

**THE IMPACT OF THE CONSTITUTION ON EMPLOYMENT RELATIONS WITH
PARTICULAR REFERENCE TO AFFIRMATIVE ACTION**



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**A mini-dissertation submitted in partial fulfilment of the requirements for the
degree of Master of Laws at the Mafikeng Campus of the North-West University.**



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DECLARATION BY CANDIDATE

I, the undersigned, hereby declare that this mini-dissertation submitted to the North-West University, Mafikeng Campus, for the degree LLM is my work which has not been submitted in any other institution, and any secondary information contained therein has been duly acknowledged.

Signedthis.....day of.....2011

DECLARATION BY SUPERVISOR

I hereby recommend that the mini-dissertation by NJIEASSAM ESTHER EFFUNDEM, student no 22525122, entitled, "The impact of the Constitution on employment relations with particular reference to affirmative action", for the degree Master of Laws in Labour and Society Security Law, be accepted for examination.

Prof. M.L.M Mbao.

Supervisor.

DEDICATION

This dissertation is dedicated to God Almighty for his continuous faithfulness and love towards me, and to my Uncle Dr Enow Andrew Achou, for his financial, moral and material support.

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LIST OF ABBREVIATIONS

BBBEE	Broad Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
COSATU	Congress of South African Trade Unions
DPSA	Department of Public Service and Administration
EEA	Employment Equity Act
EEO	Equal Employment Opportunity Act
EEOC	Equal Employment Opportunity Commission
FTYR	Full-time, year-round
GNU	Government of National Unity
HIV	Human Immunodeficiency
LIFO	Last In First Out
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
RDP	Reconstruction and Development Programme
SAIRR	South African Institute of Race Relations
SAPS	South African Police Service
SAA	South African Airways
UGESP	Uniform Guidelines on Employee Selection Procedure

UN	United Nations
USA	United States of America
VSOA	Veterans Service Officer Associate
VSO	Veterans Services Officer
WPTPS	White Paper on the Transformation of Public Service
WPAAPS	White Paper on Affirmative Action in the Public Service

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ABSTRACT

This study takes an in depth look at the constitutional and legislative changes that led to the development of labour laws and the subsequent implementation of affirmative action measures in South Africa. The central question of this study is to investigate whether affirmative action is reverse discrimination or another form of apartheid in disguise as viewed by the white community.

The study reveals that though the Employment Equity Act intends to achieve equality in the workforce, through the implementation of affirmative action measures, however, the policy should not be implemented in such a manner as to have a negative impact on the non-protected group such as the white population. Despite the identification of other ills, which include the neglect of women and wage differentials between men and women, South Africa has made remarkable achievements and leaves a lasting legacy of fair racial representation in the workplace through the implementation of affirmative action measures.



CHAPTER ONE: INTRODUCTION

1.1 Background to the Study

Apartheid policies that divided South Africans left both material and social legacies in the country. According to Toks, South Africa under the apartheid regime,¹ experienced a system of racial segregation where access to services, employment, education, place of residence and basic social amenities such as water, housing, electricity, health and telecommunication was determined on the basis of race, sex, gender etc.

However, since the advent of constitutional democracy in 1994, South Africa's labour legislation is among the most progressive in the world, providing for institutions to settle disputes and ensure fairness in the workplace.² The state, being the composition of all individuals, represents the society at large.³ The apartheid era was characterized by high levels of racial administration, conflict, denial of trade union rights, cheap labour, and an authoritarian management style in the workplace. With the transition to constitutional democracy, the state has been playing a major role in transforming employment relations in South Africa.⁴ As a result, the post-1994 labour legislation became a product of extensive consultation between government, labour and employers. It recognized nine institutions to foster sound

¹ Oyedemi, T. D. (2009). "Social Inequalities and the South African ICT Access Policy Agendas". **International Journal of Communications**, p. 151-168.

² <http://www.South Africa.info/business/economy/policies/labourbodies.htm> accessed on 8 March 2011.

³ Bendix, S. (1992). **Industrial Relation in South Africa**. 2nd ed. Cape Town: Juta p. 34.

⁴ Bendix, *ibid* note 3 at 35.

co-operative employment relations,⁵ namely: the National Economic, Development and Labour Council (NEDLAC), Commission for Conciliation Mediation and Arbitration (CCMA), Advisory Council for Occupational Health and Safety, Employment Conditions Commission, Unemployment Insurance Board, Commission for Employment Equity, National Skills Authority and the Compensation Board. In South Africa, the state exerts authority on labour relations. The issue is how and why the state intervenes in labour relations? However, the state, as the main instrument of government, has a political, pre-conceived role in a modern, economically-based society and manifests itself in a pro-capital or pro-labour orientation. With regard to the above, some theories of labour relations and of the state are examined below.

Unitarists posit that independent societies promote social order based on their communal ethics, thus there is no need for conflict. To them, power belongs to the society as a whole.⁶ Therefore, there should be no conflict between management and employees.⁷ To them, the area of production should be peaceful and independent as such, any interference from outside is considered as a hindrance. Thus, trade unions should only maintain peace, order and provide a conducive atmosphere for the operation of businesses. It should be noted that the idea of

⁵ Published for Brand of South Africa by Big Media Publishers, available at <http://www.Southafrica.info/business/economy/policies/labourbodies.htm>, accessed on 8 March 2011.

⁶ Martin, S. and Gilton, K. (2010). "The State and Labour Relations: Walking the Tightrope between Corporation and New Liberalism". In Keulder, Windheok (eds) **State, Society & Democracy** Macmillan. p. 202.

⁷ Martin, S and Gilton, K *ibid* note 6 at p. 202.

unitarism was influenced by the work of Talcot Parsons, whose focus was on how order should be maintained in society.⁸

Pluralists suggest that, the state is an unbiased intermediary that promotes social order through agreement.⁹ They argue that agreements do not only revolve around the processes in which disputes are resolved among different interest groups in the society, but rather in the framework of rules governing conflict resolution. Disputes between management and workers are resolved through institutions of collective bargaining. This implies that the state, employers' organizations and trade unions should work together by formulating social and economic policy.¹⁰

In relation to the radical/conflict approach, the state is responsible for maintaining and strengthening the position of the ruling capitalist class. Therefore, it cannot be expected to act impartially, in the best interest of the society.¹¹ It can implement force in the society using the police, army and judiciary when it fails in obtaining authority from the population. This implies that the state can use coercion in society to maintain peace and order when necessary.

To market individualism, for any economy to succeed, there must be a self-regulating system which ensures the equal distribution of wealth amongst organizations. Therefore, terms and conditions of employment should be determined by the contract of employment. Thus, employment contracts, contrary to

⁸ Martin, S. and Gilton, K. *ibid* note 6 at p. 202.

⁹ Martin, S. and Gilton, K. *ibid* note 6 at p. 203.

¹⁰ Neville, R. (2003). Unpublished Paper Delivered at the Prime Minister's Consultative Meeting on Labour Relations, **Windhoek**. p. 4.

¹¹ Martin, *ibid* note 6 at p. 204.

market individualism, should be between individuals and an organization. The aim is to render the individual submissive to the organization.

Liberal collectivism on the other hand, recognizes conflicting interest groups. Trade unions and employers' organizations are considered essential intermediaries between the state and an individual. That is, trade unions negotiate with management to resolve conflicts through collective bargaining. As Salamon states, "policies that enhance the rights of workers exist alongside forceful measures which ensure the continuation of power".¹²

Government policy and action in South Africa after the advent of the constitutional democracy aimed at addressing the plight and needs of the black population and to promote capital accumulation. Government therefore, regulates labour relations through legislation to provide the framework that reconciles conflicting interests of management and workers. The first democratic legislative reform saw the enactment of the 1996 Constitution.¹³

The Preamble to the Constitution provides that "We, the people of South Africa, Recognize the injustices of the past; Honour those who suffered for justice and freedom in our land; Respect 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...Heal the divisions of the past and establish a society based on

¹² Salamon, M. (1992). **Industrial Relations: Theory and Practice**. Englewood Cliffs, NJ: Prentice-Hall p. 256, as quoted by Martin, S. and Gilton, K. (2010). "The State & Labour Relations: Walking the Tightrope between Corporation and New Liberalism". In Keulder, Windheok (eds) **State, Society and Democracy** Macmillian p.208.

¹³ The Constitution of the Republic of South Africa Act 108 of 1996.

democratic values, social justice and fundamental human rights;...Improve the quality of life of all citizens and Free the potential of each person;..."¹⁴ The new labour legislation therefore consists of the Labour Relations Act¹⁵ (LRA); aimed at balancing the demands of international competitiveness on the one hand and the need to protect the fundamental rights of workers on the other hand. The Basic Condition of Employment Act¹⁶ (BCEA) was enacted to ensure fair employment standards and to promote the creation of new jobs. The Employment Equity Act¹⁷ (EEA) was designed to achieve equity in the workplace by prohibiting unfair discrimination. It also requires the implementation of affirmative action measures to ensure equitable representation of designated groups in all occupational categories and levels in the workforce. It calls for substantive equality as opposed to formal equality. Therefore, the state intervenes in labour relations to protect employees from victimization, unfair labour practices, unfair discrimination and unfair dismissals by their employers. It protects the freedom of association principle and establishes rules for the formation and registration of trade unions and employers' organizations.

The Constitution contains a dream of society where South Africans are equally treated and equally capable of enjoying the opportunities and benefits of the society.¹⁸ It is because of this history and its consequences that the Constitution commits the country to the 'achievement of equality' and mandates the enactment of

¹⁴ Preamble to the Constitution.

¹⁵ Act 66 of 1995.

¹⁶ Act 75 of 1997.

¹⁷ Act 55 of 1998.

¹⁸ The Constitution of the Republic of South Africa *opcit* note 13.

specialized legislation on equality.¹⁹ The 'Equality Clause' is a direct means at assisting South African society depart from the country's terrible history of institutionalized discrimination and the desire to end systematic patterns of inequality and disadvantage. As such, it operationalizes the constitutional vision of a new South Africa based on social justice, where the integrity and dignity of every human being is restored and the full human potential of all is realized. It is against this background that the Employment Equity Act was enacted and the affirmative action policy enshrined to address the imbalances of the past.

There is, no doubt, that the policy of affirmative action is one of the most contested areas in the South African system of labour relations. There are very strong arguments for redressing the imbalances of the past, restorative/restitutionary justice on one hand, and reverse discrimination on the other. The questions that follow are, how long will it go on? Can equality ever be achieved? Who will decide when to discontinue with affirmative action?

This study seeks to critically analyze the impact of the Constitution on employment relations with particular reference to affirmative action. To achieve this goal, an analysis is done on the status of constitutional and legislative in-roads into employment relations in South Africa. The study further examines the implementation of affirmative action in the public sector. A comparative study of the experiences in comparable jurisdiction in the United States of America is carried out, followed by emerging challenges and recommendations for policy and law reforms.

¹⁹ Section 9 of the Constitution.

Due to time constraints, budgetary constraints, and space as it is a mini-dissertation, this study is not exhaustive of all the issues clamouring for investigation.

1.2 Problem Statement

It is common cause that apartheid policies hindered the social and economic status of blacks by providing them with inferior social services to that of whites.²⁰ As such, the post-apartheid regime inherited several problems including education, unemployment and poverty. To address these problems, the “new” Constitution entrenched various policies and pieces of legislation that intended to advance the status of blacks in the public sector and other spheres of life. The Preamble to the Constitution recognizes the injustices of the past and aims at establishing a society based on social justice and the improvement of the quality of life of all citizens.²¹

It is evident that during apartheid, the public service was divided along racial lines, with separate administrations for whites, coloureds and Asians. The majority of the public servants consisted of black persons, especially Africans,²² but they were denied the opportunity to advance to management positions as the majority of the black people were employed to do menial work with low pay. Thus, gender inequalities resulted in the majority of women, irrespective of race, being employed in lower positions in departments such as education and health.²³ Also, disability was treated as a social problem. Disabled people were denied access to supportive

²⁰ Ibrahim 2010 <http://www.ddp.org.za/information-material/research-unit/research-themes/rights-and-citizenship/socioeconomic>, accessed 18 March 2011.

²¹ The Preamble to the Constitution *opcit* note 14.

²² Milne, C. (2009). “Affirmative Action in South Africa: From Targets to Empowerment”. *Journal of Public Administration*. 44 (4.1) p.969-990.

²³ Milne, C. *ibid* note 22 at p.969-990.

working environments and adequate training, therefore limiting their recruitment into the public service. The Employment Equity Act was set against this background. Its Preamble highlights the need to transform society by eradicating all forms of discriminations and inequality, and recognize the diversity and disadvantages that need to be addressed.

