SUBSTANTIVE EQUALITY AND
AFFIRMATIVE ACTION IN THE WORKPLACE

by

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SUMMARY

During the apartheid era in South Africa there was an unequivocal commitment to white supremacy, segregation and inequality. Discrimination but not on the basis of race was entrenched by the pre-democratic government. The 1980’s saw the first steps towards reversing such practices through various measures, in the form of formal equality.

Formal equality holds that the state must be act neutrally in relation to its employees and must favour no one above another. It assumes that all people are equal and that inequality can be eradicated simply by treating all people in the same way. Formal equality is therefore blind to structural inequality.

Substantive equality in contrast to formal equality holds the value that equality is not simply a matter of likeness, that those who are different should be treated differently. The very essence of equality is to make distinction between groups and individual in order to accommodate their different needs and interests. It considers discrimination against groups which have been historically advantaged to be qualitatively aimed at remedying that disadvantage.

The Constitution Act 108 of 1996 confers the right to equal protection and benefit of the law and the right to non discrimination. Prohibition of unfair discrimination in itself is insufficient to achieve true equality in a historically oppressed society.

Hard affirmative action measures are required, the Constitution further explicitly endorses such restitutionary measures.

Affirmative action is a systematic, planned process whereby the effects of colonialism and racial discrimination are being reversed in all areas if life. It is designed to achieve equal employment opportunities. In order to achieve this goal the barriers of the workplace which restrict employment and progressive opportunities have to be systematically eliminated through proactive programmes. Affirmative action is a delicate instrument of social engineering which must be used with caution.
The Employment Equity Act 55 of 1998 gives effect to the constitutional provisions and to regulate affirmative action measures in employment. The Employment Equity Act spells out the beneficiaries, who should do the protection, and advancement and what may happen to employers if they fail to comply in the view of the Director-General of the Labour.

However the explicit constitutional and legislative endorsement of affirmative action comes with its controversy and legal challenges and it has been left to the courts to resolve tension on the one hand and to ensure equal treatment on the other.
CHAPTER 1
INTRODUCTION

1.1 THE CONCEPT OF EQUALITY

The concept of equality has long been known to humanity and discussions on equality date as far back as works of Aristotle, Montesquieu, Locke, and Rousseau.\(^1\) The concept “equality” is also to be found in major national and international documents dating as far back as the American Declaration of Independence\(^2\) and more recently in the United Nation’s Universal Declaration of Human Rights.\(^3\) The Constitution of South Africa\(^4\) is the most recent example that can be added to these. It is necessary at the outset to recognize that South Africa is part of the broader international community in that it is member of the United Nations and the International Labour Organisation.

Different notions of equality exist. It is important to distinguish between these as they are fundamentally different and utilise affirmative action measures differently, if at all.

1.2 FORMAL EQUALITY

Formal equality holds that the law is neutral and that the state must act as a neutral force in relation to its citizens, favouring no one above another.\(^5\) The focus of this notion is non-discrimination. It assumes that all people are equal bearers of rights\(^6\) and it views inequality as an aberration which can be eradicated simply by treating all people in the same way.\(^7\) Formal equality is therefore blind to structural inequality. It ignores actual social economic disparities between people and sets standards that


\(^{2}\) Of 1776.

\(^{3}\) Of 1948.

\(^{4}\) It lays the foundation for a new era in the country based on the value of inter alia equality (Preamble; ss 1;(1)(a);9(1)(a)) of Act 108 of 1996.


appear neutral, but which in truth embody a set of particular needs and expectations that drive from socially privileged or dominant groups. Reliance on formal equality may therefore exacerbate inequality precisely because it does not take into account existing inequalities, but only the dominant groups expectation. It in fact disregards patterns of disadvantage amongst certain groups of society. If all people are treated the same in terms of the dominant group, equality may not be recognized, not to mention being protected and advanced accordingly. Formal equality thus denies the fact that institutions and other social structures often harbour subtle forces that favour those who already enjoy the advantages of wealth, education, social standing, and exclude those who do not. It is incapable of breaking such a cycle of discrimination and therefore is an abstract ideal. It rejects affirmative action on moral grounds and does not require active treatment of people. Affirmative action thus does not feature at all in the notion of formal equality.

1.3 SUBSTANTIVE EQUALITY

Substantive equality in contrast to formal equality takes the Aristotelian value further and holds that equality is not simply a matter of likeness. It is equally a matter of difference.

“That those who are different should be differently treated is as vital to equality as the requirement that those who are like are treated alike. In certain cases the very essence of equality is to make distinctions between groups and individuals in order to accommodate their different needs and interests.”

This notion holds first, that talents and skills are distributed uniformly, that is, that men, women, whites, blacks and other ethnic groups, have no average the same skills and talents.

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8 De Vos Equality for All 67.
9 De Vos Equality for All 67.
10 Op cit 290.
11 Wentholt Formal and Substantive Equal Treatment (1999) 56.
12 Kentridge Equality 14-3.
13 Ibid; Wentholt Formal and Substantive Equal Treatment 58.
Thus implementing the notion of equal opportunity would be expected to result in equal outcomes, in the sense that men, women, whites, blacks and ethnic minorities would be represented in positions of influence and power proportion to their total strength in society. Following this reasoning, it means that any large disparities in result must necessarily be due to the existence of systematic or structural discrimination resulting from certain practices. Secondly, the notion distinguishes itself sharply from the notion of formal equality. In this regard, it recognises the extent to which opportunities are determined by individuals’ social and historical status, including race and gender as part of a group opposed to the formal notion which is directed at the individual. Substantive equality thus recognises that discriminatory acts do not occur in isolation, but are part of patterns of behaviour towards groups, such as women, black people. Thirdly, as the prohibition of unfair discrimination is in itself insufficient to achieve true equality in a historically oppressed society, hard affirmative action measures are required. The goal of affirmative action is then to bring people up to a level where they can begin the competition more equal in those respects needed to compete, or to allow groups to reach the same levels as the rest of the population. Affirmative action measures therefore, in essence, seek to correct imbalances where factual inequalities exist such measures, must then also inevitably lead to proportional representation of groups, in the workplace. Fourthly, in order to implement affirmative action measures, notion of substantive equality perceives the state as having a duty to act positively to correct the effects of discrimination, and maintains that a refusal to intervene itself a positive statement of state support for continuing societal discrimination. Lastly, substantive equality views as the participation by and inclusion of all groups and requires valuing difference and at times, treating groups relevantly different. Substantive equality is the most complete notion of equality relative to other notion seems to be the best suited to achieve true equality. It considers discrimination against groups which have been historically disadvantaged to be qualitatively different aimed at remedying that disadvantage.

16 Ibid.
17 Du Toit et al Labour Relations Law 430.
18 Banton Discrimination 5.
19 Davis et al Fundamental Rights 59.
21 Dupper 1280 See De Vos Equality 68.
measure that favours relatively disadvantaged groups at the expense of those who are relatively well off is not discriminatory, since the consequence of such measure is eventually, a more equal society.

1.4 STRUCTURE OF THE TREATISE

Chapter 1 of this treatise has been structured in a manner of firstly showing the concept of equality in the form of formal equality and substantive equality and how the two concepts differ.

Chapter 2 focuses on South Africa as a country and how the pre-democratic government institutionalized discrimination in the apartheid era and how such substantive equality is important in achieving equality in such a country and attempting to address the issues of redressing the past imbalances. The different steps taken to achieve substantive equality through the use of legislation in the Interim Constitution Act 200 of 1993, the Constitution Act 108 of 1996 and the Labour Relations Act 66 of 1995 is discussed and how they have not been able to rectify the issue.

Chapter 3 is focused on the term affirmative action, what the term means and why we need it to address equality in South Africa. Furthermore it is shown how the Constitution has made provision for such measures to be implemented, making them justifiable. The courts have been left with the burden of interpreting affirmative action. This chapter will further show and explain how the tension has been resolved by the courts.

Chapter 4 focuses on the Employment Equity Act 55 of 1998 and how the Act gives effect to the constitutional provisions and to regulate affirmative action measures in employment. The Employment Equity Act spells out the beneficiaries, who should do the protection, and advancement, and how the protection has been extended to accommodate applicants for employment.

Chapter 5 focuses on the substantive and procedural fairness of implementing affirmative action measure. In this chapter what affirmative action measures as
envisaged in sections 15 and 20 are explained, together with how the courts have interpreted the substantive and procedural fairness of such affirmative action measures.

Chapter 6 is focused on when discrimination is allowed and the two statutory defences in the form of firstly affirmative action and secondly inherent requirement of job are discussed, and how such defences are raised, when would they be deemed justifiable.

Chapter 7 is focused on the dispute resolution and enforcement of the Employment Equity Act 55 of 1998. The channels available, being the administrative procedures and legal remedies are discussed.

Chapter 8, which is the conclusion, is a critical analysis of the Act and affirmative action.
CHAPTER 2
ATTEMPTING TO ACHIEVE SUBSTANTIVE EQUALITY THE SOUTH AFRICAN EXPERIENCE

2.1 PRE-DEMOCRATIC GOVERNMENT

The dictionary meaning of discrimination is to treat one person or a group worse or better than others.

International Labour Organisation Convention 11 of 1958 defines discrimination as:

“any exclusion or performance made on basis of race, colour, sex, religion, political opinion, national extraction, social origin which has effect of nullifying or impairing equality of opportunity, or treatment in employment or occupation.”

In the South African context, discrimination but not exclusively on the basis of race, was entrenched by pre-democratic government. In the apartheid era there was an unequivocal commitment to white supremacy, segregation and inequality. The apartheid policy, legislation and practices had black people and their communities impoverished by the allocation of resources along racial lines and had their dignity impaired by racist preference. The state had created a hierarchy of races with white people at the top, Indians and Coloureds in the middle with Blacks firmly entrenched at the base. Housing, health care, social and community services and education were provided on a segregated basis with much more money and resources expended on white community than on any other race. The limited social expenditure in the African community resulted in the presented disparities that we see in various segments of our society. Through a series of laws apartheid regulated every aspect of South African society.

In the Constitutional Court case of Brink v Kitshoff:

“The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming

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23 Brink v Kitshoff NO 1996 (4) SA 197 (CC) at para 40.
owners of property or even residing in areas classified as ‘white’ which constituted nearly 90% of landmass of South African; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were closed to black people. Instead separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.”

Such discriminatory practices are deeply rooted in South Africa’s apartheid past. In a society where racial discrimination was the norm, discrimination and inequality became a pervasive feature of employment relations in all sectors.

The institutionalisation of discrimination in the labour market can be found as far back as the promulgation of the Industrial Conciliation Act 11 of 1924. The aim of the legislation was to promote collective bargaining between employee and employer but excluding black workers from the definition. Numerous other pieces of legislation which followed drew white workers into an organised protected labour market and left black workers on the fringes.

The position was changed by legislation in the late 1970’s after it became apparent that it was no longer tenable in the the labour market. The Wiehahn Commission was appointed to address the growing workers unrest which had its roots in the differential treatment of workers as well as their race classification. The 1980s saw the first steps towards reversing such practices, though in a limited ad hoc manner. Discrimination on the basis of sex, race, and colour in industrial council agreements was outlawed in 1981.24 The Commission made various crucial recommendations which established the foundation of current labour law. One of the key consequences of the commission was its recommendation to bring workers of all races in private sector under one piece of legislation namely the Labour Relations Act 28 of 1956. The legislation however still excluded farm and domestic workers and all state employees. The Basic Conditions of Employment Act of 1983 covered all workers in private sectors.

A second important consequence was the establishment of Industrial Court, which dealt with concepts of equity and fairness and thus had the jurisdiction to look wider than the mere lawfulness of a dismissal. The concept of the unfair labour practice

24 By amendments to s 24(2) of the Labour Relations Act 28 of 1956 and by Wages Act 5 of 1957.
was legislated in the Industrial Conciliation Amendment Act 94 of 1979, subsequent to recommendations of the Wiehahn Commission. In theory this would give the Industrial Court the power to rule against discrimination of employees and declare such actions as unfair labour practice.

The Labour Relations Amendment Act 83 of 1988 made use of the terminology of discrimination:

“the unfair discrimination of any employer against any employee solely on the grounds of race, sex, creed provided that any action in compliance with any labour wage reduction measures shall not be regarded as unfair labour practice.”

This definition did no more than prohibit discriminatory practices by employer but still left the door open for the legislator to continue with a practice of institutional discrimination, and would still be able continue with the practice of separation of grouping on the basis of race and gender. So although the new definition attempted to level playing fields by prohibiting discrimination, it allowed the existing inequalities and those establishment through new legislation to continue.

The first case of this nature dealt with discrimination on grounds of trade union membership. Over the next decade and a half, discrimination on various grounds including race, sex, and age were held to be an unfair labour practice.

In *SACWU and others v Sentrachem Ltd*, the court held as follows:

“There is no doubt that wage discrimination based on race or other differences between workers concerned other than their skill and experience is an unfair labour practice”

In *Chamber of Mines v CMU*, the court in dealing with separate pension funds for workers of different races, stated that the doctrine of “separate but equal” was

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27 At 411 G-H.
28 (1990) 11 ILJ 52 (IC).
inherently unequal, and that any labour practices resting on this principle amounted to racial discrimination.

What is clear from the abovementioned judgment is that discrimination, be it direct or indirect, was unacceptable and if found to be present, would amount to an unfair labour practice.

Prior to promulgation of the Public Service Act\textsuperscript{29} and Education Labour Relations Act,\textsuperscript{30} state employees were governed by the Public Service Act which prohibited them from making use of the industrial courts. But under the ever developing unfair labour practice, the definition of all employees irrespective of race, occupation were now protected by legislation which outlawed discrimination.

2.2 \textbf{INTERIM CONSTITUTION AND EMPLOYERS PREROGATIVE}

Promulgated during the early 1990’s, one of many aspects of the Interim Constitution under the Bill of Rights was the issue of equality for all.

Affirmative action was brought to the fore and specifically it resorted under the heading fair labour practice. Equality before the law was now entrenched.

Section 8 read as follows:

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1) Every person shall have the right to equality before the law and to protection from the law.

2) No person shall be unfairly discriminated against directly or indirectly without derogating from the generating of this provision; on one or more of the following grounds in particular race, gender, sex, ethnic or social origin, colour, sexual orientation age, disability, religion, conscience, belief, culture and language.

3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of person disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.\textsuperscript{31}
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\textsuperscript{29} Act 105 of 1994.
\textsuperscript{30} Act 146 of 1993.
\textsuperscript{31} Interim Constitution Act 200 of 1993.
What is clear is that section 8(1) of the Interim Constitution\textsuperscript{32} introduced the right to equality before the law and to equal protection in front of the law. It went further than the concept of formal equality as it brought to the fore the possibility on a new form of positive discrimination in terms of section 8(3), which allowed for actions or policies which had the intention of protecting and advancement of a person or groups who had been disadvantaged by past unfair discrimination.

This clearly brought to the fore the possibility for members of society to be treated unequally but on justifiable grounds. In essence it allowed for discrimination but fair discrimination. Taking into account the historical background and the deep divides that existed in society at large, the action as a measure of speeding up equality surely had its merits.

In \textit{Association of Professional Teachers \& another v Minister of Education \& others}\textsuperscript{33} the Industrial Court was confronted with the question of gender discrimination and the interpretation of the Interim Constitution on the issue of differential treatment.

In the judgment the Industrial Court highlighted the importance of the Interim Constitution and placed emphasis specifically on equal treatment of all citizens. It found that even though no jurisdiction was conferred on it, it had an obligation in terms of section 35(j) of the Constitution to have due regard to the spirit, purpose and objectives of the bill of rights when interpreting any law.

The Industrial Court went further to conclude that not all forms of differentiation would constitute discrimination. The Industrial Court justified its interpretation with reference to section 8(2) which states that no person shall be discriminated against “unfairly”, which thus opened the door for the possibility that fair discrimination could exist, and that a distinction should be drawn between permissible and impermissible discrimination. It found that in such instances where the differentiation would not necessarily constitute discrimination.\textsuperscript{34}

\textsuperscript{32} Act 200 of 1993.
\textsuperscript{33} (1995) 16 \textit{ILJ} 1048.
\textsuperscript{34} \textit{Supra} 1050 E-F.
In the matter at hand, the Industrial Court found that the policy directly discriminated against a class of woman on the basis of sex, coupled with their marital status and thus directly disadvantage the employee. It rejected the argument of the respondent that justifiable reasons existed for the differentiation being drawn between various sets of employees. It concluded that the policy consideration constituted an unfair labour practice.\(^{35}\)

It was clear from this case that section 8(3) of the Interim Constitution permitted discriminatory practices to be determined as fair labour practice even though they are discriminatory in nature.

There was also the concept of employer’s prerogative in common law, prerogative meaning the theoretically unlimited discretionary powers or rights of an executive authority such as a sovereign.\(^{36}\) In the sphere of labour relations and employment prerogative is usually taken to refer to the right to manage an organisation and ways in which it will achieve these aims.\(^{37}\) This concept is usually seen as being of special importance when dealing with the decisions about human resources utilised by the organisation. It is linked with the ability of the employer to control activities of the workplace, from the number and type of employees to be employed by the organization as well as the terms and conditions of employment that they are offered.

“Managerial Prerogative” is derived from the real right of ownership in the property which compromises the enterprise.\(^{38}\) The term of “Managerial Prerogative” has been defined in different ways by the courts and authors, but it is generally agreed that it deals with authority and control. In the case of George\(^ {39}\) the court defined “managerial prerogative” as the totality of the capacity of the employer to decide whether its activities required the employment of an employee or the promotion of an employee.

