

**AFFIRMATIVE ACTION AS A STRATEGY FOR SOCIAL JUSTICE
IN SOUTH AFRICA**

BY

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Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM

(LABOUR LAW)

In the Faculty of Law

At the Nelson Mandela Metropolitan University

SUPERVISOR: Professor J.A. van der Walt Date: January 2016

Declaration

I Zamile Hector Sinuka , hereby declare that the work done in this dissertation has not been submitted before for any degree or examination and that all sources I have used or quoted have been indicated and acknowledged as complete reference. It is in this regard that I am able to declare this work as mine and original. It is hereby presented in partial fulfilment of the requirements for the award of the *Magister Legum* Degree in Labour Law.

Acknowledgement

First of all, I would like to express my special appreciation to my research supervisor, Professor Adriaan Van der Walt, with all the support and guidance in the process from the beginning until the end. A special thanks to Mrs Shireen Gillespie for support and professional assistance and guidance.

Thank you to the trade union movement in particular CONSAWU , SOLIDARITY, and SAMWU for exchanging view in various debates.

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Summary

The purpose of this treatise is to develop a spirit of understanding affirmative action as a strategy that gives South Africa a human face of equality. The strategic development of affirmative action as part of Employment Equity Act is based on equality at workplace. This work takes note of the need to integrate human resource development for employment, productivity and education system that is based on formal education, prior knowledge education (RPL) and previous experience. The imbalances were designed to be of racial reflection therefore the redress process is racial in character but non-racial in content as the envisaged society is a non-racial society.

The historical background of inequality and racial discrimination is noted in the environment of employment and on how other laws were enforcing the inequality. The arguments against affirmative action are debated and valid points of such arguments are noted as points of concern that must be considered in the process to attain equality. This work views affirmative action as a process that goes beyond employment relations and work as an instrument to change society by addressing social needs and services that have a reflection of inequality. Education is viewed as the out most important process to change the lives of people as affirmative action has a requirement of suitably qualified candidates to be affirmed.

In South Africa problems of inequality were political designed but were enforced by various laws that were having material and psychological impact on the previously disadvantaged. The designated groups were divided into Africans, Indians and Coloureds, in *Naidoo v Minister of Safety and Security* this principle of defining designated racial groups was promoted in correction to the direction that was taken in *Motala v University of Natal*.

Affirmative action is a legal process that addresses political designed problems. It is also a process that is exposed to abuse. Corrupt officials and managers appoint employees that do not qualify for posts on the bases of political affiliation or any other ground of discrimination. This is discussed with reference to the allegations of SADTU selling posts for principals, senior managers appointed in state co-operatives. The above mentioned tendencies are noted as part of negative indicators on the process that is meant to bring equality and non-racial society where all the citizens are given equal opportunities. This work views affirmative action as a strategy that is based on achieving a society that has a human face where race shall not be a point of reference.

Chapter 1

Introduction and overview of affirmative action as a strategy for social justice in South Africa

1 1 Background and rationale of the study

The year 1994 marked a turning point in the lives of the majority of South Africans, in particular the previously-disadvantaged groups which had been politically oppressed, economically exploited and socially degraded.¹ The era of democracy was welcomed with the hope to change the lives of the South African working class and shape a better future for the younger generation. The hopes, aspirations and expectations of all the citizens were geared at seeing equality in the standard of living in their lifetime. The new order of constitutional democracy implied hope for promotion of workers' rights and rights of the people in general.²

For workers and potential workers, affirmative action was seen as a strategy that would make it possible to achieve equality, both at individual and also at systematic level. This work examines the reasons for slow motion of affirmative action as a strategy, the constitutionality and policies created by various institutions, in trying to fast-track the process of obtaining substantive equality.

Political freedom is enjoyed by the majority of South Africans, but as to how such political freedom gives advancement to the economic status and socially accepted standard of living is still a challenge for the majority of the population. Affirmative action as a strategy to promote social justice must uphold the spirit of the Constitution in as far as substantive equality and human dignity are concerned.³

For the past twenty-one years since 1994 the designated groups of employees have not been advanced sufficiently. The causes for that are discussed in view of how affirmative action sets requirements for its implementation, and how such requirements are instrumental in influencing other institutions and State departments

¹ Biko *I write what I like* (1978) 52.

² The Constitution of the Republic of South Africa.

³ *Ibid.*

in as far as human development in the fields of education and training of workers, school-going learners and students in the higher-education band are instituted as a means of delivering suitably-skilled workers.⁴

Affirmative action is analysed in view of social justice, human resource development and economic empowerment. The aim of the study is to consider the past and create awareness as to why it is vital to implement affirmative action in the present democratic society, and how social justice can be achieved in future.⁵ I strongly believe that affirmative action is a strategy for social justice, and that South Africa can never afford to do without it.

1 2 Problem statement

The problem statement in the research of South African affirmative action can be summarised in the following question: Is affirmative action a new form of racism in South Africa, or a change of discrimination from racial conflict to class conflict?

South African society has been exposed to long-term racial discrimination, which prevented the previously-disadvantaged groups from participating on an equal basis regarding employment opportunities. Racism was structured and promoted by the State; it is therefore important to examine affirmative action so as to prevent repeating the pitfalls of the past by engaging in activities of reverse discrimination.⁶

In the United States of America where affirmative action originated, it was implemented as a strategy to empower minorities by the majority Government. The challenge in South Africa is to find a systematic method of empowering the majority, while some individuals in the minority are classified as non-designated within the group. The concerns of the minority over actions that may constitute reverse discrimination in the light of affirmative action as a fair discrimination in order to obtain equality, non-racism and a non-sexism society will be highlighted.⁷

⁴ Employment Equity Act 55 of 1998.

⁵ Ss 12-27 of Employment Equity Act 55 of 1998.

⁶ O'Brien *Constitutional Law and Politics* (1995) 1400.

⁷ *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Right Union as Amicus Curiae)* (2014) 35 ILJ 2981.

The apartheid system had structured discrimination in all spheres of life in South Africa in order to maintain inequality at all costs. The inequalities were enforced in education, employment, health, housing and ownership in regard to production and means of production. That created a physical and psychological oppression which led to feelings of inferiority in the majority, which is now classified as designated group. The inferiority complex affected the dignity of people in the designated group by reason of one of the rights being a right to human dignity.⁸

Whereas affirmative action has often been challenged on the basis of race relations in South Africa, there is a growing trend of considering the class implications in a new democratic society.⁹ The aim of this work is to stimulate a healthy debate on the justification of affirmative action as a tool of eradicating inequality. In so doing, justification in the past is analysed in a manner that shows the present situation as a transitional stage to future. There are various questions pertaining to the implementation of the process of affirmative action, which are legal, political, social and economic in nature.¹⁰

1 3 Research Question

All Acts are legislated to correct undesirable conditions, or to retain a particular State objective. It is therefore important to examine the intention of the legislature, but also to understand the historic background and its impact on the society. The purpose of the Employment Equity Act 55 of 1998 in particular sections 12 to 27, and the manner in which it promotes constitutional provisions in South Africa as a country of constitutional supremacy and democracy.¹¹

Affirmative action is a strategy for equality and justice in the workplace, but it is important to note that it can never be logical to implement it for an indefinite period of time. At some stage it must reach a level whereby it has achieved a level of substantive equality according to its purpose.¹²

⁸ S10 of the Constitution of Republic of South Africa.

⁹ Roach *Black Issues in Higher Education* (2003)22-26.

¹⁰ ILO International Journal of Labour Research *The challenge of inequality*.

¹¹ S2 of the Constitution of Republic of South Africa.

¹² Grogan *Employment Rights* (2010) 251.

The justice theory of affirmative action is based on compensating the designated groups that suffered the injustice in the past. This compensation needs to be monitored against corruption and other undesirable tendencies, such as nepotism, sexual favours and cadre deployment.

Employment Equity Act¹³ defines “black people” as Africans, Coloureds and Indians. The practical implementation of the definition in the process of affirmative action may be questionable regarding Coloureds and Indians, as they may not be black enough now, just as they were not white enough to be white in the past.¹⁴

The South African affirmative action will be compared with the Indian affirmative action, as the South African process of affirming is based on race, while the Indian one is based on class, and is implemented in job reservation.

Employers and the role they play in promoting the objectives of affirmative action as designated employers are discussed. The process utilised by employers in affirming employees must reflect the workplace democracy. The influence of the processes in human-resource development and change of *per capita* income per racial group are alluded to.

South Africa is a country with nine provinces, having different racial groups and the demographics differing as such in every province, and also dissimilar to national demographics. The impact of using the national demographics and the right to reside in any province in the country is discussed in a critical manner.¹⁵ Will the use of national demographics not cause forced removals of people in some of the provinces that are populated in the main by one of the designated racial groups? What is the future of young white males that are coming from poor or low-income families? What are the psychological effects of affirmation to the designated groups?

1 4 Aims and objectives of the study

¹³ S1 of Employment Equity Act 55 of 1998.

¹⁴ *Motala v University of Natal* (1995) 3 BCLR 374 (D).

¹⁵ Hermann *Affirmative tears* (2013) 67-70.

The study is based on presenting a broader understanding of affirmative action as a strategy for social justice rather than merely an employment attainment by designated groups of South African society. There is a need for the younger generation to understand where the society has been coming from in order to avoid the pitfalls of the past. That can be done by addressing the imbalances of the past in an orderly manner that does not compromise the inherent requirements of the jobs in question.

South Africa is a country that still demonstrates a clear reflection of the past racial discrimination. It therefore becomes vital for the upcoming generation to understand the role of the South African legal framework in enabling a smooth transition of the society from a racially divided nation to a non-racial equal society.¹⁶

Change in any society is not an easy process, as it threatens the dominant group. In South Africa the majority of cultures see the male as a provider to the family while the modern world promotes gender equality. The study of affirmative action creates a foundation for a gender sensitive society, which will view women as equal partners in the employment environment.

The non-designated group of people are classified as beneficiaries of the apartheid system. It is common to acknowledge that in the apartheid system too there were skills that were obtained by people. There is therefore a reason for affirmative action to be analysed and prevent such people from moving out of the country (with their skills). The skills obtained in any system can certainly be useful in the new order to ensure economic growth in the country. Skills directly affect the level of productivity in a country. It is a responsibility of the country to retain skilful personnel before it experiences a process of “brain drainage”. “Brain drainage” may be caused by the perception that affirmative action is a reverse process of discrimination. In the interest of retaining the skills within the boundaries of the country it becomes important to address the fears of the previously-advantaged groups.

¹⁶ S1 of the Constitution of Republic of South Africa.

The role of the employer in promoting affirmative action is one of the major components of the process. The trade unions have the burden of representing the aspirations of their members and the political aspiration of transforming the workforce to reflect demographics of the country. That implies therefore that the bargaining process must also work towards collective agreements that promote the process.

The bargaining chambers must therefore deal with matters, such as improvement of education and training (formal education), recognition of prior learning (RPL) and upskilling on work done (apprenticeship or learnership). Therefore the aim is for trade unions to be inspired to raise awareness of the role of education in improving the skills of the designated groups. On the other hand, the education system will be analysed against the needs of designated employers, and evaluated whether the students from formal schooling are employable or not. The evaluation of education for designated groups shall be measured against the marketability of candidates coming from such schools. The Department of Education may use this “criticism” as one of the indicators regarding the type of curriculum that is currently provided.

South African society is changing faster than expected. This change brings a new concern as to considering whether it is proper to determine the designated group on racial grounds, or whether the society and the law-makers should start considering a class-related approach. This will mean that the State will have the responsibility of determining a means-test in order to evaluate the social background of the individual learners. This study is therefore endeavouring to highlight the necessity of consideration of class rather than race. This will prevent the historical problem where race was a class-determining factor in South Africa.

1 5 Research methodology

The research methodology used in this work includes the analysis and critique of the historical background and impact of legislations that were governing the designated groups during the apartheid era in South Africa. The South African affirmative-action policy and the judicial pronouncements are analysed in cases that affected individuals and groups from the designated groups who happened to be of different

racial groups. In such cases the analysis is done to evaluate the constitutionality of the outcomes of such cases.

Affirmative action is analysed in an integrated approach to other social challenges, such as skills development of the current workforce and education of future workers from primary education to tertiary education. The role of the State in developing strategies on skills-development as a means of fulfilling the requirements of appointing a suitably qualified candidate is criticized.

The statistics from Statistics South Africa shall be used, as well as other reports on statistics of particular reflections. The Government Gazettes and white papers on education shall be used as means of evaluating the gap between the required standard and real conditions.

1 6 Outline of research

Chapter one consists of a brief overview of affirmative action as a strategy for social justice in South Africa. Affirmative action is analysed in a manner that builds a broader understanding of a need for affirmative action to be implemented. That the change in social classification of people has changed from racial conflict to classical conflict is noted and evaluated against the affirmative-action principles, and how such changes may lead to affirmative-action implementation.

Chapter two is the analysis of the historical impact of colonial laws and apartheid system. The historical conflict in South Africa can be traced as far back as 1652, but for all practical purposes of labour-related conflict is discussed from 1900. The analysis is based in the main on the impact of the laws of the time as instruments that created a structured inequality, which necessitates a broader affirmative action to be implemented as an instrument for social change.