This study seeks to address the ineffectiveness in the implementation of affirmative action measures by arguing that affirmative action policy intends to create a balanced situation whereby designated groups are given preference in employment relations so as to achieve equity and representation in the workforce. For instance, in the case of *Department of Correctional Services v Van Vuuren*,²⁴ although a white female employee was strongly recommended as the best candidate, a black male was appointed in terms of affirmative action policy. The Court held that there was no unfair discrimination against the white female employee as the Department was trying to meet its affirmative action targets.

In *George v Liberty Life Association of Africa Ltd*,²⁵ a white male applicant complained that the company's refusal to promote him was unfair because it had appointed a "coloured outsider" on affirmative action basis. The court found that the company was justified in making an "outside appointment" because the outsider was schooled in a historically deprived system.

However, affirmative action policies do not intend to employ people from designated groups without prior qualification as this may amount to reverse discrimination and

²⁴ (1999) ILJ 2297 (LAC).

²⁵ (1996) 17 ILJ 571 (LC).

an abuse of the provisions of the Employment Equity Act. In *Willemse v Patelia NO and others*,²⁶ the case concerned the refusal by management at the Department of Environmental Affairs and Tourism to appoint Willemse to the post of Director. The court opined that the Department had deliberately discriminated against Willemse both on grounds of his race and gender.²⁷ The court further held that, the Department had reached the representivity targets it had set for itself in order to achieve affirmative action goals. Moreover, Willemse was a designated employee who falls within the category of disabled people.²⁸ Thus, the Department was expected to consider his application favourably.

Affirmative action should not be implemented in such a way as to achieve a dramatic goal overnight; the policy needs time, the case below throws more light. In *Public Servants Association and Another v The Minister of Justice and Another*,²⁹ the court refused to accept the fact that a promotion policy aimed at advancing blacks and women was an absolute defence to discrimination that deprived suitably qualified white males from applying for jobs. It was argued that the "policy should be realistic as indiscriminate hiring; to achieve equality overnight is not desirable".³⁰ The policy was held to be unfair and in conflict with the state's duty to promote an efficient civil service.³¹

²⁶ (2007) 28 ILJ 428 (LC) (Nel AJ).

²⁷ Halton, C. et al, (2007). **Current Labour Law**. Lexis Nexis : Durban p.108.

²⁸ Halton, C. *ibid* note 27 p.108.

²⁹ (1997) 18 ILJ 241 (T).

³⁰ Basson *et al*, (2005). **Essential Labour Law**. 5th ed. Johannesburg : Labour Law Publications, p. 219.

³¹ See section 195(1) of the Constitution.

From the cases, it is certain that the implementation of affirmative action measures needs careful handling or better still the emerging jurisprudence calls for a delicate balancing of conflicting interests. The following questions cry out for answers.

-Is affirmative action reverse discrimination?

-Is affirmative action really succeeding?

-How long will affirmative action policy continue?

-Can equality ever be achieved?

-Who will decide when to discontinue with affirmative action?

-Does the society need a well educated, trained, skilled and competent workforce in the public sector/private sector or do we need to sympathize by applying affirmative action policy and preferring candidates from designated groups in employment practices?

-Should a position be left vacant where there are no possibilities of having a designated employee who is suitably qualified for the job and where the department had not met its targets in order to achieve affirmative goals?

-What happens where there are two designated employees who qualify for a particular job, which one of them will be given preference?

-Do all preferred groups receive the same preference?

In attempting to answer these questions our central research question is whether affirmative action is reverse discrimination. This question has remained problematic

among member states in South Africa. However, it is essential to understand that the policy of affirmative action is not a form of reverse discrimination; rather, it is aimed at creating conditions for all to participate effectively in decision-making and realize civil, cultural, economic, political and social rights in all spheres of life on the basis of non-discrimination.³²

1.3 Aims and Objectives of the study

The aim of this study is to critically assess the impact of the Constitution and accompanying statutory inroads into employment relations with particular reference to the implementation of affirmative action. The study seeks to achieve the following specific aims:-

- a) The constitutional stipulations on equality and re-dressing the imbalances of past-discrimination and broad based black economic empowerment.
- b) Identify statutory inroads to operationalize constitutional provisions.
- c) Determine broad public policy considerations.
- d) To assess whether state practice in South Africa conforms to international labour standards so as to harmonize the labour laws of the country with its international law obligations.
- e) To provoke a discussion on the proper implementation of affirmation action measures.

³² World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration, Agenda item 9, adopted on Sept. 8, 2001 in Durban, South Africa.

A major objective to be addressed by this study was to investigate whether state practice in South Africa on affirmative action conforms to international labour standards. It is common cause that affirmative action measures has been powerfully approved by international law, through regional and international treaties which South Africa is a party. For instance, the International Convention on the Elimination of all forms of Racial Discrimination clearly defines the obligations of state to combat discrimination and to protect the rights to all people regardless of race and ethnicity.

Also, Convention on the Elimination of all forms of Discrimination against women (CEDAW) establishes that affirmative action measures are an integral part of combating discrimination.³³ Furthermore, the Convention on the Discrimination of Employment and Occupation also prohibits discrimination in employment, training and working conditions on the ground of sex, race, colour, religion, political opinion and national origin. It emphasizes on the promotion of equality of opportunity and treatment in all spheres of life. Therefore, international law either implicitly or explicitly requires states to engage in affirmative action practices.

1.4 Methodology and Data Collection

“A research methodology is a strategy or plan of action that links the method or methods chosen to the outcome”.³⁴ There exist two types of research methods, namely, the quantitative and the qualitative methods of research. Qualitative research is the collection of rich descriptive data for a particular context. The

³³ Concluding Observations of the Committee on Economic, Social and Cultural Rights Consideration of Reports Submitted by State Parties Under Article 16 and 17 of the Covenant, Brazil (2007) para 7.

³⁴ Mbao, M.L.M., (2010). **Guidelines to Research Students**, A Faculty of Law Publication of the North-West University. p.7.

purpose is to create an understanding of what was observed or studied.³⁵ According to Welman *et al*, qualitative research is an approach rather than a particular design or set of techniques.³⁶ Qualitative research also focuses on how individuals and groups observe and appreciate the world and make meaning out of their experiences.³⁷

The main objective of qualitative research is to describe and understand rather than explain human behaviour.³⁸ Qualitative research does not only explore the what, where and when, it also deals with the how and why.³⁹ The following are some of the advantages of qualitative research; it provides an understanding of social phenomenon from the researcher's view point.⁴⁰ However, the disadvantage of this mode of research is that it may be unpredictable.⁴¹ Furthermore, it can allow individual biases and idiosyncracies to creep in.

On the other hand, the quantitative method of research is an organized study of quantitative properties, phenomena and their relationships.⁴² Quantitative research is normally used in the social and natural sciences. Unlike the qualitative method of research, the main goal of the quantitative research method is to develop numerical models, hypothesis and theories pertaining to natural phenomena.

³⁵ Maree, K. (2007). **First Steps in Research**, Van Schaik, Hatfield: Pretoria at p. 50.

³⁶ Welman *et al*, (2005). **Research Methodology**, 3th ed. Oxford University Press Southern Africa (Pty) Ltd at p.188.

³⁷ Maree K, *ibid* note 35 at p.50.

³⁸ Mouton, J. *et al*, (2001). **The Practice of Social Research**, Oxford University Press Southern Africa, p. 270.

³⁹ http://en.wikipedia.org/wiki/Qualitative_research accessed on 10 April 2011.

⁴⁰ Denzin, N.K. and Lincoln, Y.S. (2000). "Introduction: The discipline and practice of qualitative research". In Denzin, N.K. and Lincoln, Y.S. (eds) **Handbook of Qualitative Research**, 2nd ed. London: Sage Publications. p. 46.

⁴¹ http://www.macroinc.com/html:art/s_qua.html accessed on the 10 April 2011.

⁴² http://en.wikipedia.org/wiki/Quantitative_research accessed on the 10 April 2011.

The strength of quantitative research method is that, the results are statistically reliable;⁴³ this implies that the quantitative research method can reliably determine if one's concepts are better than the other. Despite the aforesaid benefits, there are some weaknesses inherent in this method of research. This research method is frequently carried out in abnormal settings in order to supervise the process.

This study is based on the qualitative method of research. In other words, the qualitative method of research is used. The researcher relies on primary and secondary sources as research tools in the form of statutes and decisions of various courts of law (precedents), secondary sources, for example, entail the views of scholars as expressed in books and articles in learned journals.

The qualitative research method has been chosen for this study because of time constraints, space and limited financial support available with which to prosecute this mini-dissertation. The purpose of this study is to investigate the relevant literature to the research topic and identify the gaps that justify this endeavour. A glance at the available literature leads to the tentative conclusion that the implementation of affirmative action policies has led to reverse discrimination that infringes upon the constitutional rights of those adversely affected.

1.5 Literature Review

The concept of affirmative action has generated serious debates among scholars and each of them has viewed the implementation process differently. According to

⁴³ http://www.macroinc.com/html/art/s_qua.html accessed on the 10 April 2011.

Coetzer, the topic has motivated intense debate amongst South Africans.⁴⁴ For instance, Niekerk *et al.*⁴⁵ are of the opinion that the justifications of affirmative action measures are irrelevant if there is no relationship between the subject matter for the claim of discrimination and the effects on the rights of the complainant.⁴⁶ Thus, in *University of Cape Town v Auf der Heyde*,⁴⁷ it was held that the defence of affirmative action measure should fail where the applicant complained that he was over-looked for appointment to a position on grounds of his race, he was also not the best applicant for the job, as such the failure to appoint him did not constitute unfair discrimination.⁴⁸

On the same note, Mlambo, J. in *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,⁴⁹ held that affirmative action should not be applied unreasonably. To him, there should be an existing policy through which it is implemented. In this case, the only reason given for the appointment of a black candidate to the position of Town Treasurer was because he was black. The court held that an employer could only rely on affirmative action as a defence if there is no affirmative action policy.

However, while the above scholars argue that affirmative action should be implemented fairly and rationally by strictly applying the policy through which it is effected, this research will make a new contribution by establishing that the

⁴⁴ Coetzer, N. (2009). "Affirmative Action: The Sword versus Shield". 21 **SA Merc LJ** p.92-101.

⁴⁵ Van Niekerk et al, (2008). **Law @ Work**, 1st ed. Lexis Nexis: Durban p.135.

⁴⁶ Van Niekerk *ibid* note 45 p.136.

⁴⁷ (2001) 12 BLLR 1316 (LAC).

⁴⁸ See Du Toit "New Light on Old Questions"? *University of Cape Town v Auf Der Heyde* (LAC) (2002) 23 ILJ 658.

⁴⁹ (2002) 21 ILJ 1119 (LC) at 1125B.

implementation of affirmative action hitherto is narrow as the other categories of persons who equally qualify for employment are excluded. To the white community affirmative action is viewed as a form of reverse discrimination and apartheid in disguise. Thus, in *Baxter v National Commissioner: Correctional Services and Another*,⁵⁰ the court held that the Commissioner had not accurately applied his mind to the merit of the case and had failed to comply with the regulations governing promotions.⁵¹ The case concerned an alleged claim of unfair discrimination by the respondent to appoint him as Director.

Grogan on the other hand has argued that "affirmative action is defensible only when it seeks to attain avowed objectives".⁵² He explained further that once it goes beyond that it becomes nothing else other than discrimination. This assertion was established by Sebola in these words, "the implementation of certain policies might bring more challenges into the picture than the deficiencies they were intended to solve".⁵³ Also, protagonists are of the view that affirmative action is defensible only if it intends to address the legacies of past discriminatory practices.⁵⁴

However, this study is recommending that employers should seek to achieve one major goal, which is the advancement of designated groups into the public service. Attention should also be paid to our economy. This is because, if unqualified and

⁵⁰ (2006) 27 ILJ 1811 (LC) (Cele A).

⁵¹ Halton, C. *opcit* note 27 p.104-105.

⁵² Grogan, J. (2007). **Dismissal, Discrimination and Unfair Labour Practice**, Juta & Co Ltd. 2nd ed. p.163.

⁵³ Sebola, M. (2009) "Affirmative Action Policy: The Administrative Efficiency and Socio-Cultural Impact on South African Society". **Journal of Public Administration**, 44 (4) p.1102-1113.

⁵⁴ Sebola, M. *ibid* note 53 p.1102-1113.

unskilled people are employed as a result of affirmative action, the economy will be adversely affected and this will lead to a drop in economic activities.

Naff and Milne have also argued that affirmative action centres more on broader empowerment rather than passive representative bureaucracy.⁵⁵ Dupper is of the opinion that "affirmative action is essential and just because it intends to remedy the legacy of colonialism and apartheid".⁵⁶ He has further argued that, despite that, the policy should be implemented in such a way as to assuage anger from non-protected groups and promote social cohesion.