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\(^{35}\) 1049 G-H.

\(^{36}\) Sachs v Dongas NO (1950) 2 SA 265 (A).

\(^{37}\) George v Liberty Life Assurance of Africa Ltd (1996) 178 ILJ 571 (IC) 582.


\(^{39}\) George v Liberty Life Assurance of Africa Ltd (1996) 178 ILJ 571 (IC) 582.
Brassey defines “managerial prerogative” as follows:

“The law gives the employer the right to manage the enterprise. He can tell the employee what they must and must not do, and he can say what will happen to them if they disobey. He must, of course, keep within the contract the collective agreement and the legal rules that govern him. He must know, also make sure his instructions do not fall foul of unfair labour practice jurisdiction.”

In short, it is the employer (within the limited grounds) who lays down the norms and standard of the enterprise.

In Nawa v Department of Trade and Industry the court held that the issue of promotion or demotion is something that falls within managerial prerogative. Even if the needs of the employee apparently meet the needs of the employer in terms of being suitable for promotion, the employer retains the discretion to appoint whom it considers to be the best candidate.

In SA Municipality Union obo Damon v Cape Metropolitan Council the court held that unless the appointing authority can be shown to not have applied its mind in the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whomever it considered to be the best candidate.

In Van Rensburg v Northern Cape Provincial Administration the court held that interference in the employers’ decision is only justified where the conduct of the employer is grossly unreasonable as to warrant interference.

In Goliath v Medscheme (Pty) Ltd the court was required to determine the issue of “employer prerogative” to manage the business. The Industrial Court held:

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40 Brassey et al The New Law supra.
41 [1998] 7 BLLR 701 (LC) 702J- 703A.
44 (1997) 18 ILJ 1421 (CCMA) 1426 F-G.
“It is not unfair or unreasonable for the employer to appoint a person with a view not only to immediate needs, but also with the view to future development. To hold otherwise would place unreasonable restraints upon ‘employers prerogative’ to manage its business. In the absence of tangible evidence demonstrating that the employer was mala fide in its decision, this court will readily interfere with the exercise of the prerogative.”

Courts were reluctant to interfere in the employer prerogative to manage its business if the employer has made out a case that there has been a sound business or economic rationale underlying his decision. It has long been regarded as an integral part of employment for the employer to discipline, hire, and promote employees.

It is then submitted that the decision to employ falls within the discretion of the employer subject to certain limitations. This discretion and right is unlimited in theory, however it is restricted by collective bargaining and labour legislation.

The first matter dealing with the issue of affirmative action was George v Liberty Life Association of Africa Ltd.46 The case was determined under the Labour Relations Act 28 of 1956 with the guidance of the Interim Constitution. Employers would be placed under pressure to adopt policies to improve the advancement of groups which were previously disadvantaged. This meant that the previously advantaged groupings would come under threat. The facts are that George was an existing employee of the respondent, who had applied for a position in a newly established department. His application was refused in part on the grounds that the employer wanted to make an appointment on the grounds of affirmative action.

The court found that section 8 followed a very definite pattern, in that the section commenced with a statement of principles, namely there shall be equality before the law and equal protection. Then it goes on to state there shall be no unfair discrimination followed by the exception, in essence authorising measures designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination in order to enable full and equal enjoyment of all rights and freedoms.47

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46 (1996) 178 ILJ 571 (IC).
47 586 A-C.
The court continued by finding that the reading of section 8(3)(a) of the Interim Constitution does not in itself create a right to advancement of previously disadvantaged groups. It rather creates a right to be a beneficiary of measures designed to achieve the purpose in section 8 of the Interim Constitution and accordingly has its own limitation over and above the general limitation clauses that is to be found in section 33 of the Interim Constitution which reads as follows:

“33 Limitation of Rights

a) The rights in the Bill of Rights may be limited only in terms of law general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors including

(a) The nature of the right

(b) The importance of the purpose of the limitation

(c) Nature and extent of the limitation

(d) The relationship between limitation and its purpose; and

(e) Less restrictive mass to achieve its purpose.”

In conclusion the Industrial Court confirmed that affirmative action could be justifiable under the unfair labour practice definition. The Industrial Court however, limited the application of affirmative action to those who had been disadvantaged in the past.

A further question evaluated in this case was who should be advantaged? Should it be based purely on the basis of race and gender? In this respect the Industrial Court held that this would be a broad an approach, and that it was clear that a situation would/could arise that even though a person that falls into a designated category, it would be incumbent on an employer to take cognisance of the individual applicants or employee’s history and not merely generalise on basis of groupings.

The last question to be considered by the Industrial Court was whether the respondent could ignore its own established principles and policies to further affirmative action. In the case of Mr George, the question was whether the employer could ignore the fact that the policy required it to consider internal applications first for a vacancy before considering external candidates. The Industrial Court found that

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49 Ibid.
by ignoring its own policies and procedures the actions of the respondent constituted an unfair labour practice.

In short, the court found that firstly the unfair labour practice definition, as developed, allowed it to entertain disputes about appointments and promotions. Secondly it found that discrimination in favour of a person who had been discriminated against in the past could be justifiable when cognisance was taken of the Interim Constitution which permitted affirmative action.

The court gave recognition to the fact that the employer’s prerogative can be fettered where there is a collective agreement between the employer, employee and the union that the employer will consider re-employment of certain employees who have been dismissed unless there are required skills which those employees do not have. The court found that such an agreement legitimately limits the employer’s common law right to select its employees at will.

In order to qualify as an unfair labour practice, the act or conduct in question had to have the effect or result of unfairly affecting any employee or class of employees or the creation or promotion of labour unrest. The unfair labour practice has had a tremendous impact on the development of large areas of our labour law. It has for instance, lead to fundamental changes in employment practices and policies and effectively curbed managerial prerogative in various respects.

2.3 THE FINAL CONSTITUTION
The new Constitution of South Africa was adopted by the Constitutional Assembly under Chapter 2 of the Constitution. The Constitution has as its core a commitment to substantive equality and seeks to map out a vision for the nation based on this commitment. This vision reflects the need to remedy the ills of the past and to establish a less divided society in which a constitutional democracy can survive and flourish. The following provisions cumulatively seek to realize this vision:

51 Media Workers Association of SA v The Press Corporation of SA (1992) ILJ 1391 (A) 1399 H-I.
• The Preamble recognises that one of the functions of the Constitution is to lay the foundations of democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law.

• Section 1 identifies human dignity, the achievement of equality and the advancement of human rights and freedoms as some of the basic values upon which the Republic of South Africa is founded.

• Section 9, the first substantive right in the Constitution, protects the right to equality before the law, guarantees that the law will both protect people and benefit them equally and prohibits unfair discrimination.\(^5\)

• The limitation clause only allows a right in the bill of rights to be limited if the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom.\(^6\)

• Courts, tribunals and forums are directed, when interpreting the bill of rights to promote the values that underlie an open democratic society based on human dignity, equality and freedom.\(^7\)

Economic power is largely in private hands. Any right to equality that does not extend obligations to private and juristic persons would be an empty one. The idea that “equality” in the South African Constitution can generate legal solutions and court decisions that may result in transformative change in South Africa. Section 9 of the Constitution is both restraining and empowering. It restrains the state and any person from unfairly discriminating on grounds that adversely impacts upon dignity. It empowers the state to take legislative and other measures to advance persons previously disadvantaged by unfair discrimination.

\(^7\) S 39 of the Constitution Act 108 of 1996.
This prohibition was superseded in very similar terms by section 9 of the final
Constitution of which the relevant subsection reads as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit
of the law.

(2) 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 disadvantaged by unfair discrimination may be taken.

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

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

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair
unless it is established that the discrimination is fair.”

Section 9(3) of the Constitution lists seventeen grounds and categorisations on these
grounds are deemed to be discriminatory. However the prohibition is on unfair
discrimination. The right presumes, in the absence of proof to the contrary, that
discrimination on listed grounds is unfair. Thus an applicant who is differentiated on
a listed ground can effectively demand an explanation so as to ensure that he or she
has not been subject to unfair discrimination.

Section 9(2), extends the concept of equality beyond the mere prohibition of formal
unequal treatment (formal equality) to the goal of achieving equal enjoyment rights
(“substantive equality”). Although the latter purpose is sometimes seen as a
contradiction of the formal right to equality, it is in fact parcel of the same right in
terms of substantive equality.

In *Minister of Finance & another v Van Heerden*\(^{56}\) the Constitutional Court explained the relationship between “formal” and “substantive” equality as follows:

“A comprehensive understanding of the Constitution conception of equality requires a harmonious reading of the provisions of s9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand s9 (2) prescribes unfair discrimination by the state against anyone on any ground including those specified. However, s9 (2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorizes legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination. Restitutionary measures, sometimes referred to as “affirmative action” may be taken to promote the achievement of equality. The measures must be “designed” to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.”\(^{57}\)

The rationale for a substantive approach to equality is rooted in South Africa’s past. In *National Coalition for Gay & Lesbian Equality & another v Minister of Justice & others*\(^{58}\) the Constitutional Court 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 provision 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 unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equally denied.”

A substantive interpretation of equality adds a critical dimension to the meaning of “discrimination”. In *President of the Republic of South Africa v Hugo*\(^{59}\) Goldstone J elaborated as follows on the implications of section 9(2) of the Constitution:

“We need therefore to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore will require a careful and thorough understanding of the impact of discriminatory action, upon the particular people concerned to determine whether its overall impact is one which furthers the

\(^{56}\) [2004] 12 BLLR 1181 (CC) at para 28.


\(^{58}\) (1998) 12 BCLR 1517 (CC) at 1546.

\(^{59}\) [1997] 6 BLLR 708 (CC).
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This section does not merely permit the adoption and implementation of such programmes but envisages and authorises the taking of such measures by legislative and otherwise.

2.4 THE LABOUR RELATIONS ACT 66 OF 1995

The Labour Relations Act 66 of 1995 (hereinafter the LRA) is one of the legislative measures adopted to implement the notion of substantive equality.

Schedule 7 of the LRA reads as follows:

“an unfair labour practice means any unfair act or omission that arrives between an employer and employee involving-

a) The unfair discrimination, either directly or indirectly against any employee on any arbitrary grounds, including but not limited to race, gender, sex, ethnic, or social origin, colour, sexual orientation, age, disability, religion, language, marital status or family responsibility.”

Two years later the new LRA adopted the same language. In the first comprehensive proscription of such discrimination in the workplace, item 2(1)(a) of Schedule 7 the so called “Transitional Arrangements”) formulated the prohibition as follows:

“For the purposes of this item, an unfair labour practice means any unfair act or omissions that arises between an employer and employee involving-

a) The unfair discrimination, either directly or indirectly, against an employee on arbitrary ground, including but not limited to race, gender, sex, ethic, or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

60 Ibid at para 39. In a footnote the court added that [1] is the logical corollary of the principle that “like should be treating unlike alike may be as unequal as treating like unlike”. See also Fraser v Children Court of Pretoria North (1997) 2 BCLR 153 (CC); Harksen v Lane NO 1998 (1) SA 300 (CC).

61 Act 66 of 1995 (“the LRA”).
The prohibition was included among the transitional arrangements because, together with the other “residual unfair labour practices”, it was regarded as an interim measures pending the introduction of more comprehensive legislation regulating equal opportunity in employment.

The fight against apartheid was motivated primarily by a determination to establish real equality in South Africa. This goal is entrenched in the South African Constitution.

The apartheid planners sought to establish a hierarchy of races as the neutral order of things and they were given unrestrained power to achieve this objective. Formal equality seeks to treat all individuals, notwithstanding their differences, the same.

Discrimination was now outlawed in the workplace and the legislative foundation had been laid for affirmative action policies. In essence this was a codification of the position as developed by the Industrial Court. As result of the political transition in South Africa the labour legislation system was well compelled to change so as to adapt within the new democratic South Africa, the LRA contains an important innovation in that it now regulates, addresses and limits the employer’s contract with persons of its own choosing. An employer’s discretion as to whom to select for employment has been limited to a significant extent by the Labour Relations Act. A person who had been refused employment could have relied on the residual unfair labour practice contained in schedule 7 and argued that the employer had committed an unfair labour practice in that it had directly or indirectly unfairly discriminated against him on arbitrary grounds.

In practice, this meant that an employer could no longer unfairly discriminate on grounds such as race, gender, sex, age, marital status when advertising vacant or new positions.

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64 S 3 of Labour Relations Act 66 of 1995 as well as clause 2(1) read with clause 2(2)(a) of Schedule 7.
The employers managerial prerogative to promote whom it deems fit are limited procedurally and substantively. Procedural fairness means that all candidates must be afforded a reasonable opportunity to promote their candidature, and insofar as substance is concerned, recent awards show that the CCMA should exercise deference to an employer’s discretion.  

In Faeson v SA Telecommunications Regulatory Authority the commissioner had to determine whether the respondent’s failure to promote the applicant to a senior position amounted to an unfair labour practice as contemplated in item 2(1)(b) of Schedule 7 of the LRA. The commissioner held that the respondent had committed an unfair labour practice by not considering and promoting the applicant. The commissioner held further that the respondent should have considered and informed the applicant of the selection and promotion process.

Although the employer managerial prerogative is subject to certain restriction under the LRA, the employer is entitled to discriminate where it can prove that inherent requirement of the particular job necessitates it. It is submitted further that an employer is allowed in terms of Schedule 7 of the Act to discriminate on the basis of affirmative action. The employer did not commit an unfair labour practice, if his decision not to employ or promote an applicant or employee if it was based on an affirmative action policy.

However in Public Servants Association v Minister of Justice the commissioner stated:

“In my opinion the managerial prerogative has been largely eroded by schedule 7 item 2(1) (b) of the Labour Relations Act. Thus ‘managerial prerogative’ must at all time be tested in context and against the notion of fairness and equity.”

The commissioner confirmed as follows:

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66 Msira v Telkom (1997) 2 LLD 153 (CCMA) 1968 G-M.
67 Unreported case number GA 2605 (CCMA).
69 Clause 2(2) (c) Schedule 7 of the Labour Relations Act 66 of 1995.
70 See Clause 2(2) (v).
71 Unreported case no NC1713 (1998) CCMA.
“Where an employer neglects or omits to exercise his managerial, or fails to exercise his managerial prerogative with due and proper care against the notion of fairness, surely such instance are open to legal scrutiny.”

Also in the case of *Department of Correctional Services v Van Vuuren*\(^\text{72}\) the issue to be determined by the court was whether the conduct of the appellant by failing to promote the respondent constitutes an unfair labour practice. In this matter the applicant alleged that she was unfairly discriminated against by the employer not promoting her. The decision was given in favour of the respondent by the Industrial Court. The employer who was not satisfied with such decision referred the matter to the Labour Court of Appeal. On appeal the employer argued that it was acting within the “managerial prerogative” in deciding whom to promote. The court held that the employer’s decision not to promote the respondents does not constitute an unfair labour practice. It further held that the employer’s action was justifiable in terms of section 8(3) of the Interim Constitution\(^\text{73}\) that the right to equality does not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination in order to enable their full equal enjoyment of all rights and freedoms.

In *Msira v Telkom*\(^\text{74}\) commissioner Van Zuydam went even further by stating as follows:

“I doubt very much whether this alleged prerogative if it exists will carry the same weight under the present Labour Relations Act.”

In the labour field a similar approach was adopted by Industrial Court\(^\text{75}\) and endorsed by the Labour Court in its first unfair discrimination case\(^\text{76}\) as well as in numerous subsequent decisions.\(^\text{77}\)

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\(^{72}\) Unreported case no PA 6198 LAC.

\(^{73}\) Act 200 of 1993.

\(^{74}\) (1997) 2 LLD 153 CCMA.


\(^{76}\) See *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) where Seady AJ held that the prohibition of unfair discrimination contained in Schedule 7 of the Labour Relations Act “sorts permissible discrimination from impermissible discrimination. By this mechanism the legislation recognises that discriminatory measures are not always unfair. What is less clear is where to draw the line between permissible and
Schedule 7 of the LRA has been repealed and the current law is now found in section 187 (e) – (f) of the LRA\(^{78}\) and the EEA\(^{79}\). In terms of which the dismissal is automatically unfair if the reason for the dismissal is:

“(e) the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy;

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion conscience belief, political opinion, culture, language, marital status or family responsibility;”

Section 187(1)(e)\(^{80}\) of the LRA now protects employees against dismissals for any reason relating to pregnancy. In terms of the LRA a pregnant woman may not be dismissed. But the section has not spelt out all the details and the extent of the protection is not entirely clear.

Section 187(1)(f)\(^{81}\) makes it automatically to dismiss an employee if the reason for the dismissal is that the employer has discriminated unfairly for any one or more of the listed grounds in this section. A mere differentiation between employees would not amount to discrimination unless the differentiation is unfair. Therefore to differentiate between employees on the basis of their race or sex alone would be unfair discrimination and automatically unfair if the discrimination resulted in dismissal. It may, however, be legitimate to dismiss an employee on the basis of ill health or serious disability in a situation where the employee was no longer able to do the job here the discrimination may not be unfair.

If the employee is not dismissed but there is some for form of discrimination against him or her, the Employment Equity Act\(^{82}\) comes into play.

