

**THE IMPLEMENTATION OF EMPLOYMENT EQUITY  
AND AFFIRMATIVE ACTION AS A TOOL OF  
BALANCING THE INJUSTICES OF THE PAST  
IN THE MINING INDUSTRY**

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## General introduction

Any attempt to discuss the labour policy of South Africa without touching on the historical background would be fruitless. Even though it becomes somehow monotonous to re-visit the apartheid era whenever a subject of any policy alteration comes to the fore, one is nevertheless compelled to address this, as someone who is not familiar with the history of the country may fail to understand why there was a need for a change in the labour market policy.

Prior to the inception of the Government of National Unity ("GNU") in 1994, the South Africa's labour market system was tainted by racial discrimination, job reservation and wage disparities, which clearly indicated that certain members of society received unequal treatment in the workplace.

The very first task of the GNU was to see to the eradication of all inequalities in society, including those in the workplace. This resulted in the repeal of discriminatory legislation in order to pave the way for a new dispensation of all-inclusive participation. However, the repeal of a few discriminatory laws did not fix things overnight. There was much more that needed to be done, as raised by the Congress of South African Trade Unions ("COSATU").<sup>1</sup>

Apartheid, political, economic and social regime was the purposive control and manipulation of the labour market in a manner, which privileged the white minority while disadvantaging and discriminating against the black majority. The legacy of apartheid is the extreme racial inequalities in the labour market of South Africa.

The evidence of this inequality is clearly seen in the mining industry, which is the single largest employer of mostly illiterate employees in the country the majority of which are males also. For those facts

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1 COSATU: Parliamentary Submission on the Draft White Paper on Affirmative Action Policy 2.

implementation of the Employment Equity Act 55 of 1998 ("EEA") to balance the injustices of the past will not be easy, as it must as well address the incorporation of women in the industry. It is interesting to see how all these factors are taken into consideration, as slow progress is made in the implementation of the EEA.

### **A brief picture of discrimination in the mining industry since about 1900 until the enactment of the Employment Equity Act 55 of 1998**

The history of discrimination in the mining industry is a long one. I intend not to recount it in this paper because that in it is a topic on its own. However, it is necessary to give a brief overview of such discrimination in order to be able to address the need for the implementation of the EEA and the affirmative action ("AA") measure to solve the injustices of the past in the industry.

The discovery of gold and diamonds in South Africa necessitated the rapid increase in the mining activities, which brought about an influx of labour and workers to the mines through out the country. Large numbers of indigenous workers, almost exclusively, blacks, from South African rural areas as well as from neighbouring countries such as Lesotho, Swaziland and Mozambique were recruited to the mines. The migrant workers were separated from their families and forced to live in single-sex hostels while the white workers were accommodated with their families on the mine property. The reliance on labour resources from neighbouring countries unable to provide their people with sufficient work opportunity applied throughout the mining industry's history up to the present time.

In most countries miners earned more than their manufacturer counterparts. In South Africa, the earnings of white miners has complied with this pattern, while African miners earned less than their manufacturer counterparts despite the fact that they work in a more dangerous environment as compared to their manufacturer counterparts.

This can be attributed to the continuing legacy of the migrant labour system.

The *Economic and Wage Commission* of 1925 found that white wage levels in the mining industry were such as to enable a standard of living considerably above that of average farmer the reason being to attract and coerce people to work on mines. The trade union organisation and public opinion prevented wage reduction levels during the years when mining industry's expansion was slowing down. However, the black wages, on the other hand were never subjected to similar upward pressures, owing to the lack of bargaining power and the abundant supply of such workers. This led to the reclassification of peoples' household income based on racial diversity. White males were placed on the highest scale followed by Indian males, then Coloured males. At the bottom of the scale were black males. Very low pay was commonly found in agriculture and domestic service, construction sectors and mining sectors. Black workers and women were more likely to be found in low paid employment.

The Carpenters' and Joiners' Union was the first union established in South Africa in 1881 and its main objective was to protect the interests of skilled foreign workers working on the mines. Trade unions catering largely for white workers mobilised increasingly on the bases of race.

The *Mines and Works Act* that reserved various types of work for white workers only was passed in 1911. A number of strikes, with the aim of securing the position of white workers on the mines, took place. After the 1914 general strike, the mines responded by restructuring. A number of white workers were retrenched. The ratio between skilled white workers and unskilled black workers on the mines was abolished.

This led to the strike of 1922 which resulted in the enactment of the *Industrial Conciliation Act* in 1924, the direct forefather of the *Industrial Conciliation Act* of 1956 which was later, renamed the *Labour Relations Act* of 1956. According to this Act, trade unions representing white

workers were accorded recognition, while a separate system for black workers was created. The 1950's turbulent time in the political history of South Africa led to the amendment of the 1956 *Industrial Conciliation Act* in order to ensure tougher controls over black workers. The difference in political power between whites and blacks became entrenched as the mining industry developed.

South African policies were always seen to be tainted by controversies according to the international standards. Its labour market system policy was no exception to any policies of the day, prior to 1994. After 1994, the GNU, embarked on a series of policy changes, amongst which was the enactment of the EEA which incorporated the AA programme aimed at addressing the injustices of the past in the employment environment.

The mining industry was and still is, a major employer of the labour and as a result it is an industry which historically has presented perhaps the most difficult of challenges in the labour field. My attempt in this dissertation is to address the implementation of the EEA and AA as a tool in eliminating discrimination in the mining industry. The question being whether it is possible to comply with the requirements of the Act, in line with the Constitution based on the history of the mining industry. However, it is vital that a brief accurate picture of discrimination in the mining industry is addressed before dwelling in the implementation process of this tool.

### **The pre-1998 law and attempts to deal with discrimination with special reference to mines**

Prior to the 1998 law, around 1979 the previous government took an initiative to address the problems faced by the working people. The *Wiehahn Commission*<sup>2</sup> ("the Commission") whose scope of reference was to investigate the Industrial Relations problems in the labour system of South Africa was formed. Its mandate was extended to cover the

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2 *Wiehahn Commission of Inquiry.*

industrial relations problems in the mining industry, which is relevant to this paper.

According to the Commission's finding, the following were issues of concern:

The monopolistic method of black labour recruitment practised by the industry precluded competition for labour in the industry. Black workers could accept or reject the low entry wages that resulted, without however any means of bargaining on the issue. Once a black worker had accepted employment in the industry, his freedom to withdraw his services until employers improve wages or working conditions was totally removed by the long-standing *Master and Servants Act*. Such Act made any such breach of a civil employment contract by a black worker a criminal offence.

The industry organised itself on the basis of a small number of highly-paid skilled workers, predominantly white, in administrative, supervisory and other skilled occupation, and a large number of blacks performing unskilled and semi-skilled work whose rates of pay, while much higher than in agriculture and in most other industries, were very low when compared to their white counterparts at the mining industry.

The trade unions and the intervention of successive Governments in defence of the white workers applied craft unionism to prevent undermining of the position of the white worker by the use of black or Coloured workers in any skilled job. Since all skilled workers in the industry were white, the unions were automatically white as well, the whites only membership were entrenched through their constitution, mainly to protect themselves against the efforts of employers to introduce exceedingly low-paid black workers whenever the opportunity presented itself. This craft barrier in those early mining unions swiftly became also a racial barrier, which has remained virtually intact ever since.

The *Mines and Works Act* was amended in 1926 to enforce in law what had been promulgated in regulations and established by convention, that is, employment in certain skilled or responsible positions in underground work in mining should be permitted only to persons in possession of Government-controlled certificates and that such certificates should be issued to white, Coloured and Malay persons only. This was the beginning of the job reservation within the mining industry.

In 1936 South Africa ratified the International Labour Organisation's ("ILO") Convention 45 of 1935, which prohibited the employment of women underground in mines. This principle was incorporated in section 11 of the *Mine and Works Act*, of 1956, which provided that no female shall work or be caused or permitted to work underground in any mine.

The Chamber of Mines in 1937 reached a closed-shop agreement with the existing trade union leadership, which gave the trade unions final and effective control over all the skilled workers in the gold mining industry. A similar agreement in respect of coal mining followed in 1941. These agreements excluded black workers and were expressly applying to whites only. The job reservation was part of the bargaining power that the existing unions had with the Chamber of Mines, which made it difficult for the non members of these unions to be catered for in these agreements. As a result of these inequalities within the South African labour market system, it has historically been viewed as the most unjust system in the world.

The *Wiehahn Commission of Inquiry* as mentioned above was established in 1979 after the 1973 Durban strike and the Soweto uprising of 1976 to investigate the labour situation in South Africa. The most consequential recommendation made by the Commission was the extension of freedom of association to cover all persons, irrespective of race or sex.

The *Wiehahn Commission* gave recommendations on the legal recognition of black trade unions and migrant workers; abolition of statutory job reservation; retention of the close shop bargaining system; the creation of the National Manpower Commission and the introduction of an Industrial Court to resolve industrial litigation. In essence what the Commission recommended was to scrap all laws that prevented the advancement of the other population groups such as blacks.