To Bentley and Habib, the implementation of affirmative action programmes favours 'race' over gender and disability, as well as Africans over coloured and Indians.⁵⁷ It is suggested that merit should be considered as an important factor for a good public service. This is because if selection was made according to social attributes, the general output of organizations that implement affirmative action will depreciate within a shorter period.⁵⁸ Thus, career advancement should be based on merit other than racial considerations, to avoid low performance in organizations in general and the public service in particular.

⁵⁵ Naff, K. (2007). "Passive Representation in South African Bureaucracy: A Lot Has Happened, but it is a Lot More Complicated", paper presented at the Annual Meeting of the American Political Science Association. Available at http://www.allacademic.com/meta/210517_index.html accessed 31 March 2011.

⁵⁶ Dupper, O. (2008). "Affirmative Action: Who, How, And How Long"? 24. *SAJHR* p.425-444.

⁵⁷ Bentley, K. and Habib, A. (2008). **Racial Redress, National Identity and Citizenship in Post-Apartheid South Africa** in Bentley K, and Habib, A. (eds) **Racial Redress and Citizenship in South Africa** p. 21.

⁵⁸ "Implementing Affirmative Action in Public Service Comparative Administrative Practice", (author unknown), available at www1.worldbank.org/Publicsector/bnpp/report%20012405.doc accessed on 4 April 2011.

From the above literature, it is evident that there are gaps in the discussions with regard to the implementation of affirmative action measures in the South African context. Therefore, this study recommends that the Constitution and other legislation regulating employment relations be reviewed to avoid the notion of reverse discrimination among the white community. It is also suggested that the state should embark on educating and training of members from the previously disadvantaged groups in order to enable them to be competitive in the job market.

In addition, section 20 (3) of the Employment Equity Act laid down four requirements for a person to be suitably qualified for a job.⁵⁹ These requirements are problematic in that most advertised jobs insist on formal qualifications with relevant experience. The question that comes to mind is, what is the position of those in the informal sector? Where do young graduates get the required experience without being given an opportunity to work? Therefore, this Act is a limitation on the policy and implementation of affirmative action. That notwithstanding, the last requirement also calls for concern in that it is difficult for an employer to measure, during an employment process, the capacity to acquire skills to do the job within a reasonable time or the employee's future potential. This section is a limitation on the policy and impinges negatively on the effective implementation of the policy.

⁵⁹ Formal qualifications; Prior learning; Relevant Experience; or Capacity to acquire, within a reasonable time, the ability to do the job.

1.6 Scope and Limitations of the Study

1.6.1 Scope

This study investigates the impact of the Constitution on employment relations with particular reference to affirmative action. In order to achieve this goal, the study has been divided into five chapters as follows:

Chapter one comprises the introduction of the main issues upon which the whole study is structured. This includes background to the study, the research problem, objectives and methodology.

The second part focuses on the constitutional and legislative in-roads into employment relations in South Africa. This entails a discussion on the historical perspectives of employment relations in South Africa. Some policies that were developed to inform the implementation of affirmative action measures are discussed.

Chapter three focuses on the implementation of affirmative action in the public sector employment relations in South Africa. A critical assessment is done on the South African equality jurisprudence, looking at the notion of formal and substantive equality. The distinction between fair and unfair discrimination is also analyzed. Thereafter, an understanding of affirmative action in South Africa is examined using decided cases.

Chapter four entails a comparative study of the implementation of affirmative action in the United States. The focus here is on drawing important lessons from the experiences of that country.

The last chapter of this study explores the challenges that have been identified from the above investigation and proffer recommendations for policy and law reform.

1.6.2 Limitations

The concept of affirmative action is very broad. Therefore, due to time and budgetary constraints, the researcher has not been able to carry out an empirical investigation. Also, there is limited space as it is a mini-dissertation. However within these limits, attempts have been made to achieve the aims of this study.

1.7 Definition of important terms

1.7.1 Affirmative Action

There are many definitions of the concept of affirmative action as there are many authors. South Africa's first public sector employment reform document, the White Paper on the Transformation of the Public Service was the first policy document to define affirmative action.⁶⁰ It defined affirmative action as "laws, programmes or activities designed to redress past imbalances and to ameliorate the conditions of individuals and groups who have been disadvantaged on the grounds of race, colour, gender and disability".⁶¹

⁶⁰ White Paper on the Transformation of the Public Service.

⁶¹ Department of Public Service and Administration (DPSA) 1995. White Paper on the Transformation of the Public Service. Available at

According to the Uniform Guidelines on Employee Selection Procedure (UGESP), "affirmative action is one element of an effort to remedy past and present discrimination and is considered vital to assuring that jobs are genuinely and equally accessible to qualified persons, without regards to their sex, racial or ethnic characteristics". Affirmative action plans can be voluntary or ordered by the court.⁶² Further, affirmative action has been defined by the policy instrument developed for its implementation, the Employment Equity Act, as being corrective steps used in the creation of an equitable environment, specifically for those who had been historically disadvantaged because of discrimination.⁶³ Grogan defines affirmative action as a "programme or policy in terms of which a group of people are accorded special treatment on the basis of some common characteristics".⁶⁴

However, for purposes of this discussion the term affirmative action will refer to the means by which previously disadvantaged groups are given preferences in employment practices in order to achieve equality in the workforce.

1.8 Summary

This chapter has captured a range of issues namely: background to the study, which includes among others the role of the state in employment relations. This involves a discussion of some theories of the labour relations and the state. The rationale behind this debate was to bring out an understanding of how and why the state

<http://www.dpsa.gov.za/documents/acts®ulations/framework/white-paper/wpstoc.pdf>
accessed on 20 May 2011.

⁶² Greene, K.W. (1989). **Affirmative Action and Principles of Justice Contributions in Leg Studies**, CA: USA. Greenwood Pub Group Newark, p. 82.

⁶³ Act 55 of 1998.

⁶⁴ Grogan, J. (2007). *opcit* note 52 p.163.

intervenes in labour issues as viewed by various theorists. The main research problem was discussed, followed by an analysis of the relevant literature relating to the concept of affirmative action in South Africa. The above literature reveals that the implementation process is narrow as other categories of persons, who qualify for employment, are over-looked. The objectives of the study were also examined.

CHAPTER TWO: CONSTITUTIONAL AND LEGISLATIVE IN-ROADS INTO EMPLOYMENT RELATIONS IN SOUTH AFRICA

2.1 Introduction

The Constitution of South Africa is the supreme law of the Republic, thus, any law or act inconsistent with its provisions will be considered null and void.⁶⁵ Therefore, it binds all legislative, executive and judicial organs of the state at all levels of government.⁶⁶ It also sets out the rules governing the operation of the state and the relationship between the state and its citizens. The Constitution provides the core democratic values that comprise the foundation of the new society it seeks to achieve. It also elaborates on the values on which the Constitution is premised.⁶⁷ These values are expressed throughout the Constitution. The Preamble envisages a 'society based on democratic values, social justice and fundamental human rights'. In setting out the founding provisions of the state, section 1 states that:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a) human dignity, the achievement of equality and the advancement of human rights and freedoms;
- b) non-racialism and non-sexism ;
- c) supremacy of the Constitution and the rule of law, and

⁶⁵ Bertus De Villiers, (1994.) **Birth of the Constitution**. 1st ed. Kenwyn: Juta p. 331.

⁶⁶ Bertus *ibid* note 65 p.331.

⁶⁷ Botha (1994). **Values and Principles Underlying the 1993 Constitution**, South African Public Law p.245.

d) universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

Constitutional values and principles are also implicit in many constitutional provisions, as they are considered an important part of the Constitution. In the light of the above, other legislation had been enacted to govern and regulate employment relations in South Africa. This is elaborated in detail in the course of the discussion hereunder. The late Ismael Mahomed, then a Constitutional Court judge posited that:

All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which

it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism.⁶⁸

The above assertion is true looking at the case of *S v Makwanyane*,⁶⁹ where the Constitutional Court upheld the value and concept of "Ubuntu" as manifested by local practices and customs by the people of the Republic. The decision in this case also charted the way forward, from the oppressive apartheid regime to a new dispensation, from confrontation to conciliation.⁷⁰ This matter concerned the constitutionality of section 277 (1) (a) of the Criminal Procedure Act.⁷¹ Portraying the concept of 'Ubuntu' in the Makwanyane case, Langa J stated that the epilogue to the Interim Constitution:

...suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimization to Ubuntu...⁷²

It therefore, became certain that despite the move to democracy, many forms of discriminations remained deeply embedded in our society today. However, the obligations to address these inequalities are found in the Constitution and in our international law obligations. The Constitution mandates national legislation to prevent unfair discrimination and promote equality.⁷³ To this effect, the values

⁶⁸ See *the State v T Makwanyane and M. Mchunu*, 1995 (6) BCLR 665 (CC) at 262.

⁶⁹ 1995, 3 SA 391 1995(2) SACR1 1995(6) BCLR 665 (CC) para 262.

⁷⁰ Tshoose, C. (2009). "The Emerging Role of the Constitutional Value of Ubuntu for Informal Social Security in South Africa". 3 *African Journal of Legal Studies*, p.12-19.

⁷¹ Act 51 of 1977.

⁷² Quoted by Khunou, F.S. and Nthai, S. (2010). "Reasoning the contribution of ubuntu through the eye of constitutional jurisprudence in a democratic South Africa". Unpublished mimeo, (unedited) p.1-22.

⁷³ Section 9 (1) and (2).

underlying constitutional supremacy not only express the democratic vision of the new South Africa; there are also important interpretive tools that the courts must use in giving meaning and content to the Bill of Rights. Section 39 (1) states that in interpreting the Bill of Rights, a court or other tribunal or forum-

must promote the values which underlie an open and democratic society based on human dignity, equality and freedom; must also consider international law; and 'may consider' foreign law. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum 'must promote the spirit, purport and objects of the Bill of Rights.'⁷⁴

In terms of section 39(2), the courts are required to interpret statutes and develop the common law and customary law in a manner that 'promotes the spirit, purport and objects of the Bill of Rights'. Thus, constitutional values are central to the judicial task of interpreting and applying the rights guaranteed in the Constitution, as well as statutes, the common law and customary law.

This chapter examines constitutional and legislative in-roads into employment relations in South Africa. To this effect, the historical perspectives of labour laws and labour relations in South Africa are discussed and this entails an examination of the various stages that contributed to the development of labour laws. Hence, some legislation that were enacted to inform the implementation of affirmative action measures in South Africa and regulate labour relations in the employment domain are analyzed.

⁷⁴ Anthea, J. (1997). *Bill of Rights Report*. Johannesburg: South African Institute of Race Relations p.139.

2.2 Historical Perspectives of Employment Relations in South Africa

This study seeks to demonstrate that the future is informed by the past, therefore, in order to understand the present and plan for the future, it is essential to study the past.⁷⁵ The importance of history hereof was motivated by the statement of Muller, who posited that, "Man looks at the past to provide him with an understanding of the present and the foundations on which his future must rest".⁷⁶ However, Finnemore has argued that the history of South Africa is very complicated and difficult to analyze.⁷⁷ This is due to the difficulty experienced in achieving democracy. The historical landmark periods are analyzed below.

2.2.1 The Pre-1924 Era

South Africa has a rich and dynamic historical background. That is from the earliest inhabitants through colonization up to the discovery of diamonds and gold.⁷⁸ The history of South Africa was marked by segregation and conflict between several ethnic groups. The Khoisans were the earliest inhabitants of present day South Africa, who lived in the southern tip of the continent from time immemorial before the arrival of European seafarers.⁷⁹ During this period, the inhabitants had no organized

⁷⁵ Iya P.F. (2001). "The Legal System and Legal Education in the Southern Africa: Past Influences and Current Challenges", *Journal of Legal Education*, 51 (3) p.355-362.

⁷⁶ Muller, C.F.J. (1981). (eds). **Five Hundred Years A History of South Africa**. 3rd rev. ed. Pretoria: Academica, p. Xi.

⁷⁷ Finnemore, M. (1999). **Introduction to Labour Relations in South Africa**. 7th ed. Butterworths: Durban p. 20.

⁷⁸ South Africa's history and heritage, available at <http://www.southafrica.info/about/history/history.htm> on 23 April 2011.

⁷⁹ A Short History of South Africa available at <http://www.southafrica.info/about/history/history.htm> on 23 April 2011.

constitutional framework compared to other modern states.⁸⁰ Their main activity was agriculture and trade.⁸¹ The employment relationship was governed by the Master and Servant Act of 1856.

In 1652, Jan Van Riebeeck and his men had settled at the Cape of Good Hope and set up a Dutch East India Company.⁸² This settlement led to a significant change of events in the history of South Africa. By 1657, the European settlers were allotted farms by colonial authorities. In response to the colonists' demand for labour, slaves were imported from Africa, Madagascar and the Dutch East Indies. The slave population increased rapidly as more labour was needed. By mid-1700's there were more slaves in the Cape than there were "free burghers" (European colonists).⁸³ Gradually, the Khoisans began losing hold of their lands as Boers started pushing north and eastwards.⁸⁴ In 1795, the British had occupied the Cape as a strategic base against the Dutch.⁸⁵ Seven years later the colony was returned to the Dutch Government and came under British rule again in 1806.⁸⁶

⁸⁰ Rautenbach, I.M. and Malherbe, E.F.J. (2004). **Constitutional Law**. 4th ed. Lexis Nexis: Durban p.13.