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impermissible discrimination. The notion of permissible discrimination is in keeping with a substantive, rather than formal approach to equality that permeates the Constitution and from which item 2(1) (a) draws its inspiration(at 2941-J. The problem inherent in categorising measures seeking to achieve substantive equality as a form of discrimination, rejected by the CC in *Minister of Finance & another v Van Heerden* [2004] 11 BLLR 1125 (CC).

See eg *Ntai and others v South African Breweries Ltd* [2001] 2 BLLR 186 (LC); *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC); *Gordon v Department of Health, KwaZulu Natal* [2004] BLLR 708 (LC); *Alexandre v Provincial Administration of the Western Cape Department of Health* [2005] 6 BLLR 539 (LC).

\(^{77}\) See eg *Ntai and others v South African Breweries Ltd* [2001] 2 BLLR 186 (LC); *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC); *Gordon v Department of Health, KwaZulu Natal* [2004] BLLR 708 (LC); *Alexandre v Provincial Administration of the Western Cape Department of Health* [2005] 6 BLLR 539 (LC).

\(^{78}\) Act 66 of 1995.

\(^{79}\) Act 55 of 1998.

\(^{80}\) Act 66 of 1995.

\(^{81}\) *Ibid.*

\(^{82}\) Act 55 of 1998.
The change in the South African constitutional order represented a significant departure from the previous dispensation. The LRA\textsuperscript{83} was the first piece of legislation to deal with discrimination in the workplace section 187 and the now repealed schedule 7. The EEA contains the detailed provisions to counteract and eliminate discrimination the workplace. These provisions of the EEA\textsuperscript{84} together with section 187 of the LRA\textsuperscript{85} are the current law, and will be discussed further in Chapter 4 of this treatise which deals with legislating affirmative action.

\textsuperscript{83} Act 66 of 1995.
\textsuperscript{84} Act 55 of 1998.
\textsuperscript{85} Act 66 of 1995.
3.1 WHAT IS AFFIRMATIVE ACTION

The term affirmative action originated in the United States and can be described as a systematic, planned process whereby the effects of colonialism and racial discrimination are being reversed in all areas of life. Through proactive programmes, affirmative action provides opportunities not previously available to black people. Affirmative action is about the economic and social empowerment of black people.\textsuperscript{86}

Affirmative action is designed to achieve equal employment opportunities. In order to achieve this goal, the barriers of the workplace which restrict employment and progressive opportunities have to be systematically eliminated.\textsuperscript{87}

3.2 THE NEED FOR AFFIRMATIVE ACTION

There is a need for such programmes especially when looking at the economy as we cannot rely on the skills of the minority of the population while ignoring the black majority.

In Du Preez v Minister of Justice and Constitutional Development\textsuperscript{88} due to the consequences of our segregated past the need for reform to redress the resultant imbalances cannot be doubted affirmative action is a catalyst.

There are many other factors contributing to an imbalance in the workplace besides apartheid, such as the social role of women and cultural differences which influence life choices, which account for some of the disproportional presence of white males in the economically active population. Apartheid nevertheless remains the major cause

\begin{itemize}
\item \textsuperscript{86} Quinta “Who’s Afraid of Affirmative Action” (1995).
\item \textsuperscript{87} The Institute for Democracy in South Africa (IDASA) “Making Affirmative Action Work” (1995) 12.
\item \textsuperscript{88} (2006) 5 SA 592 (EQC).
\end{itemize}
of employment inequity. Black people were forced to pursue certain careers; their education was far lower in standard compared to that of white people.

Affirmative action is a controversial issue as it seen as a challenge by the liberal principle of equality because it allows the employer to discriminate in order to achieve equality in the workplace.89

While the main driving force of affirmative action undoubtedly lies in the realm of political necessity and equity, the drafters of the Act were mindful of its potential impact on economic growth. Affirmative action, they argued, could have a significant economic impact:

“At the workplace level the underutilization of certain race groups, women, and people with disabilities contributes to job dissatisfaction resulting in excessive rates of absenteeism, employee turnover and grievances, which in turn lead to lower productivity. Upgrading of skills, improving access to jobs, occupation, training and promotion opportunities advance all members of the workforce and make it possible for them to achieve maximum productivity and efficiency.

On a wider scale, the elimination of discrimination raises economic efficiency throughout the economy by ensuring a more rational allocation of labour resources .... By increasing the pool of skilled and qualified employers, and improving labour mobility, economic efficiency is enhanced.

In short, the promotion of employment equity is therefore desirable on both equity and efficiency.”90

3.3 JUSTIFYING AFFIRMATIVE ACTION

Similar to other constitutions, the South African Constitution confers the right to equal protection and benefit of the law, and the right to non-discrimination. However the South African Constitution is different as it also explicitly endorses restitutionary or affirmative action measures. Section 9(2) of the Constitution91 provides that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination may be taken.

89 Faundez “Affirmative Action” supra 1187.
90 Explanatory Memorandum to the Employment Equity Bill (GN 1840 Government Gazette No 1848 dated 1 December 1997) 8-9.
91 Act 108 of 1996.
Looking at South Africa it would seem that every organisation will be compelled to implement affirmative action strategies.

A poorly designed or badly administered affirmative action or equality policy can bring about enormous and political hardship, both to individuals and to society. Affirmative action is a powerful and delicate instrument of social engineering which ought to be used with caution.\textsuperscript{92} Many politicians and trade unions who support affirmative action argue that the workforce composition of employers can be equitable only once one reflects or approaches the positions found in the general population.\textsuperscript{93}

Considering what is stated above, employers are no longer free to appoint or promote whoever they consider as a suitable candidate, their decision is subject to restriction and limitation of the LRA.\textsuperscript{94}

This discrimination is not unfair. It has been considered as a measure to redress the imbalances in the workplaces that were created by apartheid government, such discrimination is regarded as affirmative action. It involves treating persons belonging to a specific group differently so that they obtain an equitable share of a specific good.\textsuperscript{95}

The Employment Equity Act\textsuperscript{96} gives effect to this Constitutional provision and seeks to regulate affirmative action measures in employment. The EEA spells out who should do the protection and advancement, who should benefit, what protection and advancement means and finally what may happen to employers if they fail to comply in the view of the Director-General of the Department of Labour.

However the explicit constitutional and legislative endorsement of affirmative action does not mean it is not without its controversy or legal challenges. Affirmative action evokes a charge of unfairness because, as it has been argued it amounts to a

\textsuperscript{92} Faundez “Affirmative Action” supra 1193.

\textsuperscript{93} Van Wyk “Affirmative Action Target Setting: More Than Just a Head Count” (1997) SAJLR 5.

\textsuperscript{94} Act 66 of 1995.

\textsuperscript{95} Faundez “Affirmative Action” 15 ILJ 1187.

\textsuperscript{96} Act 55 of 1998.
departure from the ideal that people should be judged on the basis of individual characteristics that are relevant to the situation, rather than involuntary group membership, especially when based on arbitrary criteria such as skin colour or sex.

As a consequence, South African courts have been inundated with legal challenges against affirmative action over the past number of years, the tension between the equal treatment principle and more distributive conceptions of equality. The role of the courts then to resolve the tension between on the one hand, the aim of ensuring equal treatment of all citizens regardless of certain characteristics such as race or sex and on the other hand an aim of achieving a more equal distribution of welfare or resources among citizens that may require and in some instances, different treatment on grounds of those very same characteristics.

3.4 HOW THE COURTS HAVE RESOLVED THIS TENSION

In *Minister of Finance and another v Van Heerden*\(^97\) the first and to date the only Constitutional Court decision directly pertaining to affirmative action, the court opted for contextual or situation sensitive approach. The court stressed the resolution of this difficult question is not an abstract one, but one that is influenced by each country’s constitutional design, history and social context. Taking into account South Africa’s constitutional design, history and social context it directs courts to adopt an approach to equality that goes beyond equal treatment to some understanding of social and economic equality between individuals or groups. In other words directs courts to go beyond formal equality and more towards substantive equality.

The rationale for a substantive approach is rooted in South Africa’s past. In *National Coalition for Gay & Lesbian Equality and Another v Minister of Justice and Others*\(^98\) the Constitutional Court 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 discrimination in the past are eliminated. Past unfair discrimination

\(^98\) (1998) 12 BCLR 1517 (CC) at 1546.
frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time even when indefinitely. Like justice, equality delayed is equality denied.”

It would be wrong to see the measures as presumptively unfair if they are integral to our understanding of equality. This means that section 9(2) provides a complete defence to a claim that positive measures constitutes unfair discrimination. All that is required to succeed in this defence is to demonstrate compliance with the internal conditions established in section 9(2).

In determining whether a measure properly falls within the ambit section 9(2) the courts have broken new ground and have established a template for the consideration of all future affirmative action claims, including claims under the Employment Equity Act. The general approach can be described 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. 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.”

The Labour Court also recently confirmed and followed this approach. The level of scrutiny of positive measures is therefore lower than that which applies to unfair discrimination. In particular there is less emphasis on the negative impact of the measure which would generally be on an advantaged group and more emphasis is placed on the group that is to be advanced namely the disadvantaged group. Despite this relaxed level of scrutiny to affirmative action measures, the court nevertheless made it clear that excesses will not be tolerated:

“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.”

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99 Minister of Finance and others v Van Heerden 2004 (11) BCLR 1125 (CC) para 152.
100 Alexandre v Provincial Administration of the Western Cape [2005] 6 BLLR 539 (LC).
101 Minister of Finance and others v Van Heerden 2004 (11) BCLR 1125 (CC) para 152.
Affirmative action programmes must be subject to a two stage test. The first is whether there was unfair discrimination and therefore falls foul of section 9(3) of the Constitution. On passing this test the programme would then have to be judged whether it complies with provisions of the Constitution?

### 3.5 INTERNAL CRITERIA OF SECTION 9(2)

An affirmative action programme will only pass Constitutional muster if it complies with the triad of conditions or criteria stipulated in section 9(2) of the Constitution. The three-fold enquiry to determine whether a measures falls properly within the ambit of section 9(2) of the Constitution is established in the *Van Heerden* decision as it provides good authority from which to consider the approach of our courts to the adjudication of affirmative action claims, including those under the EEA.

The three internal requirements are, firstly that the measures must target persons or categories of persons who have been disadvantaged by unfair discrimination. In dealing with the first requirement the Constitution leaves the identity of the potential beneficiary of affirmative action open-ended by referring to persons or categories of persons disadvantaged by unfair discrimination. Implicit in this provision is the recognition that disadvantaged and inequality are complex issues in South Africa, and that affirmative action measures may be tailored to a variety of groups, provided of course that they have been disadvantaged by unfair discrimination. In the *Van Heerden case* the Constitutional Court endorsed section 9(2) by stating that its purpose is to redress disadvantages based not only on race, but also on the basis of gender, class and other levels and forms of social differentiation and systematic under-privilege which still persist.

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102 Act 108 of 1996.
103 Act 108 of 1996.
104 *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC) para 152.
106 S 9(2) of Act 108 of 1996.
107 *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC) para 27.
The second requirement is to determine whether the measure is designed to protect or advance such persons or categories of persons. The Constitutional Court adopted a criterion of reasonableness to determine whether a measure was indeed designed to protect or advance. In this regard the court held that the measures must be reasonably capable of attaining the desired outcome.\textsuperscript{108} In the establishment of this standard the court declined to follow the more stringent approach in the High Court decision of \textit{Public Servants Association of SA & others v Minister of Justice & others}\textsuperscript{109} where the court required that a causal link between the designed measures and the objectives to exist.\textsuperscript{110} All that is required is for that measure should carry a reasonable likelihood of meeting the end. To require the promoter of the positive measures to establish “a precise prediction” of a future outcome would render the measure “stillborn”.\textsuperscript{111} The criterion of reasonableness provides for a degree of flexibility, which means that the parameters of the requirements will be established over time.

Even though the precise parameters of what is considered to be reasonable or not still needs to be developed, the court has nevertheless indicated that measures that are arbitrary, capricious or display naked preference will not survive scrutiny.\textsuperscript{112} Measures taken for improper or corrupt motives or which seriously lack in thought and organisation, will suffer the same fate.\textsuperscript{113}

The third requirement is for the measure to fall within the overall purpose of achieving equality through protecting or advancing disadvantaged person or groups. The court noted that it is inevitable that the achievement of this goal may often come at a price for those who were previously advantaged.\textsuperscript{114} However because of South Africa’s constitutional goal to establish a society which recognises and treats each and every person as human being equal in worth and dignity,\textsuperscript{115} the prejudice suffered by the

\textsuperscript{108} \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 42.
\textsuperscript{109} 1997 (3) SA 925 (T).
\textsuperscript{110} at para 989 A-B.
\textsuperscript{111} \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 42.
\textsuperscript{112} \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 41.
\textsuperscript{113} \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 149.
\textsuperscript{114} \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 44.
\textsuperscript{115} See \textit{Minister of Finance and others v Van Heerden} 2004 (11) BCLR 1125 (CC) para 44,152.
previously advantaged has to be reasonable one. The courts must ensure that the measure does not amount to an abuse of power and that it does not impose substantial and undue harm or disproportionate burdens on those excluded from the measure.\textsuperscript{116}

Ultimately, transformation must be carried out responsibly and its adverse impact minimised otherwise courts have a duty to intervene.\textsuperscript{117}

The legislature implemented legislation which will enforce the implementation of affirmative action programmes. In the light of the current political, economic, and other pressures in South Africa, it is inevitable that almost every organisation will be compelled to implement affirmative action now and in the future.

There, however, no clear guidelines on how to implement affirmative action successfully as terminology contained on the issue is confusing and proposed intervention is vague and often multifaceted.

\textsuperscript{116} Minister of Finance and others v Van Heerden 2004 (11) BCLR 1125 (CC) para 44.
\textsuperscript{117} Para 152.
CHAPTER 4
LEGISLATING AFFIRMATIVE ACTION

4.1 INTRODUCTION OF EMPLOYMENT EQUITY ACT 55 OF 1998

The equality clause of the final Constitution enjoined the enactment of national legislation to prevent or prohibit unfair discrimination.\(^{118}\) This resulted in the Employment Equity Act 55 of 1998; promulgated on the 9th of August 1999 it is the first piece of major race based legislation since South Africa became a democratic state.\(^{119}\)

Its aim is to correct the demographic imbalances in South Africa’s workforce by compelling employers to remove barriers when it comes to advancement of black, coloureds, indians, women and disabled people in all categories of employment by affirmative action.

The EEA consists of two main sections. The first section mirrors, replaces, refines the prohibitions on unfair discrimination in item 2(1)(a) of Schedule of 7 of the LRA.\(^{120}\) The second aspect deals with imposing a duty to the employer to adopt affirmative action programmes.

A positive obligation on all employers is placed on employers to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Where an employee alleges an unfair discrimination, the employer bears the onus of proving that the discrimination is a fair, or practice and is not discriminatory at all. Disputes about unfair discrimination must be referred to the CCMA and if not settled to the Labour Court which has the power to order compensation or the payment of damages or to direct the employer to take steps to prevent such unfair discrimination.

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\(^{118}\) S 9(4) of Constitution Act 108 of 1996.

\(^{119}\) Brassey “The EEA Bad for Employment & Bad for Equity” (1998) \(ILJ\) 1389.

\(^{120}\) Act 66 of 1995.
The EEA furthers places a duty on designated employers to adopt affirmative action programmes, the LRA when the wording of schedule 7(2)(f) of the LRA are compared with section 6(1) of the EEA. The affirmative action provisions of the Constitution, the Employment Equity Act and the Promotion of Equality and the Prohibition of Unfair Discrimination (PEPUDA) provide a constitutional and legislative framework for the principled implementation of remedial programmes.

The unfair discrimination provision in the Employment Equity Act must be interpreted in compliance, with the Constitution of the Republic of South Africa Act 104 of 1996, with particular reference to the right to equality enjoined by preamble to the Act, with ILO Convention 111. What is clear from the wording of the Constitution when compared to that of the Interim Constitution is that there is a positive duty has been placed on the government or legislator to enact legislation to deal with issues of discrimination and affirmative action.

The purpose of the Act is to eliminate unfair discrimination in appointment condition of work and advancement in the workplace. Secondly the focus on promoting organisational transformation to remove employment barriers for all while accelerating training and promoting of persons from historically disadvantaged groups.

In reading the Act it is clear that it follows on the foundation laid by the Interim Constitution, the Constitution and the LRA.

4.2 APPLICATION OF THE ACT

Chapter II of the Act which deals with the prohibition on unfair discrimination applies to all employers.

124 S 3 on the effect of ILO Convention 111.
125 Act 200 of 1993.
126 Act 108 of 1996.
Chapter 3 which is the duty to implement affirmative action measures in the workplace only applies to “designated employers” and people from “designated groups”.

The EEA itself defines a designated employer as:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees, but whose turnover in any given year exceeds the limits laid down in schedule 4 to the EEA;
- municipalities;
- an organ of state;
- an employer appointed as a designated employer in terms of a collective agreement.

If the employer does not fall under any of the above-mentioned groups, it does not have to meet the specific requirements of the EEA as far as affirmative action is concerned. The Act however does provide for employers who wish to do so, to voluntarily comply with the Act.\(^{128}\) Furthermore, if an employer who is non-designated is charged with unfair discrimination, the Labour Court is empowered to order compliance as if the employer is a designated employer.

The Act then provides us with four definitions, which tell us who the beneficiaries of affirmative action are

- “designated groups” are defined to mean black people, women, and people with disabilities;
- “black people” being defined to include Africans, Coloureds, and Indians;

“people with disabilities” is defined to mean “people who have long-term physical or mental impairment which substantially limits their prospects of entry into or advancement in employment”.