These recommendations were interpreted differently by different stakeholders. The black unions interpreted the recommendations as a way of gaining control over their activities by the government. The South African Congress of Trade Unions ("SACTU")<sup>3</sup> understood the purpose of encouraging the legal recognition of black trade unions by registering them as recommended by the Commission, as a simple strategy by the government to be able to control these unions. And to bring them under the dictates of the repressive industrial relations system as amended in 1956. By incorporating the black unions, stated SACTU, the government hoped to eliminate the black trade unions' independence and reduce their militancy.

In June 1979 SACTU condemned the *Wiehahn Commission* at the ILO Conference by saying that the recommendation to have the black trade unions to be registered was a sham designed to weaken and smash the strength, unity and independence of these unions. As the state gave the already white registered unions the right to veto application by black unions to join Industrial Councils, which was another sinister method of preventing the black trade unions from gaining strength in relation to the employers or the white labour aristocracy.

The recommendation to abolish the statutory job reservation was said to have a great propaganda appeal by SACTU because job reservations were founded in agreements between employers and registered unions.

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3 Luckhardt and Wall *Organize or Starve - The history of the South African Congress of Trade Union* [first published by Lawrence and Wishart, London 1980].

It is believed that such unions would never relinquish the status quo for the protection of their members' jobs.

I beg to differ with the SACTU on its interpretation of the Commission's recommendations particularly to those recommendations that addressed the discrimination in the mining industry. In paragraph 4.55.1 of Part 5, the Commission stated as follows: "*the Commission wishes to re-emphasise that the removal of industrial work reservation as opposed to statutory work reservation- is in the first instance the responsibility of the parties involved*". The Commission went on to state that there is no reason why Blacks cannot be admitted to more responsible positions without in any way jeopardising safety. The Commission further recommended that there is a need for a complete removal of discrimination in the industry and all workers should acquire the same level of proficiency with respect to training and experience before being appointed to positions of responsibility. There must be equal remuneration for work of equal value and adequate protection need to be provided to all groups against racial victimisation.

In 1981 the *Labour Relations Act Bill* which had certain clauses which did not favour the unions had been extended to black workers. In other words, the trade unions representing blacks were now able to make use of the machinery of the *Labour Relations Act of 1956*.

The black trade union movements were suffering from the effect of the repressive measures taken against them under the internal *Security Act* and the *Public Safety Act*, and from the tense atmosphere which prevailed following the 1987 mineworkers' strike. And this resulted in a *Fact Finding Commission* formed to establish the basis of the COSATU's complaint to the ILO<sup>4</sup>. The new dispensation has resulted in the country emerging from a position of relative isolation to a position where it now has to compete in the global market place.

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4 'Prelude to Change Industrial Relations Reform in South Africa' (1992) 13 *ILJ* 739 [Report of the Fact Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa (International Labour Office Geneva 1992)].

## **An exploration of the legacy of discrimination on the mines- the factual situation which the EEA seeks to address**

The discrimination on the mines has always been more than the simple racial discrimination that an ordinary South African would have been observant of. Discrimination took different facets in the industry. There was discrimination based on the housing scheme, where white employees were afforded accommodation on the mine property with their families while the black employees were forced to stay in single sex hostels very close to the mine but far away from their families and friends.

Another form of discrimination was on the income classification. According to a research conducted in 1984, the household income stood as follows: 10% of regular, formal sector employees earned less than R250 per month and 38% of South Africa's approximately 7.4 million regular employees earned less than the household Minimum Living Level ("MLL"), which averaged at R 970 per month.

This is no surprise as the mining industry was the main culprit in this field because the white employees earned a lot more than the black employees, even if the black employees had more experience and were doing more work than their white counterparts.

A notable feature of remuneration in South Africa is the marked inequality in earnings between those at the top and those at the bottom of particular enterprises. In the Public Service the most senior civil servant still earns 20 times the salary of the lowest level employee. In the private sector such as the mining industry, a typical mine manager earns more than 25 times than the hard working lowest labourer. This inequality can be attributed to the structural apartheid-based inequalities of access to education, training, and jobs and the related shortages of skilled professional and managerial personnel and an overabundance of unskilled labour.

Fortunately we now have what is termed the basic minimum wage, which differs from sector to sector and from area to area, which is far better than what the study found in 1984. It must be born in mind, however that twelve years down the line; the cost of everything has gone up, which simply means the life situation has not changed much.

The Reconstruction and Development Programme ("RDP") provided that there should be living wage differentials. What figure constitutes a "living wage", however, is not specified.

The purpose of the EEA is to provide for employment equity and matters incidental thereto. In the preamble to the EEA, it is clearly stated that there are disparities in employment, occupation and income within the national labour market, which cannot be redressed simply by repealing discriminatory laws. The EEA needs to be implemented in all spheres, be it government departments or private sectors, to promote the constitutional right of equality and eliminate unfair discrimination in employment. The workforce must be representative of all people while promoting economic development and efficiency and the Act must give effect to the obligations of the Republic as a member of the ILO. What is interesting enough is that, by tacking the employment issue in the mining industry, most of the injustices of the past will be addressed as well as all the other discriminatory ground based on the condition of an employment contract.

### **The provisions of the Constitution of the Republic of South Africa, Act 108 of 1996**

The preamble of our Constitution states as follows:

We, the people of South Africa, recognise the injustices of our past, honour those who have worked to build and develop our country, and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

Section 9(1) and (2) of the Constitution states that:

Everyone is equal before the law and has the right to equal protection and benefits of the law. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

The Constitution, being the corner stone of our democracy, has as its imperative, a duty to solidify the values enshrined in the formulation of section 9. All statutes are subjected to the Constitution for validity. The enactment of the *Labour Relations Act* 66 of 1995 (LRA), the *Basic Conditions of Employment Act* 75 of 1997, the EEA and the AA provisions, are some of the measures which accelerate one of the imperatives of the Constitution, which is to bring about the equality envisaged by section 9, in the workplace.

The constitutional imperatives require that certain conditions must be met, not to render discrimination permissible, but because those conditions are a fair means to achieve the end of a substantive equality. One such requirement is that such means selected to achieve the stated purpose of an AA programme must be capable of achieving that purpose. In other words, there must be a realistic approach towards a realistic goal.

The measures adopted should be both adequate to protect and advance the previously disadvantaged employees from the past forms of discrimination to the same positions of those employees who were previously advantaged. An approach of this nature "*does not regard AA as an exception to or an exemption from the right to equality, but as a means towards the achievement of that goal*" as discussed by Van Niekerk.<sup>5</sup> The provisions of the Constitution form the basis of the application of addressing the injustices of the past in the employment sphere. The mining industry is no exception to the rest of the working sphere, thus the application of these provisions level the ground for the application of the EEA and the AA measures in the industry so unique in its historic past.

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5 Contemporary Labour Law: contribution by Van Niekerk A "*Affirmative action-three cases, two views*", Vol. 7 No. 1 August 1997

## **The provisions of the EEA and case law**

Employment equity is defined as: “a mechanism used to achieve equity in the workplace by promoting equal opportunity and fair treatment through the elimination of unfair discrimination. Through implementation of affirmative action measures which will redress the disadvantages in employment, experienced by those people in designated group as provided for in section 15 of the Act, in order to ensure their equitable representation in all occupational categories and levels in the workplace”.

The *Convention on Equal Remuneration*, No. 100 of 1951 and the *Convention concerning Discrimination in Respect of Employment and Occupation*, No. 111 of 1958 are the two most important conventions which assisted us in the formulation of our own anti-discriminatory legislation. Both of these Conventions have been ratified by South Africa and as such became part of our law as provided by section 231 of the Constitution. Section 231(4) specifically provides that “*any international agreement becomes law in the Republic when it is enacted into law by national legislation, but self-executing provision of the agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*”. We are therefore required to refer to such instruments in the interpretation of the Act as provided in section 3(d) of the EEA.

Section 9(2) of the Constitution, and *Convention* No. 111 of the ILO are the bases upon which the EEA is framed. The Convention recommends that national governments should introduce positive measures to address and prevent discriminatory practices.

The underlying principle behind employment equity is to foster the active involvement of people from the designated group in the operational, professional and executive decision-making processes in their employment entities. Code 300 of the Code of Good Practice<sup>6</sup> outlines

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<sup>6</sup> Black Economic Empowerment Codes of Good Practice.

the various criteria to be applied in determining the level of employment equity of the enterprise.

The EEA in a nutshell presents the statutory foundation of the right to equity in employment. The Constitutional Court delivered what appears to be its most comprehensive statement to date on the right to equality and affirmative action measures as an element of that right. In July 2004 the *Minister of Finance & others v Van Heerden* 1997 (4) SA 1 (CC) case played a significant role in determining future developments in discrimination law in the employment context, particularly in relation to the application of affirmative action measures as discussed by Van Niekerk.<sup>7</sup>

It goes without saying that the aim of the EEA is to promote equal opportunity and fair treatment through the elimination of unfair discrimination as well as implementation of AA measures to advance the historically disadvantaged groups<sup>8</sup> in companies, which are classified as designated employers.<sup>9</sup>

Sections 5 and 6 of the EEA are the principle source of the prohibition against unfair discrimination in employment. Section 5 provides as follows:

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

In section 6 the grounds of prohibited discrimination are set out. The most interesting part of section 6 is subsection (3), which provides as follows:

Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

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7 Supra page 15

8 According to section 1 of the Employment Equity Act, designated groups include, Blacks (Africans, Indians and Coloureds), women and disabled people.