⁸¹ "South African: History" available at <http://www.infoplease.com/ce6/world/A0861191.html> on 23 April 2011.

⁸² Duard K and Viljeon F. (1998). **Beginner's Guide for Law Students**. 2nd ed. Cape Town: Juta p. 30.

⁸³ South African Government Information, available at <http://www.info.gov.za/aboutsa/history.htm> on 25 April 2011.

⁸⁴ A Short History of South Africa *opcit* note 79.

⁸⁵ Duard, K. and Viljeon, F. *opcit* note 82 p.33.

⁸⁶ Finnemore, M. *opcit* note 77 p. 26.

In 1886, gold and diamonds were discovered on the Witwatersrand and along the Vaal and Orange Rivers in Kimberly, respectively.⁸⁷ These mineral discoveries led to great economic developments which resulted in scarcity of labour. The shortage of labour forced the miners to introduce pass laws, the hut and poll taxes as well as the Land Acts which reserved 90% of the country for white's ownership.⁸⁸ The aim was to force black people off their lands and send them into the labour markets, so as to meet the needs of the mine owners. During this period, trade unions also operated along racial lines. This situation posed enormous problems in employment relations, thus, leading to the outbreak of a strike by black employees. The continuous instability worsened with a large-scale strike by mine workers in 1913.⁸⁹

In 1914 a general strike occurred leading to the imposition of martial laws. The frequent strikes caused a drop in production, increased poverty, unemployment as well as the retrenchment of most workers to minimize costs. The mine owners therefore, had to look for a way to prevent strikes and to keep profitable mines from declining.⁹⁰ This situation resulted in the 1922 Witwatersrand strike. Many groups joined this strike including the miners, the engineering workers and the power station personnel followed by the police.⁹¹ This strike became the origin of workers'

⁸⁷ Du Toit *et al.* (2000), "**Labour Relations Law: A Comprehensive Guide**". 5th ed. Durban: Butterworths p.67.

⁸⁸ History of South Africa available at <http://www.classicencounters.com/historysa1.htm> on 25 April 2011.

⁸⁹ National Labour Law profile accessed at http://www.ilo.org/ifpdial/information-resources/national-labour-law-profile/WCMS_158910/LANG--en/index.htm on 25 April 2011.

⁹⁰ Webster, E. (2001). **Essays in Southern African Labour History**. Johannesburg: Raven Press p.80.

⁹¹ Finnermore, M. *ibid* note 77 p.24.

struggle for freedom. Thus, in an effort to resolve this instability the Industrial Conciliation Act of 1924 was passed.

This period brought a significant development of labour laws and labour relations in South Africa. From the above discussion it is realized that employees' rights were very limited. The employment relationship between the employer and the employee was very hostile and all power was vested on the employer. Simply put, it was purely a master and servant relationship. It is on the basis of this that the Constitution and other pieces of legislation were enacted to correct the injustices of the past, through the implementation of affirmative action in employment relationships.

2.2.2 Labour Relations in the period from 1924-1979

This period was characterized by the enactment of a number of legislative interventions to reduce the rights of trade unions in South Africa. These interventions led to the enactment of the various Acts as illustrated below;

2.2.2.1 Industrial Conciliation Act of 1924

The government responded to the 1922 Rand Rebellion by enacting the 1924 Industrial Conciliation Act. The Rand Rebellion was an armed uprising of white miners in the Witwatersrand region of South Africa in 1922. It is also referred to as the Rand Revolt or the Red Revolt. The Industrial Conciliation Act created an employee-employer council with the powers to negotiate and resolve disputes

concerning wages.⁹² It granted white trade unions statutory recognition with a limited right to strike, while black workers were omitted from the definition of “employee”. The net effect of this law was that white workers could negotiate the conditions of work for themselves and for African workers. By so doing, Africans were employed on less favourable conditions to those set by the Conciliation Board.⁹³ The Industrial Conciliation Act was significant for two reasons. First, trade unions in South Africa acquired the same status to that of the British in 1871.⁹⁴ Also a system of dispute resolution by voluntary conciliation was introduced. It indicated recognition by the South African government that industrial disputes could not be eliminated by merely declaring strikes illegal. The major weakness under this Act was that no provision was made for employers’ associations.⁹⁵

Thus, it is from this concept that the present dispensation has evolved to correct the inherent inequality that plagued labour relations in South Africa. The rationale behind this evolution is that the continuous instability had created awareness amongst black workers; as such they could now stand for their rights. Eventually there was a need for change of policies and revision of working conditions for black employees in South Africa.

⁹² Jordaan, C. and Ukpere, W. I. (2011). “South African Industrial Conciliation Act of 1924 and current Affirmative Action: An Analysis of Labour Economic history” **African Journal of business Management**, 5(4), p.1093-1101, at <http://www.academicjournals.org/AJBM>.

⁹³ Webster, (1978). **Essays in South African Labour History**. S A Law Publications, Johannesburg: Raven p.68.

⁹⁴ Ringrose, H.G. (1983). **The Law and Practice of Employment** 2nd ed. Cape Town: Juta p.7.

⁹⁵ Nel, P.S. *et al*, (2005). **South African Employment Relations: Theory and Practice**, Pretoria: Van Schaik, p. 80.

2.2.2.2 Industrial Conciliation Act of 1937

This Act together with the Wage Act prohibited all forms of discriminations on grounds of race and colour. This Act became unsuccessful as it failed to resolved labour issues. Thus, the new government immediately appointed both the Van Reenen Commission of 1935⁹⁶ and the Botha Commission of 1951⁹⁷ to carry out an investigation into the existing labour legislation. The argument advanced by these Commissions was that parity shouldn't be allowed between the white and black population.⁹⁸ For if done, will jeopardize the already existing white dominance. However, the Commissions recommended the establishment of separate bargaining councils which will operate independently, it also emphasized that black unions should be subject to stringent conditions and that strikes actions should be banned thus, curbing the black racial tension.⁹⁹

The government however, rejected some of the recommendations and in 1953 passed the Bantu Labour (Settlement Disputes) Act, later known as the Black Labour Relations Regulation Act. The aim of the Bantu Labour Act was to prevent trade unionism among Blacks. Most notable is the fact that the Minister of Labour was appointed to represent African workers under a white chairman. The ineffectiveness of this Act later led to the enactment of the Industrial Conciliation Act of 1956 and the subsequent development of labour relations in South Africa.

⁹⁶ Report of Industrial Legislation on Enquiry (UG 37-1951) at paras 267-270.

⁹⁷ Report of Industrial Legislation on Enquiry (UG62-195) at paras 340-342.

⁹⁸ Bendix, S. *opcit* note 3 p.334.

⁹⁹ Bendix, S. *opcit* note 3 p.334.

2.2.2.3 Industrial Conciliation Act of 1956

The government passed the Industrial Conciliation Act of 1956 three years after the passage of the Black Labour Relations Regulations Act.¹⁰⁰ The aim of this Act was to separate trade unions along racial lines, in order to weaken the unions.¹⁰¹ This Act provided that "no further mixed unions would be allowed to register", and excluded all 'Bantus' including black women from its ambit.¹⁰² There was also the introduction of statutory collective bargaining and a system of job reservation policy for a particular race. It is common knowledge that the job reservation clause became one of the most notorious provisions in South African labour legislation.¹⁰³ This is because the Act introduced racial divisions in the employment domain, whereby a particular occupation could be legally reserved for a certain race.¹⁰⁴ Thus, jobs were not necessary reserved for whites, but for members of a single race group.

The 1956 Act completed the construction of a racially segregated industrial relations system in South Africa. Thus, in 1977, the Wiehahn Commission of Inquiry was appointed by the government to investigate the state of industrial relations in the country.

It is therefore evident that this period is very vital in the development of labour laws in South Africa. As very important developments took place in the employment

¹⁰⁰ Bendix, S. *opcit* note 3 p.334.

¹⁰¹ South African History Online towards the people at <http://www.sahistory.org.za/dated-event/industrial-conciliation-act-1956-pased> on 26 April 2011.

¹⁰² Bendix, *opcit* note 3 p.334.

¹⁰³ Bendix, *opcit* note 3 p.335.

¹⁰⁴ Bendix, *opcit* note 3 p. 335.

domain, such as, the emergence of a dual labour law system in South Africa. Therefore, the concept of inequality originated from the development of labour laws under the apartheid regime. The Employment Equity Act was enacted to correct these injustices by implementing affirmative action measures in all employment activities.

2.2.2.3.1 The Wiehahn Commission of Inquiry

The ineffectiveness of the Black Labour Regulation Act of 1973, in particular its failure to grant black employees full trade union membership led to many strikes. As a result of the failure, the Bantu Labour Relations Regulations Act was enacted which also failed to resolve labour disputes. Eventually, a favourable atmosphere was needed to investigate the different codes of employment practices implemented in organizations nationwide. Thus, the government, in 1977, appointed the Wiehahn Commission of Inquiry to investigate labour activities and make recommendations for law reforms.¹⁰⁵ The Committee recommended the following;

(a) Retention of closed shop bargaining system.¹⁰⁶

(b) African workers be allowed to join unregistered unions and be directly represented in industrial councils or conciliation boards thus ending the dual system of labour relations.¹⁰⁷

(c) A Tripartite National Manpower Commission be established.¹⁰⁸

¹⁰⁵ Bendix, *opcit* note 3 p.341.

¹⁰⁶ Bendix, *opcit* note 3 p.341.

¹⁰⁷ Bendix, *opcit* note 3 p.341.

¹⁰⁸ Bendix, *opcit* note 3 p.342.

(d) Trade unions be allowed to register disputes (composition) in terms of colour, race or sex.¹⁰⁹

(e) The development of fair employment practices by the Industrial Court.¹¹⁰

(f) The abolition of statutory job reservation.¹¹¹

(g) Freedom of association be granted to all employees irrespective of race, sex or creed.¹¹²

The outcome of the Commission's report and recommendations culminated in the enactment of the Industrial Conciliation Act of 1979 which repealed the Industrial Conciliation Act of 1956.

2.2.4 The Period from 1979-1995

The government accepted most of the recommendations of the Wiehahn Commission by hoping to incorporate the militant new unions in the employment domain and to maintain peace. This led to the enactment of the Labour Relations Amendment Act of 1979, aimed at strengthening the new era in South African employment relationship.

By virtue of the recommendations, changes were enacted over a period of four years in 1980, 1981, 1982, and 1983 respectively. Prominent to these changes is the fact that black employees were included in the definition of "employee". This definition is explicitly defined in section 213(a) and (b) of the Labour Relations Act,

¹⁰⁹ Bendix, *opcit* note 3 p.342

¹¹⁰ Finnermore, *opcit* note 77 p.35-36.

¹¹¹ Bendix, *opcit* note 3 p.342.

¹¹² Bendix, *opcit* note 3 p. 342.

66 of 1995. The meaning of 'any person' here includes even black employees, which means it is not limited to a particular race or gender. African workers be allowed to join unregistered unions and be directly represented in industrial councils. The registration of mixed unions was forbidden with a few exceptions, while black trade unions could now be registered. In addition, full union rights were given to all workers in South Africa irrespective of race. It is obvious that continuous internal and external pressures led to the achievement of the above concessions and reforms in labour policy and legislation.

It is therefore submitted that the development of labour relations in the country witnessed a drastic change from that of adversarialism and exclusion to one of inclusion and orderly collective bargaining. Most significantly is that discrimination was prohibited and the concept of equality restored. Blacks were given more recognition and opportunity to be favoured in any employment relations in South Africa through the implementation of affirmative action.

2.2.5 The Transitional Period from 1990-1994

The political transition in South Africa was instigated by the process of decolonization which began in other parts of Africa in the 1950s. This process informed the National Party's enemies that apartheid would be short lived, and that the wind of change in the rest of the continent would soon reach South Africa.¹¹³

Liberals had predicted a massive drop in economic growth rates due to the influence

¹¹³ Guelke, A. (2009). "South Africa: The Long View on Political Transition". **Nationalism and Ethnic Politics**. 15: 417-435.

of apartheid. Therefore, the government was forced to abandon the notion that majority rule was inevitable in South Africa.¹¹⁴

Congress of South African Trade Unions (COSATU) was formed prior to 1990 during the political struggle. COSATU had originally set itself a dual social, economic and political role. In the preamble to its Constitution, COSATU's main goal was to bring together unorganized workers and build a strong national industrial union.¹¹⁵ COSATU was able to put pressure on the government using its extensive policies and framework. The continued internal and international pressures coupled with the great economic slump of the 1990s forced the government to reconsider its policies.