According to Act the all employers must take steps to promote equal opportunity in the workplace and to eliminate unfair discrimination in any employment policy or practice.

Employment equity is concerned with eradication of unfair discrimination of any kind, and measures to encourage employers to undertake organisational transformation to remove unjustified barriers to employment for all South African and to accelerate training, promotion, of individuals from historically disadvantaged groups.

The measures for affecting this include prohibition of all forms of unfair discrimination in recruitment, selection, training, promotion, and the provisions of benefits.

It also centres around measures to encourage employers undertake organisational transformation to remove unjustified barriers to employment for all South African and to accelerate training and promotion of individual from historically disadvantaged groups.

The existence of prohibition of discrimination and the commitment to affirmative action is an expression of the goal of “substantive equality” to which acknowledgment that special treatment will be required for certain people in certain circumstances to overcome past practices policies and law which have resulted inequality.

It is important for the employers to understand the reason for enactment of employment equity legislation and why it should be implemented. Also important for employers to note that the implementation of employment equity in the workplace is not only a legal requirement but also makes business sense.

The Act requires designated employers to consult with employees, conduct an analysis and then prepare an employment equity plan and report to the Director-General.
Equality is promoted by both the elimination of unfair discrimination and the implementation of affirmative action. The elimination of unfair discrimination in any employment policy and practice includes the prohibition of direct or indirect unfair discrimination on one or more grounds listed.

Affirmative action measures on the other hand include:

- measures to identify and eliminate employment barriers;
- measures designated to further diversity in the workplace;
- making reasonable accommodation of people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce;
- ensure the equitable representation of suitably qualified people from designated groups in all occupational and levels in the workforce; and
- measures to retain, train and develop people from designated groups.

Such measures include numerical goals and preferential treatment but exclude quotas. The Act clearly states that the employer is not required to appoint or promote people who are not suitably qualified or to take any decision concerning any 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.\textsuperscript{129}

4.3 EMPLOYMENT EQUITY AND AFFIRMATIVE ACTION

The affirmative action and employment equity terms are generally used to refer to the institutional and societal mechanism to transform the workplace, making it more responsive to target groups or beneficiaries.

\textsuperscript{129} S 20 of the Employment Equity Act 55 of 1998.
Employment equity is used to refer both to process to be put in place as well as to the outcome of the Act seeks to achieve it focuses on achieving barrier removal in the future to make “recruitment, hiring, promotion and earnings more equitable”.

Affirmative action on the other hand is focused on redressing the imbalances of the past, and affirmative action in the Act is a strategy to achieve workplace transformation it seeks both to change workplace demographics by bringing people from the designated groups into job categories and occupation where they are under represented, and to change organisational culture to make it more accommodating of the differences and diversity.

In order to achieve the above the Act creates a framework for consultation between employer, employees and trade unions in order to set realistic numerical goals to achieve equitable representativity based on the skill and economic constraints of each organisation.

The existence of prohibition of discrimination and the commitment to affirmative action is an expression of the goal of “substantive equality” to which acknowledgement that special treatment will be required for certain people in certain circumstances to overcome past practices policies and law which have resulted in inequality. 130

4.4 DETERMINING DISCRIMINATION IN TERMS OF THE EMPLOYMENT EQUITY ACT

The first step in determining an unfair discrimination dispute is to establish whether discrimination has taken place. To discriminate means nothing more than to differentiate or to treat differently. Differentiation in this sense may be in conflict with the constitutional right to equal treatment 131 but does not necessarily amount to discrimination in a legal sense. 132

131 S 9(1) of the Constitution. Where differentiation is imposed by statute, the first inquiry is whether there is a rational relationship between the differentiation and legitimate government purpose. If there is no rational relationship the differentiation in question amounts to a breach of
Dealing with the question in the context of legislative measures the Constitutional Court has explained the distinction as follows:  

“At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to unfair discrimination? This requires two stage analysis:

i. Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground, then discrimination will have been established. If it is not a specified ground, then whether or not there is discrimination will depend upon whether objectively the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

ii. If the differentiation amounts to ‘discrimination’ does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of enquiry the differentiation is found not to be unfair, then there will be no violation of section 8(2).”

In terms of this of this analysis each and every differentiation on a specified or listed ground is, on the face of it deemed to be “discrimination” and presumed to be “unfair”, regardless of its impact or purpose. The impracticality of taking such a literal view, certainly in the context is obvious.

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s 9(1) respectively: Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) (1999) 2 BLCR 139 (CC).

132 In Germishuys v Upington Municipality [2001] 3 BLLR 345 (LC) the court stated that any employer which chooses one candidate amongst a group of several for a position of employment of necessity “discriminates” against unsuccessful candidates. Discrimination in the context implies preferring one party above another. More properly, it would correct to say that the employer “differentiated” rather than “discriminated” (at para 81).

133 Harksen v Lane NO 1997 (11) BLCR 1489 (CC) per Goldstone J para 53.
These complexities were largely avoided in the employment context with the enactment of the EEA. The interpretation clause of the EEA expressly states that the Act must be interpreted in compliance with ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation which defines “discrimination” as including

“(a) any distinction, exclusion or preference made on the basis of races, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity in treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organizations, where such exist, and with other appropriate bodies”

The EEA defines discrimination as any act or omission which imposes burdens, obligations, and disadvantages on or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.\(^{134}\) This could embrace any employment practice which has the effect of unfairly discrimination in any way for whatever motive an intention to discriminate not necessary impact of the discriminatory practice is the decisive factor.\(^{135}\)

It has been held in a number of cases that the discriminatory practice must impact negatively on the dignity of the affected individual. Focus of the discrimination being as a result of being a member of a group deemed worthy of protection.\(^{136}\)

In determining discrimination the motive of the perpetrator is irrelevant, the decisive factor is the effect of the differential treatment on the individual or group in question.

\(^{134}\) S 1(1) (viii) of Act 55 of 1998.

\(^{135}\) Association of Professional Teachers & another v Minister of Education and others (1995) 16 ILJ 1048 (IC) AT 1089-1090.

\(^{136}\) Stojce v University of Kwa-Zulu Natal & another (2006) 27 ILJ 2696 (LC) court pointed out by way of example that smokers, thugs, rapists, hunters of endangered wildlife and millionaires do not qualify for protection as a class.
Section 6 of the Employment Equity Act indicates that the prohibited grounds are not exhaustive, the question is whether the criterion relied upon must be alike to the grounds listed in the definition or whether the criterion need merely be arbitrary or unjustifiable. The EEA introduces a new form of unfair discrimination, in that when considering the suitably of their qualification the employer are not permitted to discriminate against them solely on the basis of their lack of relevant experience.\(^{137}\)

For purposes of the EEA, extends discrimination and includes harassment of an employee\(^{138}\) however it must be related to one of the grounds listed in section 6(1). In *Ntsabo v Real Security CC*\(^{139}\) the Labour Court held that sexual harassment constituted discrimination for purposes of the EEA.\(^{140}\)

If an employee alleges unfair discrimination, the onus rests on the employer to prove that it has not acted unfairly.\(^{141}\) However the employee must prove the alleged discrimination. There must be a logical basis for such a claim.\(^{142}\)

### 4.5 SCOPE OF PROHIBITION

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy of practice.\(^{143}\)

Section 6(1) of the EEA prohibits unfair discrimination in the following terms:\(^{144}\)

> “no person on may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender,

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\(^{138}\) S 6(3) of the Employment Equity Act 55 of 1998.

\(^{139}\) (2003) 24 *ILJ* 2341 (LC).


\(^{142}\) *Mahlanya v Cadbury (Pty) Ltd* (2000) 21 *ILJ* 2274 (4). See also *Stoje v University of Kwa-Zulu Natal & another* (2006) 27 *ILJ* 2696 (LC) In which the court dismissed an application by a disgruntled lecturer of Bulgarian extraction, who had been turned down on the basis that his spoken English was poor.

\(^{143}\) S 5 of the Employment Equity Act 55 of 1998.

\(^{144}\) See also s 6 of the Employment Equity Act 55 of 1998, which states that neither the State nor any person may unfairly discriminate against any person. “Discrimination” and “prohibited grounds” are defined in s 1.
sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth."

i. **Race**

Discrimination against employees on racial grounds is arguably the most hateful and historically entrenched form of inequity which the EEA has set out to combat. This type of discrimination presented itself in *NEHAWU obo Mofokeng and others v Charlotte Theron Children’s Home*\(^{145}\) where it was alleged that the black applicants could never be considered for appointment as house mothers to white children solely on account of their race. If proven, Davis AJA commented, this would represent:

> “the most egregious form of unfair labour practice… of a kind that is fundamentally subversive of the very constitutional community that is promised in the Constitution of the Republic of South Africa”.\(^{146}\)

Non appointment of a suitably qualified white female as a result of the company’s employment equity policy prioritizing advancement of blacks was held not to be unfair discrimination as it amounted to affirmative action.\(^{147}\)

However in *Solidarity obo Barnard v SAPS*\(^{148}\) an employer relying on employment equity plan not to promote a white female employee who was recommended as the best candidate was found to be irrational and unfair as the employer decided not to appoint a suitable black candidate either. The employee was promoted with retrospective effect as there was no rational connection between the decision reached and objectives of the plan.

Further in *University of South Africa v Reynhardt*\(^{149}\) the court considered the relationship between equality and constitutionality mandated remedial measures in sections 5 and 6 of the EEA\(^{150}\) which followed sections 9(1) and 9(2) of the

\(^{145}\) [2004] 10 BLLR 979 (LAC).

\(^{146}\) At para 24.


\(^{148}\) (2010) 31 ILJ 742 (LC).

\(^{149}\) (2010) 31 ILJ 2368 (LAC).

\(^{150}\) Act 55 of 1998.
Constitution\textsuperscript{151} and the test for unfair discrimination settled in \textit{Harksen v Lane NO \& others}\textsuperscript{152} the basis of which once the respondent had shown that he had been discriminated against on the grounds of race, the onus fell upon the university to satisfy the court, on a balance of probabilities, that the discrimination was not unfair.

The court noted that the university’s equity plan was a measure that promoted the achievement as required by section 9(2) of the Constitution however the equity plan contained a clause which provided that once appointments had been made which achieved the proclaimed equity target, the principle of preferential treatment was no longer applicable. All appointment had to be made exclusively on the respective merits of the relevant candidates. The court therefore held university’s failure to appoint the most suitably qualified white candidate to the position and instead appointing the less qualified coloured candidate constituted unfair discrimination on grounds of race.

Racial discrimination may also take the form of racial abuse and negative assumption as to an employee’s competency that are based on her or his race. In \textit{SA Transport \& Allied Workers Union on behalf of Finca v Old Mutual Life Assurance Co (SA) Ltd \& another}\textsuperscript{153} it was found the employer’s failure to protect black employees against racist remarks amounted to direct discrimination in terms of section 9(3) of the Constitution.

\textbf{ii. Gender, Sex}

In \textit{Association of Professional Teachers \& another v Minister of Education \& others}\textsuperscript{154} the Industrial Court distinguished between the above two terms, finding that “sex” refers to the biological difference between men and women, whereas “gender” encompasses a social and cultural evaluation. In this matter it was found that the denial of a homeowner’s allowance to married women discriminated directly against a class of women on the basis of their sex, together with their marital status and deemed dependency on a male spouse. In \textit{Police \& Prisons Civil Rights Union &

\textsuperscript{151} Act 108 of 1996
\textsuperscript{152} 1998 (1) SA 300 (CC).
\textsuperscript{153} (2006) 27 ILJ 1204 (LC).
\textsuperscript{154} [1995] 9 BLLR 29 (IC) at 59.
others v Department of Correctional Services & another\textsuperscript{155} the Department of Correctional Services instruction for male correctional officers to remove their dreadlocks but permitting women officers was found to be unjustifiable and unreasonable.

Sex discrimination may also take the form of prejudicial treatment of employees for reasons intrinsically bound up by their sex. In \textit{Ehlers v Bohler Uddeholm Africa (Pty) Ltd}\textsuperscript{156} an employee was reinstated after it was found that the true reason for the dismissal was because she underwent an a transsexual gender reassignment and not operational requirements of the employer.

There is further no duty on an employee to make disclosures at interview of information relating to intended gender reassignment process from male to female. Any dismissal arising from such a non disclosure amounts to unfair discrimination.\textsuperscript{157}

iii. Pregnancy

Pregnancy is defined as including intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy.\textsuperscript{158} In \textit{Collins v Volkskas Bank (Westonaria Branch) a Division of ABSA Bank Ltd}\textsuperscript{159} the Industrial Court sanctioned a limitation on the right to maternity leave contained in a collective agreement on the grounds that it was not unfair as to justify the Court’s intervention.

Women may also not be dismissed in any circumstances merely because they are pregnant.\textsuperscript{160} Section 187 (1) (e) of the LRA\textsuperscript{161} further renders impermissible a dismissal of a woman on maternity leave. However a woman on maternity leave is not immune from dismissal for preceding conduct.\textsuperscript{162}

\textsuperscript{155} (2010) 31 ILJ 2433(LC).
\textsuperscript{156} (2010) 31 ILJ 2383 (LC).
\textsuperscript{157} Atkins v Datacentrix (Pty) Ltd (2010) 31 ILJ 1130 (LC).
\textsuperscript{158} S 1 of the Employment Equity Act 55 of 1998.
\textsuperscript{159} (1994) 15 ILJ 1398 (IC).
\textsuperscript{160} Hunt v ICC Car importers Services Co (Pty) Ltd 20 ILJ 364(LC).
\textsuperscript{161} Act 66 of 1995.
\textsuperscript{162} Wardlaw v Supreme Mouldings (Pty) Ltd (2007) 28 ILJ 1042 (LAC)
If the main reason for the dismissal is the employee's pregnancy, the employer cannot rely on ancillary reasons to dismiss the employee.\footnote{163} Conversely a pregnant woman cannot rely on her pregnancy as a defence against conduct that constitutes a disciplinary.

\textbf{iv. \hspace{1em} Marital Status}

It is generally impermissible to distinguish, prefer or exclude employees on the basis of their marital status since this will very seldom have a bearing on the requirements of a job. Thus, the denial of a home owner's allowance to female married teachers on the assumption that their male partners would attend to their housing needs was struck down by the Industrial Court as an instance of unfair discrimination based on marital status as well as sex.\footnote{164}

\textbf{v. \hspace{1em} Family Responsibility}

This is clearly prohibited but on the other hand, the demands placed on employees by their family responsibilities may create situations where differential treatment is necessary to accommodate them and where differential treatment is needed the omission of such action may constitute unfair discrimination.

In \textit{Co-operative Workers Association & another v Petroleum Oil & Gas Co-operative of SA & others}\footnote{165} the question arose whether a collective agreement entered into in terms of which remuneration of employees with family responsibilities improved substantially amounted to unfair discrimination against employees without dependants. The court held that such differentiation based on family responsibility was not unfair in terms of EEA which recognizes employees with family responsibilities as a vulnerable group deserving protection.

\textsuperscript{164} Association of Professional Teachers & another v Minister of Education & others [1995] 9 BLLR 29 (IC).
\textsuperscript{165} (2007) 28 ILJ 627 (LC).}
vi. Age

If the reason for treating an employee differently to others is the age, discrimination is established and the onus is on the employer to show it is fair in terms of section 11 of the EEA. Selecting, exclusion or differentiation between employees as a result of their age will be justified only if it is based on inherent job requirement. Refusal to appoint a person solely on the unsubstantiated assumption that the person is too old or too young would constitute a clear case of direct age discrimination. To justify discrimination on prohibited ground such as age, employer must do so with reference to genuine occupational requirement that is age based and merely citing age as a factor is not sufficient.

A blanket policy laying down age restrictions without reference to employees ability to do work in question, will likewise be open to challenge. In Randall v Karan t/a Karan Beef Feedlot & another a employers unilateral termination of employment based on age was found to amount to automatic unfair dismissal. The employer was not entitled to rely on section 187(2)(b) of the LRA as justification or a defence once the employee went beyond the normal retirement age.

vii. Disability

Disability means a long term or recurring physical or mental impairment, which substantially limits prospects of entry into or advancement in employment. The definition is further explained in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities. Physical impairment means a clinically recognised condition or illness that affects a person’s thought processes, judgment or emotions. Long-term means that the impairment has to have lasted or is likely to last

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166 HOSPERSA obo Venter v SA Nursing Council (2006) 27 ILJ 1143 (LC)
167 Swart v Mr Video (Pty) Ltd [1997] 2 BLLR 249 (CCMA).
for at least 12 months. Recurring impairment is one that is likely to happen again and to be substantially limiting. Progressive conditions are those which are likely to develop or change or recur.\textsuperscript{174}

In \textit{IMATU and Another v City of Cape Town}\textsuperscript{175} Murphy AJ noted that in terms of the Code, protection of people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment and not on the diagnosis or the impairment. A long-term impairment of which the adverse effects in relation to the working environment can be largely prevented or removed by means of treatment such as type 1 diabetes, therefore does not constitute a disability.\textsuperscript{176} Such discrimination however could however amount to unfair discrimination on an unlisted ground.

viii. Religion

Not all employees are of the Christian faith, and employers may be faced with competing demands for opportunities to observe their religious beliefs and holidays. In \textit{Food & Allied Workers Union & others v Rainbow Chicken Farms}\textsuperscript{177} an employers refusal to allow employees a day off to celebrate religious holidays not gazetted as public holiday was held not to be unfair, unless the employer permitted some members of other religions to take off and others not. In \textit{Dlamini & others v Green Four Security}\textsuperscript{178} a company policy requiring security officers to be clean shaven where employees were alleging their religion did not permit the trimming or shaving of beards was held not to be discriminatory, as it applied consistently to all employees irrespective of religion.