Chapter three critiques the role of education in building capacity of human resource for designated group. The affirmative-action requirement of a suitably-qualified candidate is viewed in three areas of influence, which are as follows:

- (i) The influence that is directed at the formal education system in preparing learners that are coming from the designated groups for future employment. The influence on curriculum change and content changes in subjects that are industry-related.
- (ii) The role of vocational training and the recognition of prior-learning knowledge in a manner that upgrades workers to be professionally qualified in their field of work.
- (iii) In-service training as means of educating both workers in formal education, and those with experience continually in new technological applications as a means to meet the standard of the fast changing technology.

Chapter four analyses the role of the employer in the implementation of affirmative action. The principles of democracy by involving workers through the trade unions are also discussed. This chapter evaluates the steps the designated employer must take to ensure the legality and enforceability of affirmative action. The decided cases are used to help in advancing the arguments regarding the importance of the steps that must be taken by the designated employer.

Chapter five evaluates the society in terms of race relations, income level and the status of designated groups by implementing affirmative action. South African society has a long history of racial conflict and inequality, and it is therefore vital to find strategies of bringing equality, irrespective of any ground that may constitute discrimination.

Chapter six is the conclusion of this work which analyses problems that reflect negatively in the implementation of affirmative action as a strategy for social justice. The threats may be, but are not limited to the following list of undesirable conducts:

- (i) Corruption.
- (ii) Sexual favours.
- (iii) Nepotism.
- (iv) Political appointments (cadre deployment).

All of the above tend to undermine the vital role that may be played by affirmative action in bringing substantive equality.

Chapter 2

Impact of Colonial Laws and Apartheid System

2 1 Introduction

Though in South Africa colonialism may be traced as far back as 1652, the legal development of the South African legal system was also developed by colonial laws. In this chapter, the focus will be on the development of labour law, and the role played by colonial and apartheid laws in enforcing inequality. The historical background of labour relations shall be discussed as from 1900. This period will also reflect events of labour dispute such as the 1922 Land Rebellion. The impact of the rebellion is also analysed with its role in creating inequality in labour relations, as well as in the social and economic spheres of South African society. The manner in which the legal system has operated in regulating human behaviour (workers) at that particular time in social, educational and economic legislation where related to labour legislation, will be considered.

The growth of trade unionism within the society, and the strategic development of a forum that was to accept all trade unions through the proposal of the Wiehahn Commission is evaluated, and noted as the beginning of change in the labour law towards an all-inclusive system. It is also noted that the black unions did not trust these changes, and regarding their power they were not strong and sufficiently competent to attempt engaging in such forums. The plant-bargaining system was the order of the day, and all processes for bargaining were to attempt gaining recognition first, and then all the other matters were to follow.

In the 1980s the Industrial Court established the progressive principle for parties to bargain in good faith. The principle is discussed and the powers of the court are noted in the event of a party not following the principle of good faith. In the 1990s the beginning of political changes brought South Africa a rapid change of social structure and attitude. From these emanating changes Labour Law experienced much faster changes in an attempt to balance the unequal forces in the employment relationship. The process of redressing the employment relation in the public sector could not wait

for a New South Africa as the State is one single employer that was to lead by example.

2 2 Historical Background of Trade Unions in South Africa

This historical background is to give a broad view of the development of trade unionism in South Africa. This will be based on activities that were forcing changes in the employment relationship, and the reaction of the State as the response to such actions. The South African labour-law development history is a social and political mirror of the society.

2 2 1 1900 – 1930s

The discovery of diamonds and gold in the 19th century led South Africa to a rapid industrial-development society. The black workers left the rural homes and agricultural activities, and went to seek work in the mines. During this period in 1910 the Union of South Africa was founded, including British descendants and Afrikaners. A Native Land Act (No 27 of 1913) was passed on the 19 June 1913. This Act dispossessed Africans of land. The land dispossession forced many African people, particularly men to go and sell their labour power elsewhere.¹⁷

The influx of blacks into the cities of mining led to the workforce of the mining industry having a number of workers that were threatening the white workers. There were conflicts of interest between workers and employers similar to any employment relationship, but the South African workforce at that time was much more focused on the conflict between black workers' and white workers' interests. The white workers' attitude developed into a radical rebellious-industrial action.¹⁸ The action was based on seeking protection from competition by black workers. In 1922 the industrial action by white workers escalated to its highest level to such an extent that it became commonly known as "Rand Revolt" or "Rand Rebellion".

The outcome of such a revolution was the introduction of a labour legislation in the name of Industrial Conciliation Act of 1924. This Act introduced the establishment of

¹⁷ www.sahistory.org.za(2015/04/24).

¹⁸ www.nationsonline.org/oneworld/History/South-Africa-history.htm(2015/04/25).

industrial councils, voluntary and centralised collective-bargaining forums. The establishment of such forums for collective bargaining gave recognition to the trade unions, but such recognition also entrenched racial discrimination in labour legislation. The primary objective of the Act was to protect and promote the interests of white workers. It is during this period that the Job Reservation Act of 1926 was introduced, leaving black workers unskilled, as they were not appointed in certain jobs that were categorised to be for whites only. Black workers were excluded from activities of bargaining, as their trade unions were not recognised and were discouraged by all means.¹⁹

The labour relations that were discriminating against black workers were further supported by laws that govern social behaviour. In 1923 a legislation which is commonly referred to as Influx control, i.e. Native (Black) Urban Areas Act No 21 of 1923, was passed. The mines and other industries were situated in the urbanised areas, and black people were to be controlled to enter or leave in such areas. The white workers were protected from the majority of black workers by controlling the numerical strength of black people. The few blacks that were to be granted work permits were low-grade workers. This kind of discrimination excluded the majority of the South African population from the development of skills.²⁰

2 2 2 1930s – 1960s

In the 1930s the trade-union membership grew and collective bargaining and conciliation were used by white workers, as it was provided in the Industrial Conciliation Act. Exclusion of Blacks/Africans in the process and procedures of trade unionism and collective bargaining continued. By 1942, during World War II, a restriction, known as War Measure 145, banned Blacks from drinking, while imposing a penalty of 500 fin or three years' imprisonment for any breach of the measures that kept black workers in fear of the authorities. In 1947 an Act was proposed that was to make the black workers completely suppressed as it proposed to declare trade unionism illegal and a criminal offence for Blacks/Africans in various industries and to ban all strikes by Black workers. The proposed Act of criminalising

¹⁹ Grogan *Collective Labour Law* (2010) 3&4.

²⁰ *Ibid.*

union members for Black workers faced great opposition to the formation of racially-segregated unions which were established. This kind of arrangement also made it illegal for Black workers to strike under any circumstances.²¹

In the 1950s the Government realised that there was no way that it could keep black workers from unionism, and at the same time without any rights to voice their problems, even if these were not all going to be taken care of. Workers' committees were set up by employees and were officially registered. Each workplace was permitted to have one committee only which was comprised of five members only. The committee's function was to forward complaints to a regional committee, composed of Black workers appointed by the Minister of Labour. Regional committees were to report to the Black Labour Board, which consisted of whites only. Blacks had no power to represent themselves. On the social side blacks and whites were not permitted to stay in the same area. The Group Areas Act of 1950 divided the country in which blacks, coloureds and whites had to reside in distinct residential zones. This Act established the distinct areas of South Africa in which members of each race could live and work, typically setting aside the best urban, industrial and agricultural areas for whites. Blacks were restricted from renting, or even occupying property, in the areas deemed as "white zones" unless they had received permission to do so. The black workforce was exposed to higher expenditure on transport for long-distance trips when going to work, drawn out of their low income, while white workers were in the main staying in areas that were near to their workplaces. The Group Areas Act did not just succeed in separating people of South Africa, it also entrenched the inequality of the South African population. Its impact has been typically economic, social/political and psychological in nature. The psychological impact resulted in the belief of superiority *versus* inferiority of the citizens on the basis of race.²²

The psychological oppression of black workers was reinforced by the Bantu Education Act No 47 of 1953. The Bantu Education system provided an inferior education for the black child. This resulted in job seekers not having had suitable

²¹ Basson; Christianson; Dekker; Garbers; Le Roux; Mischke; Strydom *Essential Labour Law* (2009) 5.

²² Biko *I write what I like* (1978)

backgrounds and skills in the fields of Mathematics and Physical Science in consequence of quality and skills, not having been realised in squatter- and poor social living conditions, characterised by poor or non-existing education- connected with physical, financial-, tutorial- and syllabi-related standards. The skills of artisanship were completely in white hands in South Africa, being the outcome of the Rand Rebellion demand: competent and skilled whites in practically all areas of endeavour, competing with blacks for jobs in the skilled-labour situation.

2 2 3 1970s – 1980s

In the 1970s black workers became more aware of their rights and joined trade unions and that increased the number of members in trade unions. This led to trade unions becoming part of a large and powerful movement that exercised considerable power in the workplace. The increase in pressure exerted by unions led to the establishment of a Commission of Enquiry that was appointed in the late 1970s.

This commission was named after its chairperson, Professor Wiehahn, and was known as the Wiehahn Commission.²³ The commission's recommendations were translated into legislation between 1978 and 1983. Black workers' trade unions were to gain access to all forums and processes that were established by the legislations of that time. However, the black trade unions were reluctant to participate in such forums and processes.

In the first report of 1979 the following were recommended:

- (i) trade-union rights should be granted to black workers;
- (ii) stringent requirements were needed for trade-union registration;
- (iii) job reservation should be abolished;
- (iv) a new industrial court should be established;
- (v) a national manpower commission should be appointed;
- (vi) provision should be made for legislation concerning fair practices;
- (vii) separate facilities in factories, shops and offices should be abolished, and

²³ Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 558.

(viii) the name of the Department of Labour should be changed to Department of Manpower²⁴

The above recommendations of 1979 yielded amendments in various legislations. In 1981 the Wiehahn Commission made the following recommendations:

- a) labour law and practices should correspond with international convention and codes;
- b) statutory requirements and procedure for registration of trade unions should be revised;
- c) urgent attention should be given to specific defects of the Industrial Court;
- d) bargaining rights of workers, councils should be laid down by statute;
- e) the position of close-shop agreements should be clarified;
- f) basic labour rights should be extended to the public sector;
- g) specific legislation should be adopted regarding unfair labour practices;
- h) the Wage Act should be retained but amended, and
- i) conditions of employment and working circumstances of female employees should be revised in various aspects.²⁵

The trade unions at that time were morally supporting the broader national struggle against apartheid, and the reluctant behaviour might have emanated from that. Secondly, trade unions were not as massive as they are today; their strength was more obvious at the workplace (Plant Level) than in the industry sector. This mode of operation and attitude created a collective-bargaining system at plant level. The entry point for such bargaining was to initially fight for the recognition of the trade unions, as black trade unions were gaining power and knowledge of the bargaining at industrial level through the industrial council. The black workers were now able to negotiate minimum terms and conditions of employment through the industrial council as well. The industrial-council agreement was also extended to workplaces where the union had no influence, and it was also economical as negotiations were undertaken as one process rather than various sets of negotiations.²⁶

²⁴ *Ibid.*

²⁵ Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 559.

²⁶ *Ibid.*

2 2 4 1980s – 2004

In the 1980s the State intervention in the employment relationship was minimum. In this period the Industrial Court was also imposing a general duty to employers to bargain in good faith. The duty implied two things: Firstly, the Industrial Court recognised that the employers had a duty to engage in collective bargaining with trade unions, and also grant organisational rights to trade unions. In all strategies and tactics that were to be used, the Industrial Court emphasised that negotiations should be done in good faith. Any information that was misleading the workers, or the employer, or any form of undermining the trade-union views on the bargaining process was seen as engaging in collectively bargaining in bad faith. The bad-faith bargaining was corrected by Industrial Court by means of issuing a court order.²⁷

In the 1990s South Africa experienced change that resulted in the growth of collective bargaining and trade unions. By 1993 the following three (3) statutes were adopted²⁸

- I. Education Labour Relations Act 146 of 1993.
- II. Public Service Labour Relations Act 102 of 1993.
- III. Agricultural Labour Act 102 of 1993.

These three Acts promoted collective bargaining in the Education, Public and Agricultural sector. The political changes and the new dispensation of a democratically elected Government, which based its rulings on Constitutional Supremacy, influenced a process of introducing new labour statutes that were formed to promote the spirit of the Constitution. These statutes are the following:

- I. Occupational Health and Safety Act 85 of 1993.
- II. Labour Relations Act of 1995.
- III. Basic Conditions of Employment Act 75 of 1997.
- IV. Employment Equity Act 55 of 1998.
- V. Skills Development Act 97 of 1998.
- VI. Skills Development Levies Act 9 of 1999.

²⁷ Basson *et al Essential Labour Law* (2009) 6 & 7.