Eventually, political parties and other liberation movements were unbanned. In 1990, Nelson Mandela was also released, this brought about a new political era in South Africa. It therefore became necessary to enact a Constitution that sought to redress the injustices of the past. To that effect, the Interim Constitution of 1993 was enacted and later replaced by the Final Constitution of 1996. This peaceful transition gave way to a new constitutional dispensation that led to a new phase in labour relations in South Africa.

2.2.5.1 The New Dispensation and Employment Relations with particular reference to Affirmative Action

The most prominent policy which was implemented during the transitional period was the Reconstruction and Development Programme (RDP), advocated by

¹¹⁴ Guelke, A. *ibid* note 113 p.417-435.

¹¹⁵ Bendix *opcit* note 3 p. 374.

COSATU with other unions. The RDP was considered the brainchild of COSATU.¹¹⁶ To Alder and Webster, the RDP involved important demands of the pro-democracy movement that could transform socio-economic activities.¹¹⁷ The new government's main goal was to set up policies that would address the needs of the society and rules that would regulate employment relations as well.

The most compelling reason for reforming labour legislation was the requirements of the Interim Constitution which invoked the notion of equality to redress the injustices of the past, through affirmative action measures. It was later replaced by the Final Constitution of 1996. Chapter two of the Bill of Rights had entrenched certain fundamental rights and protected them from infringement by government. Additional to these rights were the so called 'labour rights' contained in sections 9, 16, 17, 18, 22, and 23 of the Final Constitution. These sections had entrenched fundamental rights to citizens to challenge legislation and other actions of government that infringes their rights.

The above provisions also aimed at improving the employment conditions of workers. COSATU since then has remained as an umbrella organization, protecting the interest of workers in collective bargaining processes, debating and negotiating the wages of employees with employers. Thus, the new dispensation witnessed stability in the employment domain since the RDP had promised a strategy for

¹¹⁶ McKinley, D.T. (1994). "COSATU and the Tripartite Alliance", available at <http://general.rau.ac.za/sociology/Mckinley2.pdf> accessed on 15 May 2011.

¹¹⁷ Alder, G. and Webster, E. (1995). "Challenging Transition Theory: The Labour Movement, Radical Reform, and Transition to Democracy in South Africa". *Politics and Society*, 23(1):75-106.

rebuilding the economy and developing the human resource department of the country and focus on the basic needs of its citizens.¹¹⁸

In a similar vein, the National Economic Development and Labour Council (NEDLAC) was launched to usher in a new era of exclusive decision making and consensus-seeking in the economic arena.¹¹⁹ The aim was to discuss policies, propose legislation and create other platforms for government, employer and employee organizations so as to meet the needs of South Africans. Its origin lies in the struggle against apartheid, and a call from all sectors of society to make decisions in a more inclusive and transparent manner.¹²⁰

To this effect, the concept of affirmative action was enshrined both in the Constitution and other pieces of legislation in order to redress the injustices of the past, and create a balance in the employment domain. Below are some of the policies that were developed in South Africa to ensure the proper implementation of affirmative action measures. They are elaborated below.

2.3 Policies that were developed to inform the Implementation of Affirmative Action Measures in South Africa

It should be noted that there are a number of affirmative action policies that were developed to assist the proper implementation of affirmative action in South Africa. That said, it is essential to discuss them to give an understanding of how these

¹¹⁸ Bendix, *opcit* note 3 p. 343.

¹¹⁹ <http://www.nedlac.org.za/about-us/background.aspx> on 20 April 2012.

¹²⁰ <http://www.nedlac.org.za/about-us/background.aspx> on 20 April 2012.

policies can be realized. Some of the affirmative action policies are discussed in the next section.

2.3.1 The Public Service Act, 1994 (Proclamation 103 of 1994)

The significance of this Act is to ensure that the Public Service is equitably and fully represented by black South Africans who were disadvantaged by the apartheid regime. Section 11 of this Act provides for appointments and filling in of posts with members from designated groups. Sub section (i) states that during appointments and filling in of posts due regard must be given to equality and other democratic values and principles enshrined in the Constitution.¹²¹ It further provides for the evaluation of candidates based on training, skills, competence, knowledge and the need to redress the injustices of the past, so as to achieve a public service broadly representative of South African people, as well as representation according to race, gender and disability.¹²² Section 3 provides for the relevant executing authority to approve the appointments, transfers or promotions of employees in such a way as to promote the basic values and principles referred to in section 195(i) of the Constitution,¹²³ in order to achieve reasonable progress towards employment equity in an employer's workforce, as anchored by section 20(1) of the Employment Equity Act

¹²¹ Public Service Act, 1994. Proclamation 103 of 1994 as amended.

¹²² See Sect 2 (b) of the Public Service Act 1994.

¹²³ Section 11 has been substituted by section 8 of the Act No. 47 of 1997.

2.3.2 The White Paper on the Reconstruction and Development Programme 1994 (WPRDP)

The important aspect of this white paper is that it set out targets for the creation of five million jobs within a period of ten years. The rationale behind this programme was to ensure the effective representation in the public service by designated groups as provided by the Constitution and the Employment Equity Act. This white paper on RDP is a contribution to the renewal of our society. It recommits the state and society as a whole to the task of improving the life's of all South Africans within the shortest possible time.¹²⁴ The programme aimed at reconstituting the public service so as to be servants of the people in order to be accessible, transparent, accountable, efficient, and free of corruption by providing an excellent quality of service.¹²⁵ It outlines the different roles of government. For instance, the Interim Constitution provides for different levels of government at national, provincial and local levels and allocates competencies and powers to each. With the adoption of the Final Constitution these competencies and powers were to set the parameters for the roles of different tiers of government over the coming years.

The WPRDP of 1994 provided that issues relating to disparity and affirmative action should be dealt with urgently and holistically.¹²⁶ This means that the policy of affirmative action must aim at creating a broadly representative public service. Therefore, this programme had to be implemented within the framework of the Constitution and the need to empower disadvantaged communities who suffered

¹²⁴ <http://www.info.gov.za/whitepapers/1995/transformation.htm> on 29/April 2011.

¹²⁵ Republic of South Africa, Government Gazette (1994) 353 (16085). Cape Town p. 33.

¹²⁶ Republic of South Africa, Government Gazette *ibid* note 121 p.33.

from apartheid policies. It is anticipated, however, that every office of government from the smallest village council to the largest national department, should be restructured to take forward the RDP and create a just and equitable society.

2.3.3 The White Paper on the Transformation of Public Service, 1995 (WPTPS)

The main thrust of this White Paper was to set up a policy framework to direct the introduction and implementation of new policies and legislation aimed at transforming the South African public service.¹²⁷ It also laid down the preliminary affirmative action goals, in the form of targets, for fixed affirmative action categories particularly in chapter 5(1)(c) of the WPTPS. The white paper states that all designated employers should, within four years, have 50% black staff at management level, at least 30% of new recruits, within four years. It also provides that women should be at senior and management level within four years. Furthermore, within the period of ten years, 2% of the public service personnel should be people with disabilities.¹²⁸ It also required each Department of state to have detailed affirmative action plans as part of the broader human resource development and capacity building, as it was viewed as part of the process of empowering disadvantaged people.¹²⁹

The importance of this white paper is to empower the black community and create a balance in the labour and work force of South Africans. This policy document was

¹²⁷ <http://www.info.gov.za/whitepapers/1995/transformation.htm> on 29/April 2011.

¹²⁸ Department of Public Service and Administration (DPSA) 1995. White Paper on the Transformation of Public Service. Available at <http://www.dpsa.gov.za/documentts/acts®ulations/frameworks/white-papers/wpstoc.pdf> accessed on 29 April 2011.

¹²⁹ DPSA *ibid* note 128.

guided by the terms of the Interim Constitution. Section 212(1) of the Interim Constitution stated that, the transformation process would need a supportive and appropriate legislation to allow key role players to function effectively. Thus, there was a need to amend existing legislation and introduce new legislation that will redress these challenges. Therefore, the Public Service Labour Relations Act,¹³⁰ was replaced by the new Labour Relations Act that protects both private and public sector workers.

2.3.4 The Labour Relations Act, 66 of 1995 as amended (LRA)

This Act is the centrepiece of labour legislation in South Africa.¹³¹ The purpose of this Act is to advance economic development, social justice, labour peace and the democratization of the workplace. This Act, amongst others, regulates the rights to unionize, provides a framework for collective bargaining, and regulates dismissal law and for resolution of labour disputes.¹³² The Act was intended to give extensive rights to workers by guaranteeing them the freedom to associate, form and join trade unions of their choice. The reason was to redress past injustices where blacks were prevented from joining trade unions and could be treated unfairly by their employers. It recognizes Bargaining Councils, Statutory Councils and Workplace Forums. These Fora were to ensure favourable conditions of work for employees and discuss the terms of employment with regard to wages, sick leave and annual

¹³⁰ Proclamation 105 of 1994.

¹³¹ LRA 66 of 1995 as amended.

¹³² Fuo, O. and Luyando, K. A. (2008). "Exploring the Critical Landmarks in the History of Labour Law and Labour Relations in South Africa and Discussing the Impact of Constitutionalism on the Current Status of Labour Law in South Africa", seminar paper presented to the Post Graduate Class, Faculty of Law, NWU p.19, unpublished mimeo.

leave. It equally provided for the resolutions of disputes between trade union representatives and employers organizations.

The significance of this legislation is to reduce the powers of employers and avoid unfair dismissals and unfair labour practices by employers over their employees. This Act was enacted together with other legislation to improve the labour and working conditions of employees and to ensure equality in employment relations and the advancement of persons disadvantaged by unfair discrimination.

2.3.5 The Constitution of the Republic of South Africa, 1996

The Final Constitution concluded South Africa's negotiated transition to democracy.¹³³ Affirmative action policies were therefore enshrined within the Bill of Rights, principally in section 9(2), which states 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" Furthermore, 195(1)(i) of the Constitution provides that "public administration should be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to address the imbalances of the past to achieve broad representation". This implies that the Constitution was enacted to provide for equality in the society by eliminating all forms of discriminatory practices and the advancement of members from designated groups through the implementation of affirmative action measures.

¹³³ Laubscher, (2004). "Employment Law Update". In De Rebus, 54-55.

Therefore, it is evident that the Constitution instigated the enactment of other legislation to achieve the dreams of a just and united society.

2.3.6 The Basic Conditions of Employment Act, 75 of 1997 as amended (BCEA)

This Act was intended to regulate the right to fair labour practice as contained in Section 23 (1) of the Constitution. It also gives effects to the obligations incurred by the Republic as member state of the International Labour Organization. Therefore, the Act regulates the minimum standards of employment pertaining to working hours, annual leave and sick leave, termination of contracts of employment, and particulars of employment. It also prohibits the employment of minor children and the implementation of forced labour.

2.3.7 The White Paper on Human Resource Management in the Public Service 1997

This Paper sets out goals for managing employees in the public service and acts as a support for affirmative action programmes.¹³⁴ The policy provides that, in combination with affirmative action, better human resource management may possibly achieve a representative public service.¹³⁵ This White Paper is bound by the Labour Relations Act of 1995. It prohibits unfairness in employment between employees and their employers.

¹³⁴ <http://www.info.gov.za/whitepapers/1997/hrmwp.pdf> on 29 April 2011.

¹³⁵ DPSA, 1997. White Paper on Human Resource Management in the Public Service. Available at <http://www.dpsa.gov.za/documents/acts®ulations/frameworks/white-papers/pservedec.pdf> accessed on 29 April 2011.

2.3.8 The Employment Equity Act, 1998 (Act 55 of 1998)

The Employment Equity Act of 1998 provides a framework for the implementation of the guidelines set out in the other affirmative action policies. It is also aimed at promoting the constitutional right to equality and to redress the effects of discrimination that came as a result of apartheid. According to this Act, all designated employers are required to have detailed employment equity plans; particularly section 13(1) of the Employment Equity Act provides that "Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act". This in effect implies that employers are under a duty to have an employment equity plan in place in order to implement affirmative action so as to meet representivity targets in the public sector.¹³⁶

According to section 15(1) to (4) designated employers might resort to preferential treatment in hiring practices, make reasonable accommodation for people from designated groups so as to ensure equal opportunities and equitable representation in the workforce. They might also use measures designed to further diversity in the workplace, identify and eliminate employment barriers including all forms of discrimination, which might adversely affect people from designated groups. The above section permits some forms of discrimination that are aimed at advancing members from designated groups.