9 Those companies employing 50 or more employees and those employers with a threshold turnover specified in Schedule 4 of the Employment Equity Act.

This part becomes very important in determining the vicarious liability of employers for acts of harassment and/or discrimination committed by their employees on their fellow employees, as is discussed below in this paper.

An “employee” for the purpose of section 6 includes an applicant for employment. This definition extends the application of equality rights to access to employment.

The purpose of the EEA is to correct the demographic imbalances of the nation’s workforce by compelling employers to remove barriers and to advance people from designated groups in all categories of employment by employing AA measures.

The kick off point of the EEA is to address the identification of designated groups. According to section 1, the designated groups earmarked for AA includes - black people<sup>10</sup>, women<sup>11</sup> and disabled people.

As mentioned before, ‘corrective measures’ in the context of AA is not a new concept in South African politics and legislation, but one, which the National Party used to some effect in 1948. Such corrective measures in South Africa will have to deliver tangible benefits for the designated group<sup>12</sup>. The mining industry can follow the same steps to have the injustices of the past addressed in this case they are in a better position of working within the framework of the EEA.

The court in *Minister of Finance & others v Van Heerden*<sup>13</sup> delivered four judgments which most possibly represent a comprehensive approach on the nature of the constitutional right to equality. In this judgment the fourth concurred with the other three.

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10 “Black people” is a generic term, which means Africans, Coloureds and Indians.

11 Currently, black men are given preference with regard to race, white women are preferred with regard to gender, while black women are largely falling through the cracks and are not benefiting from equity laws and policies.

12 Terreblanche and Du Plessis 1998 *Insig* 32-33.

13 1997 4 SA 1 (CC).

The claimant was a member of a closed pension fund, which came into operation on 5 January 1994 and comprised of members who were members of Parliament and political office bearer prior to 1994. The contribution to the fund was fully financed by public funds. A new pension fund, which required that each member contribute a percentage of its pensionable annual income, was separately brought into being.

In terms of the rules of the new fund, three categories of members were established. Those members who were members of the closed pension fund got a lower rate of contribution from their employer until 1 May 1999 when the differentiation between the three categories fell away and the employer contribution became standard for all.

Mr Van Heerden alleged that over the past five-year period during which a differentiation in employer's contribution to the fund existed, he had been unfairly discriminated against in comparison to other Parliamentarians.

The High Court held that the challenged provisions were discriminatory in nature as the differentiation was unfair first because it was arbitrary and secondly because it was based on intersecting grounds of race and political affiliation. The Court noted that the Respondents had failed to discharge the onus to establish that the measure in dispute were justified, *inter alia*, as they did not bear a rational connection to the end that they purported to achieve.

The submission to the Constitutional Court on appeal was that the High Court had misconceived the nature of the right to equality as established by the Constitution, and in particular, that it had resorted to a formal rather than a substantive nature of equality. The Constitutional Court noted that the "achievement of equality" goes to the bedrock of our constitutional architecture and that the conception of equality established by the Constitution is the one that goes beyond mere formal equity and non-discrimination in the sense of identical treatment, whatever the starting point or impact.

In analysing section 9 of the Constitution, the Court said the following:

However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.

In other words, there is a constitutional duty upon us to redress the injustices of the past and the EEA in a way, does just that. Section 9(2) of the Constitution gives a determination of a designated employer and group, and recognises the fact that restitutionary measures may be taken to promote the achievement of equality. Section 9(3) of the Constitution, on the other hand, clearly states that the employer may not discriminate either directly or indirectly against any employee. Restitutionary measures based on the specified grounds listed in this section cannot be presumed to be unfairly discriminatory unless the unfairness of the discrimination is proved. Where restitutionary measures constitute discrimination on a prohibited ground, it becomes necessary to apply the *Harksen v Lane NO* test<sup>14</sup> to determine whether such discrimination is unfair.

The three judges in the *Van Heerden* case approached the matter from different angles as follows:

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14 1998 1 SA 300 (CC). [Three basic enquiries to determine whether discrimination is unfair: (1) whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose-if no such connection, there is a violation of section 9(1); (2) if it bears such a connection, the second question is whether the differentiation amounts to unfair discrimination- if does not amount to unfair discrimination the question ends there and there is no violation of section 9(3) and if the discrimination is found to be unfair, then the third enquiry is triggered, which, whether the differentiation can be justified under the limitation provision, this will depend on whether the measure complained of is contained in a law of a general nature].

Mokgoro J approached it from section 9(3)'s point of departure. According to her the pension fund rule under attack fell short of the requirements of section 9(2) because it did not target a group previously disadvantaged by unfair discrimination. She found that when tested against section 9(3), the measure clearly discriminated between those members who served in Parliament prior to those who did not before 1994. However she found such discrimination to be fair since it did not unduly impact on the interest of the respondents, the majority of whom remained better off than the beneficiaries of the measure.

Ncobo J applied the *Harksen v Lane NO* test by determining whether impugned rule made a differentiation that bore rational connection to a legitimate government purpose, whether the differentiation amounted to unfair discrimination and whether such impugned rule could be justified under the limitation provision? He found that though the measure had a disproportionate impact on the respondent and other members of Parliament prior to 1994, the rule indirectly discriminated against the respondent, however that did not mean that the discrimination was unfair. He concluded by saying there was no basis to conclude that the impugned rules constituted unfair discrimination.

Sachs J delivered a judgment that reconciled all the others, his approach was to treat section 9(2) and (3) as "overlapping rather than discreet". The Court held that there was no question of vulnerability or any suggestion that the Respondent and his class of Parliamentarians had been marginalised or in any way unfairly excluded or discriminated against or that the scheme was invasive of their dignity. The appeal was upheld and the High Court order declaring relevant provisions of the rules of the pension fund to be unconstitutional and invalid, was set aside.

In a nutshell, designated employers are required to take five steps towards employment equity which are: prepare a profile of their workforce, review their employment policies and practices, prepare and implement an employment equity plan, lodge a summary of the plan with

the Department of Labour and report to the Department on the progress in implementing the plan.

In addition section 27 which is entitled 'income differentials', obliges designated employers to submit a report on the remuneration and benefits received in each occupational category and level of the workforce. If the income differentials are disproportionate, the employer must take steps to progressively reduce such differentials.

### **The concept of affirmative action and its objectives**

Section 15 of the EEA introduces the process of AA measures, which will assist in bringing about the implementation of employment equity. These are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. In other words in our case, the mine management must ensure that in implementing the AA measures they include identification of the prospective talented candidates and elimination of employment barriers, including unfair discrimination, which adversely affect people from designated groups.

Casey Business Solutions<sup>15</sup> defines AA as:

... a set of measures designed to ensure that persons from disadvantaged groups enjoy equal opportunities and are equitably represented in various positions or levels of employment within the organisation.

The African National Congress ("ANC") document on the AA policy defines it by saying:

Affirmative action represents a conscious effort to correct the racial and gender imbalances in South African society in a principled and effective way.

There is no way someone would understand the AA programme without prior knowledge of our historical background and without comparing

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15 Casey business Solutions is part of Casey Investment Holdings – copyright reserved 2001 – found at <http://www.casey.co.za/rdp.htm> an article on Casey's RDP & Social Contribution.

other systematic implementations of such programmes in other countries. Whether such countries have failed or succeeded in the implementation of similar programmes is immaterial.

The most interesting part of our history is that such a programme is not new to our country. Just after the Anglo-Boer war the same principles were applied to uplift the plight of the disempowered Afrikaners from the English economic dominance of the 1940's.

It is only in the current situation that the programme is structured in a way that is codified.

In 1991 the ANC held a Conference on AA, where it stated that the object of affirmative action *"is to eliminate the harmful effects of apartheid based on race and gender by creating equal employment opportunities to redress inequality, rooted in the principle of justice and equality."*<sup>16</sup> This is in line with the purpose of the EEA and the Constitution.

The former President of the Republic of South Africa, Nelson Mandela, once said:

The primary aim of affirmative action must be to redress the imbalances created by apartheid. We are not asking for handouts for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future.<sup>17</sup>

This statement sets out the purpose of AA as defined above. It must be born in mind that it is not envisaged that to:

... overcome the legacy of past discrimination, it is intended to ensure the advancement of unqualified persons. On the contrary, it is to ensure that those who have been denied access to qualifications in the past can now become qualified, and that those who have been qualified all along but have been overlooked because of past discrimination, are at last given their due.<sup>18</sup>

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16 Koekemoer [Found on the Internet] [http://general.rau.ac.za/aambeeld/june1998/affirmative\\_action.html](http://general.rau.ac.za/aambeeld/june1998/affirmative_action.html) 27/06/2005.

17 President Nelson Mandela, opening statement to the ANC Conference on Affirmative Action, Port Elizabeth, October 1991.

18 *Ibid.*

The striking truth of the last part of the above speech is eminent in the mining industry. We had in the industry those people who have been denied access to qualification as a result of the job reservation legislation as discussed above. We also had people in the industry who were "qualified" in the sense that they were used to train the newly appointed white workers who in turn became their superiors as it is discussed below on this paper. These people fit the profile perfectly, as they are *"those who have been denied access to qualifications in the past" and "those who have been qualified all along but have been overlooked because of past discrimination"*, as stated above.