\textsuperscript{174} Ibid Item 5.
\textsuperscript{175} [2005] 11 BLLR 1084 (LC) at para 89.
\textsuperscript{176} At para 91.
\textsuperscript{177} (2000) 21 ILJ 615 (LC).
\textsuperscript{178} (2006) 27 ILJ 2098 (LC).
ix. HIV Status

In Hoffman v SA Airways\textsuperscript{179} the Constitutional Court found discrimination on the basis of HIV status to be unfair in terms of section 9 of the Constitution, without even expressly considering whether HIV status fell into the category of unlisted grounds. However any uncertainty has been removed by the inclusion of HIV status as a prohibited ground of discrimination in the EEA and further, by the regulation of HIV testing for employment\textsuperscript{180} as well as the Code of Good Practice: Key Aspects of HIV/AIDS and Employment.\textsuperscript{181} In Allpass v Mooikloof Estates (Pty) Ltd \textit{t/a Mooikloof Equestrian Centre}\textsuperscript{182} a recent case it was held that discrimination relating to HIV status constitutes discrimination on arbitrary grounds prohibited by section 187(1)(f) of the LRA\textsuperscript{183} unless the employer is able to show that being HIV free is an inherent requirement of the job. In the case the real reason for the dismissal was the HIV status therefore the dismissal was held to be automatically unfair and compensation was awarded.

The protection is limited to employees including applicants for employment. On the face of it, the prohibition extends to discriminatory conduct by all persons including, but not limited to employers. It is however restricted to conduct occurring within the scope of an "employment policy or practice".

Section 6(1) is potentially applicable to any other procedure, process, rules or custom forming part of the employment relationship. The Constitutional Court held that where discrimination is based on one of the specified grounds, it is presumed to be unfair, if the discrimination is based on some other ground, the complainant must establish unfairness.\textsuperscript{184} However the court also held that discrimination in the sense contemplated by the Constitution takes place only if the ground upon which the alleged discrimination relates to those specified in the Constitution. These specified grounds have been used in the past to categorise, marginalise and often oppress

\textsuperscript{179} [2000] 12 BLLR 1365 (CC).
\textsuperscript{180} S 7 of the Employment Equity Act 55 of 1998.
\textsuperscript{181} GN 1298 of 1 December 2000.
\textsuperscript{182} (2011) 32 ILJ 1637 (LC).
\textsuperscript{183} Act 66 of 1995.
\textsuperscript{184} Harksen v Lane NO 1997(11) BLCR 1489 (CC).
persons with these attributes or characteristics and have the potential, when manipulated to demean persons in their inherent humanity and dignity.\textsuperscript{185} This suggests that before a claim of alleged unfair discrimination on any ground than those specified in section 6 of the Employment Equity Act\textsuperscript{186} is entertained the court must be satisfied that the discrimination complained of is indeed prohibited.

In the first reported employment discrimination decision handed down by the Labour Court, the court did not spend anytime on the question of what constituted a policy or practice for the purpose of the case. This was due to the fact that the policy or practice that allegedly had disparate impact on the case was easily identifiable.\textsuperscript{187}

However in \textit{Woolworths (Pty) Ltd v Whitehead}\textsuperscript{188} the Labour Appeal Court a decision of an employer in regard to a single individual can hardly be described as a policy or practice.

The Labour Court in several cases decided under the repealed the item 2(1)(a) of Schedule 7 to the Labour Relations Act, which prohibited discrimination not only on the specified grounds but also on any arbitrary ground. In \textit{Ntai v South African Breweries}\textsuperscript{189} the court warned against the practice of simply alleging discrimination on arbitrary conduct by the employer, without specifying grounds for that allegation. The finding in \textit{Kadiaka v Amalgamated Beverage Industries}\textsuperscript{190} that the employers competitors refusal to hire an applicant because of his past association constituted unfair discrimination on an unlisted ground, is almost certainly incorrect.

\textsuperscript{185} At para (48) of the judgment.
\textsuperscript{186} Act 55 of 1998.
\textsuperscript{188} [2000] 6 BLLR 640 (LAC).
\textsuperscript{189} (2001) 22 ILJ 214 (LC).
\textsuperscript{190} (1999) 20 ILJ 373 (LC).
Unlike item 2(1) of the Labour Relations Act, section 6 of the Employment Equity Act does not refer to an act or omission. The phrase does however appear in section 10(2)\textsuperscript{191} and may be regarded as being implicit in section 6.

The Labour Court has suggested that a refusal to employ persons belonging to a particular group on outdated and irrational medical grounds is enough to demean the inherent human dignity of members of that group.\textsuperscript{192} So too has disqualifying employees on a fixed-term contract as candidates for senior posts been found to impair the dignity.\textsuperscript{193}

However employees complaining of discrimination on an unlisted ground must provide evidence that the act complained of affected their dignity or injured their feelings, are insufficient to prove a claim of discrimination.\textsuperscript{194}

Direct discrimination occurs when adverse action is taken against people precisely because they possess one of the characteristics listed in section 6\textsuperscript{195} or attributes.

Indirect discrimination occurs when seemingly objective or neutral barriers are placed before people which exclude members of particular groups merely because they happen to be members of those groups, for example height or weight requirement which would exclude all but a tiny minority of women. Indirect discrimination may be intentional or unintentional.\textsuperscript{196}

\textsuperscript{191}S 10(2) reads: “Any party to dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omissions that allegedly constitute unfair discrimination.”

\textsuperscript{192}Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (LC).

\textsuperscript{193}Mc Pherson v University of Kwa-Zulu Natal & another [2008] 2 BLLR 170 (LC).

\textsuperscript{194}Mothoa v South Africa Police Services & others (2007) 28 ILJ 2019 (LC).

\textsuperscript{195}Employment Equity Act 55 of 1998.

\textsuperscript{196}Association of Professional Teachers & another v Minister of Education & others (1995) 16 ILJ 1048 (IC).
Employment policy or practice is defined as including but not limited to:

a) recruitment procedures, advertising, and selection criteria;
b) appointments and the appointment process;
c) job classifications and grading;
d) remuneration, employment benefits and terms and conditions of employment;
e) job assignments;
f) the working environment and facilities;
g) training and development;
h) performance evaluation systems;
i) promotion;
j) transfer;
k) demotion;
l) disciplinary measures other than dismissal; and
m) dismissal.

4.6 THE EXTENT OF COVER FOR APPLICANTS OF EMPLOYMENT

The meaning of employee is extended for purposes of section 6, 7, and 8 to include applicants for employment. Many of the employment practices or policies referred to in section 6(1) for example those relating to promotion, demotion, training or benefits and suspensions are inapplicable to job applicants. The only issue job applicants raise for protection under the Employment Equity Act is non-appointment as a result of alleged unfair discrimination.

Generally there is no duty on an employer to appoint any particular job applicant, provided they do not discriminate unfairly employers have a wide discretion with which the courts will not readily interfere unless serious irregularity is shown.

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197 The Code of Good Practice: Key Aspects on the Employment of People with Disabilities recommends that when recruiting, employers should identify the inherent requirements of the position; i.e. those necessary to enable the employee to perform the essential functions of the job. Advertisement should describe clearly the required skills, set reasonable criteria for selection and contain sufficient detail about job requirements: see item 7.

The Employment Equity Act permits applicant for employment to challenge their non-selection on the ground that they have been discriminated against. The discrimination against applicant for employment may be direct or indirect.

A particular example of such unfair discrimination is recorded in *Stokwe v MEC Department of Education Eastern Cape Province & another*¹⁹⁹ Ms Stokwe a teacher applied for a vacant post as a principal of an Afrikaans-medium school. The interviewing committee ranked her first, above a male candidate and the acting principal. However the school governing body thought the male candidate had more experience.

The department then set up a review panel consisting of 3 white Afrikaans speaking principals. They insisted on conducting the interview in Afrikaans but Ms Stokwe objected and it ended being conducted on English. However, the interview panel then asked if she could translate continuous evaluation in Afrikaans and ultimately told her she should not have applied for the post because she could not speak Afrikaans. They went even further and asked why she was bold enough to compete with a man.

Ms Stokwe lodged a complaint with the department but the senior official decided to go with the recommendation that the Afrikaans-speaking male be appointed. The judge found that Ms Stokwe had been discriminated against on the basis of race, sex, gender, language. Moreover there was no provision in the applicable legislation for the creation of review panels.

The department during the trial tried to settle by making a proposal. The judge agreed and made an order transferring Ms Stokwe to a post elsewhere on a grade equivalent to that of principal of the school.

Selection criteria are confidential to committees and individual they are difficult to monitor. However the criteria by which applicants are assessed may indicate an

intention to discriminate because they seek to solicit information not immediately relevant to candidates abilities.

The EEA also provides that when determining whether an applicant is suitably qualified for the job, the employer must take into account not only formal qualifications but also prior learning, relevant experience or the capacity to acquire within a reasonable time, the ability to do the job. However, when making the decision the employer is not permitted to discriminate against applicant solely on the ground of his and her lack of relevant experience.

Where an employer’s affirmative action policy provides that preference will be given to members of a particular race group, it is nevertheless unfair to exclude applicants from other race groups entirely from consideration.

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200 S 20(3) of the Employment Equity Act 55 of 1998.
202 IMATU obo Gounder v eThekwini Municipality; Metro Electricity (2003) 10 BALR 1101 SALGBC.
5.1 INTRODUCTION

In ensuring both substantive and procedural rationality the EEA provides for four combined mechanism to ensure rationality in the context of affirmative action:

- Firstly section 13 of the Act place an obligation on every “designated employer” to implement affirmative action measures to advance people from “designated groups”.

- Secondly section 15 describes what “affirmative action” measures have to be implemented.

- Thirdly sections 16-26 of the Act provides for a procedure through which so-called “employment equity plans” have to be prepared, submitted, implemented and monitored in the workplace.

- Fourthly, sections 34-50 and section 53 of the Act provides for a variety of enforcement mechanisms to ensure compliance with the Act.

5.2 AFFIRMATIVE ACTION MEASURES

Section 15 of the EEA provides:

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

Section 15 gives a broad definition of what it regards as affirmative measures. It is a measure aimed at ensuring the equal employment opportunities and equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce. On reading of the whole section it is clear...
that “affirmative action measures” go much wider than only preferential appointment of members of the designated groups to vacant positions in the workforce.

In Harmse v City of Cape Town\textsuperscript{203} it was held that section 15:

“indicates a role for affirmative action that goes beyond the passivity of its status as a defence. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace”.

Failure to implement affirmative action measures it was suggested, may violate the right of employees from designated groups not to be unfairly discriminated against.

This finding was rejected in Dudley v City of Cape Town & another\textsuperscript{204} where it was held that

“in general, a failure to comply with the requirements of Chapter III will be a non-compliance issue and not on one of unfair discrimination”.

The Labour Appeal Court endorsed this approach on appeal,\textsuperscript{205} but left open the question whether an employee may challenge an employer’s failure to implement affirmative action measures in the Labour Court after exhausting the dispute resolution procedure laid down in Chapter V of the Act.

5.3 WHAT MUST BE INCLUDED IN THE AFFIRMATIVE ACTION MEASURES IMPLEMENTED

Section 15(2) of the Act reads as follows:

(1) Affirmative action measures implemented by a designated employer must include

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

\textsuperscript{203}[2003] 6 BLLR 557 (LC) at par 33 and 47.
\textsuperscript{204}[2004] 5 BLLR 413 (LC) at par 72; followed in Cupido v GlaxoSmithKline South Africa (Pty) Ltd [2005] 6 BLLR 555 (LC) at par 18; Thekiso v IBM South Africa (Pty) Ltd [2007] 3 BLLR 253 (LC) at par 44ff; PSA obo Karriem v SAPS & another [2007] 4 BLLR 308 (LC) at par 323.
\textsuperscript{205}Dudley v City of Cape Town & another [2008] 12 BLLR 1155 (LAC).
Section 13(2) goes on to create four specific duties linking affirmative action measures to the broader scheme of employment equity plans. It states that every designated employer must

(a) consult with its employees in terms of section 16;

(b) conduct an analysis in terms of section 19;

(c) prepare an employment equity plan in terms of section 20; and

(d) report to the Director-General in terms of section 21 on progress with implementing its employment equity plan.

Since an employment equity plan must contain the affirmative action measures referred to in section 15(2), the effect is to create an integrated process of identifying and addressing the inequitable representation of persons from designated groups within the workplace as well as eliminating unfair discrimination.

Designated groups are defined as:

“Black people, women and people with disabilities. ‘Black people’ means ‘Africans, Coloureds and Indians’, and ‘people with disabilities’, means people who have long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.”

While these are not the only groups who have suffered unfair discrimination in the past the decision to prioritise them may be explained in by the number of people who

206 S 15(2) (a) refers to the elimination of unfair discrimination only in respect of persons from designated groups. Given the clear language of s 9(2) of the Constitution and s 6(1) of the EEA, it is submitted that employment equity implies the elimination of all forms unfair discrimination.

fall within these groups and the existent of their exclusion. The effect is that while unfair discrimination on other grounds affirmative action measures in terms of the EEA are limited to designated groups. In *Stulweni v SAPS Western Cape Province*\(^{208}\) it was found that affirmative action measures in terms of the EEA are limited to designated groups (*ie* black people, women and people with disabilities) and that there are no basis to apply such measures on the grounds for religion.

The demographics of the national and regional economic active population are the primary criterion against which compliance with the EEA must be measured.\(^{209}\)

5.4 THE MEANING OF EQUITABLE REPRESENTATION AND SUITABLY QUALIFIED PEOPLE

Section 15(2)(d) of the EEA reads as follows:

“Section 15 (2)

(a) subject to subsection (3), measures to

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.”

On reading provisions of section 15(2)(d) the two important measures taken into account when implementing affirmative action measures are equitable representation and suitable qualification discussed below upon how they have been interpreted in the courts.

\(^{208}\) (2003) 3 BALR 374(CCMA) at par 379.

Section 20 of the EEA reads as follows:

“(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer’s workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state

(a) the objectives to be achieved for each year of the plan;
(b) the affirmative action measures to be implemented as required by section 15(2);
(c) where underrepresentation of people from designated groups has been identified by the analysis the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within which this is to be achieved, and the strategies intended to achieve those goals;
(d) the time table for each year of the plan for the achievement of goals and objectives other than numerical goals;
(e) the duration of the plan, which may not be shorter than one or longer than five years;
(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
(h) the persons in the workforce, including senior manager, responsible for monitoring and implementing the plan; and
(i) any other prescribed matter.”

In determining whether suitably qualified people from designated groups are equitably represented within a workforce section 42(a) sets out factors that must be taken into account by the Director-General of Labour or any other person applying the EEA.

The primary point of reference in setting targets for each category of employment is the demographic of the region when recruiting locally or the country as a whole when
recruiting nationally. Persons in formal or informal as well as the unemployed are taken into account. The affirmative action programme should strive to achieve an appropriate racial and gender balance among the different categories of black persons a racial balance among women and racial gender balance among disabled people. Compliance must be measured against the pool of suitably qualified people from designated groups from which the employer may be reasonably expected to promote or appoint employees. \(^{210}\)

Secondly the degree of competition in a sector, skills levels, changing technology, strategic plans of the enterprise and its financial health will have an important bearing on which the employer is able to appoint suitably qualified persons from the under-represented designated groups. The objective focus is on economic and financial factors rather than a mere desire on the part of the employer to minimise costs or maximise profits. In *Whitehead v Woolworths (Pty) Ltd*\(^{211}\) Waglay J found that

> “if profitability is to dictate whether or not discrimination is unfair it would negate the very essence … of a Bill of Rights”.

On appeal\(^{212}\) the Willis JA held

> “that while profitability is not to dictate whether or not discrimination is unfair… nevertheless it is a relevant consideration”.

The rate at which appointments or promotions of designated groups is determined by the rate of turnover or expansion of the workforce, employers are not permitted to dismiss employees from non-designated groups in order to make room for persons from designated groups.

In *Thekiso v IBM South Africa (Pty) Ltd*\(^{213}\) it was held that an employer is not obliged to consider the requirements of section 15(2)(d)(ii) when selecting employees for dismissal for operational reasons in terms of section 189 of the LRA. Thus when interpreting this sub-paragraph it is not required of the employer automatically to


\(^{211}\) [1999] 8 BLLR 862 (LC).

\(^{212}\) Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC) at par 134.

\(^{213}\) [2007] 3 BLLR 253 (LC) at para 41ff.
retain a suitably qualified black woman rather than a white male in a particular position.

(ii) Suitably Qualified

There are a number of issues to consider in this instance firstly where there are two applicants who have virtually the same qualifications and experience, the applicant from the previously disadvantaged group should be given preference. Discrimination is not unfair if the employer is taking positive affirmative action that is consistent with the purpose of the EEA. Affirmative action is confined to the preferential treatment of suitably qualified persons from designated groups.

The employer may treat an employee or job applicant from a designated group on a preferential basis however there is nothing in the Act which requires the employer to recruit or promote a person who lacks the competency to do the work in question.