²⁸ *Ibid.*

All the above Acts were to govern the conduct of the relationship between employers or employer organisations and employees, or trade unions. The arrival at this stage of having statutes that govern employment relationships was not an easy road to travel, and collective bargaining is an instrument to ensure that parties in an employment relationship arrive at agreements that are promoting the spirit of the above statutes and their objectives, with the noting of Constitutional supremacy at all times.²⁹

2 3 New Era and Democratisation of Workplace

The new political dispensation in South Africa developed new laws that were declaring discrimination a crime. The labour law and the process of collective bargaining were encouraged. In the public sector a Public Service Co-ordinating Bargaining Council (PSCBC) was established for all public sectors in order to bargain centrally. Various professions within the public sector have councils, or bargaining chambers, that are dealing with matters that affect a particular profession or practice. An example of a profession or practice council is the Education Labour Relations Council (ELRC). Affirmative Action also includes the principle of the collective-bargaining process concerning the consultation process between employer and trade union, as were the outcomes of the Employment Equity Plans (EEP). Grogan says the following about collective bargaining:

“Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession, its objective is not only to listen and consider the representation of the other but also to abandon a fixed position where possible in order to find common ground.”³⁰

The above definition of Grogan accepts collective bargaining under the following conditions which must be noted when dealing with the process:

- i. Employer/s and organised labour.
- ii. Mutual accommodation (includes mutual respect).

²⁹ S2 of the Constitution of Republic of South Africa.

³⁰ Grogan *Workplace Law* (2003) 304.

- iii. Aim at addressing demand through concession to reach an agreement.
- iv. It is not consultation, and both parties must be listened to and come up with a common ground (collective ground).

2 3 1 Objectives of Collective Bargaining

The objectives of collective bargaining may be described as follows:

- I. Improvement of working conditions, e.g. Health and Safety conditions.
- II. Establishment of a procedure for matters affecting employees and employers.
- III. Integration of workers' views on position taken by management as instrument of decision-making.
- IV. Dispute prevention and dispute resolution.³¹

The main objective of collective bargaining is to reach collective agreements. Both parties (employer and employee organisation/ trade union) participate in advising their interests, but at a certain point a compromise must be reached. In this process both parties come to negotiations with a mandate in a situation that the negotiation is deadlock because of a new element that has not been foreseen, both parties will go back to their respective constituencies to seek a new mandate. This may take time, according to the size of the organisation, the sensitivity of the matters at hand and the impact of the proposal to other external parties to the bargaining.

2 3 2 Constitutionality of Bargaining

The process of collective bargaining is a process that resulted from inherent contradiction between workers and employers. The International Labour Organisation (ILO) adopted a Right to Organisations and Collective Bargaining Convention, 1949 (No 98), which was ratified on 19 February 1996 by South Africa, which meant that it shall be part of South African law.³² The South African Constitution (Act 108 of 1996) in the Bill of Rights in Section 23 states the following:

³¹ S23-63 of Labour Relations Act 66 of 1995.

³² <http://www.ilo.org> (2015/04/21).

1. *“National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation ‘Everyone has the right to fair labour practices’.*
2. *Every worker has the right:*
 - a) *to form and join a trade union;*
 - b) *to practice in the activities and programmes of a trade union; and*
 - c) *to strike.*
3. *Every employer has the right:*
 - a) *to form and join an employer’s organisation; and*
 - b) *to participate in the activities and programmes of an employer’s organisation.*
4. *Every trade union and every employer’s organisation has the right:*
 - a) *to form its own administration, programmes and activities;*
 - b) *to organise; and*
 - c) *to form and join a federation.*
5. *Every trade union, employer’s organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).*
6. *must comply with section 36(1).³³*

The constitutional democracy states the rights and recognition of unions’ and employers’ organisations. In the process of failure of a peaceful bargaining, a right to strike is guaranteed as opposed to the past that criminalised industrial actions. That marks a change in South African labour relations. The process in current labour relations needs unionists and a workforce that is skilled or educated in understanding the technicalities of production and processes that are undergone by the business of the employer because the employer may disclose relevant

³³ S23 of the Constitution of the Republic of South Africa.

information where required.³⁴ Education and training are also important for the total transformation of the workforce that is faced by the inequalities caused by the past all-round labour situation in South Africa.

³⁴ S16 of Labour Relations Act 66 of 1995.

Chapter 3

Education and human-resource capacity building

3 1 Introduction

In this chapter the requirement of affirming suitably-qualified candidates is discussed against the background of inequalities caused by apartheid, and how this requirement has influenced change in the education system. The education system is viewed as a process of introducing skills that are necessary for affirming the designated group.

Formal education emphasises and describes the adaptations to the curriculum in order to achieve the suitable qualifications and skills. The suitability of the qualifications is discussed in a comprehensive manner that affords a broader understanding of the role of formal education. Formal education is viewed in accordance with the General Education and Training (GET) band, the Further Education and Training (FET) band, as well as the Department of Higher Education (DHE). The role of each level in providing the foundation for skills development is critically discussed.

The recognition of prior learning (RPL) is explained as a process that encourages a learning process, in particular to adults of the various population groups that were disadvantaged in the past. Adult-education theory and RPL are discussed in a way that shows the relationship between the two in the process of obtaining a suitable qualification.

The adults are learners with experience, and such relevant experience with may assist the process of acquiring a skill or a qualification, within a short space of time. The capacity of an individual to acquire the ability to do the job is discussed in relation to the education which does not lead to a qualification, but to the competence of handling the job.³⁵

³⁵ S20 (3) (a)-(d) of Employment Equity Act 55 of 1998.

3 2 Education and social justice

The requirement of a suitably-qualified candidate must be viewed against the reality of the past twenty-one years since the establishment of democracy in South Africa, where there still appears to be reflection of the injustice experienced by blacks during the colonial and apartheid past. The inequality is still traceable in disparities of wealth; education, health status and access to opportunities, are still based on race and gender. There is also a growing black middle class that has been empowered by the new conditions created by the arrival of democracy, which has managed to transform their lives. However, the majority of black people are still poor, and most are still served by lower-quality public services and institutions, including education and training institutions.³⁶

The Minister of Basic Education identified that the schools' infrastructure is the area that needs attention in the education for previously-disadvantaged groups. The schools of previously disadvantaged are needy in regard to infrastructure which needs the following to be considered for a school in order to operate effectively and efficiently:

- (1) A school must have an enabling teaching and learning environment for teaching and learning to take place.
- (2) An enabling teaching and learning environment in a school comprises of :
 - (a) educational spaces;
 - (b) education-support spaces; and
 - (c) administration spaces.
- (3) A school must be provided with adequate sanitation facilities that promote health and hygiene standards, and that comply with all applicable laws.
- (4) A school must be provided with a basic water supply which complies with all relevant laws.
- (5) A school should be provided with some form of energy which complies with all relevant laws.
- (6) Where reasonably practicable, a school should be provided with some form of connectivity for purposes of communication.

³⁶ White paper for post school education and training (20 November 2013).

- (7) Nothing in these regulations prohibits the Member of the Executive Council from providing temporary structures that are suitable and safe for use as additional spaces.
- (8) Notwithstanding the provisions of this regulation, the provision of these facilities shall be progressively realised upon availability of resources.³⁷

The national Minister further delegate powers and responsibilities to provincial members of the executive council (MEC) to do the following in promoting a process of equality in education:

- (1) In order to progressively realise regulations, the member of the executive council must develop a plan for providing the facilities to schools in his or her province.
- (2) The plan must take into account the following –
 - (a) Learner number in a school;
 - (b) Access and availability of such facilities within the community where a school is located; and
 - (c) Any other relevant factor, including availability of resources and curriculum choices.³⁸

3 3 Post-apartheid curriculum

The requirement of suitably-qualified candidates means people from designated groups with inferior education may not compete for employment. This has led to a curriculum change regarding the beginning of the school process. At the level of the foundation phase (Grade 1–3) which is part of Early Childhood Development this phase follows the principle of interdepartmental collaboration between the Departments of Education, Health and Welfare and Social Development.³⁹

Teaching and learning has been changed for the intermediate phase to be contextualised into cross-curricular themes or topics, which will constitute eight individual learning areas at senior phase. This proposes to be preparation for a

³⁷ Government Gazette (NO 36062) of 08/01/2013.

³⁸ *Ibid.*

³⁹ www.saqa.org.za. (2015/07/21).

learner at early stages of learning in order to be prepared for a suitable qualification.⁴⁰

In the senior phase (Grade 7–9) learning is less contextualised, but more abstract and more area-specific than in foundation and intermediate phases. The learners at this stage should be able to relate information regarding his/her career of choice for the future, in line with the areas of strength in their learning achievement levels, and be ready to enter into the further-education and training-band later in Grades 10,11 and 12.⁴¹

Further Education and Training (FET)-band in public education in South Africa is provided in the secondary school and FET colleges. In this section I shall consider the secondary school curriculum to evaluate the notion of a suitable qualification against the idea of advancement of the previously disadvantaged.

Currently about one in eight obtains a Grade 12 (Matric) qualification that fulfils the requirements for Bachelors' studies at a university. Comparisons with the situation in other similar countries, and analyses of demand in the South African labour market, indicate very clearly that this is not sufficient. The low number of learners qualifying for Bachelors' studies each year is a key reason behind the skill shortfall in the country, including the under-supply of teachers.⁴²

Much of the challenges can be solved by improving situations in schools serving poor communities. That is evident by the results at Grade 12. In terms of comparing the results there is a relationship between the level of living and results where a quintile 1 school is in poor community with low income, and less resourced school, and quintile 5, being the highly-resourced schools in communities that have a high level of income. The results are approximately that 45% of Grade 12-examination candidates in quintile 5 achieve Bachelors'-level passes; 25% for quintile 4 and 3 only 15% for quintile 1 and 2.⁴³

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Action plan 2014 towards the realisation of schooling 2025.

⁴³ *Ibid.*

This means that examination candidates in the more affluent schools are thus three times more likely to achieve the Bachelors'-level pass than their counterparts in the poorest schools. Evidence suggests that key obstacles in the poorer schools include insufficient access to the right textbooks in Grade 10 to 12, and poor teacher subject knowledge. In fact there has been no research to establish precisely where the subject-knowledge gaps lie at the Further Education and Training (FET) level, or the Grade 10 to 12 levels in schools.⁴⁴

In light of the above conditions it becomes clear, that for the majority that was previously disadvantaged, the notion of suitably-qualified candidates is difficult to achieve because this may include one or combinations of the following:

- The specific subject is based on the job to be done (e.g. Mathematics, Accounting, and Science).
- The pass rate obtained by the candidate in that particular subject (e.g. 60% in Mathematics).
- The level of the qualification (Grade 12 / Matric).

In India economic growth was the core of the political agenda after independence, and it was the means by which greater welfare was to be achieved. The development of human-resource primary education was central, as it was provided to all citizens, irrespective of their position in the social and economic hierarchy.⁴⁵ South Africa is similar regarding the nature of operation in as far as the curriculum content of basic education. However, the reflections of inequality as a result of apartheid leave a racially based inequality. The readiness for post-school education or employment remains a challenge as the skills available in the basic-education system may not be of suitable quality for the jobs that are available in the job market.

⁴⁴ *Ibid.*

⁴⁵ Fischer; Leubolt and Saha Insight from Brazil; India and South Africa 2014 volume 6 issue1; *The challenges of inequality* 75-93; 80.

3 4 Post-School Education and Suitability of Qualifications

Post-school qualification is established after a programme that is developed for the learner to obtain knowledge after a specific time (e.g. 3 years) that is desirable in a particular career. The curriculum for post-school education can be developed by a joint-relationship of the post-school education system, business and industry in order to identify critical skills.

3 4 1 Criticism of Education by Business and Industry

- (a) Business and industry criticise education for its failure to prepare students for the workplace.
- (b) Some points of criticism are:
 - There is a gap between education and the working world.
 - There is a lack of knowledge and skills amongst school learners and graduates.
 - Education must bear the greater part of guilt for transmitting an anti-industrial-culture bias whose consequence, generation after generation, has been the steady decline in economic performance.
 - Schools fail to instil a positive attitude towards the business world and industry in school learners, and instead promote negative attitudes toward authority, entrepreneurship, and the fundamental concept of a market- and profit-oriented economy.⁴⁶

From the above it becomes clear how employers are viewing the product produced by the education system in South Africa. In the formal education system suitability of qualification is viewed in relation to criticism, however, the two are interdependent.

3 4 2 Interdependence of Education and the Workplace

Education should not be seen as being self-sufficient as the ultimate aim is to provide skills for living within and adaptation in society. Without industry providing

⁴⁶ Pretorius *Business and Industry involvement in education* (1993) 124.

people with jobs, the efforts of education will be fruitless because there is little point in training people without also providing them with job opportunities in which they can practise their abilities and training. On the other hand, the professional/business world is dependent on education to supply literate and learned people with specific expertise, skill and attitudes (suitable qualifications), in order to provide successfully for the needs of the developing society. Social and economic changes have made it even more important for education to take note of the needs of the workplace, and adapt continually.

The changes may include the following:

- Rapid technological change;
- Decrease in large scale of employment by the manufacturing industry;
- The rise of the service industry;
- The rise of information and knowledge industry;
- Economic recession;
- Unemployment of youth and adults.⁴⁷

The old paradigm, which holds that education, is for education's sake, which was the product of the Western middle-class culture is out-dated, and South African Education System must be liberated from such a paradigm. The suitable qualification in formal education must ensure knowledge that is supported by scientific research that is applicable at the workplace in order to ensure that the qualification is suitable for the job to be done. It is clear that regarding the suitability of qualifications the business and industry cherish positive and appropriate expectations of the products of the education system.