The objectives of AA are to address the injustices of the past by affirming the majority who were trodden down by the laws of the apartheid. It simply means that the method used in the past, for example, when appointing a senior manager should be done away with. Naturally an employer would seek someone with the right blend of experience, expertise and seniority to fill a managerial position, but this could unfairly discriminate against the previously disadvantaged group, as they would not have the necessary experience or expertise due to past injustices.

### **Comparative Affirmative Action**

The need for AA in South Africa is similar to that in the United States of America ("USA"). These countries are comparable in the sense that the disparities in treatment based on race and divisions between race groups had been government-imposed. However it was easier to implement AA in the USA as compared to South Africa. In the USA, black people are in the minority and the USA is a rich country with a strong economy while in South Africa, the United Nation statistics indicates that 95 out every 100 poor South Africans are black.<sup>19</sup>

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19 Keeton *Sowetan* 25 May 1998.

In *Action Travail des Femmes v Canadian National Railway*,<sup>20</sup> a Canadian case, the Court held that

An employment equity programme...is designed to break a continuing cycle of systemic discrimination. An employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forbears.

From this it can be deduced that employment equity must be taken as a corrective measure rather than a reverse apartheid or punishment and AA provides such measures for an implementation of the programme.

It is envisaged that AA can be used as an effective tool to bring about such transformation, even though most of us might see AA as a policy which does not incorporate total transformation as it is not a policy of empowerment.

For AA to be regarded as a policy of total transformation it is submitted that it must be supported by policy proposals which tackle unequal access to financial assistance, assets acquisition and the right to own land. Affirmative action must be a central drive for change and equity in post apartheid-South Africa and the EEA must be seen to police corrective measures taken by AA.

### **The application of the EEA to the mining industry**

EEA seeks to co-ordinate the advancement of a previously disadvantaged group. As mentioned above the *Job Reservation Act*<sup>21</sup> ensured that specific jobs in the mining industry were legally reserved for a certain group of the population.

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20 Co 40 DDR (4TH) 193.

21 The 1956 *Industrial Conciliation Act* introduced statutory job reservation, which allowed the Minister of Labour to reserve any job for whites. However, closed shop agreements had an even greater effect on the employment prospects of African workers than job reservation. These agreements reserved "skill jobs" for registered union members, and because African workers were not included in the definition of an employee, they could not belong to registered unions, they were automatically barred from these jobs. See Steven Friedman "*Building Tomorrow Today*" (1987) 34.

An example of such law was a regulation, which stated that only a scheduled person could be a holder of the Blasting Certificate, which enabled a person to perform the duties of a *ganger*.<sup>22</sup> This included the handling of explosives. According to section 1 of the *Mine and Works Act 55 of 1956*<sup>23</sup> a scheduled person was defined as “a person of a *European descendant*”. The *Wiehanh Commission* recommended that the term “schedule person” should be completely removed and be replaced by the concept of “competent person” without distinction on the basis of race in the Act and the Regulation. Hence in 1988 the term “scheduled person” with reference to race was repealed in Chapter 1 of the *Mine Health and Safety Act 29 of 1996* and replaced by the term “competent person”.

What is evident from the *Wiehanh Commission's* report as well as what was still in existence before the repeal of the 1956 Act was that contravention of the provisions of that Act, allowed non-schedule persons to undertake “schedule work” already in 1964. In essence it means that since 1964 we already had people who were doing those jobs which were reserved for “schedule persons” but could not be regarded as such and they were not compensated accordingly. The application of EEA in the industry is ensure that such past injustices are addressed by ensuring that such people are given what is rightfully due to them.

Using the mining sector as our focus, in the past, where a young white male person of 18 years who probably dropped out at standard six at school, came to the mines to start working, from the start, he would get trained as a miner and obtain a blasting certificate which would make him a “scheduled person”, as mentioned above.

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22 The term was used when referring to a person responsible for a team of workmen collectively called a gang.

23 This Act was repealed by the *Minerals Act 50 of 1991*.

Such a youngster would be given to a group of black experienced, but uneducated workers, who would do everything for him, that is, show him what is done and how it is done. While in this learning phase, he would already be their "boss" and will earn possibly five times their wages, even though he may know absolutely nothing, only by virtue of being a blasting certificate holder and being a "scheduled person".

This same principle could be used to advance the previously disadvantaged people. AA without training and development would be a disaster and would lead to frustration and the lowering of standards.

It is very interesting to observe that the Commission found that there were already Black team-leaders who were adjustable to taking more responsible tasks and as a result their capabilities were not put to full use. The Commission recorded that an appropriate adjustment to the legislation to enable these abilities on the part of all workmen to be fully utilised was a clear necessity.

Chapter II of the EEA prohibits all unfair discrimination in employment.

According to the requirements of the EEA, there is a prerogative on the employer to apply justified discrimination in his employment equity implementation program as found in subsection (2). This kind of discrimination is termed a "fair discrimination" and it can come about under the following grounds:

*Inherent requirements of the job* - for an example, an employer cannot be compelled to employ a blind person (disabled according to definition of designated group) as a pilot because the job entails a guidance by the instruments and such a person should be able to read the map.

As to the inherent requirements of the job, in the *Woolworths case*,<sup>24</sup> Whitehead claimed that she was unfairly dismissed after having not been appointed as the Human Resources: Information and Technology Generalist. She approached the Court and claim that she was not given

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24 *Woolworth (Pty) Ltd v Beverly Whitehead* (2000) 9 BLLR (LAC).

the position on the grounds of her pregnancy. As such the conduct of the Applicant (Woolworths) constituted discrimination on the ground of sex, and therefore an unfair labour practise as defined in Item 2(1)(a) of Schedule 7 of the LRA 1995.

The court held:

... that there is nothing arbitrary in the employer taking into account the applicant's pregnancy in deciding whether or not to offer her a contract of permanent employment. The employer testified that, given the nature of the position and in particular circumstances prevailing, it needed continuity in the position for an uninterrupted period of time of at least 12 months.

The court further held that:

Employers must base their communal decision on reasonable probabilities. Risk taking is intrinsic to enterprise. Risk is discounted, *inter alia*, by an evaluation of probabilities.

Therefore it is submitted that the notion that the mining industry is unique and as a result the inherent requirement of the industry as a whole makes it impossible for applying the EEA is unfounded. Most of those who need to be empowered might not have the formal education needed but as it is indicated above have the necessary experience to do the job to such an extent that they were entrusted with the responsibility of training new recruited "schedule persons".

*Fair discrimination based on Affirmative Action* - where the applicants are from a variety of the workforce, it is justified to give preference to those candidates or applicants who come from the designated groups namely, blacks, women and disabled people. However, such discrimination must be in line with the limitation clause contained in section 36 of the Constitution.

The essence of fair discrimination as envisaged by the EEA, is derived from the knowledge of our past and the focus on our future as was held as follows in the *Van Heerden case (supra)*:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of

new patterns of disadvantage. It is therefore incumbent for the Courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history and nature and purpose of the discrimination practise and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.

For this reason, fair discrimination should not be seen as the reverse apartheid, as we have to start some where in order to achieve our goal.

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

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

The concept of "fair discrimination" as it stands, poses a threat to the generation of prospective candidates/applicants who do not fall under the designated group. Thus its validity was challenged in *George v Liberty Life*<sup>25</sup> case, where the court was required to determine the so-called 'sunset clause' or the cut off date of the AA. In that case, the Industrial Court noted that by its nature that AA is a temporary measure and that once its purpose of redressing past imbalances had been achieved, it would no longer provide a defence to an equality claim.

It is submitted that it is not possible for anyone to determine when it will be possible to say that time is up for AA. It cannot be said to be long enough, because in order to address the disparities brought about by the policies of apartheid over the decades, it will be unjust to try to solve that with a few laws overnight. Unlike in the United States where AA was "never intended as a permanent tool", in South Africa AA it is based on the substantive concept of equality. Our Constitution envisage total equality of the entire citizens, thus ours is an ongoing process as compared to that of the United States.

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25 *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC).

However as stated above even in the application of AA measure in the process of exercising the 'fair discrimination' principle, the employer is not required to discriminate against its current employees or prospective employees who may not be of the designated group in the name of fair discrimination.

The ILO Convention No. 111 clearly gives an indication of the Canadian Charter on fair discrimination. Section 15 of the Canadian Charter, Canada's principal constitutional document dealing with individual rights and freedoms, addresses gender equality and affirmative action, and it states:

Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>26</sup>

Section 15(2) states:

Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It goes without saying that even the Canadian Charter emphasised the importance of a programme or activity, in our case the AA, which has as its primary objective the amelioration of conditions of those who have been previously disadvantaged by one reason or the other.

Based on the above it is submitted that taking AA measures and exercising the so called 'fair discrimination' principle some social ills of the past can be rectified. However, apart from the traditional problems faced by the black workers in this case males at the industry at that time, there was another thorny issue as provided in section 11 of the *Mines and Works Act of 1956*, which restricted the employment of females on underground work in mines of all kinds and Convention No. 89 concerning night work of women employed in the industry. The *Mine Health and Safety Act*, 29 of 1996 does not reflect these two

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<sup>26</sup> Trotten 2003 *Berkely Journal of International Law* [Vol. 21:27] 45; Canada *Constitution Act*, 1982 part I (Canadian Charter of Rights and Freedoms).