There are a number of issues to consider in this instance, which brings section 20(3)–(5) into play again of the EEA which read as follows:

“(1) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that persons-

(a) formal qualifications;
(b) prior learning;
(c) relevant experience; or
(d) capacity to acquire, within a reasonable time, the ability to do the job.

(2) When determining whether a person is suitably qualified for a job, an employer must-

(a) review all the factors listed in subsection(3); and
(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

(3) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.”
The effect of the above is that the employer must review all the above factors in considering whether a person is suitably qualified for a job.²¹⁴ Suitability may be established if a person is qualified in terms of one or more those factors.²¹⁵ This essentially means that firstly when making a selection among suitably applicants, affirmative action criteria should be used in terms of an employment equity plan to employ persons from groups that are under represented in the workforce. Secondly the term “suitably qualified” should not automatically be equated with the highest possible qualification but should refer to a level of skill and knowledge that is required to perform a job in a sufficiently competent manner.

Suitability for a position should not be judged only in the light of technical qualifications; the need for greater diversity may be also be a criterion in itself. This may be inferred from the *Fourie v Provincial Commissioner, SAPS (North West Province)*²¹⁶. The court noted that affirmative action measures are only permitted in respect of “suitably qualified” person from designated, the court went on to accept that efficiency and representativity should not necessarily be viewed as competing or opposing aims but that they could be linked.²¹⁷ The fact that one applicant has more experience than another need not mean that the latter is not “suitable” or “unqualified”.²¹⁸ Similarly in *Dudley v City of Cape Town & another*²¹⁹ the court rejected the view that affirmative action appointment is by definition not the appointment of the best candidate, even though it might be true in a “great many instances”. If there is an affirmative action applicant with superior qualifications it was found that means at least that the hurdle of suitably qualified will have been cleared.

In deciding on an applicant’s suitability for a position an employer may not unfairly discriminate against a person solely on the grounds of that persons lack of relevant

²¹⁴ S 20(4) (a) of the EEA.
²¹⁵ S 20(4) (b) of the EEA.
²¹⁶ [2004] 9 BLLR 895 (LC) at pars 42-43.
²¹⁷ *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) at 11033-1034.
²¹⁸ *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC) at par 46.
²¹⁹ [2004] 5 BLLR 413 (LC).
experience. This provision is designed to deal with the fact that black people, women and disabled people were practically or legally excluded from certain jobs in the past and thus prevented from gaining relevant experience in those jobs and fields. If such experience remains a decisive criterion, they will remain excluded even though they might have the ability to perform the work in question. However if lack of relevant experience is the only reason for rejecting the applicant the prohibition should apply. An applicant may also be excluded if he or she lacks formal qualifications, prior learning or capacity to learn to learn to do the job within the reasonable time. Discrimination on the ground of lack of relevant experience is more likely to be regarded as justifiable in respect of senior positions.

Although suitably qualified persons from designated groups are not necessarily entitled to affirmative action measures, it may amount to unfair discrimination to exclude them from consideration. The term “suitably qualified” should not be construed too narrowly given the remedial nature of affirmative action it was noted in Alexandre v Provincial Administration of the Western Cape Department of Health that a person may be suitably qualified for a job as a result of any one, or any combination of the factors listed in section 20(3).

Even though it is practically impossible to determine whether a person will at some time in the future acquire the ability to do the job, the “reasonable time” provision enables the application. How long such a period might be would depend on the nature of the job and the circumstances.

The term “ability to do the job” has an objective connotation. Therefore the mere fact that an applicant believes that he or she has the necessary competency will not suffice if there is convincing evidence to the contrary. A relative short coming in an applicant’s competency may not be treated as a disqualification if it could be remedied within the scope intended by section 20(3)(d) through on the job experience or training. In practice, newly appointed employees are often allowed

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221 In SATAWU v Metrorail Services (2002) 23 ILJ 2389 (ARB).
222 [2005] 6 BLLR 539 (LC) at par 5.
some time to familiarise themselves with the work. Refusal to do so in the case of persons from designated groups could be a contravention of section 20(3).

5.5 PREFERENTIAL TREATMENT, NUMERICAL GOALS AND THE EXCLUSION OF QUOTAS

In this regard section 15(3) reads as follows:

“(3) The measures referred to in subsection 2(d) include preferential treatment and numerical goals, but exclude quotas.”

Numerical goals for the achievement of equitable representation of people from designated groups must be included in the plan. Quotas, however, are not required. A quota may be taken to mean a fixed ratio or number of persons from designated groups to be recruited or appointed. The reason why the Act does not impose quotas is to enable parties to put in place measures to achieve equality which are appropriate to their own workplace without undermining the goal of a more representative and diverse workforce. Numerical goals should be designed within organisation to reflect the numbers of suitably qualified black people, female and disabled employees that it realistically expects to appoint within specified periods, given the benchmark set by the regional and national economically active population, the nature of its operations and the relevant labour markets. Such numerical goals should be relatively flexible and adjusted as circumstances change.

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223 Ss 15(2)(d) and 20(2)(c) of the Employment Equity Act 55 of 1998.
225 See s 42 of the Employment Equity Act 55 of 1998 and item 8.4.2, Code of Good Practice.
5.6 IS IT AN ABSOLUTE BARRIER TO PEOPLE WHO ARE NOT FROM DESIGNATED GROUPS

In the regard section 15(4) reads as follows:

Section 15(4)

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

Affirmative action does not require measures that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups. Although this implies that such barriers may be permissible, in practice the opposite is sometimes assumed.226

Recent decisions interpreting the provisions shed light on the meaning of “absolute barrier” to prospective or continued employment or advancement of persons not from designated groups. In Coetzer and Others v The Minister of Security and Another227 the court found that, where the employer invited applications only from members of designated groups, it did not create an absolute barrier against the latter. Similarly, in SAPU obo Lotter v SAPS228 the reservation of positions for members of designated groups was found not to constitute an absolute barrier on the grounds that members of non-designated groups were able to apply for other positions.

Section 15(4) has also been applied as between members of different as between members of different designated groups. In Health and Other Personnel Service Trade Union of SA obo Klaasen v Paarl Hospital229 it was held that the exclusion of a coloured applicant for promotion in favour of an African applicant on the ground of numerical goals contained in an employment equity plan amounted to an absolute

226 Partington & Van Der Walt suggests, that in putting up a defence to a claim of unfair discrimination. “An employer who has created absolute barriers to the employment or advancement of non-designated groups will have a greater burden in proving the reasonableness of the affirmative action measures”: “The Development of Defences in Unfair Discrimination Cases (Part 2)” (2005) Obiter 595 at 598.


228 (2002) 8 BALR 889 (CCMA).

barrier as it prevented the former from being promoted until the numerical goals were met. In such circumstances, the arbitrator found that the employer could deviate from an employment equity plan.

However dismissal of employees to make way for persons from designated groups is not sanctioned by the EEA and would be automatically unfair in terms of the LRA. Dismissal on grounds race, gender, sex, disability or other grounds listed in section 187(1)(f) of the LRA is prohibited. While dismissal of any employee may be fair if based on an inherent requirement of a particular job or if the employee has reached the normal retirement age, dismissal for the purposes of affirmative action is given no protection. Thus in Espach v Telkom SA Ltd where the employer purported to terminate all positions in a department and then invite certain employees to apply for vacant positions subject to criteria of race and gender, the CCMA found that the use of affirmative action criteria in selecting employees for dismissal on operational grounds amounted to unfair discrimination. In Van Zyl v Department of Labour a government department seeking to become racially representative notified a white employee that she would not be reabsorbed. The CCMA found that the Constitution does not justify the termination of services in order to promote representivity and was unfair discrimination. This matter however was decided in terms of the LRA.

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CHAPTER 6
WHEN IS DISCRIMINATION ALLOWED: THE STATUTORY DEFENCES

6.1 INTRODUCTION

The Employment Equity Act sets out two grounds which remove differential treatment for the ambit of unfair discrimination:

“It is not unfair discrimination to-

a) take affirmative action measures consistent with the purpose of the Act; or

b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.”

6.2 AFFIRMATIVE ACTION

The reason for affirmative action is that formal equality, in the shape of the prohibition of future unfair discrimination, would not go far enough to redress the inequities of the past in a country like South Africa due to its long constitutional history of unfair discrimination. Affirmative action presents itself in terms of the EEA both as a duty and as a defence.

Section 6(2) seeks to strengthen affirmative action appointments against attack on the basis of unfair discrimination, employers however are not given full discretion as the provision does set down certain limits. To escape being branded unfair, an affirmative appointment must be consistent with the purpose of the EEA.

The preamble to the Act describes the purpose of the EEA as being to promote the constitutional right of equality and the exercise of true democracy, to eliminate unfair discrimination in employment to ensure the implementation of employment equity to redress the effects of discrimination; to achieve a diverse workforce broadly

233 S 6(2) of the Employment Equity Act 55 of 1998.
234 Chapter III of the Act 55 of 1998 places designated employers under a duty to implement affirmative action measures.
representative of our people to promote economic development and efficiency in the workforce; and to give effect to the obligations of the Republic as a member of the International Labour Organisation.

What this suggests is that the benefits granted must be proportional to the goal of achieving equality. The granting of extravagant benefits that disproportionately enhance the positions of members of formerly disadvantaged groups at the expense of others could conceivably go beyond goals of the EEA.

Affirmative action measures thus are excluded from the ambit of unfair discrimination. This follows from section 9(2) of the Constitution which defines equality in a substantive sense and legitimate affirmative action as a means towards this ends. Section 6(2)(a) of the EEA therefore does not legitimise affirmative action as a form of discrimination that is fair rather, it serves to exclude such measures not only from the ambit of unfairness but from the concept of discrimination itself. Any doubt that may have existed was removed by the Minister of Finance and Another v Van Heerden,\(^{235}\) where the significance of affirmative action measures was explained as follows:

> “Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not ‘reverse discrimination’ or ‘positive discrimination’ as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of section 9(1) and section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure ‘full and equal enjoyment of all rights’. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.”

To this extent it is submitted that the formal approach adopted in PSA v Minister of Justice\(^{236}\) has been superseded and that, while the existence of a policy or plan may help to establish the validity of such measures, it can no longer be regarded as an absolute prerequisite.

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\(^{236}\) (1997) 5 BLCR 577 (T).
Section 6 of the EEA must be read in the light of section 9 of the Constitution, which permits legislative and other measures designed to protect or advance persons of categories of persons, disadvantaged by unfair discrimination.

Various principles have been laid down by the courts in testing the legality of affirmative action measures. Where there is a agreement that an employment equity plan will be drawn up, this must be done if an employer wishes to rely on affirmative action as a defence. Where an employer has failed to implement an agreed affirmative action programme it has been held that any appointment on purported affirmative action grounds is illegitimate because it is not in terms of any formulated policy against which it can be tested.\textsuperscript{237} Where a policy or plan exists, it must be followed. In \textit{Mc Innes v Technikon Natal}\textsuperscript{238} the court proposed a two staged enquiry with the first question into the enquiry being whether the employer’s policy falls within the ambit of the statutory provision and the second being whether the measure in question falls within the ambit of that policy. Measures falling beyond the employers own definition of affirmative action as laid down in a policy or plan. Measures falling beyond the employers own definition of affirmative action as laid down in a policy or plan.

The effect is to limit the scope of section 6(2)(a) to measure intended to advance people from designated groups only. Measures affirming employees from other groups disadvantaged by unfair discrimination, would have to be justified on the basis of section 14 of PEPUDA\textsuperscript{239} or where applicable section 9(2) of the Constitution.\textsuperscript{240}

It is sufficient for disappointed candidates from a formerly advantaged group to plead merely that they are more qualified than a candidate from a designated group for example in the \textit{Stoman v Minister of Safety and Security and others},\textsuperscript{241} the High Court held that the Constitution promotes, not merely formal equality but also substantive equality. This includes affirmative action sanctioned by legislation such

\begin{enumerate}
\item \textit{IMAWU v Greater Louis Trichardt Transitional Local Council} (2000) ILJ 1119 (LC).
\item [2000] 6 BLLR 701 (LC).
\item Act 4 of 2000.
\item Act 108 of 1996.
\item (2002) 23 ILJ 1020 (T) at 1032.
\end{enumerate}
as the EEA and Promotion of Equality & Prevention of Unfair Discrimination (PEPUDA). That goal according to the court arose and derives its justification from the fact that unless remedied the effects of past discrimination may continue for a substantial time and even indefinitely. The only issue the court said is whether the particular affirmative action was indeed designed to protect and advance persons or categories of persons who were previously disadvantaged, as there must according to the Constitution be a rational connection between the affirmative measures and aims which they are deigned to achieve.

The Stomans case was decided under the final Constitution, the court was prepared to accept that affirmative action cannot justify the appointment of an applicant from previously disadvantaged groups have qualification and attributes broadly comparable to those of better qualified or more experienced white males.

The court came to the same conclusion in Du Preez v The Minister of Justice and Constitutional Development a case decided under the PEPUDA as the EEA was not applicable to magistrates in terms of Magistrates Act 90 of 1993 because they are judicial officials in public service and are subject only to the Constitution. They do not work for the state and are not employees as defined in the EEA.

The EEA does not expressly deal with how efficiency must be reconciled with representivity when employers strive to promote economic development and efficiency of the workforce. Neither does the Act indicate how much weight is to be accorded the two goals when they clash. The issue arose in Coetzer and others v Minister of Safety of Security and another the applicants were highly trained and experienced inspectors in the bomb squad of the South African Police Services. Due to the fact they were white males, they could apply only for certain posts open to non-designated employees in the squad. When these were filled, they applied for designated posts, their applications were rejected even though there had been no applications from members of designated groups.

244 Act 108 of 1996.
In Coetzer\textsuperscript{247} the Labour Court was called upon to decide this issue within the framework of the EEA. The question was whether the South African Police Services efforts to promote representivity in the explosives unit were rationally balanced with efforts to change the demographics of its staff. The problem the police services had as the employer was that it had based its defence solely on its claim that it had conformed to the representivity requirements of the EEA. The court held that National Commissioners refusal to appoint the applicants to the vacancies was irrational and Commissioner had entirely overlooked his constitutional duty to ensure that the service remained efficient.

The Coetzer\textsuperscript{248} and Du Preez\textsuperscript{249} confirmed that there are limits to the extent to which a plea of affirmative action can serve as a defence to an action for unfair discrimination against white male employees. This judgment also confirms that discrimination becomes unfair to members of non-designated groups where an employer disadvantages them in the name of affirmative action in circumstances where members of non designated groups do not benefit.

The question with regards to how far the skills, experience of qualification gap must be extended before the appointment of a less qualified or black experienced candidate becomes irrational and impeachable. In Stomans case the gap must be considerable. The court rejected the argument that affirmative action can only be fairly applied when candidates have broadly the same qualifications that the said court would detract from the goal of true equality. However did not go so far as to hold that differences in qualifications are never relevant the court merely recognised that an affirmative action appointment is not necessarily unfair merely because the candidate is formally less qualified than a candidate from a previously advantaged group. However some balance had to be struck between the goals of equality and efficiency and decisions to appoint affirmative candidates must be rationally defensible. The appointment of people who are wholly unqualified or less than suitably qualified or incapable in responsible position cannot be justified.

\textsuperscript{247} (2003) 24 ILJ 163 (LC).
\textsuperscript{248} (2003) 24 ILJ 163 (LC).
\textsuperscript{249} (2006) 2 ILJ 1811 (SE).
Another limitation to section 6(2)(a) defence is that the beneficiaries must have been disadvantaged by unfair discrimination. Disadvantaged in this context means that the persons concerned were denied opportunities and benefits accorded to others in the past. Further, the disadvantage must have occurred as a result of past discrimination, that arising out of personal circumstances will not be enough. In South Africa the obvious and major cause of disadvantage in the past was apartheid legislation against black people in general and white women were also the victims of indirect discrimination in selection and promotion. The same might be said of other groups such as homosexuals and the disabled.

Conflict may arise between members of designated groups as to who are the most deserving of affirmative treatment. In such a case, it seems black candidates may be preferred.

In *Fourie v Provincial Commissioner of the South African Police Services (North West Province & another)*, in which the court held that in choosing between members of designated groups being black people, white women the employer is entitled to take into account the degree of past disadvantages.

In *Motala v University of Natal*, the court held that it was not unfair to restrict the numbers of Indian students at medical school on the basis of a quota that favoured blacks.

However in doing so the employer must follow its policy as was held in *Lotter v SAPS* a white female officer, who received the highest rating from the selection panel, was overlooked in favour of a black male officer. The employer claimed that it was merely seeking to correct a scarcity of black males at the level in question. The arbitrator noted that in terms of the South African Police Services policy affirmative action could only be taken into account when 2 candidates receive equal scores and

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251 (1995) 3 BCLR 374(D) at 383 C-E.
that the selection panel had misinterpreted the policy and perpetrated on unfair labour practice.

Those who favoured affirmative action are of the view that affirmative action is a perfect measure to redress gross injustices of the past and specifically at redressing major imbalances in the make up of the public service.\textsuperscript{253}

In \textit{President of the Republic of South Africa v Hugo}\textsuperscript{254} the Constitutional Court held that an unfair discrimination enquiry required an assessment of whether the overall impact of discriminatory action furthers the constitutional goal of equality or not. Affirmative action is no doubt a measure in furtherance of the goal of equality.