3 4 3 Business and Industry's Expectations of Education

According to the British Chamber of Commerce the following are some of the requirements:

The ability to learn; the ability to get on well with people; reliability; basic literacy and numeracy; and an understanding of how society's wealth is created. Pretorius

⁴⁷ Dekker *The Provision of Adult Education* (1993) 306.

summarises both soft skills and core skills for the job as expectations that business and industry require from job seekers as follows:

- basic abilities required for the job;
- communication skills;
- interpersonal skills;
- adaptability;
- problem solving skills;
- reliability;
- computer skills;
- the ambition to achieve;
- an appreciation of the norms of the work sphere;
- a satisfying work ethic.⁴⁸

From the above list it is clear that business and industry need to influence institutions of learning on the designing of syllabi so as to ensure that the qualifications obtained are suitable for the jobs to be performed in the workplace.

3 4 4 Education's Expectations of Business and Industry

According to Dekker education needs feedback from business and industry on the suitability of qualifications and skills provided to the world of work. The feedback may influence change in the system and the quality of education provided. In noting such feedback the following are areas of focus:

1. Education needs to understand better the problems in its system. It is comprehensive, multifaceted and complex, affected by a number of factors of which the economy.
2. Creation of job opportunities for education graduates. That can be achieved through addressing the problem of scarce and critical skills, in order to ensure the marketability of graduates.
3. The provision of advice. The business and industry must be able to advise the education system (departments) about the changes in the practical world of work, so that the theory is brought in relation to the practice.

⁴⁸ *Ibid.*

4. Financial assistance. The development of institutions of learning need financial assistance, as the resources of the State may be limited, and may not meet the need to achieve the desired outcomes.
5. Making its facilities available to education. The learners will need experiential training to develop skills. The business and industry must support such learners and institutions by availing its facilities for the development of suitably-qualified candidates.
6. Open communication channels. The communication channel amongst institutions of learning, business and industry, may result in the development of an integrated approach to the development in the education system.⁴⁹

The formal education system is still the dominating form of education that is available to the majority of the population. In addressing the inequalities of the past the Employment Equity Act recognises the suitability of qualifications through other means as well. Formal qualifications, important as they are, are not the only way of obtaining qualifications for purposes of offering designated groups opportunities for advancement in various kinds of jobs.⁵⁰

3 5 Prior Learning as Suitable Qualification

The Employment Equity Act views prior-learning knowledge as a qualification. That is true but it is certainly not a complete qualification because further learning will take place. The word “prior” means “before”, therefore prior learning is knowledge before the learning process. In the field of Education and Training it is referred to as “recognition of prior learning”. The assumption that prior learning means to be considered as having a qualification without undergoing a process of training or education to meet the required standard is not correct.

“Recognition of Prior Learning (RPL)” means the principles and process through which the prior knowledge and/or skills of a person are made visible and are assessed for the purposes of certification, alternative access and admission, and further learning and development. As a principle, it endorses the value of giving

⁴⁹ S20 (30) (c) and (d) of Employment Equity Act 55 of 1998.

⁵⁰ Government Gazette (NO 35747) of 2012/10/05.

recognition to knowledge and skills that have been acquired outside a formal learning programme. As a process, it consists of a range of educational and training activities and services through which the principle of RPL is applied and learners are supported in different contexts as they go through the RPL process. These activities and services include the provision of RPL-related information; advising, coaching, and administration services; integrated curriculum design; and a variety of formative and summative assessment practices.⁵¹

3 5 1 Common Principles of RPL.

RPL is a process that accommodates the designated groups in terms of affirmative action to gain recognition that will make them suitably qualified. It does not mean that because it addresses the imbalance of the past it must operate in any manner. The following principles are important in ensuring the objectivity of the process of promoting social justice. The following are some of the common principles:

- The idea of RPL is aligned to three key elements of South African national-policy discourse since 1994: transformation, accreditation and lifelong learning, as well as the National Qualification Framework (NQF).
- The RPL process is a multi-dimensional one, a process through which non-formal and informal learning are measured, mediated for recognition across different contexts, transitioned, accredited and certified against the requirements for credit, access, inclusion, or advancement in the formal education and training system, or workplace. RPL processes can include guidance and counselling, and extended preparation for assessment.
- Assessment, an integral feature of all forms of RPL, does not exist in isolation from a range of other strategies that bring different sources of knowledge and forms of learning into a shared discursive space, where comparisons and judgments can be made.
- RPL is multi-contextual, and how it takes place differs from context to context. RPL may be developed and implemented differently for the purposes of personal development, further learning and advancement in the workplace, recognised within the three sub-frameworks of the NQF. Furthermore, it may

⁵¹ *Ibid.*

be conducted by a variety of methods, using a combination of teaching-learning, mentoring and/or assessment approaches, as appropriate. The purposes and contexts determine the practices and outcome of RPL in each case.

- RPL may be carried out at any level of learning and at any NFQ level.
- There are different forms of RPL, which reflect the different purposes, the different processes and the different NFQ levels within which RPL takes place.
- RPL may lead to the awarding of credits towards a qualification or part-qualification at a diagnostic, formative or summative point, or in-curriculum to create opportunities for advanced standing. In general, the awarding of credits may result in a transcript, where the assessment is summative, or in certification. RPL for credit takes place against the learning outcomes and/or assessment criteria and knowledge and/or skill statement required and specified for a qualification or part-qualification.
- The following principles are important elements of an holistic approach to RPL:
 - a) The focus is on what has been learned and not on the status of the institution, organisation, or place where the learning was obtained.
 - b) Credit is awarded for knowledge and skill acquired through experience and not for experience alone.
 - c) Learning is made explicit through assessment and/or other methods that engage the intrinsic development of knowledge, skill and competencies acquired.
 - d) Candidate guidance and support, the preparation of evidence and the development of an appropriate combination of teaching-learning, mentoring and assessment approaches are core RPL practice.
 - e) Notwithstanding all the features listed here, RPL is generally considered to be a developmental process, and not an end itself.⁵²

⁵² *Ibid.*

3 5 2 Qualifications through RPL

- (i) Higher Education Qualification: An institution of higher learning may use *curriculum vitae* (CV); letter from the employer, any document of proof that shows knowledge or skill in that particular field. Learning may start at bringing the gap and continuing until obtaining a formal qualification.
- (ii) General and Further Education: Adult Base Education and Training (ABET) has NQF levels from 1–4. These levels are equivalent to the 4th phase of Basic Education, which includes General and Further Education.
- (iii) Occupational Qualification: This is the most-used model of education in manufacturing and construction industries. The skill-based occupation, such as Electrical, Mechanical and Civil Construction, are overseen by the Quality Council for Trade and Occupation.

Look at the above three areas of skills development through RPL. It can be noted that the objective of RPL plays a pivotal role. According to the Government Gazette the objectives of RPL policy are for redressing the imbalance of past and open participation of all role players.

3 4 5 RPL policy objectives

- a) Developing shared understanding of RPL within a broader lifelong learning framework.
- b) Providing an expanded scope for a holistic model and approach to RPL, inclusive of the provision of a full range of RPL services and programmes, by all providers in the system.
- c) Providing a national framework for further development and implementation of RPL, include resourcing, effective delivery models and quality assurance.
- d) Facilitating the formulation of sector and institutional RPL policies.
- e) Setting guidelines for gathering, documenting and reporting on RPL-related practices and data.
- f) Enabling potential candidates to attain recognition of the appropriate knowledge and skills required for personal development and the employment market.

- g) Demonstrably changing the lives of RPL candidates, including blue and white collar workers and learners of all ages including unemployed people and other marginalised groups, as important beneficiaries of RPL services.
- h) Recognising the role and function of employers in the education and training system.
- i) Recognising the role and function of public and private providers in the education and training system.
- j) Recognising the role and function of RPL practitioners in the education and training system.
- k) Supporting the establishment of the National Co-ordination Mechanism for RPL that will focus on research, support, advocacy and the mainstreaming of RPL.
- l) Researching national and international RPL best practice.⁵³

RPL is based on knowledge and skills gained over a period of time in the workplace. It is therefore closely related to relevant experience.

3 5 4 Relevant Experience and Ability to do the Job

Experience in terms of affirming people from designated groups is viewed as a qualification for the purposes of advancing the previously disadvantaged. Employers are therefore responsible to consider experience of the candidate for the job. The experience that is relevant may not be the same for the job that is required to be done, but may be based on similar principles. In a job that needs the basic principle of capacity to acquire skills within a reasonable time, is a possible activity.⁵⁴

3 6 Education and Employability of Job Seekers

The education provided should make designated groups employable. This means that the training system, including the educational needs to be designed around close cooperation between employers and education and training providers – especially in those programmes providing vocational training. In some areas, such as medicine, where work in teaching hospitals is an integral part of training doctors,

⁵³ *Ibid.*

⁵⁴ S20 (3) (c) and (d) of Employment Equity Act 55 of 1998.

this is well developed and could possibly provide a model for others, including professional organisations. In areas of work, such as artisan trades, apprenticeships have traditionally been a pathway to qualifications; however, the apprenticeship system has been allowed to deteriorate since the mid-1980s, resulting in a shortage of mid-level skills in the engineering and construction fields. Re-establishing a good artisan-training system is an urgent priority; the current target is for the country to produce 30 000 artisans a year by 2030. It is also important to expand other forms of on-the-job training, including learner-ships and internships in non-artisan fields. As has already been noted, the SETAs have crucial roles to play in facilitating such workplace-learning partnerships between employers and educational institutions.⁵⁵

Given the demographics of the South African labour force, it is not enough to focus on education and training in preparing people for formal-sector employment. Unemployment levels in South Africa are extremely high, particularly among youth. In the second quarter of 2013 the official unemployment rate was 25.6 per cent. If discouraged work-seekers are included, the rate was 98.4 per cent. As noted above a third of persons aged 15 to 24 were not in employment, education or training. The unemployment statistics demonstrate the value of an education: the highest unemployment rate (30.3 per cent) was among those without a National Senior Certificate (NSC) or equivalent, while those with NSC or equivalent had an unemployment rate of 27 per cent. Among university graduates, the unemployment rate was only 5.2 per cent, while the rate for others with a tertiary education was 12.6 per cent.⁵⁶

This situation means that we are providing training for individuals who will not, in the foreseeable future, be able to find formal employment in existing enterprises. To make a living, they will have to create employment opportunities in other ways – by starting small businesses in the informal or formal sector, or by establishing cooperatives, community organisations or non-profit initiatives of various types. The education and training system must cater for people in such circumstances by providing suitable skills. Education must also cater for the needs of communities by assisting them to develop skills and knowledge which are not necessarily aimed at

⁵⁵ S20 (3) (d) of Employment Equity Act 55 of 1998.

⁵⁶ Statistics South Africa, Quarterly Labour Survey, Quarter 2 (2013; xiv).

income generation – for example: community organisation; knowledge of how to deal with Government departments, or commercial enterprises such as banks; citizenship education; community-health education; literacy. The proposed community colleges are expected to play a particularly important role in this regard, and must therefore be designed to be flexible in meeting the needs of their own particular communities.⁵⁷ The colleges must build on the experiences and traditions and people's education development by non-formal, community-based and non-governmental organisations over many decades.⁵⁸

The challenges of the South African affirmative action are the provision of types of advancement of the majority over minority, as well as the racial reflection. These problems create an atmosphere of poor race relations. It is always important to keep and develop good race relations as a means of attaining an ideal non-racial society.

The employers have a role to play in fast-tracking the process of attaining a non-racial and equal society. Employment for the large number of population is still a source of income that upholds and promotes human dignity. If equality can be fast-tracked at employment level, then the majority would be benefitting towards a better non-racial society.

⁵⁷ White paper for Post School Education(2013/11/20).

⁵⁸ *Ibid.*

Chapter 4

Positive Obligations on Employers to Effect Affirmative Action

4 1 Introduction

This chapter is based on the obligation (role) of designated employers in implementing affirmative action. For the past seventeen years after legislation of the Act there is little that has been done to reach equality through affirmative action. It is therefore important to note the important role of employers in promoting affirmative action to create a substantive equality in the workplace.

For the benefit of indicating a clear direction regarding the role of employers in this chapter, the provisions that make employers obliged to implement affirmative action are discussed. The process of consultation is seen as a major component of democracy; therefore the provisions of Section 16 are evaluated in an attempt to provide an all-inclusive approach. Consultation is followed by analysing the nature of work done, the skills of workforce and determining employees' profile for future activities and skills development.

The employers with profiles of their employees are able to draw employment-equity plans. A case of *Reynhardt v University of South Africa* is cited,⁵⁹ and the legal influence of an employment-equity plan in binding employers to stick to their plans highlighted, in a process of implementing plans through which they must affirm suitably-qualified candidates. The meaning of "suitably qualified" is discussed and compared with the spirit purported in the case of *South African Police Service v Solidarity obo Barnard*.⁶⁰

The process of affirming will take place as per plan and analysis of the workplace profile. The employer has the role of reporting to the Director General. The objectives of reporting are discussed, in particular according to the number of employees at the workplace.

⁵⁹ *Reynhardt v University of South Africa* (2008) 29 ILJ 725 (LC)

⁶⁰ *South African Police Services v Solidarity obo Barnard* [2014] ZACC 23.