Conventions which are clearly inconsistent with the right to equality as provided in section 9 of the Constitution, which precludes unfair gender discrimination.

With the way paved for incorporation of women in the industry by the removal of the previous restriction as was provided for as mentioned above, there remains an element of doubt in applying the EEA to those in charge in the mining industry. In applying the EEA in the industry one must take into cognisance the other forms of discrimination that women may be faced with besides the racial discrimination faced by their black male counterparts.

The LRA clearly defines what constitutes an unfair discrimination. One of such definitions is unfair discrimination based on pregnancy, which is applicable only to women.

Recent case law gives a clearer picture of unfair discrimination based on pregnancy.

In *Mnguni v Gumbi*<sup>27</sup> case, a receptionist in a medical practice claimed unfair dismissal after her employment was terminated in circumstances where she was eight months pregnant and had been told to go home after complaining that she was tired. The Court found that on balance of probabilities, that the conduct of the Respondent constituted a constructive dismissal. The Court observed that the LRA prohibited employers from dismissing employees for any reason related to pregnancy. The Court held that the employer's conduct was considered to be "*outrageous*" and that such conduct "*no longer has a place in this country*". Section 187 of the LRA clearly provides that pregnancy or reasons related to pregnancy are invalid and therefore automatically render termination of employment on this ground to be unfair.

Pregnancy is not a form of medical incapacity. The reason that the Act specifically includes pregnancy and grounds related to pregnancy as

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27 [2004] 6 BLLR 558 (LC).

automatic unfair grounds for dismissal is precisely to avoid this debate. The LRA and the EEA extend this protection to women.

In *Lukie v Rural Alliance CC t/a Rural Development Specialist*,<sup>28</sup> the Applicant was employed as a receptionist/accounts clerk. When she discovered that she was pregnant, she advised her supervisor, who told her to “have the baby and not return”. The court found that she had established, on a balance of probabilities, that her dismissal was related to her pregnancy. In awarding the Applicant the equivalent of eighty weeks remuneration, the Court stated:

Her services were terminated because she was pregnant. I have some doubts whether her services would have been terminated had she not fallen pregnant. The legislature had deemed it necessary to double the compensation that a woman would be entitled to if her dismissal is related to her pregnancy. It is totally unacceptable that despite our Constitution and the advancement of women’s rights in the workplace that some employers still dismiss women for having fallen pregnant. Women are still being discriminated against in the workplace.

The application of the EEA in the industry should take into consideration such added obligations as would apply to the women only. All stakeholders involved such as the mining authorities and the organised forums such as the unions and gender equality groups can do this through a well-developed process. Obviously, despite the decision in *Whitehead* above where the inherent requirements of the job were taken into consideration as a fair discriminatory factor, women employed on the mines in underground work cannot be dismissed when they fall pregnant, as the raising of a fair discriminatory clause would not apply.

### **Current situation in the mining industry**

Since the enactment of the EEA and the voluntary participation of companies in implementing it, not much can be said about the actual progress in the mining industries. As mentioned above, mining is the single large employer of the semi-skilled to unskilled labour force in the country. The requirement of the EEA to have the demographic

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28 [2004] 8 BLLR 769 (LC).

representation of people in this industry's hierarchical management structure is a very interesting subject.

The current position in most mining companies is shocking. Almost six years since the enactment of the EEA, not much progress can be seen. The policies have been established, senior managers to oversee the process have been appointed, and plans required by the EEA have been drawn and sent to the Department of Labour as required.

Certain numerical targets have been set with estimated completion dates, some panel interviews have been held to identify people from designated groups, development programmes have been drawn for the identified candidates, but yet still all are not even close to their numerical targets. The prospects of reaching these numerical targets remain a dream. The cause of this can be attributed to the fact that, once candidates are identified and given some training to enable them to get exposed to the respective positions within the organisation, someone else grabs them. Most of the people who were prospective AA candidates in the mining industry have been offered better jobs within other sectors; others left for the government positions in the Department of Mineral and Energy Affairs. However there is hope that ultimately, the numbers will come by as our Constitution is in support of the substantive equality.

In *President of the Republic of South Africa v Hugo*,<sup>29</sup> the Constitutional Court held the following:

This substantive conception of equality is endorsed by the Constitution itself. Section 9(2) of the Constitution provides as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination may be taken."

According to this section, the aim should be to advance and protect those disadvantaged by unfair discrimination. Without implementing the said steps, those who are targeted to be uplifted will forever stay in the

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29 1997 4 SA 1 (CC).

same position as they were and the state of true equality will never be reached.

The Constitutional Court has affirmed the substantive concept discussed in the *Hugo* case in the most recent case of *Minister of Finance & Others v Van Heerden*.<sup>30</sup> The majority judgment in paragraph 23 said the following:

[23] For good reasons, the achievement of the equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for a long time to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone, to heal the divisions of the past and to establish a caring and a just society. In explicit terms the Constitution commits our society to improve the quality of life of all citizens and free the potential of each person.

In relation to the steps taken by the mining companies, there is still a lack of a convincing implementation of the EEA.

Owing to the fact that the majority of mining employees are illiterate, to alleviate this problem many of them are enrolled in the Adult Basic Education and Training ("ABET") programmes which equip them with basic numeric and language skills. From this category, those who perform better are further put into a programme termed the "Mining Introductory Certificate" ("MIC"). This then enables them to write the government examinations and on being successful in those examinations they are awarded Blasting Certificates and thus enable them to be appointed as 'gangers', the jobs previously reserved for the 'scheduled persons' as mentioned above.

### **The culture of the mining industry**

Historically mining is known to be difficult and laborious task that demands physical power. In the miner's language, it is said, "*mining is a man's game*". The industry has always been so structured that even the language used had a commanding tone, a relationship of master and

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30 *Ibid.*

servant and there has never been any point of one behaving like a gentleman.

In the past, there was a practice in some mines where, when a worker was found not to have completed the task of the day, such a person would find himself spending a night, if he worked day shift, or a day if he worked night shift, in jail. As according to the *Master and Servant Act* such a breach of a civil employment contract was considered a criminal offence. The mine security would tell him that, by not completing the job, he has cost the mine money as he had stolen the wages of the day. For example, because of the task that he did not complete, such as not cleaning a *stope*<sup>31</sup> face, that *stope* face cannot be drilled and blasted. Thus, the people working there for the day will be entitled to be paid a day's wages while the place is not blasted. In such a case, the mine lost revenue, as it could not get the *stope* face blasted.

Based on these facts, it becomes a mammoth task to incorporate the women folk in the mining industries. As much as most industries are prepared to comply with the law and stop any form of discrimination, especially on the basis of sex, in the workplace, it goes without saying that some of these industries were really never meant for women, especially the mining industry.

A conducive environment that is inclusive of all employees, with their similarities and their differences, is critical to the progress towards employment equity.

Most senior managers support the process of the implementation of the EEA and the employment of the AA measures, but it is sad to say that the line managers, who must see the process through, do not share the same sentiments. Line managers are the ones most influential in creating inclusive organisational cultures that support employee diversity

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31 An excavation underground from where the ore body is exposed and extracted by being drilled charged up with explosives and blasted to break it out of the rock.

created by strategies to achieve employment equity and in promoting staff retention.

As such line managers seeing that they play a critical part in the implementation of the Employment Equity, it is advocated, that they should be assessed for ability to create inclusive organisational cultures and any lack in this function should be addressed by the provision of suitable training.

### **Women in the mining industry**

The Beijing Platform for Action and *Convention on Elimination of all forms of Discrimination Against Women* ("CEDAW") was ratified in 1996 as was the SADC's *Declaration on Gender and Development* in 1997. According to these instruments the aim was to have 50% of all positions within the SADC region filled by women by 2005.

South Africa has an impressive Constitution and gender sensitive legislation and has ratified a number of international instruments relating to gender issues. The Commission on Gender Equality ("CGE") is one such '*State Institution Supporting Constitutional Democracy*' established in terms of Chapter 9 of the Constitution.

The constitutional mandate of the CGE is set out in section 187 of the Constitution in the following terms:

- (1) The CGE must promote respect for gender equality and the protection, development and attainment of gender equality
- (2) The CGE has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advice and report on issues concerning gender equality.

As already stated above, section 1 of the EEA mentions categories of people disadvantaged by unfair discrimination, which is, termed a designated group. Such categories are too broad and need to be narrowly defined; thus there was a need of the CGE. Currently, black men are given preference with regard to race and white women are preferred with regard to gender, while black women are largely falling

through the cracks and are not benefiting from equity laws and policies. Because of this, it is submitted that, in categorising designated groups, black women should have been a category of their own.

It is most probably on this basis that women were introduced in the mining industries. South Africa is still very patriarchal and this is evident in everyday attitudes, religious institutions, education systems, and so on. The fact of the matter is that transformation is not only about laws and policies; it is about personal transformation, challenging long held beliefs and norms.