Affirmative action is a powerful and delicate instrument which ought to be used with caution. The very justification for it also contains the warning signs in respect of reversed discrimination and abuse of power. The question is whether an applicant can make use of the affirmative action clause to insist that he or she be appointed to a position because he or she is from a previously disadvantaged background.

In \textit{Abbot v Bargaining Council for Motor Industry (Western Cape)}\textsuperscript{255} this question came to the fore Mr Abbot who described himself as a coloured man claimed that he was overlooked for employment as a designated agent of the respondent in favour of a white man and that this amounted unfair discrimination. Mr Abbot possessed all the qualities of a disadvantaged person in that he was 42 years, came from a poor family, with a university degree in labour relations.

Thus the Labour Court had no difficulty in finding that the applicant did fall in the category of previously disadvantaged, but asked the question whether affirmative action clause as encapsulated in Schedule 7(2)(1) of the Labour Relations Act\textsuperscript{256} could be used only as a shield for employers attempting to achieve the aims of the legislation on whether it could be used as a sword by previously disadvantaged

\textsuperscript{253} \textit{Brink v Kitshoff} (1996) 4 SA 197 (EC).
\textsuperscript{254} (1997) 6 BLCR 708 (CC).
\textsuperscript{255} [1997] BLLR 115 (LC).
\textsuperscript{256} Act 66 of 1995.
groups and thus create a right to appointment. The Labour Court however concluded that affirmative action could only be used as a defence.

In *George v Liberty Life Association of Africa*\textsuperscript{257} an early discrimination case the Industrial Court held that the personal circumstances of the favoured individual were relevant. However in *Stoman’s*\textsuperscript{258} case, the court answered the question categorically and stated that emphasis is on the group or category of persons, not the individual. The aim of affirmative action is not to reward individuals, but to advance the category of persons who were previously disadvantaged where they belong. It will accordingly not help or assist a complainant to prove that the individual beneficiary cannot conceivably be described as disadvantaged. The employer must be able to show that he acted in terms of a coherent and defensible plan.

In *MWU obo Van Coller v Eskom*\textsuperscript{259} the arbitrator held that it is not enough for an employer to rely upon a generalised intention to advance or protect persons or groups or categories of persons, the employer must rely on standards that have been developed for that purpose. When affirmative action is applied the rights of other members of the community must not be undermined efficiency must not be compromised.

In *Eskom v Hiemstra NO and others*\textsuperscript{260} which was a review application the Labour Court was asked by the employer to set aside the award of the arbitrator. The facts before the arbitrator were that the employer had indicated that it was an affirmative action employer. Thirteen employees who applied including Sonia Van Coller were graded by a selection committee after the interviews. Van Coller received the highest grade and was recommended for the position. The union’s second best applicant lodged a grievance on grounds that white candidates were considered and placed on the list. At first the company found that the selection process was fair and did not discriminate against any body. However at the insistence of the union the matter was reconsidered again this time by the head of department in which the

\textsuperscript{257} (1996) 17 ILJ 571 (IC).
\textsuperscript{258} (2002) 23 ILJ 1020 (T).
\textsuperscript{259} [1999] 9 BLLR 1089 (IMMSA).
\textsuperscript{260} (1999) ILJ 2362 (LC).
vacancy existed to appoint the second best candidate on the grounds that all the positions in the same grade where white and solely on this basis the company had adopted an informal affirmative action policy. There was no formal policy in place.

The arbitrator in his decision took guidance from the already established case of *Public Servants Association v Minster of Justice & others*\(^{261}\) to find that in the absence of an affirmative action plan or development standards the employer would not be able to merely rely on the broad intention to advance persons or groups of categories of persons under the guise of affirmative action the arbitrator found that the unfairness could not be justified.

The employer relied only on one ground to challenge the arbitrators decision that being that the arbitrator should have considered whether the appointment of the second best candidate was fair and in the event it was found unfair, he should then only have considered the defence that the discrimination was in terms of affirmative action.

Landman J submitted that the “the issue can be answered in two ways with the same result …. the arbitrator may well have asked the crucial question was the discrimination, for it is for a common cause that there was discrimination in the sense of differentiation between a black employee and a white employee *prima facie* unfair if the arbitrator was of the opinion that it was, he would pass to the next step and ask whether it was justified in terms of item 2(3) (b)”\(^{262}\).

The Labour Court did not expressly state whether it agrees with the finding, as is the function of the court when dealing with a review application it is clear from the finding that the arbitrators reasoning was reasonable and justifiable it implied as much.

It thus not good enough for an employer to state it has an affirmative action stance or view. Such a stance needs to placed in a detailed format should it wish to rely on other protections from Schedule 7(2)(2) (b) the judgment an award however remained silent on the question on the question of how to deal with issues of

\(^{261}\) *Supra.*

\(^{262}\) 2369 A-B.
competing rights when both employees fall under previously disadvantaged categories.

Another question to consider is how far an employer can go when infringing upon rights of a previously advantaged grouping in the name of affirmative action.

The court reached a similar conclusion in *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*²⁶³ the appointment of a black man to the position of town treasurer was that he was black. However the successful candidate had received a lower score during the pre-appointment test than other candidates. The court held that an employer can only rely on affirmative action as a defence if it has an affirmative action policy. In the absence of such a policy the failure to explain why weaker candidate had been appointed which gave rise to the presumption that there was no justification for the appointment. The court also observed that an employer owed it to other previously disadvantaged candidates to ensure that appointments were made from the best among them.

In *Gordon v Department of Health, Kwa-Zulu Natal*²⁶⁴ however, the Labour Court held that the judgment mentioned above did not lay down an inflexible rule that a employer must have a formal affirmative action plan in place before it can rely on the defence afforded by section 6(2)(a). The court held that to lay down such requirement would be to limit the purpose of the section. While the court acknowledged that plans were not irrelevant, the proper test was whether there was a rational connection between the decision to appoint or not to appoint, a plan can facilitate proof of such a connection. However, even in the absence of a plan, the decision to appoint a person for the purpose of promoting affirmative action may be rational and defensible.

The decision to appoint a black man rather than a white man to the post in question even though the black man had less experience than the white was perfectly rational

when measured against the constitutional imperative to promote the advancement of members of formerly disadvantaged groups.\textsuperscript{265}

The defence may not hold even where an affirmative action policy in place. In \textit{McInnes v Technikon Natal}\textsuperscript{266} where the question asked was whether the appointment of a black candidate rather than a white female who was recommended was in accordance with the Technikon policy. The court found that the appointment amounted to unfair labour practice against the white candidate as the Technikon ignored its own policy by disregarding the respective merits of the candidates.

On face value section 6(2) (a) of the EEA permits, but does not require a employer to engage in affirmative action programmes that obligation is expressly imposed by Chapter II of the Act.

Claims by non-designated employees that they have been unfairly discriminated against by not being appointed or promoted are generally met by counterclaims by the employer that the discrimination is fair because a member of a designated group was preferred in other words because the employer was seeking to apply an affirmative action policy.

In \textit{Swanepooel v Western District Council}\textsuperscript{267} the unsuccessful applicant for the position claimed that she was a victim of unfair and unconstitutional affirmative action policy. She alleged that she was unfairly discriminated against because she was a white female and better qualified \textit{than} appointee who was a black, male and politically connected. The court held that such grounds were in themselves sufficient proof of unfair discrimination.

In \textit{Consolidated Billing v IMATÜ}\textsuperscript{268} the internal applicants were excluded from appointment on basis of race after being shortlisted for selection. The arbitrator held

\begin{footnotes}{
\footnote{265}{See also \textit{Willemse v Petalia NO & others} (2007) 28 ILJ 428 (LC) at 443 G.}
\footnote{266}{(2000) 21 ILJ 1138 (LC).}
\footnote{267}{[1998] (9) BLLR 987 (SECL).}
\footnote{268}{(1998) 8 BALR 1049 (IMSSA).}
that such exclusion was unjustified at that stage of the selection process and therefore such failure to appoint the applicants amounted to unfair labour practice.

However the under representation of black people, and women in senior positions was one of the key reasons for the enactment of the Employment Equity Act and with a view of eliminating unfair mechanisms by which such under representation is maintained, sections 6 and 9 of the Act mandate the courts to scrutinize the procedures followed by employers in recruiting and selecting applicants for employment.

There have been a few cases in which members of designated groups have complained that they were victims of unfair discrimination because they were overlooked in favour of white males. In such cases the employer could not claim that they were seeking to advance affirmative action because employment equity requires blacks and females to be favoured over white males in all but a few workplaces.

The only defence on which the employer could therefore rely either to deny that the appointment or promotion of the white male was discriminatory or to deny that the disappointed applicant had a right to be appointed or promoted simply because they were members of designated groups.

Other cases decided before the promulgation of the EEA are *TGWU & another v Bayete Security Holdings*,269 *Mahlanyana v Cadbury (Pty) Ltd*,270 *Lagadien v University of Cape Town*.271

Until the promulgation of the Act employers could adopt affirmative action programmes if they wished to do so. If they did, disappointed applicants could at most claim that they had a legitimate expectation to be appointed if the employer departed from the programme. In none of the above cases could the applicants argue that the employers were bound to appoint or promote them solely because

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they were black female or disabled. Their claims had to be linked to a formal affirmative action policy.

Even after the promulgation of the EEA, it was generally held that the Act protect people against discrimination on the grounds set out in section 6, but that this provision people to special consideration on those grounds.

The possibility that the EEA may give rise to claims for special consideration by members of designated groups arose directly for the first time in Harmse v City of Cape Town Mr Harmse, a municipal official who had applied for a post in the Cape Town, approached the Labour Court, where he claimed that he was suitably qualified for any of the three posts and that he had applied for and that he was not appointed because of his race, political belief, lack of relevant experience and or other arbitrary grounds.

Harmse not only claimed that the municipality refusal to appoint him for any or all of these reasons constituted unfair discrimination he also claimed that the municipality had discriminated against him by failing to apply the provisions of the EEA.

The grounds on which Harmse claimed discrimination were that the municipality had failed to review all the factors set out in the EEA on determining whether he was suitable candidate namely that the municipality had unfairly discriminated against him because he lacked the relevant experience and as a result the municipality had failed to meet its numerical goals to achieve the equitable representation of suitably persons from designated groups.

Harmse relied on a combination of protection afforded him by section 6 of the EEA and claimed that he had a right to be preferred. He was a “designated person” and the municipality was a “designated employer” which had to promote “employment equity”.

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The first question was whether a claim that a designated employee had been overlooked for appointment because of his lack of experience provided a valid basis for a claim of unfair discrimination. On this issue the court decided that the employer’s failure to promote affirmative action could in appropriate circumstances give rise to a valid complaint of unfair treatment by designated employer’s who are not affirmed.

Up until this stage affirmative action had been used as a defence against discrimination. The proposition that employers who fail to promote equality by taking affirmative action measures violates the right of a designated employee not to be unfairly discriminated against raised a number of possibilities. As it meant that all suitably qualified designated members of such an employer’s workforce may have a remedy against the employer, without having to prove that they suffered any particular prejudice as a result of the employer’ failure to advance them as required by the EEA.

On the other hand Harmse could prove that he would have been appointed to one of the posts had the municipality not raised prior experience as a *sine qua non* for appointment. Which could also mean that he was indirectly discriminated against because as a black individual he lacked the opportunity to acquire that experience.

The court added that whether employees have a general right to affirmative action arising out of an employment equity plan is another question altogether. The court however did acknowledge that the EEA itself might not give a positive answer to the question. The judge did venture on the view that if an employer adopts an employment equity plan that regulates appointments and promotion of its employees and applicants may have a legitimate expectation that the employer will act in accordance with that plan.

The effect of this judgment is that the failure to implement affirmative action reasons in accordance with section 15 and section 20 of the EEA can lead to a claim for unfair discrimination in terms of section 6 of the EEA. Concluding that section 6 serves as both a defence for employers and a cause of act for disappointed employees.
In *Dudley v City of Cape Town*\(^{273}\) the court declined to follow the Harms judgment. Dudley was another disappointed candidate for a promotional post in the City of Cape Town municipality. She claimed that as a designated employee she had been unfairly discriminated against because a white male was appointed ahead of her. Her claim however went further than Harmse claim as she also sought an order compelling the municipality to implement affirmative action as required by its employment equity policy and for the EEA. In the Dudley matter the judge noted a number of distinctions between Chapter II and Chapter III of the EEA.

The first difference is that for the purposes of Chapter II the presence of unfair discrimination is a matter to be determined by the application of law which means unfair discrimination in this context is not the subject of consultation between employer’s and employees it is for the court to determine.

Chapter III by contrast is aimed at promoting affirmative action through consultation. Employers therefore have to consult the employee on the content of the equity plan as well as on its implementation furthermore employees must also be consulted on all reports submitted to the Director-General in terms of section 21. All this indicated to the judge that the provisions of Chapter iii are collective and there is no compromise in this regard.\(^{274}\)

The difference between has been summed as follows:

“According to *Harmse* the designated employees or applicants for employment may prove discrimination if the employer favours a non-designated person where other requirements or qualities are (almost) equal. According to *Dudley*, such a complaint is not about discrimination; it is about the alleged failure to implement affirmative action. The Labour Court lacks jurisdiction to entertain that issue only because the legislative has chosen to place such issues in the hands of the director-general of Labour.”\(^{275}\)

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\(^{274}\) At para 33 and 75.

Nevertheless, it is suggested that the contrast is not absolute:

“Even in terms of Dudley the designated employee may still approach the court under section 10 of the EEA if their complaint is that they have been discriminated against on... any grounds listed in section 6, or grounds akin thereto. But if designated employees do this they cannot simply assert that they should have been appointed because they are designated. They must allege and prove that the employer overlooked them because of their race or sex. To do so, designated employees must allege must at least allege that the appointee was from the non-designated group. But that claim can never be sufficient on its own. Both Harmse and Dudley leave open the question whether, and in what circumstances, the courts will find that employees in the position of the applicants in these cases were in fact discriminated against.”

After Harmse and Dudley it remains an open question, whether a designated employee can claim a right to receive favoured treatment or that they were discriminated against because they were not favoured.

In the Cupido v Glaxosmithkline SA (Pty) Ltd the Labour Court confirmed the view held in Dudley and held that the EEA does not provide for a right to affirmative action. The reasoning in Dudley and held that when affirmative had not been applied by a designated employer this established the right to have them enforced under Chapter III by the Director-General of Labour and not to an unfair discrimination claim under Chapter II. This approach was also followed in PSA obo Karriem v SAPS & another.

The debate was put to rest by the Labour Appeal court in the Dudley v City of Cape Town & Another case. The Labour Appeal Court noted that the respondent’s exception to both claims by Dudley were based on two premises. The first was that an employer’s failure to apply affirmative action to prefer or advance a member of a designated group who has applied for employment cannot constitute discrimination as contemplated by the EEA. The second exception was that Dudley had no right to institute legal proceedings under the EEA without first exhausting the monitoring and enforcement procedures provided by that Act. Concerning the first exception the court held that Dudley was asking for the same advantage that whites had been

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276 Ibid.
277 [2005] 6 BLLR 555 (LC).
given under apartheid when she complained about not being preferred to a white candidate. However, the court held that she could not complain that she had been discriminated against by not being given a head start, since all candidates were treated on merit.

In dealing with the second exception the court agreed with the approach of the Labour Court and noted in particular that the dispute resolution procedure for Chapter II matters culminates in adjudication by the Labour Court. However, Chapter III contains no such dispute resolution procedure. Enforcement of Chapter III provisions is catered for in Chapter V, a programmatic process which is triggered by the issuing of a compliance order by an inspector of the Department of Labour. This indicated that parties aggrieved with an employer’s failure to apply affirmative action measures must use the procedure set out in Chapter V. The Labour Appeal Court accordingly concluded that it was not competent to institute proceedings in the Labour Court in respect of an alleged breach by the employer of its obligation under Chapter III of the EEA without first exhausting the enforcement procedures prescribed by the EEA.

One question was left open in the Dudley case. This question was whether a designated employee may institute action on the basis of an employer’s failure to take affirmative action measures after the employee has exhausted the enforcement procedures provided by the EEA.

The court added that its judgment should not be construed as a bar to Dudley pursuing an action in terms of Chapter II of the EEA based on a claim that she was not appointed because she was a female or black. That would have been an action pursued on her own behalf and would have raised different consideration.

However, should the reason for differentiation be a lack of experience, the employee may allege indirect discrimination based on race and possibly sex and in such a case the employer will have to justify discrimination based on inherent requirement of the job.
The EEA similarly embraces a substantive concept of equality.280

6.3 INHERENT REQUIREMENT OF A JOB

The EEA provides that is not unfair to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Thus an employer’s refusal to appoint or promote a person who does not meet an inherent requirement is justifiable even if it relates to one of the listed arbitrary grounds. In essence it reflects a decision based on operational requirements rather than discrimination in a legal sense.

Sex, race belief may be valid reasons for differentiation where it is essential to employ a person of a particular group. Any departure from the principle of equality, however is permissible only in exceptional circumstances. The nature and degree of the differentiation must be weighed up against its purpose.

The legislature has left it to the Labour Court to establish when the various arbitrary ground listed in section 6(1) can be said to be related to an inherent requirement for a job. The word inherent means a particular personal characteristic, necessary for effectively carrying out the duties attached to a particular position the employer’s business would be adversely affected.281 The fact that a requirement is important does not render it indispensable for purposes of the EEA.