4 2 Employment-Equity Objectives

The Employment Equity Act 55 of 1998 (EEA) aims at promoting the Constitutional rights of equality as provided in Section 9 of the Constitution.⁶¹ The objective is to equalise groups that were unequal or that appear to be unequal. The spirit of the EEA is based on finding and enforcing substantive equality. The South African snap view of inequality was seen as inequality between Black and White people. The EEA in section 1 defines Black people generically as African, Coloureds and Indians.⁶²

According to Grogan there are two approaches to employment equity. One approach is to prohibit any form of discrimination for appointment, promotion, determination of remuneration, and the distribution of benefits, as well as open a way to compete, based on merits.⁶³ This approach of stopping inequality deals with the social design of the past that was based on socially degrading blacks, and economically exploiting black workers. The second approach is a system that compels the employers to prefer the previously-discriminated group. The second approach may be seen as discrimination in favour of the previously-disadvantaged group. The Constitution does not prohibit discrimination, but it is against unfair discrimination, as section 9(4) and (5) state the following:

- (4) *“No persons 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.”⁶⁴*

The Constitution, which is the supreme law of the Land, allows discrimination, provided there are grounds that are established to determine that such discrimination is fair. In section 2 of the EEA clause (a) provides the promotion of equality, fair treatment and elimination of discrimination.⁶⁵ Section 2(a) is in line with the first approach of the two approaches discussed above. Section 2(b) provides for

⁶¹ S9 of the Constitution of Republic of South Africa.

⁶² S1 of Employment Equity Act 55 of 1998.

⁶³ Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2007)163.

⁶⁴ S9 (4) and (5) of the Constitution of Republic of South Africa.

⁶⁵ S2 of Employment Equity Act 55 of 1998.

implementation of affirmative action to redress the past disadvantages and provide equitable representation in all occupational categories.

The spirit of section 2(b) is in line with the second approach of giving preference to the previously-disadvantaged groups. In the employment environment the first approach, or the provisions of EEA section 2(a), are not a problem as the qualifications and experience shall be considered irrespective of race, gender or any grounds that may constitute unfair discrimination. The aim of the EEA goes further than opening the gates to employment, but also levels the ground of play so as to give opportunities to the previously disadvantaged through affirmative action.

4 3 Affirmative Action and the Role of the Employer

The EEA focuses on affirmative action from section 12 to section 27 as a process in an employment environment. The Act in section 12 to section 27 indicates the steps to be followed affirmative action process.⁶⁶ The provision in section 12 to section 27 is a combination of the role of employees, employer and Government. In this chapter the focus shall be on sections that provide positive obligations on the employer in implementing affirmative action.

4 3 1 Positive Obligation on Employers to Effect Affirmative Action

The EEA on section 13 is titled as a section that reflects the duties of designated employers. Subsection 1 indicates the duty of employers to implement affirmative action as a means of achieving employment equity. Subsections 2(a) – (d) refer to other sections of the Act as sections that constitute the duties of the employer.⁶⁷ In implementing the duties as provided in sections 16, 19, 20 and section 21, the employer has to consider other sections of the Act and other legislation that are operational pertaining to the work environment. Affirmative action does not give employers a right to do as they wish, or the designated employees a right to be preferred unfairly. In the possibility of employees and employers holding different expectations the Act places a duty on the shoulders of the employer to consult employees.

⁶⁶ Ss12-27 of Employment Equity Act 55 of 1998.

⁶⁷ S13 (1) and (2) of Employment Equity Act 55 of 1998.

4 3 2 Consultation with Employees

The consultation process is commonly viewed as a process that ensures democratisation of labour relations. Section 16(1) (a) and (b) provide the following in ensuring that matters of consultation indicated in section 17 are given a good foundation, such as:-

- a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them, or
- b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.⁶⁸

The two subsections are allowing the employer to consult unionised employees as well as un-unionised employees. This eliminates the excuse that employees of an employer do not have a union; therefore there will be no consultation.

In section 16(2) the employer is given the duty of an all-inclusive approach when consulting employees. The abovementioned section is stated as follows:

- (a) “employees from across all occupational categories and levels of the employer’s workplace;
- (b) employees from designated groups; and
- (c) employees who are not from designated groups.”⁶⁹

The spirit of section 16(2) (a) is based on providing all employees the opportunity to raise their concern, and also to understand the affirmative-action direction taken by the employer. The understanding of the employees, in particular the category that acts on behalf of the employer (Management), will not be easy for the affirmative-action implementation. The presence of the designated group according to clause (b) will make the group understand that affirmative action is a process. The consultation and tabling of the group interest will prevent undesirable consequences and eliminate unrealistic expectations.

⁶⁸ S16 (1) (a) and (b) of Employment Equity Act 55 of 1998.

⁶⁹ S16 of Employment Equity Act 55 of 1998.

In South Africa today the non-designated group may feel that there is a process of undermining their contribution to development of institutions where they are employed. It is therefore important to consult them; clause (c) makes a provision for the inclusion of groups that are not designated. Some employees in the groups that are not designated may be mentors of the affirmed candidates in future, so it becomes important to prepare the attitude towards what such process entails. Predominantly, the above mentioned group may be constituted of the white males that were previously advantaged by the system of apartheid.

On the other hand, foreign nationals that come in the country with qualifications and knowledge will be dealt with. The consultation should guide the behaviour of the authorities in the place of employment. In the Western Cape a young man who had been a South African resident for six years, with supporting documentation that allowed him to work, was turned away from an employment opportunity within the first two minutes of his interview. The interviewer, who was herself a United Kingdom (UK) citizen, claimed that the company does not employ foreign nationals or asylum seekers. The CCMA ruled that the applicant was unfairly discriminated against and that the company had no legal ground to turn him away.⁷⁰

The above case proves that consultation may help in governing the conduct of all employees. It is important that the non-designated groups are included in the consultation process, and made to understand the objective of the plan to achieve equality. It will also help all workers to respect the human dignity of all groups, even the applicants for the jobs in a particular institution or company.

The consultation process is therefore a ground to prepare the minds of the affected groups in the workplace. The aim is ensuring support of the process. The employer will then need to analyse the activities at the workplace for the implementation of affirmative action.

⁷⁰ *WECT 25.08.15 (Matter handled at CCMA Western Cape).*

4 3 3 Analysis

The analysis of the process may be divided into the following two areas of focus:

- (i) Impact of pre-1994 legislations and strategies to remedy the inequality left by apartheid.
- (ii) The analysis of workplace environment and the human capital in that working environment.

4 3 4 Analysis of the Impact of Legislation

The consequences of apartheid and other discriminatory laws and practices pre-1994 which resulted in:

- disparities in employment and economic opportunities;
- job reservation on the basis of race;
- marginalisation of certain categories of workers;
- salary differentials based on race and gender;
- inequitable provisioning of education, based on racial lines;
- separate-development policies that alienated communities from one other;

These injustices suffered by South African people, and the lives lost and willingly given in the struggle for a free and just society, still burns deeply in the psyche of many, but the past is something one cannot change, and the future is ours to determine. It is precisely for this reason that the rights to equality, freedom and human dignity are the cornerstones that inform our policy considerations on employment equity.

To promote the notion of equality as a foundational principle of our new-found constitutional democracy, the Constitution of the Republic of South Africa Act 108 of 1996, hereafter “The Constitution”, obliged Government to give effect to section 9(2) which promotes the achievement of equality through legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination in the past. Section 9(3) further elaborates on the grounds upon which the State may not discriminate, which include *race, gender, sex, pregnancy, marital status, ethnic or*

*social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth.*⁷¹

To the public service, the Constitution further gives direction under section 195(1) (i), which states:

*“Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past and to achieve broad representation”.*⁷²

The above section qualifies the notion of representatively based on the following criteria:

- ability,
- objectivity,
- fairness and
- the need to redress imbalances of the past.

4 3 5 Analysis of the Workplace Environment

The employer has to conduct an analysis by collecting information and use it as a basis for analysing activities of workplace. The analysed activities may include the following:

- Employment policy,
- practices and professional requirements,
- procedure in the process of employing, and
- skills of the workers.

The aim of the analysis is to identify employment barriers that affect designated groups. The analysis must display the profile and representation of the designated

⁷¹ S9 of the Constitution of Republic of South Africa.

⁷² S195 (1) (i) of the Constitution of Republic of South Africa.

workforce. The analysis of the workforce will then provide the employer with the possibility of affirming the workforce according to the profile of each worker.⁷³

In the case of *Engineering Council of SA and Another v City of Tshwane Metropolitan Municipality and Another*, Mr Weyers, an electrical engineer, at a meeting of senior managers of the municipality, raised concerns and refused to cooperate with the practice of appointing of people simply for the sake of employment equity. In his analysis he found that the appointed persons were experiencing endangerment of their lives by members of the public and/or fellow-employees.⁷⁴ It should be noted that the preamble⁷⁵ of the EEA lays down the purpose of the Act, which gives recognition to apartheid-style discrimination, and creates the legal framework to promote the right to equality in workplaces, eliminates unfair discrimination, ensures the implementation of redress, achieves a diverse workforce, as well as promotes economic development and efficiency in the workplace.

Section 6(2) of the EEA emphasises the grounds on which unfair discrimination is prohibited, which include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground, in any employment policy or practice.

However, section 6(2) is qualified by section 6(3), which states that it is not unfair discrimination to take affirmative-action measures consistent within the purpose of the EEA, or to distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job.⁷⁶

In the abovementioned case the employer failed to analyse the skills and competencies of the persons to be affirmed according to the requirements of the job. This case is written exactly and analysed in the spirit of Protected Disclosure Act, due to the steps that were taken by the engineer (Mr Weyers). The starting point

⁷³ S19 of Employment Equity Act 55 of 1998.

⁷⁴ *Engineering Council of South Africa and Another v City of Tshwane Metropolitan Municipality and Another* (2008) 29 ILJ 899(T).

⁷⁵ Preamble of Employment Equity Act 55 of 1998.

⁷⁶ S6 (2) and (3) of Employment Equity Act 55 of 1998.

should be noted that it is the affirmation of the candidate that is not suitably qualified. Section 15 (1) states that affirmative action should be implemented to designated, suitably-qualified people.⁷⁷ Affirmative action does not mean all other legislations must be inferior, as this case is based on the Occupational Health and Safety Act (OHSA) 85 of 1993. Judge Prinsloo also noted the importance of the reference to OHSA. The City of Tshwane Metropolitan Municipality lost the case with costs. The correct analysis gives people in authority in the business of employers a picture of the kind of personnel they have on the system, and elucidates the plans to be implemented for employment equity.

4 4 Employment Equity Plan

A plan in any process is a guide to ensure that the desired objectives are reached. Employment equity plan is a cornerstone of ensuring that affirmative action will come into operation. In section 20(1) the employer must prepare and implement an employment plan towards employment equity.⁷⁸ In the case of *Reynhardt v University of South Africa* it is indicated that the employment-equity plan becomes a definite law of the employment environment.

In this case Judge Ndlovu raised his concern on the employment-equity plan of the employer, and said the following:

“The applicant gave what I can safely describe as clear and straightforward evidence. He knew his facts well in that he relied principally on objective factual information which could not be gainsaid by the respondent’s witnesses. For example, it turned out to be a proven fact in his favour that at the time Professor Summers was appointed the ratio was already 75%:25% in favour of Black Deans over White Deans, which meant that the target of 70%:30% had already been reached and surpassed. Upon Professor Summers’s appointment the ratio was further increased to 80%:20% in favour of Blacks (of course a calculation which excluded the vacancy of Dean in the Faculty of Law, in which Professor Maré, a White female, was acting for the time being). It seems to follow, accordingly, that the application of the

⁷⁷ S15 of Employment Equity Act 55 of 1998.

⁷⁸ S20 (1) of Employment Equity Act 55 of 1998.

respondent's employment-equity policy, plan and guidelines in the present instance was not only a contravention of section 15(4) of the EEA but also a violation of the respondent's own employment equity measures".⁷⁹

From the above analysis of the plan targets by Ndlovu J one can learn that relevant plans need to be looked at as possibilities when employing new staff in order to keep representation within targets.

In *Barnard Moseneke, ACJ* also points out the target of the employment representation. In this case the over-representation of white women was pronounced at salary level 9. White females were employed in excess, despite of the equity targets.⁸⁰ Ms Barnard was also aware of the targets of the Employment-Equity plan which was the accepted plan. So she knew beforehand that, even if she might be the best candidate, the employment-equity targets may supersede her performance in the process for appointment.⁸¹

The plan may have been set for five years, but within each year it may have included targets (baby steps) towards the desired outcome after five years. The plan is also informed by targets in skills-development plan, which will identify people that will be suitably-qualified after a particular period. Plans may also be influenced by the business trends. Planning in Employment Equity is not a fact in isolation to the nature and activity of the workplace.

The plan for employment equity is a legal document because the plan, in terms of the provisions of section 20 and subsection 2, entails that the employment-equity plan must state the following:

- (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 each occupational

⁷⁹ *Reynhardt v University of South Africa* (2008) 29 ILJ 725 (LC).

⁸⁰ *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23.

⁸¹ *Ibid.*

category and level in the workforce, as well as the timetable within which this is to be achieved, and the strategies intended to achieve those goals.