The mining industry is still very much a male dominated place and it is probably going to stay as such for a very long time. The cloud of abuse of children and women over shadows the current society with the perpetrators most often being males. Bringing the women in the mining environment is a recipe for problems. It goes without saying that women form an integral part of the employment equity plan of any designated employer. As most of them were not only deprived of the enjoyment of their human rights as protected in the Bill of Rights, the majority of them were not only disadvantaged as blacks but as women in general. Since 1994, there have been major developments aimed at improving the status of women and their quality of life.

An important number of international instruments referred to above have recognised the human rights of women as an inalienable, integral and indivisible part of all human rights and fundamental freedoms. These rights are indivisible, interdependent and inter-related.

For South Africa to realise its vision of achieving the full realisation of gender equality there will be many challenges and obstacles such as the impact of new people in a new work environment and the impact of such change on the economy. To achieve a society free of racism and sexism, there is a need that the country must undergo a paradigm shift with regard to how resources are allocated and how people relate to each other.

One of our country's major problems is the high percentage of unemployment, which leads to poverty. This requires the employment of women in previously male dominated working places.

Most of the women employed on the mines are there just because there is no where else to get employment. The group of women, which were interviewed during the course of this research, raised an interesting subject. They said that if there was an alternative job they would not think twice of leaving the mining industry as any place is much better than being a labourer on the mines. Poverty and job scarcity brought them to the mines: it was a matter of desperate times calling for desperate measures.

Currently, we have almost exclusively black women as labourers on the mines, and almost no white or Indian women. All of them came to work on the mines hoping that while already employed it would be easier to apply from within for a better job, such as being a clerk or an artisan. Once there is an advertisement of any job posting for a surface office work, it is a known fact that all the current underground women employees are going to apply for it. Sadly not all can be accommodated in that sphere.

### **Emancipation of women**

In March 2003, the *Draft Protocol on the Rights of Women* was finalised as an addendum to the *African Charter on Human and Peoples Rights*. This protocol together with the other ratified instruments as stated above, aim at one and the same point, that is, to address the plight of women in the world.

Women's issues form a very important part of the EEA. Not only did they not enjoy their Human Rights as now entrenched in the Bill of Rights but also in the past the majority of them were disadvantaged as women in general.

Since 1994, there have been major developments aimed at improving the status of women in South Africa and their quality of life. In agricultural production, the role of rural women and their importance as producers in their own right is rarely recognised. Their role in reproduction (as wives and as mothers) is too often the only one taken into consideration. Fortunately, that has changed in the past six years, although there is still a need to address the question of self-belief. That is, some women need to be convinced that the possibility of change rests first and foremost with them before they are likely to act.

To achieve a society free of racism and sexism, the country must undergo a paradigm shift with regard to how resources are allocated and how people relate to each other. Poverty and a lack of job opportunities have led to people being placed in the position where they take whatever is placed before them.

### **EEA application in mining-women labourers**

As mentioned in the discussion of designated groups, one of the categories is women. In an effort to comply with the EEA, the mining industry embarked on a project of recruiting women to be incorporated in the historically male dominated working environment.

A small number of women, most of them matriculants, are currently employed in the mining industry. Like any new recruits, they are allocated into working gangs so as to form part of the group. There has been some difficulty as far as they are concerned. What seems to happen is that, when a task is to be performed by a team of which a woman or women are part, it is not always easy to find her doing anything related to the work. What transpires is that the males won't let her do the work, but jump to do her part instead.

It must not be construed that these women are lazy, rather, they are willing to perform but the males do not let them. These males tend to form a protective shield around these women and at the end, the job gets done. In 2003, I ran a project that focused on recruiting women for

careers in mining. These women were not taken for their strength, but were employed as they had the required qualifications and had medical fitness certificates deeming them fit to work in a mining environment.

Apart from the fact that women are generally not physically strongly built like men, there are other risks involved when employed in the mining environment. Due to the fact that most of these women cannot perform in the production face, they are slowly moved to those jobs, which are usually performed by semi-medically incapacitated employees. They are placed in jobs such as tip attendants (this involves waiting for the locomotives at the station tips when bringing in ore) who record locomotives as they come to tip ore into the tips. Others are placed as station assistants who help in pushing material cars in and out of the cages (hoists), while others are involved in the delivery of explosives and working in the workshops to do the cleaning operations there.

In essence, women in mining are not doing the hard face labour done by their male counter parts, however, as mining is a large operation and has an inter-departmental structure which support one another, there are jobs that can be and are done by women. Those jobs such as doing deliveries of material, operating locomotives, being hoist operators, *onsetters*, artisans, and women can effectively perform as clerks. Strong men who do not need strength to do such jobs are currently doing such jobs. However, replacing these males with females would not solve the requirement of having demographical representation in all spheres of the company.

### **Safety issues surrounding women employees in mining**

The mining environment, besides being a difficult place to be, is also very dangerous. All of the mining premises are classified as radioactive areas, and there are warning signs to that effect. This poses a threat to any female who is pregnant or may fall pregnant. On this basis, women have more obstacles to overcome in the industry than their male counter parts.

While in cages, women are often targets of sexual harassment, which may be physical or verbal. The sanitation facilities are often not structured in such a way that they cater for women. The male employees, especially the machine operators,<sup>32</sup> are used to changing their clothing in the morning and after knocking off. Others prefer drilling half-naked as the mines are hot and watery and this may be offence to both males and females.

If a woman needs to change after working and being in a warm place, there are no facilities underground where she can change unless she were to go into a store or a refuge bay and have a male act as a guard while she changes. This can be a very awkward situation.

The treatment of heat stroke (an illness caused by exposure to excessive heat, which might be fatal within minutes if not treated immediately) is part of First Aid training in the mining industry. The treatment involves the stripping of all of the patient's clothes, leaving only his underwear, and massaging his chest muscles towards the heart, while splashing water over him and blowing compressed air on him from a distance of one metre. Should the person be unconscious, mouth-to-mouth resuscitation is required.

Should there be a situation whereby a woman gets heat stroke and there are only four males surrounding her and they have to apply first aid, it is probable that most of them would rather call for help instead of acting quickly. This is due to the fact that from a distance, it might appear that they are trying to take advantage of the woman, and it is possible that a woman could wake up and claim attempted rape or, to be more precise, she could claim sexual harassment. In section 6(3) of the EEA it is clearly stated that harassment is a form of discrimination.

What is most interesting is what is brought to light by section 60 of the EEA regarding liability of employers. This is totally different from the

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32 Those people who operate the rock drill on the stope face to drill for holes, which will be charged and blasted.

*Occupation Health and Safety Act*<sup>33</sup> which protects the employer from the actions of an employee whose negligence result in an accident of a fellow employee. Section 60 states that:

If it is alleged that an employee, while at work contravened a provision of EEA, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of the EEA, the alleged conduct must immediately be brought to the attention of that employer. Should an employer fail to take necessary steps to stop such contravention and it is proven that the employee did in fact contravene the EEA, the employer will be held liable. However, such employer will not be liable if it can be proven that he did all that was reasonable practicable to ensure that the employee would not be in contravention of the EEA.

In other words, the employer will only be able to escape liability if it can show that it did '*all that was reasonable practicable*' to ensure that the employee concerned did not act in contravention of the EEA. In the *Grobler v Naspers Bpk & 'n Ander*<sup>34</sup> case, the court took a different approach. In that case, the employer had responded to a complaint of sexual harassment by dismissing the manager concerned, which could be viewed as the ultimate reasonably practicable measure for the purpose of the EEA. Unfortunately the employer could not escape liability at common law.

It was held that the manager had created a hostile working environment, and because his conduct was foreseeable behaviour, that was sufficient to render the employer strictly liable to the complainant. There was a sufficient connection between the misconduct committed by the manager and the risks created by the relationship to justify the imposition of vicarious liability. The dismissal of the manager, against whom the complaint of sexual harassment was made, was not enough to escape liability.

The *Orr & another v UNISA*<sup>35</sup> case illustrates the multiple causes of action that might arise from an act of sexual harassment. In that case the First Applicant instituted a claim in the High Court claiming that the chairperson of the University Council had wrongfully and willingly

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33 85 of 1993.

34 [2004] 25 ILJ 439 (L).

35 [2004] 19 BLLR 954 (LC).

indecently assaulted her in violation of her right to physical integrity at common law and in terms of the Constitution. The case was settled on the basis that she be paid an amount in settlement by the University chairperson of the Council. She also instituted a claim against the University in terms of the LRA, claiming unfair dismissal and in terms of the EEA claiming that the University was vicariously liable for sexual harassment. The University responded by claiming that the actions instituted were similar to both the Labour Court and the High Court actions, and thus the defence of *res judicata* should apply.

The Labour Court rejected such argument and found that the chairperson of the University Council and the University are different entities and that the University was not merely a successor to the liability of the chairperson of its Council. In other words there was no reason in law why the Applicant should not be entitled to pursue claims of unfair dismissal and unfair discrimination in Labour Court. These were said to be statutory claims not common law claims based on the University's liability for acts of the chairperson of its Council.

Another recent case is *Ntsabo v Real Security CC*<sup>36</sup> wherein the Applicant had been sexually harassed. She had sought the assistance of a more senior manager in this regard but her employer had failed to respond to her concerns. She resigned and claimed compensation for unfair dismissal in terms of the LRA and damages in terms of the EEA. The Court held that the failure by the employer to implement punitive and preventative measures constituted a constructive dismissal of the Applicant. The Court held that the employer, by failing to implement a policy related to harassment, was not entitled on that basis to avoid any potential liability to its employees and thus, the company was found to be vicariously liable for the damages that flowed from the act of sexual harassment committed by the supervisor on the Applicant.

