they might at first have thought”.²³⁸

It is submitted that this research agrees with De Vos in this case. De Vos is a constitutional law scholar and has articulately pointed out that this judgment can also be said to be a victory for

²³² See section 1 of the Constitution.

²³³ See section 9 of the Constitution.

²³⁴ [2016] 7 BLLR 671 (LC).

²³⁵ Devenish G ‘A great triumph par excellence for non-racism in our jurisprudence *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)’ 2017 *Obita* 222-228.

²³⁶ See South African Survey 2014/2015 12; South African Survey 2013/2014 22.

²³⁷ Pierre De Vos teaches Constitutional law at the University of Cape Town Law Faculty.

²³⁸ Daily Maverick ‘*Constitutional Court: Addressing redress*’ Available at: <https://www.dailymaverick.co.za/opinionista/2016-07-20-constitutional-court-addressing-redress/#.WimSy0qWbIU> accessed 01 December 2017.

diversity and the protection of vulnerable minorities against the dominant Africans given that such dominance of a racial nature can would be abomination to the non-racism advocated in the Constitution.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

In terms of the discussions above, it is submitted that the issue addressed in this research is that affirmative action is not the problem but implementation of it is the problem. Affirmative action is not yet complete, it needs to be taken further. Now that affirmative action has been on the ground for a while, we need to start looking at implementing it properly. The problem is not only about the implementation of affirmative action but also the perception that society has with regard to this concept. At first glance affirmative action seems to be a process that excludes certain groups which gives the perception that it is unfair discrimination whereas this is not so.

As said above, affirmative action is a process of equalling the playing field by extending equality to previously disadvantaged groups. The function of affirmative is not to exclude but to include those who were excluded. For example, if there are two applicants (a black male and a white male) for a single post, if affirmative action applies, it can be seen to exclude the white male but this perception of looking at it in that particular way is misguided. As the point of affirmative action is not to exclude the white person but to include the black person who was previously excluded. Affirmative action addresses the problem of exclusion.

It is submitted that this research is highlighting the idea that affirmative action is good as it equalises the playing fields but the implementation of it needs to be relooked at. Even though affirmative action may seem to some as unfair discrimination, it is fair in terms of our constitution. However, the implementation of affirmative action is not what it is supposed to be because presently it is all about filling quotas thus making issues such as delivering effective service delivery at risk because by merely filling quotas employers are putting employees into positions that they are unable to do justice to. Government departments and companies are putting people into positions that are ill-prepared or simply not skilled enough. It is therefore submitted that in levelling the playing fields these employers must employ people in terms of affirmative action that have the skill, education and all that is required to do the job properly.

It is submitted that training programmes should be implemented by employers to potential employees to place those particular previously disadvantaged employees at a level where the employers want them to be. For example, if the Department of Justice employs an LLB

graduate with no practical experience as a legal advisor, that particular graduate fulfils the education requirement but has no practical experience, therefore it is submitted that further training must be provided to the appointable candidate in order for them to be able to cope sufficiently enough to be able to carry out the full requirements of the job. Many companies and even government departments do not have these training programmes in place. This turn to create a situation where the newly appointed affirmative action employee is left to their own devices in order to survive in the workplace. If it so happens that that employee fails at the job that they have been put into affirmative action is blamed and immediately there is a perception that the employee is incompetent. By not having programmes in place to level the playing fields sufficiently enough is tantamount to setting up affirmation action appointments to fail. It is therefore submitted that this training for affirmative action appointments should be a requirement for every potential employer. It is further submitted that this particular kind of trainings will create confidence in these particular appointees and allow them to believe not only in themselves but in the fact that they were not merely offered the position because of the colour of their skin. This will in turn have a positive effect in the workplace and most importantly, service delivery. It is submitted that this is one of the most practical ways to deal with affirmative action employees. In-still confidence in these appointees in order to get the best out of them.

It is submitted that the issues addressed in this dissertation is that affirmative action is not at an end. This means instead of us seeing affirmative action as a problem, it is actually an instrument (although painful to some) to equality. Regardless of how we look at affirmative action, the law values the fundamental tenant of equality. Therefore, affirmative action is as a result a means to create a just society, and a just society is one that treats people equally. It is further submitted that as much as section 42 provides that affirmative action should be a combination of education, skills development and employment opportunities, there should real implementation of this suggested combination in order to implement affirmative action successfully. On a practical level companies that are implementing affirmative action measures should consider this combination seriously in order to further affirmative action appointees:

Education

Section 15 of the EEA requires the persons from designated groups to be suitably qualified. This means that the people from the designated groups must have qualifications as a condition to enjoy this benefit provided by this provision. I recommend that the government needs to take

further steps in enable people from designated groups to meet this condition. The first stage would be to improve the quality of education provided in public school as most of member from designated groups cannot afford private schools. The government must also make sure that resources (such as libraries, laboratories and more) are made available to public schools and try manage poor management at those public institutions. The university intake example used in chapter one which shows nationally in 2007, 62.6 per cent of all students (476 770) in the public higher education system were Black African, 23.7 per cent (180 461) were White, 6.9 per cent (52 596) were Indian/Asian, and 6.4 per cent (49 066) were Coloured has to improve if we are to achieve the goal of equality as education can be considered a key to success.