- (d) The timetable for each year of the plan for the achievement of goals and objectives other than numerical goals.
- (e) The duration of the plan may not be shorter than one year nor longer than five years.
- (f) The procedures that will be used to monitor and evaluate the implementation of the plan, and whether reasonable progress is being made towards implementing employment equity.
- (g) The internal procedures to resolve any dispute about the interpretation or implementation of the plan.
- (h) The persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and any other prescribed matter.”⁸²

According to section 20(3) the plan has a time frame of one year to assess progress in as far as achieving the goals of an employment-equity plan. One year being the minimum and five years the maximum. The employers in this process affirm suitably-qualified candidates for the job. “Suitably-qualified” may mean one or a combination of the following:

- (a) Formal qualification.
- (b) Prior learning.
- (c) Relevant experience; or
- (d) capacity to acquire, within a reasonable time, the ability to do the job.⁸³

In the process of implementing affirmative action some employers may reach the targets and be able to share best practices in promoting affirmative action. On the other hand some employers may be frustrated by the complexity of their nature of work, compared to the affirmation of designated groups who may not be in possession of the suitable qualifications.

It therefore becomes vital for employers to report their progress.

⁸² S 20 (2) (a) – (i) of Employment Equity Act 55 of 1998.

⁸³ S20 (3) (a) – (d) of Employment Equity Act 55 of 1998.

4 5 Report

Reporting is a process of giving an indication on progress, achievements or attempts in reaching the desired objectives. Employers are also subjected to the process of reporting for employment equity as provided by Section 21 of EEA. All designated employers must report to the Director General. Employers with fewer than one hundred and fifty (150) employees at the implementation of the Act (EEA) were given one year (twelve months) to report, and then report after every two years. The employers with one hundred and fifty (150) or more employees were given six months to report from the implementation of the Act (EEA), and thereafter they must report every first working day in October.⁸⁴ The objectives of the Employment Equity Act are positive for creating an equal socially-economic stability and politically just environment. Any process has its negative, positive, and correctable feature which shall be discussed in conclusion.

4 6 Objective that Needs Employers' Understanding

Affirmative action is a strategy that is geared to correcting the imbalances of the past. The designated groups, who were politically discriminated against, economically exploited and socially degraded, are given opportunities to develop and play meaningful roles. The challenge is that, if some people in the designated group may have the necessary formal qualifications they may not have relevant experience, due to exclusion or discrimination of the past, and "suitability" includes that experience as Section 20(3) of the EEA provides.⁸⁵

South Africa is a developing country, and after the establishment of democracy new foreign investors became interested to trade with South Africa. This posed challenges because the Education system of the country was not yet liberated from the negative influences of apartheid, as discussed in chapter 3.

As generation to generation praises and blames the discriminatory past affirmative action may be a correcting factor. A child born in 1994 is currently 21 years old, logically he or she has passed matric looking for work, or doing his or her first-year tuition in a tertiary institution.

⁸⁴ S21 of Employment Equity Act 55 of 1998.

⁸⁵ S20 (3) of Employment Equity Act 55 of 1998.

These are children that form the so-called “born-free” generation. If by the year 2017 affirmative action is still in force, and such a child has graduated and seeks employment, he or she will not understand the preference of designated groups or some of the groups. The pace of affirmative action according to the demographics is showing that South Africa has a long way to go; as progress is very slow.

Grogan is of the view that affirmative action cannot be implemented indefinitely; at some stage it must have achieved its purpose. He further noted that it is a political fact rather than a legal question.⁸⁶ If for political reasons affirmative action may come to an end it will compromise the designated groups but if it continues for a very long period it will provoke the non-designated white groups in future in consequence of their having very little understanding of their life-time situation and the past, as some will not be aware of the past and others will not have been beneficiaries of the past system of apartheid.

In view of the racial reflections of South African society in the past affirmative-action period, affirmative action might be seen as a strategy for social justice and equality. The equality in South Africa is a process that touches race relations in the society. The next chapter will consider affirmative action and race relations as builders of a non-racial society.

⁸⁶ Grogan *Employment Rights* (2010) 251.

Chapter 5

Affirmative Action and Race Relations in South Africa

5 1 Introduction

This chapter researches the structure and stance of race relations in South Africa; it is noted that there is only one human species irrespective of race and human dignity should be protected in all processes.⁸⁷In terms of South African law there are only two racial groups, these are black and white. The case of *Chinese Association of South Africa* is discussed, as they were also demanding to be classified as black people that were previously disadvantaged.⁸⁸

The legislation and case-law interpretation are discussed with reference to section 15 of the Employment Equity Act and the case of *Motala v University of Natal* as well as the change of interpretation in the case of *Naidoo v Minister of Safety and Security*.

The right not to be discriminated against is viewed in light of the current state of implementing affirmative action in South Africa. The use of demographics of National population and the practice of forced removal are compared. The strategies of bridging the gap between racial groups are using education as a weapon of change by supporting schools, children from disadvantaged communities and parents with no income or low-income levels.

The workforce demographics are considered, and it is clear that there is no way the labour market may absorb all workers, but there is a need to support programmes of self-employment, and the attraction of new foreign investment, while developing skills for upgrading domestic production.

The designated groups are people with different cultures, beliefs and religion; therefore employers have a duty to accommodate their values. In the accommodation of value systems there must be no compromise on the inherent

⁸⁷ S10 of Constitution of Republic of South Africa.

⁸⁸ *Chinese Association of South Africa V Minister of Labour* 5925/20079(TPD):(2008)ZAGPHC.

requirements of the job to be done. In the requirement to accommodate the culture of employees and gender equality, a case of *POPCRU and Others v Department of Correctional Services and Another* is discussed.

5 2 Race in Terms of Equity Act

In the Employment Equity Act the designated racial groups are defined as one group. The designated groups are defined as black people, women and people with disabilities.⁸⁹ From the above definition it is clear that one sees one factor only, the racial reflection. The term “black people” in the Act means Africans, Coloureds and Indians.⁹⁰

The above definition means that there are two racial groups according to the legal perspective, namely black and white. The current judgment added the definition of “black” according to the North Gauteng High Court namely, that the South Africans of Chinese descent were also declared to fall within the definition of “black people” for the purpose of the Employment Equity Act and the Broad Based Black Economic Empowerment Act 53 of 2003.⁹¹

In this case the court noted that Chinese were deprived of citizenship and had been classified as Coloured. In that process they also suffered indignity.⁹² So, to be black, is not the colour of pigmentation but the conditions of suffering indignity in the past or to have been discriminated against in the past. In 2005 the African National Congress (ANC) reconfirmed that the national question in South Africa is about the liberation of the African majority. This declaration by the ANC actually suggested that in creating an equal society, measures of affirming the designated group should be in particular on the racial grounds rather than gender and disability, as well as and African over other segments of black people, namely Coloureds and Indians. The decision by the ANC in the late 1970s to endorse the Black Consciousness Movement (BCM) utilisation of the term “black” to refer to Africans, Coloureds and Indians, was a contested one, and is still so even today. Many are of the view that it

⁸⁹ S1 of Employment Equity Act 55 of 1998.

⁹⁰ *Ibid.*

⁹¹ *Chinese Association of South Africa v Minister of Labour 5925/20079(TPD); (2008) ZAGPHC.*

⁹² *Ibid.*

homogenised the political experience of the three groups, underplaying their varying locations on the hierarchy structures of apartheid.⁹³

5 3 Legislation and Case Law Interpretation

Section 15 of the EEA defines affirmative-action measures as follows:-

- (1) *Affirmative-action measures are measures intended to ensure that suitably-qualified employees from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.*
- (2) *Affirmative-action measures implemented by a designated employer must include –*
 - (a) *measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;*
 - (b) *measures designed to further diversify in the workplace, based on equal dignity and respect of all people;*
 - (c) *making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;*
 - (d) *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*
 - (j) *retain and develop people from designated groups, and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.*
- (3) *The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.*
- (4) *Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would*

⁹³ Dupper and Grabers *Equity in the workplace* (2009)302.

*establish an absolute barrier to the prospective and continued employment, or advancement of people who are not from designated groups.*⁹⁴

Given the above principles, our case law indicates the contrary.

I commence with the *Motala v University of Natal* 1995 (3) BCLR 374 (D)⁹⁵ case. The reason why I start here is simply because this judgment has given a certain nuance to the meaning of the word “disadvantaged”, which has had an influence on judgments following this case in the context of employment equity.

Briefly, the case came before the Durban High Court on the grounds that Fatima Motala, a pupil of Indian descent, was refused admission to the medical faculty at the University of Natal, notwithstanding the fact that she acquired an “A” aggregate in her matric examination. The University applied a quota system in their admission policy, which allocated only 40 seats to Indian students, and more to African students contending that the required intake for Indians had been achieved. *Motala* contended that this policy discriminated against her unfairly. The High Court rejected this contention and held as follows:

*“The contention by counsel for the applicants appears to be based upon the premise that there were no degrees of ‘disadvantage’. While there is no doubt whatsoever that the Indian Group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the {apartheid} system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of (the equality provision of the Interim Constitution)”*⁹⁶

What is significant in this judgment is that it does not elaborate, nor unpack the evidence before it regarding the “the degree of disadvantage” that African students were subjected to. From what appears in the judgment it seems that the court merely took judicial notice of the fact that African pupils were more disadvantaged under

⁹⁴ S15 of Employment Equity Act 55 of 1998.

⁹⁵ *Motala v University of Natal* 1995 (3) BCLR 374 (D)

⁹⁶ *Motala v University of Natal* 1995 (3) BCLR 374 (D).

Bantu Education than Indian pupils. The doctrine of judicial notice has a conceptual foundation in our law of evidence in that a judicial officer may take notice of facts where such facts are of such common knowledge that they do not require proof, or where proof thereof can be readily obtained. Given the contention in the *Motala* case, a member of a race group that also was subject to discrimination, was the reasoning of the court misplaced in its judgment to deny her relief? At the stroke of a pen, this court denied her right to equality, fundamentally because she was a member of a race that in the court's eyes was disadvantaged to a "lesser degree", despite an admission by the court that she was in fact a member of a race group that was disadvantaged under the system of apartheid. Moreover, the EEA does not endorse the notion of "degrees of disadvantage" as point out in *Motala* ⁹⁷

Seemingly, the court in this case did not see itself in the role of healing injustices suffered in the past, nor did it take cognisance of this fact that is so eloquently encapsulated in the preamble of our Constitution,⁹⁸ which states:

*"We, the people of South Africa,
Recognise the injustices of our past"*⁹⁹

To equate such injustices to "degrees of disadvantage" not only devalues the experiences of those who fought against the apartheid system but also those who are born "in the wrong colour" as the term black is also inclusive of all races that were disadvantaged.¹⁰⁰

Whilst this judgment was not decided in the context of employment equity it has been extensively quoted in a number of cases, thereby entrenching the concept of "degrees of disadvantage" in contentions with regard to employment equity and the achievement of "equitable representation" in workplaces.¹⁰¹ The danger of that approach was to make some people within the designated group to feel that they were not light-skinned enough to be white. In the new democratic society they are now not black enough to be affirmed.

⁹⁷ *Ibid.*

⁹⁸ Preamble of Constitution of the Republic of South Africa.

⁹⁹ *Ibid.*

¹⁰⁰ S1 of Employment Equity Act 55 of 1998.

¹⁰¹ *Henn V SA Technical (Pty) Ltd* (2006) 27 ILJ 2617 (LC) at 2623.

It can be categorically conclude in the light of the *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC)¹⁰² that the president created in this judgment was never the intention of Sections 9 and 195 of the Constitution.¹⁰³

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

This case was heard before the Labour Court that challenged the SAPS EEP¹⁰⁴ for the period January 2007 to December 2010. The plan provided, amongst other things, the following:

- Numerical Targets to be achieved were formulated on the basis of the national race demographics: 79% African; 9,6% White; 8,9% Coloured and 2.5% Indian (2001 census report).
- Gender targets were set in the following ratio: 70% male and 30% female – (contrary to the 2001 census report which indicated that women constituted 51% of the population).
- On 14 April 2009, the SAPS advertised several posts, including 5 positions for cluster commander in the Gauteng region.
- Naidoo applied for the position of “cluster commander: Krugersdorp”, a level-14 post. She was shortlisted and interviewed and was given a rating of 74,2%, the 2nd highest score.
- The candidate with the highest score was recommended for another post. Although the provincial selection panel recommended the appointment of Naidoo because it would address gender equity, the national panel did not appoint Naidoo because it would not enhance employment equity, and would not be consistent with service-delivery objectives. Instead, they appointed a black African candidate.
- Naidoo alleged that she had suffered unfair discrimination because the EEP placed an absolute barrier on her appointment, and that the targets are essentially arbitrary. The barrier is demonstrated by the following mathematics:

(a) There were 19 positions on level 14.

¹⁰² *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC).

¹⁰³ S9 and S 195 of Constitution of Republic of South Africa Act 108 of 1996.

¹⁰⁴ SAPS EEP–South African Police Services Employment Equity Plan.