The Act equally contains a section (section 20(3)) on affirmative action, where it gives details on targets that are broader than those contained in the White Paper on

¹³⁶ See section 13(2)(c) of the Employment Equity Act, 55 of 1998.

the Transformation of the Public Service (WPTPS). This section states that there should be suitably qualified people from target groups across all occupational categories and levels. Sections 20(3)(a)(b)(c) and (d) also makes provisions for other categories that might be considered to implement affirmative action measures and achieve employment equity in South Africa. The above sections form the foundation for the analysis of the outcomes of affirmative action measures in an employment domain.

2.3.9 The White Paper on Affirmative Action in the Public Service, 1998

The legislation informed by this policy document is the Employment Equity Bill and other laws applicable to the public sector employment relations. This White Paper provided a framework that guided National Departments and Provincial Administrators on how to develop and implement affirmative action programmes.¹³⁷ It directly addressed affirmative action and representative bureaucracy. This document sets out the framework for the creation of a representative public service where the ultimate goal of affirmative action is set out, meaning that the public service should be representative of the population of South Africa. As a result, the targets set out in the WPTPS should be viewed at least as guidelines and as temporary steps to attain full demographic representation. As per the DPSA, the original targets were to be reviewed and revised in 1999 and also at three-year intervals.¹³⁸ The importance of this white paper is to direct the public sectors

¹³⁷ http://www.polity.org.za/polity/govdocs/white_papers/affirmative.html on 29 April 2011.

¹³⁸ DPSA 1998. White Paper on the Affirmative Action in the Public Service, available at <http://www.dpsa.gov.za/documents/acts®ulations/frameworks/white-papers/affirmative.pdf> accessed on 29 April 2011.

authorities, other Departments and other pieces of legislation on the effective implementation of affirmative action measures. It also had a duty to ensure that this policy is properly addressed and enforced in any employment domain.

2.4 Summary

This chapter has explored the constitutional and legislative in-roads into employment relations in South Africa, looking at the historical perspectives and the various phases that led to the birth of the new Constitution and automatically the new dispensation. It is incontrovertible that the Bill of Rights entrenched in the Constitution brought great changes into employment relations in South Africa. With this development employees are now able to challenge the activities of their employers which are contrary to the Constitution and other legislation. We also realized from the above discussions that the public service must be fully represented by South Africans to create a balance in society.

From the above discussions some policies that were developed to inform the implementation of affirmative action measures were analyzed so as to determine the extent to which designated groups are represented in the public service to address imbalances of the past and to show their influence on the development of employment relations in South Africa.

In the next chapter, we will focus on the implementation of affirmative action policies in public sector employment relations in South Africa

CHAPTER 3: IMPLEMENTATION OF AFFIRMATIVE ACTION IN THE PUBLIC SECTOR EMPLOYMENT RELATIONS

3.1 Introduction

Affirmative action is commonly viewed as a means of achieving equality in a substantive manner.¹³⁹ This view is buttressed by section 9(2) of the Constitution which provides that, 'equality includes the full and equal enjoyment of rights and freedoms', and that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination may be taken". Therefore, there is an obligation on the state to ensure that everyone fully and equally enjoys all rights and freedoms. Thus, affirmative action measures are seen as a substantive and composite part of the right to equality.¹⁴⁰

It is true that there is no place for discrimination in the employment domain. On the other hand, not everyone is aware of, or understands the laws that prohibit or protect employees from discrimination. In the South African context, the prohibition of discrimination in employment relations is enshrined by section 9 of the Constitution. There are a number of statutes¹⁴¹ that gives effect to the Constitution in the context of discrimination in employment to wit: the Labour Relations Act of 1995, the Basic Conditions of Employment Act of 1997 and the Employment Equity Act of 1998, all designed to give effect to the constitutional right to fair labour practice.

¹³⁹ Currie, I. and De Waal. (2005). **The Bill of Rights Handbook**. 5th ed. Cape Town: Juta p. 264.

¹⁴⁰ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) it was held that the constitutional goal of substantive equality must be upheld with regards to the notion of formal equality.

¹⁴¹ Grogan J, (2007). **Workplace Law**. 9th ed. Cape Town: Juta p.118.

The effective elimination of discrimination and the implementation of measures to ensure equitable representation of all races and both genders are imperative in the context of contemporary employment relations in South Africa. However, issues that remain unresolved are the emerging challenges encountered by employees in cases of actions where harm is caused to job seekers by the application and implementation of affirmative action measures.

The purpose of this chapter is to analyze the implementation and application of affirmative action measures in the public sector employment relations. To achieve this purpose, a distinction is made between fair and unfair discrimination with the help of case law to argument our thesis. Also, an analysis of the equality clause as contained in the Bill of Rights is pursued. The aim is to expose the strengths and weaknesses of the actual implementation of the concept of affirmative action with the intention of criticizing the emerging jurisprudence.

3.2 Understanding Discrimination

The word “discrimination” has both a relative and subjective meaning. The subjective nature of the word arises from the way many authors have attempted to approach the subject. Some authors are of the view that preferring one group for employment over the other merely because he/she was a victim of past discrimination will violate others rights.¹⁴² To them this approach is not the best way to achieve equality in our society, looking at the constitutional right to equality and human dignity. Subsequently other authors hold that the only way to compensate for the legacies of the past is to prefer one group over the other in employment

¹⁴² <http://www.allbusiness.com:print/1317-122eeq.html> on 27/08/2011.

relationships.¹⁴³ It is pivotal to mention here that discrimination claims can sometimes be very subjective in nature.

With regard to the relative aspects, the term discrimination varies from case to case. This implies that each case must be treated according to its own merits. In the United States of America the term "discrimination" has been defined follows;

unfavourable or unfair treatment suffered by employees due to their race, religion, national origin, disabled or veteran status, or legally protected characteristics. This group could also include employees who suffer reprisals for opposing workplace discrimination or for reporting violations to authorities. Federal law prohibits discrimination.¹⁴⁴

According to Du Toit,¹⁴⁵ the term "discrimination" in the South African law was dealt with in the case *Raad van Mynvakkbonde v Minister van Mannekrag*,¹⁴⁶ where the court held that any "differentiation" in terms of conditions of employment could not be classified as unfair. That case dealt with the issue of differentiation in relation to the payment of sick leave for the first three days of illness. In the South African context, the term discrimination has been interpreted by the Constitutional Court on several occasions, and the conclusion drawn by the court was that the term is pejorative in nature and cannot be understood in a neutral sense. It stated;

¹⁴³ **Understanding Workplace discrimination** accessed at <http://www.allbusiness.com/print/1317-122eeq.html> on 27/08/2011.

¹⁴⁴ <http://www.allbusiness.com:print/1317-122eeq.html> on 27/08/2011.

¹⁴⁵ Du Toit D, (2006). "The Evolution of the Concept of 'Unfair Discrimination' in the South African Labour Law". 27 *International Law Journal*.1311.

¹⁴⁶ (1983) 4 ILJ 202 (T).

the proscribed activity is not stated to be 'unfair discrimination' but is stated to be 'unfair differentiation'. Given the history of this country, we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.¹⁴⁷

From the *dictum*, the impression one gets is that the word 'unfairly' does more than distinguish between different kinds of differentiation. It differentiates between permissible and impermissible discrimination, where the discrimination itself has a pejorative meaning. The Labour Court has observed thus:

The provision sorts permissible from impermissible discrimination. By this mechanism the legislation recognizes that discriminatory measures are not always fair...the notion of permissible discrimination is in keeping with a substantive, rather than formal approach to equality that permeates the Constitution and from which the Labour Relations Act draws inspiration.¹⁴⁸

The above *dictum* distinguishes between permissible and impermissible discrimination. Furthermore, it amplifies the notion of equality, which underpins the Constitution. There is no doubt that discrimination is undesirable in the workplace as echoed by the Labour Relations Act.

¹⁴⁷ *Prinsloov Van Der Linde and Another* 1997 (3) SA 1012 (CC), where the constitutional Court drew a distinction between differentiation between legitimate differentiation and illegitimate differentiation.

¹⁴⁸ *Leonard Dingler Employee Representative Council v Leonard Dingler (pty) Ltd and others* (1998) 19 ILJ 285 (LC). In this case the Court attempted to differentiate between permissible and impermissible discrimination. The Court opined that there was no justification for permitting only monthly paid staff to join the staff benefit fund.

It is important to mention here that, the definition of discrimination in this discussion will be informed by the approach of the Constitutional Court in *Prinsloo v Van der Linde and Another*.¹⁴⁹ This case concerned differentiation between two categories of people. In other words, the matter was about the concept of equality and discrimination. The Constitutional Court found that differentiation which did not involve unfair discrimination was permissible, while differentiation which involved unfair discrimination was impermissible. The reason for adopting this definition is explained by the fact that it takes into consideration the political history of the country.

In this study, the definition of discrimination has been contextualized; it will be a one-sided argument if an understanding between direct and indirect forms of discrimination is not shown. In this sense, direct discrimination deals with situations where some people are treated differently from others on the grounds of sex, race, religion, sexual orientation or other protected traits. The other (indirect discrimination) will be inferred in situations where an employer utilizes an employment practice that is facially neutral but disproportionately affects members from disadvantaged groups in circumstances where it cannot be justifiable.

3.2.1 Prohibition of unfair discrimination

Apart from constitutional provisions against unfair discrimination, the Employment Equity Act aims at achieving equality in the employment sector by;

¹⁴⁹ 1997 (3) SA 10012 (CC) supra.

- ◆ promoting equal opportunity and fair treatment through the elimination of unfair discrimination; and
- ◆ Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups; in order to ensure their equitable representation in all occupational categories and levels in the workforce.¹⁵⁰

Section 6(1) of the EEA reads as follows:

No person may unfairly discriminate, directly or indirectly, against an employee, in an employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

The above section provides basic protection for employees against unfair discrimination.¹⁵¹ It is true, however, that not all forms of discriminations are unfair. This said, it is essential to distinguish between fair and unfair discrimination.

3.2.2 Distinction between fair and unfair discrimination

As earlier noted, the Employment Equity Act states that not all forms of discriminations are unfair. This implies that there are certain types of discriminations which are considered fair. However, it is difficult for employers and employees to

¹⁵⁰ Labour Market Commission Restructuring the South African Labour Market 1996 accessed at <http://www.polity.org.za/polity/govdocs/commission/fin8.html> on 06/09/2011.

¹⁵¹ Bregmans Attorneys, "The Prohibition of Unfair Discrimination in the Workplace" accessed at <http://www.royal.co.za/home/article/theprohibitionofunfairdiscrimination2/pageid/labour-law-article> on 06/09/2011.

develop a lucid understanding of the difference between fair and unfair discrimination unless they understand what actually the concept of 'unfairness' is all about.

“Unfairness” occurs when an employer’s conduct infringes upon the employee’s entrenched rights, is one-sided, unnecessary and/or inappropriate under the given circumstances.¹⁵²

In situations where an employee is unreasonably sidelined for employment because he/she is disabled or where a job applicant is unsuccessful because he/she is white this could amount to unfair discrimination. This was the case in *Consolidated Billing v IMATU*.¹⁵³ The employees in this case were turned down for internal appointments because they did not meet the desired racial profile. The arbitrators found that the failure to appoint them constituted an unfair racial discrimination. This is because the test of unfairness focuses principally on the impact of the discrimination on the complainant and others in his or her situation.¹⁵⁴

On the other hand, unfair discrimination, unlike fair discrimination, is based on the attributes having the potential to impair, to a significant extent, the fundamental human dignity of citizens as human beings. It is true that this impact imposes burdens on people who have been victims of past patterns of discrimination.¹⁵⁵

¹⁵² <http://www.labourguide.co.za/workplace-discipline-note-discrimination-is-not-always-unfair-623> on 06/09/2011.

¹⁵³ (1998), 8 BALR 1049.

¹⁵⁴ Dupper, O. and Garbers, C. (2004). “The Prohibition of unfair discrimination”. In Strydom, E. **Essential Employment Discrimination Law**, Cape Town: Juta p. 35.

¹⁵⁵ Currie, I and De Waal *opcit* note 139 p. 246.

In *Hoffmann v SA Airways*¹⁵⁶ (SAA), the case was about the constitutionality of SAA refusal to employ Hoffmann (appellant) because of his Human Immunodeficiency (HIV) status as a cabin attendant. Hoffmann therefore challenged the constitutionality of SAA policy and alleged that it constituted unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practice as entrenched in the Constitution. The court held that SAA's policy discriminated against him on the grounds of his HIV status. The court referred to the Harksen test in terms of "discrimination" and "unfairness". The court held that people living with HIV should be given more protection in law during employment because the impact of discrimination on HIV-positive persons was devastating. The court noted that it is even worse when the discrimination occurs in the context of employment, as it denies them the right to earn a living.