This research supports the fees must fall campaign as it can be taken as a bigger picture of how people (especially the people from designated groups) feel about the conditions and the status co. The questionable report²³⁹ on fees must fall suggest that free tertiary education is not possible, if so, it is submitted that the government must ensure that bursaries are provided to the members of designated groups and further ensure that low interest rate loans are made available.

Skills Development

Education alone is not enough to put persons from designated group at the same level as those who have been enjoying exclusively the privileges of our resources. Skills development is needed. This refers to the processes of learnership. According to the Labour Department, statistics by the Commission Employment Equity Annual Report²⁴⁰ show that Africans are only estimated to be at approximately 16.8%, Coloured 5.6, Indians 7.1 and Whites at 34.5.6% at skills development rate. This means white people have the highest proportions of people recruited as statistics shows that they are standing at 42.6 at management level.²⁴¹ To achieve the goal of capacitating people I recommend that the government must take measures to ensure that skill development opportunities are made available to persons from designated groups.

²³⁹ Commission of enquiry into higher education and training report available at: <http://www.thepresidency.gov.za/sites/default/files/Commission%20of%20Inquiry%20into%20Higher%20Education%20Report.pdf> accessed 8 December 2017.

²⁴⁰Commission Employment Equity Annual Report available at: <http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2013-2014/commission-for-employment-equity-report-2013-2014> accessed 08 December 2017.

²⁴¹ Ibid.

Education and skills development is the key to enable people from designated groups to enjoy fully their rights and freedoms guaranteed in section 9 of the Constitution.

Employment Opportunities

Once people have been capacitated, have obtained their tertiary qualifications and have their skills developed employment opportunities need to be created. Job creation is also an effective way to improve representivity. It is submitted that state policies be directed towards job creation as this would enable affirmative action to play its role and achieve its objectives. Education and skills development would be useless if employment opportunities are not created.

This dissertation has attempted to expose the true interpretation of affirmative action which brings about a situation where, as required by the legislation and policies, and the Constitution, equal opportunities are made available to all and at the same time have no sense of oppression directed towards white minorities. Firstly, in chapter one the research set out the topic and moved on to discussions which the research intended to achieve. Moreover, the methodology used to compile this dissertation was also provided for in this chapter. The chapter was concluded by setting out the purpose and the background of this study.

The second chapter defined affirmative action. It moved on to discussing affirmative action in South African context. A further discussion on the notion of equality and the South African approach was discussed and this chapter was concluded by setting out the legislative requirement for equal employment opportunities. The third chapter looked at how the racial nature of affirmative action can be managed whilst meeting the requirement for equal employment opportunities for all and discussed arguments for and against affirmative action. The aim of this chapter was to examine the question of whether the tension between inclusivity and equal opportunity be bridged in our interpretation of affirmative action.

The fourth chapter observed the current legal position regarding affirmative action and how it was applied in South Africa. This chapter used the *South African Police Service v Solidarity obo Barnard* and *Solidarity and Others v Department of Correctional Services and Others* to achieve observe the current situation. Other current and relevant cases were looked at. The *Barnard's* case was used in this analysis because of its status of being the current leading case in issues involving the application of affirmative action. The final chapter contained the conclusion to the dissertation. This chapter answered the question of: How South Africa can

continue with affirmative action that is not inclusive but at the same time still believing in equal opportunity for all. Lastly the chapter provided recommendations.

“Transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution.”²⁴²

In essence this study has demonstrated that the beauty of our law is that it has found a way of addressing the problem of inequality by including those who were excluded but in the process appearing at though it is excluding others. If one looks closely to the facts, it is clear that some come from a privileged group and were protected by unjust law. It is submitted that affirmative action promotes precisely inclusion. The importance of our law is that it has given us a tool (affirmative action) to steer towards equality. For this reasons it is submitted that our affirmative action should be interpreted to mean achieving the goal of equality and equal opportunity for all.

²⁴² *Bato Star* above note 72 at para 76.

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