- (b) To calculate how many of these posts would be given to Africans, the following calculation was applied: $19 \times 79\% = 15$ posts.
- (c) A similar calculation was applied to Indians: $19 \times 2.5\% = 0,475$ posts. To calculate how many of these would be occupied by Indian females: $0,5 \times 30\% = 0,1$ which was rounded off to 0%.
- (d) The calculation in relation to Coloureds would be as follows: $19 \times 8.9\% = 1.69$ posts; and in relation to Whites would be $19 \times 9.6\% = 1.82$ posts.
- (e) In other words there was no provision made for the appointment of Indian females, despite the fact that they had shortlisted, interviewed her and recommended Naidoo's appointment.
- (f) The net effect of the gender targets is that in the lower grades of levels, where there are many more jobs, the 2,5% ratio allows for some Indian representation, whereas in the middle or top levels, where the posts are few, Indians cannot be employed. According to a strict application of the demographics, Whites received more posts than Coloureds or Indians.

LC judgment

The court opined as follows about the targets:¹⁰⁵

- (i) Its practical effect is to set a race- and gender-based preference, in which Indian females fall at the end of the designated groups.
- (ii) Its second effect is that it creates degrees of disadvantage within the designated groups. That means that women, as the majority of the designated group, will continue to suffer underrepresentation.
- (iii) The EEP undermines the constitutional objective of equality. Instead of promoting non-racialism, it promotes race rivalry, and instead of embracing non-sexism it proffers tokenism.
- (iv) The numeric targets present themselves as a barrier and quota rather than a target. The quota provides that no Indian females may be appointed.

¹⁰⁵ *Naidoo V Minister of Safety and Security* 2013(3) 486 (LC).

- (v) The object of the EEA is to create a workforce that was broadly representative of the South African community. Section 42(a)(i), which refers to the demographic profile of the national and regional economically-active population, is at variance with section 15(1) of the EEA, that states
*“Affirmative action measures are designed to ensure that suitably qualified people from designated groups have equal opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer”*¹⁰⁶
- (vi) In its criticism of the employer’s reliance on the national race demographics, court stated the following:
*“It may well be that to achieve substantive equality and ‘equitable representation’, a group within the designated group is advanced, while another is disadvantaged. The disadvantage to be endured by the latter group is incidental to the purpose of promoting substantive equality. The disadvantage suffered is in pursuit of a higher purpose and, to the extent that the higher purpose is realised, the disadvantaged group also benefits. Thus advantage and disadvantage cannot be seen in a narrow context bound by the moment. A situation-sensitive approach is required.”*¹⁰⁷
- (vii) Our jurisprudence and laws call for “equitable representation” and this requires a concrete, contextualised approach. All employers must abstain from a formulaic, mechanistic approach.¹⁰⁸
- (viii) In section 42 of the Equity Act, the factors to be considered in assessing compliance are circumscribed, and within the designated group there is no ranking order or preference for favour. It may well be that one or another group at particular moments in time warrants special attention on account of the fact that they are simply not represented, or sufficiently represented, to the degree “equitable”.

¹⁰⁶ S15 (1) of Employment Equity Act 55 of 1998.

¹⁰⁷ *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC) par160.

¹⁰⁸ *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC) par165.

5 4 The Right Not to be Discriminated on the Basis of Race

Whilst Government's affirmative-action policies are configured on race and racial quotas, the point of departure should be based on the fact that race alone should not inform the development and advancement of workers. Racial discrimination is defined in Article 1 of The International Convention on the Elimination of All Forms of Racial Discrimination¹⁰⁹ [ICERD] as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

Within The South African context, on the question of racial discrimination, domestic legislation is formidable. However, the problem arises when Article 1 is viewed in terms of this clause, *“enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”*¹¹⁰

What constitutes an “equal footing” is the precise question one has to answer in any challenge one envisages with regard to employment equity/affirmative-action measures. Two streams of thought emerge in this regard.¹¹¹

- What does “equal footing” mean for the non-designated groups in the context of affirmative-action measures?
- What does “equal footing” mean for the designated groups in the context of affirmative-action measures?

Finally, how does one bring these two streams together to complete the notion of a society built on the principles of equality, inclusivity, non-racism and non-sexism?

¹⁰⁹ International Convention on the Elimination of all forms of Racial Discrimination: Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December, 1965 entry into force 4 January 1969, in accordance with Article 19

¹¹⁰ International Convention on the Elimination of all forms of Racial Discrimination, Article 1 Clause 1.

¹¹¹ Hermann *Affirmative tears* (2013) 62.

Given the above input, trade unions may indicate that the following factors should give credence to the notion of “equal opportunity” if one is to compete on an “equal footing”:¹¹²

- In the current era of skills shortage vulnerable workers who are largely illiterate have no means to access skills training. Therefore a skills-development programme that is user-friendly, easily accessible and recognises language competency through oral testing, is needed, especially in the domestic and farm sectors.
- The marginalisation of white, especially male workers, who are highly skilled, is contrary to the notion of building an inclusive non-racist and non-sexist society. A retention-system approach of mentorship development will assist in building a diverse and united workforce.
- The marginalisation of Coloured and Indian workers in favour of African workers by means of using national-population demographics is tantamount to the notion of forced removals as has been practised by the apartheid regime. Coloured workers in the Western Cape Province and Indian workers in the KZN-Province where such workers have lived for generations will have to move to other provinces to find work, thus causing their experiencing further hardship, notwithstanding the fact that both population groups are defined as part of the designated group which the EEA aims to affirm.¹¹³
- The earlier socio-economic conditions under which persons of all race groups persevered for a better life for all South Africans. In this regard the question is asked: Were white people the only beneficiaries of political, social, and economic power and did persons of colour (those who are currently defined as the “designated” group) not benefit as participants of the apartheid regime? Herein lays the problem that the Government refuses to answer, in that many white people joined in the struggle for the creation of a just and free society.¹¹⁴ At the same time many black persons colluded with the apartheid regime¹¹⁵ thereby

¹¹² Hermann *Affirmative tears* (2013) 68-70.

¹¹³ Hermann *Affirmative tears* (2013) 68.

¹¹⁴ www.sahistory.org.za End Conscription Campaign.

¹¹⁵ Biko *I write what I like* (1978) 93.

benefitting from its racist practices, such as homelands and other self-governing territories. The EEA does not consider this at all.

- A bursary system that identifies, and advances students of all race groups, based on merit by giving consideration to the following criteria:
 - The type of school one attends (public /private).
 - The language spoken (mother tongue).
 - The area in which the child lives (urban /rural).
 - The joint-income of parents.
 - The career choice of the student (i.e. scarce skill).

In some institutions of higher learning the consideration of promoting the admission of designated groups is not only racially-based, but also considers the type of school attended by the applicant.¹¹⁶ After 1994 black people of the middle class sent their children to schools that were for whites, and only the poor majority was left in under-resourced schools.

If the determination of class regarding people to be affirmed is the approach to bridge the gap between poor and rich, then the arguments should be about class exploitation, gender and control of wealth.¹¹⁷ On the other hand statistics indicate that class consideration also will be more linked to racial cases, as the economically-active workforce is as follows:

- 73% of Black Africans,
- 11% Coloureds,
- 3% Indians/ Asians and
- 13% Whites.

Even if one removes all white people (both men and women) from the workforce, notwithstanding the fact that white women are also categorised under the designated groupings, it would mean that 60% of the black African workforce would still have to

¹¹⁶ www.uct.ac.za (2015/06/02) University of Cape Town Admission Policy.

¹¹⁷ Employment; unemployment; skills and economic growth – An exploration of household survey evidence on skills development and unemployment between 1994 and 2014 – Statistic South Africa; www.statssa.gov.za (2015/06/01).

be affirmed. One can take this even further and remove Indians and Coloureds from the workforce, who would constitute a further reduction of 14%. One would still not achieve the notion of substantive equality. Notwithstanding that fact that, if one did this one would be in serious violation of all equity legislation. To complete this argument one needs to understand what exactly is meant by “*equitable representation*.” Policy considerations give effect to the concept in relation to the national and provincial demographic of the economically active population¹¹⁸. At a glance, if one considers the above statistics one can easily conclude that “equitable representation” has been achieved, but this is not so; the concept is expanded to mean equitable representation “*within each occupational level in that employers’/ employees ratio in relation to the demographic profile of the national and regional economically active population.*”¹¹⁹

From the above one can note that affirmative action is not about employment only, but it is also about skills development. The rate of development of a skilled workforce since 1994 to 2014 pertaining to the workforce of 15 million workers, per population group, is:¹²⁰

- 18% African, up by 3% since 1994,
- 61% Whites up by 19% since 1994,
- 50% Indian up by 26% since 1994,
- 21% Coloured up by 11% since 1994.

Since 1994 and up to 2014 the proportion of African workers in the labour force has increased by 10%, and constitutes 73% of the workforce. The white labour force has decreased by 7% and constitutes 13% of the labour force. The Indian labour force has decreased by 1% and constitutes 3% of the labour force, and the Coloured labour force has decreased by 2% and constitutes 11% of the labour force.

The conclusion that may arise from the above statistics is a very simple one: Whites and Indians constitute a high percentage of the skilled workforce which constitutes professionals, technicians, etc., and it is precisely this which creates tensions at this occupational level of the workforce. Naturally, equity legislation still applies at this

¹¹⁸ S42 (1) (a) of Employment Equity Act 55 of 1998.

¹¹⁹ *Ibid.*

¹²⁰ www.statssa.gov.za (2015/06/01).

occupational level to both the designated and non-designated groups. This tension has been played out in our courts and I shall deal with a number of relevant examples.

It is therefore the role of the State to provide an education that up-skilled the designated groups. The increase in the representation of population groups in all levels of occupation is directly related to the development of skills in the communities of designated groups. For the skilled workforce to find employment that is suitable for their qualifications there must be employment opportunities. It is therefore the duty of Government to attract foreign investment in order that the skilled workforce finds employment within the borders of the country.¹²¹

The higher-education system must be supported by scientifically-based research so as to ensure that the primary products produced are developed to secondary and tertiary “goods” (final products). Affirmative action is a strategy that must embrace human-resource development in order to unchain South Africans from being slaves of international trade. In the centre of such process is the development of a skilled workforce through:

- (a) Education at schools and tertiary institutions.
- (b) Workplace education (artisanship.)
- (c) Vocational training (colleges of specific skills)¹²²

The South African society has not yet achieved an equally-resourced education system, therefore in the employment process, the skills development is still a challenge.

5 5 Duty to Accommodate Employees on the Basis of Gender, Religion and Culture

In a case concerning five male officers at Pollsmoor Prison who refused to cut their dreadlocks when ordered to do so as required by the applicable dress code. Three of

¹²¹ Dupper and Garbers *Equity in the workplace* (2009) 303.

¹²² National Skills Development Strategy (NSDS III).

them had embraced Rastafarianism and refused to cut their dreadlocks on the grounds that this was incompatible with their religion. The other two employees grew dreadlocks as part of traditional Xhosa cultural practices related to the healing arts and rituals (*ukutwasa*), and they asserted discrimination on the basis of culture. The employees also asserted discrimination on the basis of gender, because the dress code prohibited male officers from wearing dreadlocks, but did not prohibit female officers from doing so.¹²³

When the matter came before the Labour Court the claims of religious and cultural discrimination failed, but the claim of gender discrimination succeeded. Although the Labour Court accepted that the employees wore dreadlocks because of their religious or cultural beliefs, it found that they had never brought it to the attention of the employer that the instruction was in conflict with their religious and cultural practices. The Labour Court found that this had the effect that there was no discrimination on religious or cultural grounds in their dismissals. Nonetheless, the employees succeeded before the Labour Court on the basis that the employer had not shown that the gender discrimination in the dress code was fair. On this basis reinstatement with full retrospective effect and cost, was ordered.¹²⁴

When the matter came before the Labour Appeal Court (LAC), it disagreed with the reasoning of the Labour Court, holding that, in addition to the gender discrimination claims, the religious and cultural discrimination claims should have succeeded. The LAC noted that the employees' testimony that their unwillingness to cut their dreadlocks was based on sincerely-held religious beliefs and cultural practices had not been contested. It held that the Labour Court's finding that there had been no discrimination because the employees had not asserted their rights, was both factually incorrect and conceptually erroneous. The employees had all asserted their rights but, even if they had not, a failure to do so does not render discriminatory action non-discriminatory. The LAC's judgment provides helpful guidance on what must be shown in order to establish discrimination. It rejected the employer's argument that, because its reason in dismissing the employees was to ensure compliance with a departmental policy applied equally to all employees, it could not

¹²³ *POPCRU and Others v Department of Correctional Service and Another* [2010] 10 BLLR 1067 (LC).