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36 [2004] 1 BLLR 58 (LC).

There is no doubt that mining companies are treading on a thin line, however, it is possible to circumvent such, by implementing policies which deal with ensuring that people adhere to the provisions of the EEA as far as sexual harassment is concerned.

## **Pregnancy**

The BCEA and the *Unemployment Insurance Fund* (UIF) govern maternity benefits. Section 25 of the BCEA states that an employee is entitled to at least four consecutive months maternity leave, which she may commence at any time from four weeks before the expected date of birth or another date necessitated on medical grounds. No employee may work for six weeks after the birth of her child unless she is certified to do so, on medical grounds.

Never before has pregnancy been an issue in the mining industry due to the fact that most of the female employees worked in the offices where there was not much of an issue regarding the risk of their exposure to radioactive substances. Currently, with regards to those working underground, the situation is different. Once a person has confirmed her pregnancy, she is immediately expected to inform her Human Resource Officer ("HRO") of the fact. The HRO must arrange to have her pulled from underground and given an alternative job for the duration of her pregnancy. This must happen from as early as six weeks into her pregnancy. Based on the fact that radiation would pose a danger to the foetus. In such cases, the person is usually placed as an assistant to the HRO for about eight months. If no complications occur during her pregnancy, thereafter she will go on maternity leave for four months, which means such a person can be out of her position for the whole twelve months. Once a member of the team is taken from a team, the "*complement*"<sup>37</sup> stays the same whereas the "*strength*"<sup>38</sup> has dropped and, as such the position must be filled. There are often no people to

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37 A gang is made up of a certain amount of people, for example, it can be said that a breaking gang is made up of a total number of ten people.

38 The strength in this context is the actual number of people in the gang, thus once one is out of the gang there is a shortage.

replace such individuals, and as a result, the production machine suffers. It must be kept in mind that even though it was previously said that the fellow team members do not let the women do the job, there are small jobs they are allowed to do, such as fetching water for the working team.

One can not go the route of *Woolworths v Whitehead*<sup>39</sup> case, where a pregnant woman was offered a fixed term contract, which was to terminate on the confinement period of her pregnancy. This would be deemed to be discriminating against these women on the grounds of their pregnant status. On the other hand, their contract of employment cannot be terminated, as it would constitute an unfair labour practice based on discrimination on the grounds of pregnancy. As was the case in the *Mguni v Gumbi* (supra) where the court held as follows in paragraph 17:

[17] Employers are prohibited from dismissing employees for any reason related to pregnancy [section 187(1)(e)]. The phrase "any reason related to pregnancy" which the legislator has made use in section 187(1)(e) is, in my view, wide enough to cover the dismissal of the applicant in this case.

Therefore, there is not much that one can do as far as pregnancy of employees in the mining is concerned. It is a difficult issue that has yet to be satisfactorily dealt with.

As much as one cannot be expected to compare women to men on physical bases, it will serve no purpose to mention their performance rates in comparison to their male counterparts. Due to the fact that mining is a male dominated environment, it has always been easier to place one or two women in a group or a team of men to perform a certain task. One might call it a human nature, but once a task is allocated and it is a turn of the female worker to perform, it is a practice that a male will stop her and do what she is supposed to be doing. The male employees often feel obligated to do the job instead of letting the female employee perform it. At the end of the day, the job is done but what remains is that the female employee did not actually perform as part of the team, not because she did not want to, but because they

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39 *Ibid.*

would not let her. In my experience however, there was an exception, where one woman was actually doing much more than any ordinary male could do, as a miner's assistant whose job was to help charging up the face for blasting operations and she was good at it. Fortunately for her, she was sent for training as an artisan on the electrical site.

Once the problem of the women not being allowed to perform by their fellow male team members was identified, there was a project put in place where a team consisting only of women was to run a totally independent section. Unfortunately the project did not work, thus supporting the notion that women are not physically built to work under the conditions men are used to. What has now transpired is that women are gradually moved to jobs, which were usually performed by the semi-medically incapacitated employees, such as being tip attendants.<sup>40</sup> Some are moved to the station areas to operate locomotives and others as material transporters. Once again, this is a form of discrimination as they are taken out of the working faces and become isolated in the odd jobs.

What is interesting is the fact that all these women are matriculants, which means that they are already at an advantage as compared to most of their male counterparts. It must not be construed that women cannot do what men can do, since, in actual fact, there are jobs in the mining industry where women can actually do much better than men, such as those of artisans, *onsetters*, clerks, hoist operators and so on.

### **The effect of the EEA and affirmative action on the industry**

Section 6 of the EEA firstly prohibits unfair discrimination, then goes on to provide that it is not unfair discrimination to take AA measures consistent with the purpose of the EEA. This then means that AA is a

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40 Those people who stay by the tipping places waiting for the locomotives and record as the locomotives come to tip ore.

defence to be employed by an employer against claims that it has discriminated unfairly against an employee. The EEA requires an employer to take measures to eliminate discrimination in the workplace; this is a tool that can be effectively used to try to balance the injustices of the past in the mining industry.

AA measures are designed to address such disparities by focusing in the development of those people from designated groups. The employer must first identify these people, bearing in mind the needs of the company. Then, most importantly, the employer must take into consideration that some may not have the necessary skills and qualifications but the EEA clearly states that such people must be in a position to acquire such skills within a reasonable time.

What employers must avoid at all costs is “window dressing” and “tokenism”, which seemed to be a pattern followed by many in the name of beating the deadline of transformation. There is a need for a cautious approach in the implementation of AA, especially where the appointments made indicate that appointee’s experience and qualifications are inferior to the qualifications and experience of those overlooked for appointments. In *McInnes v Technikon Nata*<sup>41</sup> the Court held that AA cannot constitute a fair basis for dismissing, as opposed to appointing, an employee.

To enable us to see the benefits of the implementation of the AA, one should look at it from a positive point of view. One of the many ways is to have “shadow appointments”<sup>42</sup> and mentorship. The late Lyndon Johnson, an American president in the 1960’s, said:

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41 [2000] 6 BLLR 701 (LC).

42 Where an experienced someone choose to take a prospective AA candidate under him/her, while continuing with his/her task, teach such an individual, show him what is done why is it done like that, etc.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line in the race, and then say: you are free to compete with all the others.<sup>43</sup>

This statement seems to be the belief of the current ruling party, post the apartheid era, that is, the idea should be to help people catch up before running the race. AA will do just that: prepare people to run the race by being given opportunities to first learn about the job and grow in the job and the EEA is there to police such a process. As mentioned above, section 9(2) of the Constitution stipulates that:

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

This is where AA comes in.

In *Harmse v City of Cape Town*,<sup>44</sup> the Court held that AA could serve as a sword, as well as a shield, to a defence of a claim of unfair dismissal. This means that if an employer fails to promote the achievement of equality through taking AA measures, then it may be said that the employer has violated the rights of employees in designated group not to be unfairly discriminated against. If there is a plan that provides for appointments and promotions, employees may have a legitimate expectation that their employer would act in accordance with the plan.

However, in *Dudley v City of Cape Town & Another*,<sup>45</sup> the decision was different. The Court held that the EEA could not be used as a "sword" in an application based on AA. In other words, an employee from a designated group cannot claim to be employed in a position based on AA.

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43 This was his approach to the implementation of an affirmative action after the repeal of slavery in the United States of America, as slaves used to be hobbled in chains by their masters. Thus in order for ex-slaves to compete effectively they need to be trained accordingly.

44 [2003] BLLR 557 (LC).

45 [2004] BLLR 623 (LC).

The Labour Court in *Gorden v Department of Health, KwaZulu Natal*,<sup>46</sup> considered the previously much debated issue of whether an employer must have adopted a formal AA plan before it can raise AA as a justification for discriminating against non-designated employees. The Court held that as the right to equality is not merely formal, the absence of a plan couldn't frustrate the objective or change the contents of the right to equality. Thus an AA plan was held not to be a pre-requisite for making AA appointments. It is interesting to note the recent judgment in *PSA obo Helberg v Minister of Safety & Security*,<sup>47</sup> where the failure to promote was considered unfair, as there was no employment equity plan in place.

In essence the effect of the EEA and AA on the mining industry when correctly implemented will rectify the injustices of the past brought about by the practices of the past. It cannot be argued that the impact would not be felt immediately as it is clear that there is no pool of ready people to take up these positions.

In 1994, the proportion of black managers in the civil service was 6%. By 1997, the proportion was 38% in central government and 66% in the provincial administration. In private business, figures are hard to come by, although proportions seem to have risen rapidly in 1994-1996, and then to have stuck somewhere between 10 and 20%.

The reason, say businessmen, is that the supply of suitably skilled blacks has run dry. It goes without saying that under apartheid, blacks were deliberately deprived of a decent education. Twelve years down the line, we have seen a significant improvement in levels of education, but unfortunately this cannot be felt in the labour market as of yet.

The demand for black high-fliers is ravenous, only the supply is lacking. To comply with the EEA is a tricky business, as it can be seen from the case law below.