Pretoria City Council v Walker,¹⁵⁷ is another case that clearly illustrates the distinction between fair and unfair discrimination. The claim was based on the fact that white residents residing in some areas in Pretoria paid more for electricity than residents in previously black areas. The majority of the Constitutional Court, after examining the impact of the two policies adopted by Pretoria City Council, found that the Council's action amounted to indirect discrimination on the listed ground of race. The majority held further that the aspect of flat rate and cross-subsidization complained by Walker did not amount to unfair discrimination, while the aspect of selective recovery of debts amounted to unfair discrimination. Unfair discrimination,

¹⁵⁶ (2000) 21 ILJ 2357 (CC) see also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) *supra* where the same line of argument was upheld.

¹⁵⁷ 1998 (2) SA 363 (CC).

as explained by the court, is differentiation that has an unfair impact on its victims.¹⁵⁸

Thus, the Constitutional Court held that the fact that white suburbs subsidized consumption in the black townships could not be said to 'impact adversely on the respondent's dignity nor was he affected in a manner comparably serious to an invasion of his dignity'.¹⁵⁹ The court opined further that the implications of the right not to be unfairly discriminated against was affirmed in section 8 of the Interim Constitution and section 9 of the Final Constitution respectively which are the equality clause.

From the discussion, one is tempted to argue that the issue of flat rate and cross subsidization implemented by the City Council on white resident had an adverse impact and discriminated unfairly against them. Besides this was not the only way to recover the accumulated debts. The government is expected to act rationally when implementing laws. The difference in the cost of electricity between white residents and black residents caused great disparity and is not in line with the constitutional goal of achieving equality.

The lesson to be learnt from the three stage approach of the distinction between fair and unfair discrimination is that the constitutional commitment to eradicate inequality is upheld thus, upholding what the legislature intends of equal opportunities. This

¹⁵⁸ Currie I and De Waal, *opcit* note 139 p. 247.

¹⁵⁹ De Waal et al, (2001). **The Bill of Rights Handbook**. 4th ed. Cape Town : Juta p. 214. See also *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC). In this case the Court found that it was significant to consider the issue of unfair discrimination which it had rejected.

was the case in *Holomisa v Argus Newspapers Ltd*,¹⁶⁰ where it was found that the Constitution plants new standards in the South African legal system, namely; equality, democracy, transparency in government and accountability.¹⁶¹ It should also be noted that the court did not share the view that mere willingness to right pass wrongs made discrimination fair.¹⁶² Thus given the fact that black people as a group were discriminated against under the apartheid era and that the goal of the affirmative action plan was to "achieve substantive equality," therefore, just being a black person is enough to meet the definition of one who was subjected to unfair discrimination.¹⁶³ By some interpretations, if a white applicant experiences discrimination, it would not be considered "unfair" because of the legacies of the past.¹⁶⁴ The justification for this view is that the effects of the past are still felt today in our society.

3.3 The South African equality jurisprudence

The concept of equality is very tricky and confusing. Equality as per section 1 of the Constitution is a foundational value. Therefore, this constitutional imperative calls for the promotion of equality by eliminating unfair discrimination. According to Currie and De Waal, formal equality means that "people who are similarly situated in relevant ways should be treated similarly".¹⁶⁵ This implies that "people who are not

¹⁶⁰ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

¹⁶¹ Loyson, M. (2009). "Substantive Equality and Proof of Employment Discrimination": A critical analysis of the changing nature of the test for jurisdiction of discrimination in Employment. Degree in Partial Fulfilment of Magister Legum, Nelson Mandela Metropolitan University. p.1-99.

¹⁶² Loyson, M. *opcit* note 161 p.1-99.

¹⁶³ Grogan, J. (2003). **Workplace Law**. 7th ed. Cape Town: Juta p.138.

¹⁶⁴ Van Jaarsveld, I.L. (2000). "Affirmative Action: A comparison between South Africa and the United States" 42(6): 1-40.

¹⁶⁵ Currie, I and De Waal. *opcit* note 139 p. 230.

similarly situated should not be treated alike".¹⁶⁶ Before we continue, it is essential to have an understanding of the equality clause in detail, including the obligations that are imposed therein. The equality clause comprises five subsections. These subsections are discussed as follows;

According to section 9(1), everyone is equal before the law and has the right to equal protection and benefit of the law. This sub-section, commonly referred to as the 'equality clause', provides a general promise of formal equality to everyone by insisting that everyone is subject to the law. The second clause provides for equality in that no one is above the law. De Vos, posited that section 9(1) contains little more than a "guarantee of non-discrimination".¹⁶⁷ Therefore, this section confers the right to equal protection and benefit of the law to everyone on the basis of universality.¹⁶⁸ Put differently, the provisions deliberately guarantee equal treatment of all persons by organs of state in the same way, in spite of their position in the society.

The question that remain unanswered is that, if everyone is treated equally then the policy of affirmative action will not be necessary. Therefore, it is important to note here that in order to address the injustices of the past some particular group of people need to be treated differently so as to create a balance in our society.

Section 9(2) states that, "equality includes the full and equal enjoyment of all rights and freedoms". "To promote the achievement of equality, legislation and other measures designed to protect or advance persons, or categories of persons,

¹⁶⁶ Currie and De Waal *opcit* note 139 p. 230.

¹⁶⁷ De Vos P. (2000). "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court" 63 **THRHR** 62 p 64.

¹⁶⁸ Currie, I and De Waal. *opcit* note 139 p. 235.

disadvantaged by unfair discrimination may be taken". This provision strictly deals with affirmative action measures which impose a duty on designated employers to implement policies and practices in the workplace that are aimed at advancing those who were previously disadvantaged. What is important here is that the affirmative action provision is set as an exception to the equality principle as provided for by section 9(1) of the Constitution. This provision is a promise of substantive equality.¹⁶⁹

The third provision states "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."¹⁷⁰ This subsection contemplates two categories of discrimination: discrimination on listed grounds and discrimination on analogous grounds. It prohibits unfair discrimination on certain grounds ('listed grounds') and tolerates discrimination that is aimed at advancing the previously disadvantaged. The essential issue of this subsection is that, the above provision guarantees preferential treatment in any employment relations.

The fourth provision requires that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.¹⁷¹ These two sub-sections are the non-discriminatory provisions. This is true because

¹⁶⁹ Section 9 (2).

¹⁷⁰ Section 9(3).

¹⁷¹ Section 9 (4).

while sub-section (3) prohibits discrimination by the state, subsection (4) prohibits discrimination by private persons. Simply put, this provision extends the prohibition of unfair discrimination to a horizontal level and requires the enactment of national legislation to prohibit unfair discrimination at this level. As is articulated hereunder, that requirement was fulfilled with the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.¹⁷²

The final sub-section states that discrimination on one or more grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair.¹⁷³ With regard to this, the provision assumes that state or private discrimination on the listed ground is unfair. This in a way implies that discrimination is unfair unless fairness is proved. For instance in *Harksen v Lane NO and others*,¹⁷⁴ a case concerning the appropriation of the estate of Mr Harksen who was married to Mrs Jeanette Harksen, the respondents were trustees in the insolvent estate of Mr Harksen. Mrs Harksen alleged that the provisions of section 21 violated the equality clause of the Interim Constitution. The Constitutional Court held that to determine whether discrimination was unfair in that case, it had to be considered whether the complainant had suffered from past patterns of disadvantage. The discrimination was held not to be unfair.

Thus, from the above discussion it will be of paramount importance to understand the significant difference between formal and substantive equality and to conclude why the latter is more preferable to the former in our society today.

¹⁷² Act 4 of 2000.

¹⁷³ Section 9 (5).

¹⁷⁴ 1998 (1) SA 300 (CC).

3.3.1 Formal equality

Formal equality refers to equality of treatment in that the law must treat individuals in like circumstances alike.¹⁷⁵ This concept originated as far back as Aristotelian times and his *dictum* that equality meant “those group of people who fall under the same category should be treated the same”.¹⁷⁶ The corollary to that would mean that people who are different should be treated differently as well. This gives the impression that all persons are equal bearers of rights and must be treated equally.

Formal equality has been criticized as it ignores social, economic, political and legal disadvantages suffered by women, racial and ethnic minorities,¹⁷⁷ including people who are differently abled and other vulnerable groups in our society. Formal equality also fails to reduce systemic patterns of inequality as it benefits only members of previously advantaged groups. For instance, white middle class women and black middle class men benefited from economic opportunities. In the case of *Minister of Finance and Another v Van Heerden*,¹⁷⁸ a case involving differences in employer contributions to members of parliament and other political office-bearers in the Political Office-Bearers Pension Fund, Mr Van Heerden approached the High Court alleging that the differences in employer contributions were unconstitutional. The majority of the court held that legislative and other measures that fell within the

¹⁷⁵ Currie, I. and De Waal *opcit* note 139 p. 232.

¹⁷⁶ Westen, P. (2007). “The Empty Idea of Equality”. *Harvard Law Review*, 95(3) 1982, p. 537 at <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20f%20Equality%20and%20Non-discrimination,%20and%20Substantive%20Equality.Pdf> on the 3/08/2011.

¹⁷⁷ Mbao, M.L.M., (2011). “Equality under the Constitution: Some Personal Reflections”, paper presented to the Equality Symposium-Institutional Office, NWU, 18 of March, unpublished mimeo.

¹⁷⁸ (2004) 25 ILJ 1593 (CC) *supra*.

requirements of section 9(2) were not presumed to be unfair, and did not derogate from, but formed a substantive and composite part of the equality protection as stated by section 9 of the Constitution. Differentiation aimed at protecting or advancing the vulnerable group warranted measures shown to conform to section 9(2) of the Constitution.

However, the practical implications of treating people identically (formal equality) was illustrated in the case of *President of the Republic of South Africa v Hugo*.¹⁷⁹ The case concerned the granting of remission of sentence by the President to female prisoners with minor children. The applicant in this case was a male prisoner with a minor child, who would have qualified for the remission if he was a woman. The court held that treating people identically might result into inequality. The court referred to *Brink v Kitshoff NO*,¹⁸⁰ where it was held that it was sufficient, if the discrimination was largely based on one of the listed grounds, only to deal with that ground.¹⁸¹ Thus the need for such remedial or corrective measures was acknowledged in both the Interim and the Final Constitution. This implies the imperative of advancing previously disadvantaged groups into the public sector through the implementation of affirmative action measures is necessary. Thus, to achieve employment equity in our society the concept of affirmative action must be effectively implemented in the public sector.

¹⁷⁹ 1994 (4) SA 1 (CC).

¹⁸⁰ 1996 (4) SA 197 (CC).

¹⁸¹ Loyson, M. *opcit* note 161 p.1-199.

The recognition of the shortcomings of formal equality resulted in a movement towards 'substantive equality', both in international law and in some comparable jurisdictions. I turn now to the notion of substantive equality.

3.3.2 Substantive Equality

The Constitutional Court has given a generous meaning to the notion of "substantive equality" in South Africa. The epilogue to the Interim Constitution and the Preamble to the 1996 Constitution describe some of the deeply entrenched inequalities in our society and how the effects of this inherited inequality persist today. The concept of substantive equality requires the law to ensure equality of outcomes and is ready to tolerate disparity of treatment to achieve this goal. Substantive equality in employment relations imposes a duty on the state and private individuals to favour one group over another in terms of appointments or promotions so as to achieve a desired result.¹⁸² A commitment to substantive equality seeks to achieve actual social and economic equality for all persons and groups by taking account of the context in which the discrimination is alleged to have occurred as well as the impact of the discrimination on the affected group or individuals.

Substantive equality suggests that in order to treat people equally, we need to treat them differently, especially where a particular group had suffered from historical disadvantages. Substantive equality requires that the Constitution's commitment to equality be upheld. From an understanding of both concepts in relation to the principles and purposes of the Constitution and the historical burden of inequality

¹⁸² Dupper, O. (2002). "Affirmative Action and Substantive Equality": The South African Experience, 14 **SA Merc LJ** 275 at 278 ff.

that it seeks to overcome,¹⁸³ it is certain that formal equality fully neglected the deepest commitment of the Constitution whereas substantive equality is supportive of these fundamental principles.

The Constitutional Court linked its understanding of substantive equality with the need to address and remedy South Africa's history of deep-seated racial inequalities and other forms of systemic discrimination in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.¹⁸⁴ That case concerned the constitutionality of a number of provisions criminalizing gay sex. The Constitutional Court held that equality has a 'remedial and restitutionary purpose' to protect groups that suffered from past injustices. In the words of Ackermann J:

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.¹⁸⁵

Therefore, considering the massive inequalities of the past, formal equality is not enough. Thus some groups be accorded preferential treatment need to be treated

¹⁸³ Currie I, and De Waal, *opcit* note 139 p. 233.

¹⁸⁴ (1998), 12 BCLR 1517. See also the US Supreme case of *Griggs v Duke Power Company* (1971) 401 US 424.