¹²⁴ *Ibid.*

be said that the employees were dismissed because of their religion, culture or gender. The court referred to section 187(1)(f) of the Labour Relations Act which categorises a dismissal as automatically unfair only if the reason for the dismissal is unfair discrimination on a specified or analogous ground.¹²⁵

The Court held:

“The reason contemplated and to be sought by the court is the objective reason in a causative sense. The Court must enquire into the objective causative factors which brought about the dismissal, and should not restrict the enquiry to a subjective reason, in the sense of an explanation from one or other of the parties”.¹²⁶

The Court referred to certain foreign authorities and then held:

“In other words, discrimination is not saved by the fact that a person acted from a benign motive. Usually motive and intention are irrelevant to the determination of discrimination because that is considered by asking the simple question: would the complainant have received the same treatment from the defendant or respondent but for his or her gender, religion, culture etc.?”¹²⁷

The Court also held:

“Direct discrimination does not require that the employer intends to behave in a discriminatory manner or that it realises that it is doing so. In the present case the reason for the dismissal was that the respondents wore and refused to cut their dreadlocks. But for their gender, religion and culture, they would not have been dismissed. The evidence establishes beyond question that the reason for their dismissal was discrimination on grounds of gender, religion and culture”.¹²⁸

¹²⁵ *Department of Correctional Services and Another V Police and Prison Civil Right Union (POPCRU) and Others* (CA 6/2010) [2011]ZALAC 21.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

The Court accordingly found that there had been overlapping gender, religious and cultural discrimination.¹²⁹

From the above case it can be established that the employers, through the process of affirmative action, must accommodate the diversity of cultures which are influenced by the diversity of racial and ethnic groups that are found in South Africa. The religion and culture practised by the employer need not be in conflict with the co-competencies of the job. Affirmative action in the sense of accommodating employees' values is an extension of fairly dealing with the employees, as part of fair labour practice.¹³⁰

¹²⁹ Freund, Le Roux and Thompson *Current Labour Law* (2010) 109.

¹³⁰ S23 of the Constitution Act 108 of 1996,

Chapter 6

Conclusion on affirmative action as a strategy for social justice

6 1 State of equality and affirmative action

Affirmative action is one of the products of peaceful transformation that is aimed at promoting the dignity of all South Africans. The history of the development of labour law in South Africa and the impact of other laws that have reinforced inequality, might have been viewed as a reason for a more aggressive approach. It is good fortune that negotiators were sober in order to allow a constitutional supremacy and reconciliatory approach in resolving the problems of inequality and discrimination.

The objective of referring to the historical background which is covered in chapter two of this work may be summarized as follows:

- (i) To educate the youth and young workers (born free) about the origins of inequalities.
- (ii) To make everybody understand that affirmative action is a strategy to solve social problems, without taking drastic steps that may cause conflict.
- (iii) To create an understanding that the inequality at work was supported by inequality in education, landownership and social status, and that had a psychological impact to black people, which resulted in an inferiority complex. Therefore affirmative action will be instituted in workplaces, institutions of learning, provision of financial support for businesses and land ownership as means of boosting the confidence of the designated groups that were discriminated against in the past.
- (iv) To learn to test and trust processes, as a lesson can be drawn from the Wiehahn commission, which was not trusted by black unions. It is also the duty of the current workforce and society to test and trust the provisions and processes that enable the implementation of affirmative action, so that it can be successful.
- (v) To appreciate what was brought about in terms of the new legislations that are aimed at promoting fair labour practice as per provisions of section 23 of the Constitution.

- (vi) To see the future developing out of the present by sharing the objectives of affirmative action, where workers shall enjoy substantive equality in a workplace that is free from discrimination of whatever form.¹³¹

Education is a key for the society to develop the skills of the citizens. The requirement of affirming suitably-qualified candidates makes the process of affirmative action to be related to education and skills development. The Skills Development Act¹³² is legislated to develop worker education, while the Skills Development Levies Act¹³³ determines funding of the process of skills development. School leavers are job seekers; therefore the education from primary to tertiary education must provide basic knowledge that will be applicable in the workplace, and hence formal education is counted as one of the criteria for producing suitably-qualified candidates.

Education of the designated groups needs to be of high quality to meet the required standards. In the designated groups the disabled people's education needs to be developed, in particular the education of the psychologically challenged as they may not cope with the mainstream education. On other levels of disabilities such as physical disabilities, efforts to work towards inclusive education must be established to incorporate the people with disabilities in the main stream of education. People with disabilities are equal members of our society, and the education system should reflect such demographics so that employment can follow with the same demographical reflection.

The education system must respond to the needs of business and industry in the country. The skills gained by learners in the education system must be of value to the production process and provision of services. South Africa is experiencing protests of service delivery, mainly because of skills that were not carried over to a number of employees in offices and elsewhere. Business and industry also have a duty to furnish the education system information so that a new or improved content is introduced in the syllabi of learners or students who will become workers/employees

¹³¹ S2 of Employment Equity Act 55 of 1998.

¹³² S2 of Skills Development Act 97 of 1998.

¹³³ S3 of Skills Development Act Levies of 1999.

after they have qualified. The statistics in chapter 3 clearly indicate that educated people have more opportunities to be employed. Skills in South Africa may in addition be utilized as a foundation for self-employment.

The designated employers have a responsibility of affirming the people from the previously-disadvantaged groups. In the process of affirming the designated people the non-designated people may not be unfairly discriminated against. The Employment Equity Act on section 12 to 27 provides the roles to be played.¹³⁴ The role of the employer in consulting employees, or their trade union, is a principle of democratizing the workplace. The Act provides representation of all workers from various categories of the workforce.

The employment-equity plans are the instruments of enforcing the democratic procedure in affirming people. In most cases the employment-equity plan becomes a point of attack or defence. Plans for employment equity may force the employers to support students from designated groups, and offer them jobs as one of the strategies to meet the desired targets. The targets may also be reached by advanced training and up-skilling of the workers to be ready for promotional positions.

In South Africa the process of affirmative action is meant to empower the majority people that have been oppressed by apartheid laws. The negative part of South African discrimination is the fact that it was on a racial basis, which causes affirmative action to have a racially-redressing approach. The preference approach encountered problems in United States of America also which were noted as follows:

- First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.

¹³⁴ Ss 12-27 of Employment Equity Act 55 of 1998.

- Second, preferential programmes may reinforce only common stereotypes, holding that certain groups are unable to achieve success without special protection, based on a factor having no relationship to individual worth.
- Third, there is a measure of inequity in forcing innocent persons in a respondent's position to bear the burdens of redressing grievances not of their making.¹³⁵

The first problem identified in America is the same problem to be identified in South Africa, as the Employment Equity Act does not validate the suffering of individuals. In South Africa there were homelands (Transkei, Venda, Bophuthatswana and Ciskei) and self-governing territories, such as KwaZulu and KwaNdebele. Individuals in those areas benefited from a system that was created by the apartheid regime. These groups of black people were living and voted in such areas, but now are also members of the designated group. The poor whites that were in the low-income bracket (the lower class of the previously white-dominated society) are not considered. There is no means test to check how they can be accommodated: they are just declared as non-designated on the basis of race.

The second problem was preferential programmes, utilized as reinforcement of stereotypes, meaning that certain groups may not attain success through affirmative action. The common view creates a feeling of rejection regarding the process of affirming people. The people from designated groups may feel that they are made to appear as less intelligent than others. In that regard it should be noted that the South African affirmative-action programme has a cornerstone in its foundation, that of the requirement for being judged a suitably-qualified candidate.

All of the above are human reactions and behaviours to the provision of the affirmative action law. The problems are founded on the understanding and interpretation of the law, as well as ideological differences in perceiving the various social and other developments in the society. There are also problems created by incompetent employees in offices of authority.

¹³⁵ O' Brien *Constitutional Law and Politics* (1995) 1382.

6 2 Problems in the implementation of affirmative action

The current affirmative-action format does not set a sunset clause for the achievement of substantive equality within the workplace. Consequently, the lack of such clause has affected the erosion of skilled personnel; thus further exacerbating the skills shortage in the country. Trite knowledge alludes to the fact that workers will seek better economic opportunities, and should such opportunities be denied to them, they will seek them elsewhere. Thus, the exodus of skilled personnel, especially the youth of all race groups, is an indication that South Africa is no longer a destination point for economic opportunity and advancement for its citizens.

6 2 1 Mixed marriages and mixed race

Since the abolition of the Mixed Marriages Act¹³⁶ in 1985, it may be asked, how are South Africans classified in terms of race, given that employment-equity plans are predicated on the achievement of numerical goals based on a race criterion, which in turn assesses the achievement of substantive equality at a workplace? How do South Africans, born of mixed parentage since 1985, claim a right to affirmation? Therefore the racial classification in this sense is artificial and arbitrary, and may be seen by others as a residual construct of apartheid regime that erodes the dignity of all human beings born in such circumstances.

6 2 2 Cadre deployment

The current format of implementing affirmative action empowers and advances only the political elite. The system needs a format that will target the substantive empowerment of all workers, including vulnerable workers regardless of race, gender or any other discriminatory grounds, who are in need of such empowerment and advancement in all categories and levels of employment, based on merit. The practice of cadre deployment by the ruling party is based on political and union affiliation, has had a severe negative impact on service delivery, both by Government institutions, for example the Department of Health, as well as

¹³⁶ [\(2015/08/29\)](http://www.sahistory.org.za) Mixed Marriages Act No 55 of 1949.

parastatals. The recent case of Ellen Tshabalala¹³⁷ illustrates the mode of operation of Government when appointing persons to key positions.

The above example is an indication of the appointments that are commonly called “token appointments” which may impact on production output in the workplace. Most candidates appointed to these posts are poorly skilled and lack knowledge to perform adequately in such posts, given that most are politically-led appointments. This has resulted in extremely poor service delivery in the public sector. Governmental structures have also articulated a similar viewpoint, which should form basis of a review with regard to such appointments.¹³⁸

6 2 3 Union affiliation informing recruitment policies of the State departments

Members of the independent public-sector unions are marginalized on the basis of their union affiliation; consequently skilled workers are not recognized, nor advanced into positions of management. The outcome of such a practice has resulted in expertise being lost or suppressed, which in itself creates an environment of disinterest, resentment and labour unrest. One of the negativities of such marginalization has resulted in the collapsing of service delivery in the public sector. Politically-aligned unions have openly and consistently invited members of the non-politically-aligned unions to join them if they wish to be promoted.

These unions took a step further than using employment as bait, and started selling pots. This practice has become out of control in the Department of Education.¹³⁹ The Minister for Basic Education, Angie Motshkga, established an investigation commission which was headed by Professor John Volmink. The commission discovered that not only is education in KwaZulu-Natal being run by rogue-union members, but South African Democratic Teachers Union (SADTU) members have been found to have violated the system in the provincial education department of Gauteng, North West, Eastern Cape, Mpumalanga and Limpopo.¹⁴⁰

¹³⁷ *Tshabalala V Speaker of National Assembly and Others* (18871/2014) [1014] ZAWCHC 169.

¹³⁸ Mail and Guardian (July 12, 2012).

¹³⁹ Daily Dispatch (May 19, 2015).

¹⁴⁰ <http://m.news24.com> (2015/10/12).

If people can buy posts to become principals of schools in exchange for money or live-stock, then the progress of affirming competent candidates is under threat. The principals of schools are managers and accounting officers of institutions of learning that provide formal education; it is therefore a threat to the process of developing suitably-qualified candidates. If a person can obtain such a position by unethical means, then his or her mode of operation is certainly also unethical.

6 2 4 Sexual favouritism

This is a practice that lowers the dignity of workers, and is legally and morally abhorable. It denies dedicated and competent workers opportunities of accessing training and development because they do not yield to the advances made by management. In the Eastern Cape in Bisho National Education, Health and Allied Workers' Union (NEHAWU) the following allegations were documented:

- Some senior managers demand sexual favours from interns in exchange for jobs.
- Employment practices are manipulated to employ cronies.
- Policies are implemented without consultation¹⁴¹

The above allegations trigger disputes regarding sexual harassment, as some workers may fall victims, as they do not concede to the unreasonable approaches and desires of management. In cases of sexual harassment management should note the following principles:

- Employers should create and maintain a working environment in which the dignity of employees is respected, and where victims of sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals.
- Implementing the following guidelines can assist employers in achieving these ends:
 - All employers/ management and employees have a role to play in contributing towards creating and maintaining a working environment in

¹⁴¹ Daily Dispatch (June 3, 2015).

which sexual harassment is unacceptable. To this end they are required to refrain from committing acts of sexual harassment.

- They should earnestly ensure that their standards of conduct do not cause offence, and they should discourage unacceptable behaviour on the part of others.
- Employers/management should attempt to ensure that persons, such as customers, suppliers, job applicants and others, who have dealings with business, are not subjected to sexual harassment by the employer or its employees.
- Employers/management are required to take appropriate action in accordance with the Code, when instances of sexual harassment which occur within the workplace are brought to their attention.
- Whilst the Code recognizes the primacy of collective agreements regulating the handling of sexual-harassment cases, collective agreements and policy statements should take cognizance of and be guided by the provisions of the Code.¹⁴²

From the NEHAWU allegations it may be argued that the consideration of suitably-qualified candidates has been undermined, and formal education has been made to have no value in the eyes of the young workers (interns). This kind of practice affects the dignity of the victims and also undermines the objectives of affirmative action.

Affirmative action is about uplifting the previously disadvantaged and ensures that all people are equal. Steve Biko has said the following about equality and humanity:

“We have set out on a quest for true humanity, and somewhere on the distant horizon we see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight and our brotherhood. In time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face.”¹⁴³

Affirmative action is not about discriminating or causing a reverse discrimination. It is about forming an equal society that recognises all citizens as human beings, where skin colour shall not be a point of reference. Affirmative action is a strategy to solve problems of inequality in order that South Africa may proudly show a society with a human face.

¹⁴² S5 of Notice 1367 of 1998 issued under the National Economic Development and Labour Council as attached to the Labour Relations Act 66 of 1995.

¹⁴³ Biko *I write what I like* (1978) 108

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