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46 [2004] BLLR 708 (LC).

47 [2005] BLLR 135 (LC).

In 1997, *Sarita van Coller*,<sup>48</sup> a white woman, applied for a job at Eskom, the state owned electricity provider. She scored the highest mark by a wide margin on an aptitude test, but the job was given to a coloured applicant. She protested to a labour arbitrator and won. The arbitrator ruled that there was nothing wrong with giving preference to blacks or coloureds, but that Eskom should not discriminate unfairly against whites. One very important aspect was the fact that she fell within the category of 'designated group' as a woman. In the *Fourie*<sup>49</sup> case just as in the *van Coller* case, both employees fell in the designated group, that is, a white woman and a black man. The court clarified this problem where the subject of dispute was that both employees fell under the same designated group by referring to *Motala v University of Natal*.<sup>50</sup> In that case, the Court upheld a system of selection for admission to a medical school that favoured African students over Indian students. The court held as follows:

I do not believe that it can be disputed that black people were discriminated against under apartheid. African people in particular were severely discriminated against. They were treated as fourth class citizens. I accept that white women were discriminated against under apartheid but not to the extent as black people particularly African people.

The employer must at all times be on the alert when implementing AA programmes, as one cannot justify dismissing one employee from a certain group in order to create space for another employee from a different group. One thing that anyone who wants to raise AA as a "sword" must consider is the decision in *Dudley v City of Cape Town & Another*.<sup>51</sup> In that case the Court held that AA under EEA is not available to individual employees for use as a "sword" in the prosecution of a claim based on AA. The Labour Court held, amongst other things, that the EEA does not establish an independent individual right to AA and that there is no right in respect of such claim of direct access to the Labour Court.

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48 See *MWU obo Van Coller v Eskom* (1999) 9 BLLR 1089 (IMSSA).

49 *Fourie v Provincial Commissioner SAPS (North West Province)* [2004] 9 BLLR 895 (LC).

50 [1995] 3 BCLR 374 (B).

51 *Ibid.*

The effect of the EEA and AA in the mining industry will clearly address what the *Wiehanh Commission* found when interviewing the white trade unions years ago that. There can be no doubt that Blacks were and are the only resource available for satisfying long-term skilled manpower needs and that furthermore the frustration of Black career ambitions could pose as much threat to industrial peace as the prospect of a "white backlash".

Quite clearly as the Commission stated, there can be no deviating from the fundamental principle that there should be equal access to job opportunities for all, regardless of colour, questions such as whether or not enough whites were available to fill skilled position in mining industry was therefore irrelevant.

### **Conclusion**

While legislation is integral to addressing unfair workplace discrimination, it is merely the beginning of the process. A holistic and supportive human resources practice is essential in the quest for workplace equity.

For most companies to find suitable candidates for the implementation of their employment equity program may be an enormous task. The mistake made by many companies is recruiting persons with good political connections, for example, a black accountant, actuary, or consultant and appointing him or her to the board with the aim of using such a person to win them government tenders. In doing so, they are trying to comply with section 217 of the Constitution which provides that in the procurement of tenders, an organ of the state must follow a system that is fair and equitable. However, it does not prevent any allocation of contracts in preference of the protection and advancement of people from the disadvantaged group.

Recruitment areas may vary depending upon the level of responsibility and the degree of the specialisation of the occupation. The higher the

degree of responsibility or specialisation required for the job, the broader the recruitment area.

The relevant recruitment area is reasonably that geographic area from which the employer would reasonably be expected to draw or recruit employees. Most of the mining companies have a common problem in the sense that, based on the nature of their core business, such expertise is not readily available, and thus they are left with a limited choice to develop from within the company. As such, it is very important that the process of identifying the prospective candidates should be sped up and development programmes be put in place to enhance such progress.

The experiences drawn from Malaysia, India, the USA, Canada, Britain and Zimbabwe note that 'best practices' in employment equity include:

... a strong and inclusive consultative process with all stake holders, numerical target setting with regular monitoring by a credible authority, a focus beyond the numbers to include comprehensive training, development, mentoring and coaching processes, clear communication and top management commitment to the initiative.<sup>52</sup>

The line managers in the case of the mining industry, those, who are "hands on" with the process, are usually the ones who are identified as mentors for prospective candidates. It is traditional in the industry that the young energetic people are looked after by these people who are supposed to teach them the 'tricks of the trade'.

These youngsters are trained and coached as future leaders. The problem is, most of those who hold these positions are white males who are to train and coach their former subordinates, which may become problematic for them.

There are currently a lot of youngsters who are either from technikons or universities who chose careers in mining. Once these people have completed their studies, they are sent to the mines where they are supposed to be trained in the practical side of things by these middle to

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52 Thomas 2002 *International Journal of Manpower* 237-55.

line managers. These people fall into a programme called the Management in Training ("MIT"), which is a well-structured programme to enable young diplomats and graduates to become managers.

These young people automatically become a threat to the same people who are supposed to be their trainers, due to the fact that most of them have much better qualifications than their mentors and most of them are from designated a group, which makes them employment equity candidates.

What is then often done by the so-called "trainers" is to frustrate these people and make it unbearable for them, forcing most of them to resign. As a result, other sectors (including government departments) take these youngsters and they end up in companies which have absolutely nothing to do with mining, which is their trade.

This is why it is very important that line managers need to buy in, so to speak, to the vision and the plan of the manager responsible for overseeing the implementation of the company's employment equity plan through the process of AA.

What is not usually taken into cognisance by the top management in the mining industry is the reason why so many if not almost all black top managers from the designated group leave the companies. It is often not simply for the greater remuneration and related benefits, but because they feel alienated from the historically established corporate culture and are often not afforded the opportunity to add value to company business. To expect AA appointees to perform well in a "white world" without the necessary training and adaptation of corporate cultures is a recipe for disaster.

One way of retaining new employees in the workplace (those brought in through a process of affirmative action in the South African context), *is by providing adequate training and development opportunities for such people. In this regard, individual training needs should be identified and related to training plans developed in line with organisational goals and*

objectives.<sup>53</sup> Ultimately, they should be allowed to take up responsibilities and add value to the industry.

There is a need to overcome the “*stereotypical thinking, for example, which is prevalent in the South African context, where black employees are often perceived as not having the ‘right skills’ to move into management positions*”.<sup>54</sup>

After the Anglo-Boer war, white Afrikaner males in most of the businesses of the time, most of which had to do with mining replaced white English males. The perception was that Afrikaners (later nicknamed “die voortrekkers”), would never make it in business as their greatest passion of the time was farming and trekking as they moved from one place to another in search of better grazing for their livestock.

It is ironic that this very perception (that black people know nothing about business and will never make it in the corporate world in the post-1994) is currently maintained by ‘staunch die-hards of the old era’.

Just as the future of the Afrikaner nation was determined and guaranteed by the laws passed after the Anglo-Boer war, the EEA seeks to co-ordinate the advancement of the previously disadvantaged group.

Despite the fact that it cannot be seen at this moment, it goes without saying that there are prospects of success in the near future. As pointed out in this research that change is inevitable and most importantly for South Africa and its people there is a light at the end of the tunnel.

Much has been invested in implementing the EEA in the mining industry, and where much is given, much is expected.

It is no longer just a threat to groom the young and aspirant people from designated groups as it has been in the past. There is a new breed of managers emerging who are pro-active and who see the programme as

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53 D'Netto & Sohal 1999 *International Journal of Manpower* 530-47.

54 Thomas & Robertshaw 1999 “*Achieving employment equity: a guide to effective strategies*” Randburg: Knowledge Resources.

a challenge rather than a threat and with the help of the unions are 'hands on' in ensuring that the programme succeeds.

Most of our people are more enlightened as far as the challenges facing the industry is concerned. There is more acceptance of the new breed of managers and prospective managers than it was the case earlier on in the industry. The people responsible for the implementation of the EEA are much better qualified as they learnt from the mistakes of the past. Since the enactment of the EEA and the LRA much has been developed in the field of implementation of the programme that will see the achievement of a successful demographic representation of our society.

The fact that we still have some precipitation of some people still showing some racist leadership skills does not deter the total commitment of the people to see change.

As far as recruitment and selection processes are set, nowadays when there is an advertisement for a certain post, both male and females of all races apply, as the advert clarifies the fact that, the company is an equal opportunity employer. Such open recruitment programmes makes it easier for the prospective employer to choose candidates for their EEA and AA programme. In mining industry as mentioned above, it was easier to recruit from within as it was not easy to attract people from outside the mine as it was regarded as an industry that specialised in illiterate workers. This stereotype thinking has changed through the years and we find a lot of aspirant young people who are keen to venture into the mining industry, thanks to our most recent mining magnates in the form of the Patrice Matsipes and the Tokyo Sexwales.

Surely given time, the mining sector will be able to address the problems identified and be in a position to ensure proper demographic representation in the industry. Fortunately there is no such a thing as a '*sunset clause*' on the implementation of this programme therefore it is submitted that this aim will in fact be realised in the near future. As previously stated our system promotes substantive equality, which

clearly means we envisage attaining total equality of all in the country. It is not important how long it will take, but the goal is to totally transform our society towards the vision of section 9 as enshrined in our Constitution.

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