Prior the enactment of the EEA commercial rationale was considered as possible justification that the employer conduct was neither arbitrary nor unfair. However differing standards were adopted for defining the defence. In Whitehead v Woolworths (Pty) Ltd282 where after Ms Whitehead had been offered a position, she disclosed that she was unable to furnish a guarantee as a she was pregnant. As

280 See Alexandre v Provincial Administration of the Western Cape Department of Health [2005] 6 BLLR 539 (LC) at par 41.
281 Whitehead v Woolworths (Pty) Ltd [1999] 8 BLLR 862 (LC).
282 [1999] 8 BLLR 862 (LC).
result the company withdrew the offer of permanent employment and instead offered her a fixed term contract that would terminate at the time of her confinement.

The Labour Court held that Ms Whitehead inability to work continuously for 12 months was irrelevant. The court did acknowledge that the requirement of uninterrupted job continuity applied to all applicants for the position and that this was rational. However Ms Whitehead was condition was not the principal reason for the company’s decision to terminate the contract. The main reason was that she would not be able to work for the full period when her services would be urgently required. This result may have been discrimination against towards Ms Whitehead, but that this was not arbitrary. Woolworths was relying on operational requirements to support its case.

The Labour Court rejected altogether the notion that commercial rationale could negate unfairness. Waglay AJ found:

“it would negate the very essence of the need for a Bill of Rights.”

The court concluded that a person can never be said to be unsuitable for a position because of the possibility or in the case certainty of a future absence. Woolworths decision to turn Ms Whitehead down for a permanent position for the sole reasons that she could not work continuously for the first 12 months was nothing more than discrimination against her because she was pregnant.

The judgment however was reversed on appeal, where the fact that the employer had taken into account perfectly rational and commercially understandable considerations which were neither trivial nor insubstantial was considered an adequate defence against the claim of discrimination on the ground of pregnancy, but the majority held for the company for different reasons. On this basis it seemed that almost any commercially rational consideration could serve as a defence.

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283 At para 28.
285 At 688.
In *Ntai & others v South African Breweries Ltd* the court rejected that a mere commercial rationale as a criterion, and instead adopted test which was more focused on business necessity. This test was more close to the inherent requirement for a job standard.

Similarly in *NUTESA v Technikon Northern Transvaal* the CCMA found that the requirement of three years experience at technikon was not essential to the post of Dean and that the advertisement containing this requirement was therefore unfair as it may have discouraged eligible candidates from applying. In *Lagadien v University of Cape Town*, the court accepted that proven skills, experience, and knowledge in specified areas were indispensable requirements for the particular job and that refusal to appoint a person without those skills was permissible within the ambit of section 6(2)(b) of the EEA.

The Constitutional Court confirmed that the defence of inherent job requirement should be strictly interpreted. While in *Hoffmann v South African Airways* it was accepted that the airlines policy of excluding HIV-positive persons from the position of flight attendants was justified by an inherent requirement of the job, the Constitutional Court found that neither the purpose of the exclusion nor the objective medical evidence justified this policy. In doing so the Constitutional Court held that a blanket refusal by the employer to employ HIV-positive persons as flight attendants was unfair and that each case should be treated on its merits.

The Labour Court reached a similar conclusion in *Independent Municipal Allied Workers Union & another v City of Cape Town* the second applicant who was an insulin dependent diabetic, had applied for a position as a firefighter and was rejected in terms of a policy of the respondent not to appoint diabetics as firefighters on the

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286 [2001] 2 BLLR 186 (LC) at par 188.
288 [2001] 1 BLLR 76 (LC) at par 83.
291 *In casu* the court held that the applicants HIV status was such that he could perform the job of flight attendant without prejudicing his own safety or that of other passengers.
grounds that their condition rendered them unable to meet the requirements, particularly the safety standards that are inherent in the job.

The court concluded that a blanket ban was unjustified and that a policy of individual assessment would be more appropriate. That the minimal risk of something happening should not disable the employee from carrying out the inherent requirements of the job and cannot justify a total ban on employment.

In light of the above cases it is suggested that the notion of an inherent job requirement of a job should be tested against the following criteria:

- it must be a permanent feature of the job;
- it must be integral to the job; in that it cannot be changed without materially altering the job itself; and
- it must be essential to the performance of the work in question.
CHAPTER 7
DISPUTE RESOLUTION AND ENFORCEMENT OF THE EMPLOYMENT EQUITY ACT

7.1 CHANNELS AND OPTIONS FOR ENSURING NON-COMPLIANCE

The first available option in dispute resolution about the interpretation and implementation of an employment equity plan is the internal dispute resolution which every employment equity plan must contain.\(^{293}\)

Industrial action about disputes arising from the implementation or interpretation is not precluded as the EEA does not contain provisions limiting industrial action. A strike therefore does not lose its protected status even if the issue in dispute can be referred for adjudication in terms of the EEA.\(^{294}\)

The two channels provided for ensuring compliance with Chapter III, of the EEA are administrative procedures and legal action.

The administrative procedures are done by way of motion either by a complaint from an employee or trade union representative or by the Department of Labour.

Legal action entails a referral to the Labour Court by the Director-General or an aggrieved employer of an alleged non-compliance.

7.2 ADMINISTRATIVE PROCEDURES

Administrative procedures are taken by the Department of Labour to enforce compliance with the requirements of Chapter III. It can take two routes.

The first route is to the issue of compliance orders. Inspection by a labour inspector is the first step in the process of enforcement of administrative means. The labour

\(^{293}\) S 20(2)(g) of the Employment Equity Act 55 of 1998.

\(^{294}\) TSI Holdings (Pty) Ltd & Others v NUMSA & others [2004] 6 BLLR 600 (LC).
inspectors have extensive powers to enter premises, to question persons, inspect and make copies of documents. These powers extend to enforcing compliance with any law administered by the Minister of Labour, thus including the EEA as a whole.

The inspectors powers in enforcing the requirements of Chapter III by means of compliance orders are limited to the following duties of designated employers:

- consulting with employees as required by section 16;
- conducting an analysis of employment policies and practices in terms of section 19;
- preparing an employment equity plan in terms of section 20 and implementing it;
- reporting to the Director-General as required by section 21;
- publishing reports as required by section 22;
- appointing senior managers to take responsibility for implementing employment equity plans in terms of section 24;
- displaying and making available to employers the information required by section 25; and
- keeping records as required by section 26.

If there are reasonable grounds to believe that the designated employer has failed to comply with any of the duties set out the inspector request and obtain a written

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296 Ss 65(1) and 66(1) of the Basic Conditions of Employment Act 75 of 1997.
undertaking to comply from the employer. Only after a fair and objective has been taken investigation has been carried by the inspector.

Section 42 sets out the criteria for determining compliance with the EEA which may be relevant to the investigation as follows:

“(i) the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employers workforce, in relation to

(a) the demographic profile of the national and regional economically active population;

(b) the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(c) the economic and financial factors relevant to the sector in which the employer operates;

(d) the present and anticipated economic and financial circumstances of the employer; and

(e) the number of present and planned vacancies that exist in the various categories and levels, and the employer’s labour turnover;

(ii) progress made in implementing employment by other designated employers operating under comparable circumstances and within the same sector.

(iii) reasonable efforts made by a designated employer to implement its employment equity plan;

(iv) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(v) any other factor prescribed by regulation.”

All the above criteria may not be applicable in relation to every employer. The demographic criteria stated in paragraph (i)(a) will in all cases serve as the primary and most general point of reference the remaining criteria serve as qualifiers which indicate the degree of compliance.

A labour inspector will issue a compliance order if an employer

- refuses to give an undertaking to comply as et out above; or


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• gives an undertaking but fails to comply with it.\textsuperscript{299}

Employers who have been served with a compliance order may

• object by making written representation to the Director General of Labour within 21 days or at any time later on good cause shown for the delay,\textsuperscript{300}

• lodge an appeal with the Labour Court within 21 days of receiving the Director-General’s order or any time provided good cause is shown for the delay.\textsuperscript{301}

If the employer neither complies nor appeals the Director-General may apply to the Labour Court to have his decision made an order of court.\textsuperscript{302}

The second administrative procedure route which may be followed would be the Director-General of Labour conducting a review to determine whether an employer is complying with the Act.\textsuperscript{303}

These review proceedings may be launched in respect of any provision of the EEA and are not confined to designated employers.

The specific powers given to the Director-General however relate to the duty of designated employers to prepare and implement employment equity plans.

The review is problem solving in nature and the recommendation made by the Director-General findings for intents and purposes have the same status as compliance orders. The Director-General may refer the matter to the Labour Court if the employer fails to comply with a recommendation or with any request for information or for meeting.\textsuperscript{304}

\textsuperscript{299} S 37 of the Employment Equity Act 55 of 1998.
\textsuperscript{300} S 39 of the Employment Equity Act 55 of 1998.
\textsuperscript{301} S 39(5)(b), read together with ss 40(1) and 40(2) of the Employment Equity Act 55 of 1998.
\textsuperscript{303} S 43(1) of the Employment Equity Act 55 of 1998.
\textsuperscript{304} S 45 of the Employment Equity Act 55 of 1998.
7.3 THE LEGAL REMEDIES

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the EEA except where the EEA provides otherwise.\textsuperscript{305}

The two instances where the Labour Court does not have jurisdiction are the following:

- disputes over the protection of employee rights where both parties consent to arbitration by the CCMA;\textsuperscript{306} and

- disputes over the disclosure of confidential information for purposes of consultation.\textsuperscript{307}

The Labour Court within its jurisdiction in a matter may make any appropriate order including

(a) making a compliance order an order of court in terms of sections 37(6) or 39(6);

(b) condoning the late filing of any document with, or the late referral of any dispute to the Labour Court;

(c) directing the CCMA to conduct an investigation to assist the court and to submit a report to the court;

(d) awarding compensation in any circumstances contemplated in the Act;\textsuperscript{308}

(e) awarding damages in any circumstances contemplated by the Act;

\textsuperscript{305} S 29 of the Employment Equity Act 55 of 1998.
\textsuperscript{306} S 52(3)(b) of the Employment Equity Act 55 of 1998.
\textsuperscript{307} S 18(2) read with s 16(9) of the Labour Relations Act 66 of 1995.
\textsuperscript{308} S 50(2) of the Employment Equity Act 55 of 1998.
(f) ordering compliance with any provision of the EEA, including a request made by the Director-General in terms section 43(2) or recommendation made by the Director-General in terms of section 44 (b);

(g) imposing a fine in terms of Schedule 1 for contravention of certain provisions of the Act;

(h) reviewing the performance or purported performance of any function provided for in the Act or any act or omission of any person or body in terms of the Act on any grounds that are permissible in law;

(i) confirming, varying or setting aside all or part of an order made by the Director-General in terms of section 39 in an appeal brought in terms of section 40; and

(j) dealing with any matter necessary or incidental to performing its functions in terms of the Act.\(^{309}\)

The fines which the Labour Court is authorised to impose in terms of section 50(1)(g) relate exclusively to contravention of the following sections of the EEA:

- section 16 the duty to consult with employees;
- section 19 the duty conduct an analysis of employment policies and practices;
- section 21 the duty to report to the Director-General of Labour;
- section 22 the duty to publish a summary of the report; and
- section 23 the duty to prepare successive employment equity plans.

The maximum fines range from R500 000 for a first offence to R900 000 for a fifth contravention of the same provision within three years. The fines are not mandatory but are options available to the Labour Court in making an appropriate order.

The EEA expressly states that that disputes concerning alleged unfair discrimination exclude disputes concerning unfair discrimination.\(^{310}\) Literally, a dismissed employee

\(^{309}\) S 50(1) of the Employment Equity Act 55 of 1998.

\(^{310}\)
must content themselves that claims under the LRA, and if the dismissal is as a result of discrimination, to claim compensation for automatic unfair dismissal. However where claims for damages arise from constructive dismissal as a result of discrimination the position may be different.

In *Ntsabo v Real Security CC*[^311] an employee who resigned after being sexually harassed claimed and was awarded compensation for unfair dismissal and damages for unfair discrimination.

Whether individual employees may seek orders compelling their employers to implement affirmative action plan was considered in *Dudley v City of Cape Town*.[^312]

Both the Labour Court and Labour Appeal Court decided that they could not. However, the Labour Appeal Court refrained from deciding whether individual employees who have exhausted the statutory process may then approach the court with an unfair discrimination claim.

The proper course for dissatisfied employees in such a situation would seem to seek *mandamus* against the Department of Labour.

[^310]: Section 10(1) of the Employment Equity Act 55 of 1998.
[^312]: [2004] 5 BLLR 413 (LC).
CHAPTER 8
CONCLUSION

8.1 CRITICAL ANALYSIS OF THE EMPLOYMENT EQUITY ACT AND AFFIRMATIVE ACTION

Apartheid impoverished the South African society mainly in two ways. Firstly through its racial preference policy in that it denied significant portions of the black community the basic necessities of life such as water, housing, social security and medical care. Secondly through its segregationist measures such as job, tertiary institutional and economic reservations and by its deliberate policy of creating a hierarchy of races it, it impoverished the dignity of people.

In South Africa the difference in quality of life is both shocking and unacceptable.

Rectifying discrimination and equality in South Africa could not be done as no particular attention was paid to it. The legislation of the past shaped in such a way that it supported discrimination and inequality.

The courts did attempt to address discrimination in employment. However in doing so the courts did not address openly for what it was instead found it to be unfair labour practice.

Gradually the new government created legislation specifically to deal with discrimination. The most important legislation created being the South African Constitution Act 108 of 1996, supreme law of the country. This South African Constitution sees equality as both as value and a right for all citizens of the country. One of its main goals of to achieve equality in South Africa, and in doing so has taken into account that such equality will not be achieved if the notion of formal equality is followed that we are equal before the law.

The Constitution was implemented not to only to redress the past but to further improve the quality of life and free the majority of citizens from abject poverty.
Unless this is done, any endeavour of achieving substantive or real equality will be stillborn.

Substantive equality however controversial it may be is the best way of achieving such equality and addressing past discrimination imposed by the apartheid government.

The fact that the system of discrimination was previously institutionalized and entrenched in South Africa, made it necessary that legislators put in place such measures to actively eradicate discrimination. Such discrimination could not be removed by the Constitution simply declaring we are equal. Affirmative action which some may call reverse discrimination is required to address and it is for this reason the Employment Equity Act 55 of 1998 was enacted.

Affirmative action offers solutions for endeavours to eliminate the disparities caused by past injustices. This affirmative action is conducted through the Employment Equity Act 55 of 1998.

The Employment Equity Act 55 of 1998 places a duty on employers to achieve equality goals through reasonable progress and numerical goals.

The issue of having to discriminate in employment is tolerated as long as the aim of the discriminatory action is to protect or advance persons or groups, categories of persons who were previously disadvantaged by unfair discrimination.

The Act is not without its problems as it is rather vague and inadequate in its enforcement mechanisms. The Department of Labour has also until recently not adopted an approach of strict enforcement, and until 2010 left the programmatic enforcement to self-regulation.

The Act proposes that certain employers automatically be placed under statutory obligation to develop and implement equity plans and they are further subject to more detailed reporting requirements than smaller organisations. The criteria mentioned of singling out certain employers are vague and in the extreme. The fact that the Act does not apply to all employers but only to those deemed designated employers
leaves a lot to be desired as there are too many employers falling under the requirements set out for an employer to be deemed a designated employer. What this essentially means is that those employers are given the discretion to continue to discriminate and not be equitably represented.

Moreover this Act contains the most important provisions of the employment equity proposals; the content of these proposals is given through codes of practice issued by the Department of Labour. However the legal nature of the code in whether they will serve as guidelines for employers and adjudicators or whether they are enforceable.

The Labour Court has drawn between permissible and impermissible discrimination. An employer wishing to justify his actions of advancing an employee from a previously disadvantaged category by applying affirmative action would still have to justify his actions in terms of his employment equity plan. If such actions are not in line with the said plan the there discrimination would amount to being unfair.

If an employer fails to appoint, promote a suitably qualified designated employee in terms of his employment equity he must justify his action by successfully raising the defence of inherent job requirement. In other words the employer must be able to show that it was for this reason that the designated employee was not employed.

The statutory defence “inherent requirement of the job” available to an employer where unfair discrimination has been alleged and the term “suitably qualified” provided for in the Act are in my opinion controversial. I say this as I am of the opinion that they hinder the goal of substantive equality and affirmative action in that they provide employers with an escape route. These defences give the employer the right not to aim at equitable representation as the employer can set out stringent requirements for the job and such requirements being unattainable to a person coming from a designated group, and leaving that person not “suitably qualified”. The inherent requirement of a job also gives the employer too wider a discretion of who it will employ. Unless the courts ensure that the concepts are not abused, substantive equality will never be achieved as the employers will continue hiding behind them.
The courts have not been doing a good job in ensuring this can be seen on the inability of the courts to answer the question of whether an applicant or an employee would be able to use the failure of an employer to comply with its own equity plan as ground to state that he or she was discriminated against. The Labour Court seem divided on this issue and other issues.

It is my view that until the question of whether the Act may be used as a sword or shield is answered, and furthermore the removal of the escape routes employers are given these routes being the term “suitably qualified” and the defence of inherent job requirements that this Act which is supposed to be temporary will forever be in existence.

The enforcement and punishment also leaves a lot to desire as the measures not sufficient to prevent or deter the employer from continuing to do as he wishes.

For an Act which is intended to be temporary and is 13 years in existence a great deal still needs to be done. It is time for the enforcers of this Act to stop barking and start biting if its purpose is to be achieved in our lifetime!
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