¹⁸⁵ Jagwanth, S. (2000). "South Africa: The inequality challenge". *SAR*. 15 (3) p. 30, accessed at <http://www.africafiles.org/printableversion.asp?id=3652>.

differently than others in order to reach true equality. Substantive equality addresses directly the nature and consequences of the past. The Final Constitution did not only guarantee formal equality and substantive equality, it also required the state to enact national legislation to prohibit unfair discrimination.¹⁸⁶ The South African public service has to be fully represented, that is, employers (designated employers) have the obligation to implement policies and practices that will give opportunities to the previously disadvantaged groups. The government has an obligation to ensure that substantive equality is promoted through the implementation of affirmative action measures in the employment domain. As a result, it is not unfair discrimination to prefer a member of the designated group in any employment promotions and appointments.

3.4 Understanding affirmative action through case law

3.4.1 Affirmative action and promotions

Promotion had been recognized as one of the critical areas where affirmative action measures in employment relations are addressed. Therefore the failure by a designated employer to promote a member of a designated group to positions in the public service will amount to unfair discrimination. The logic behind the idea of promotion constituting a ground for claims based on affirmative action remains a controversial issue. However, the onus is on the complainant to prove that he was over-looked for promotion for some unacceptable reasons, or that the employer initially failed to follow his own employment equity policies and practices as elaborated in the Employment Equity Act.

¹⁸⁶ See Section 9(4).

This principle was illustrated in *University of Cape Town v Auf der Hyde*¹⁸⁷ where the Labour Appeal Court over-ruled the Labour Court's findings that failure by the University of Cape Town to appoint a white lecturer on a fixed term contract to a permanent position while appointing two black lecturers permanently did not constitute unfair discrimination on the basis of race. The court based its findings on the fact that the white lecturer was not a member from a designated group, besides he had no expectation that his contract would be renewed. The appellate court found further that the lecturer's argument that he had been discriminated against on the ground of race was equally untenable. The above judgment shows the strength of the objective nature of the application and implementation of affirmative action measures by meeting the demands of the Employment Equity Act and the constitutional goal of representivity in the workplace.

It is significant to point out that he who alleges unfair discrimination in relation to promotion bears the onus of proof. This is so because employers might have a valid reason to have preferred one candidate to the other. Section 6 of the Employment Equity Act states that, "it is not unfair discrimination to take affirmative action consistent with the purpose of the Act or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job". Thus, employees may as well have a valid complaint if they can show that they possess objective attributes which the person employed do not possess but were over-looked, and the employer failed to justify his actions. However, it is not clear whether victims of unfair discrimination relating to promotions might prove that they have actually been discriminated

¹⁸⁷ (2001) 22 ILJ 2647 (LAC).

against. This means that the employer must adduce sufficient evidence, on a balance of probability, that its decision is fair.

This issue was addressed in *Solidarity obo Barnard and Another v South African Police Services (SAPS)*¹⁸⁸ where the applicant brought an action, claiming that the respondent's failure to promote him constituted unfair discrimination. The court held that the spirit of the Constitution stated that such policies should be applied not only in relation to equality but also with due regard to the dignity of the affected group. Therefore the failure to promote the applicant was unfair and not in compliance with the provisions of the Employment Equity Act. The Employment Equity Act and the employment equity plan should be applied in accordance with the principle of fairness.

At times employers may be held to have acted in bad faith where they are unable to prove, on the balance of probabilities, that their action is fair. Thus, in *George v Liberty Life Association of Africa Ltd*,¹⁸⁹ a position was advertised internally in the Department where the applicant worked. The applicant was unsuccessful while the respondent recruited "a coloured person" from outside. The applicant then brought an application for an order alleging that the respondent's failure to promote him constituted an unfair discrimination on the basis of his race, as he was contractually supposed to be placed in the position in question. The court found that the respondent was bound by his employment policy which stated that eligible employees were entitled to apply for vacancies within the company which

¹⁸⁸ (2010) 5 BLLR 561 (LC).

¹⁸⁹ (1996) 4 BLLR 494 (LC).

prescribed certain qualifications which the applicants had to possess. The court held that the respondent had acted in bad faith and his conduct amounted to unfair discrimination in relation to promotion.

The Employment Equity Act was intended to remove barriers to the advancement of employees from previously disadvantaged groups. There has been a debate about employees from different, designated groups competing for the same position. This issue led the Labour Court to decide who should actually be given preference in such circumstances. This debate was resolved by the court in *Solidarity obo Christiaans and Eskom Holdings Ltd*¹⁹⁰ where a 'coloured' employee contended that he was discriminated against for a promotional post by an employer when he appointed an African male. The arbitrator agreed with the employer's argument that it had to ensure that its workforce was 'representative' as required by the Employment Equity Act and its own employment equity policy. Therefore the discrimination was considered fair. Besides, degrees of past discriminations were different, blacks suffered more in the past than the other races.

The Labour Court has attempted to clarify the concept of affirmative action particularly in situations where two members of the same designated group compete for employment. There have actually been doubts as to who are the most deserving of affirmative action measures. From the cases it appears that black candidates are given preference.¹⁹¹ This may be accepted only in situations where the employer

¹⁹⁰ (2006) 27 ILJ 1291 (ARB).

¹⁹¹ Grogan, J. (2007). *opcit* note 141 p. 287. See for example *Fourie v Provincial Commissioner of the SA Police Service (North West Province) and another* (2004) 25 ILJ 1716 (LC), where the Court found that when choosing between members of the same designated group. (that is, a

follows its policy. For instance, in *Lotter and South African Police Service*,¹⁹² a white female police officer was over-looked in favour of a black male officer. The arbitrator held that in relation to the terms of the SAPS policy, affirmative action could only be taken into account when two candidates received equal scores. It was held that the selection panel had misinterpreted the policy and perpetrated an unfair labour practice.¹⁹³ The above judgment reveals that affirmative action measures should be implemented rationally so as not to impair the dignity of the other party.

3.4.2 Affirmative action and appointments

Another area of interest where affirmative action is implemented is during appointments. Though legislation provides for the employment of members from the designated groups, this does not give powers to employers to over-look a qualified candidate and employ a person who is less qualified and lacks the relevant experience in to the public service, for instance, in situations where there are no qualified candidates from the designated groups. As Grogan puts it "To escape being branded unfair affirmative action appointments must be 'consistent with the purposes' of the Employment Equity Act".¹⁹⁴ This aspect remains problematic to candidates who are over-looked for appointments.

white woman and a black male) degrees of past disadvantaged should be considered. *Motala v University of Natal* 1995 (3) BCLR 374 (D) the Court held that there was no unfair to restrict the number of Indian students at medical school on the basis of a quota that favoured blacks.

¹⁹² (2005) 26 ILJ 578 (BCA)

¹⁹³ Grogan, J. (2007). *opcit* note 141 p. 287.

¹⁹⁴ Grogan, J. *opcit* note 141 p.120.

This was the situation in *Public Service Association obo Karriem v South African Police Service and Another*.¹⁹⁵ In this case the applicant's claim that she had been unfairly discriminated against on the ground of her race for an appointment was thrown out. In deciding the matter the court concurred with the interview panel's argument that instant competency was required in order prevent inefficiency in the workforce. The court found that it would have taken 14-36 months for the applicant to acquire the necessary skills that was required for the job in question. Therefore in such situations, the above considerations had to prevail over the achievement of employment equity targets.

Similarly in *Stoman v Minister of Safety and Security and Others*,¹⁹⁶ the High Court followed the findings in *Public Servants Association* by holding that affirmative action may not be used to justify the appointment of an applicant who was incompetent and incapable of performing the task.¹⁹⁷ The court held thus;

Some tension may in certain situations exist between ideals such as efficiency and some representivity and a balance then has to be struck. Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing arms. They are linked and often inter-dependent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in the situation where a society emerges from history of unfair discrimination. The advancement of equality is internally part of the consideration of merits in such decision-making

¹⁹⁵ (2007) 28 ILJ158 (LC).

¹⁹⁶ (2002) 23 ILJ 1020 (T)

¹⁹⁷ Grogan, J. *opcit* note 52 p.118.

processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified or less than suitably qualified, or incapable, in responsible positions cannot be justified.

The court finally rejected both arguments that Ms Karriem and Mr Stoman's constitutional rights to equality and fair labour practice had been violated.

In addition, the Employment Equity Act had said very little on the issue of how efficiency should be reconciled with representivity when it comes to promoting the goal of affirmative action. The Act had also been silent as to what is required of these goals when in conflict. The court attempted to address this issue in *Coetzer and Others v Minister of Safety and Security and Another*.¹⁹⁸ The court found that the failure of the explosives unit of the SAPS to appoint members from the non-designated group to fill a vacant post amounted to unfair discrimination. The SAPS, according to the court, had based its argument exclusively on the aspect of representivity and failed to address the efficiency requirements and the duty imposed on SAPS by the Constitution. The decision in *Coetzer* confirmed the limits to which a plea for affirmative action might serve as a defence to an action for unfair discrimination against members of non-designated group.

However, of importance is the Supreme Court of Appeal's judgment in *Gordon v Department of Health: Kwazulu-Natal*.¹⁹⁹ The appellant, Gordon, applied for the post of Deputy Director of Administration at the Grey's Hospital. He was considered the most suitable candidate for appointment, but the Provincial Public Service

¹⁹⁸ (2003) 24 ILJ 163 (LC).

¹⁹⁹ (2008) 11 BLLR 1023 (SCA)

Commission directed the respondent to appoint a black candidate. Gordon then instituted proceedings alleging that he had been discriminated against on the basis of his race.

The Supreme Court over-ruled the Labour Court's decision that appointing Gordon to the post would have violated the constitutional imperative of promoting equality and transforming the public service. However, by referring to a number of cases the court found that 'measures found to be inherently arbitrary and irrational cannot be said to have been designed to achieve the objectives of the constitutional imperatives of equality.'²⁰⁰ According to this decision the department must have an effective affirmative action plan in order for an employer to succeed in a claim of affirmative action, otherwise those actions will constitute an unfair discrimination.

The Supreme Court stated as follows;

In the quest to attain representivity, efficiency and fairness were not to be compromised. To justify the failure of a candidate who complied with stipulated requirements, it had to be shown that the action was not fair.

Affirmative action measures do not intend to accord preference in filling vacant positions. Though the Employment Equity Act imposes an obligation on employers to consider designated groups of employees in any employment procedures, this does not give employees any guarantee to approach the court that they have been over-looked for appointment by the employer simply because the employer failed to comply with his employment policies or he failed to apply his mind to its own

²⁰⁰ Cheadle, H. et al, (2008). **Current Labour Law**. LexisNexis: Durban p.105.

employment equity plan. These issues remain problematic and the court has attempted to address them in the case of *Dudley v City of Cape Town and Another*.²⁰¹ In this case the relationship between the right not to be unfairly discriminated against and the obligation to implement affirmative action was raised. The court held that the failure by an employer to prefer an employee in an employment policy did not amount to unfair discrimination. Put differently, there was no enforceable legal right to preferential treatment from members of designated groups.²⁰² Therefore an individual did not have the right to approach the Labour Court to institute proceedings that an employer has failed to comply with a compliance order.

This judgment over-ruled the decision of the Labour Court in *Harmse v City of Cape Town*.²⁰³ In this case the applicant brought an action alleging that the respondent's decision not to shortlist him for one of the three executive posts he applied for constituted unfair discrimination on the basis of race, political belief, lack of relevant experience 'and /or other arbitrary grounds'. The court found that if section 6 of the Act was considered then it would be concluded that affirmative action was no more than a defence to a claim of unfair discrimination. This implies that affirmative action was a sword in the hands of an employee from a designated group.²⁰⁴

²⁰¹ (2008) 25 ILJ 305 (LAC).

²⁰² Laubscher, T. (2009). Employment Law: "Affirmative Action" in *De Rebus* p. 45.

²⁰³ *Harmse v City of Cape Town* (2003) 6 BLLR 557 (LC).

²⁰⁴ See par 44; and par 33.

3.4.3 Affirmative action and race

The Constitution prohibits discrimination by the state or private individuals on the basis of race. The legislature also frowns at policies that are applied irrationally. However, the question that comes in mind is whether victims of unfair discrimination on grounds of race can actually establish that they have been discriminated against. Thus, in the case of *Du Preeze v Minister of Justice and Constitutional Development and Others*,²⁰⁵ the applicant claimed that he was discriminated against because he was refused an opportunity to compete for a number of vacant posts as a regional court magistrate. A black female was favoured and the Department argued that it had to achieve its constitutional imperative to promote representivity on the Bench. The court found that the short-listing procedure used by the respondent raised an overwhelming obstacle for the complainant and as such constituted an absolute barrier to his appointment. The court further found that the discrimination had a legitimate purpose, but, it concluded, the short-listing criteria involved the establishment of an absolute barrier.

In the case of *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,²⁰⁶ the court found that an employer could rely on affirmative action as a defence if it had a comprehensive affirmative action plan in place. However, in the absence of such a policy and failure to explain why he over-looked the best candidate in favour of a weak candidate for appointment or promotion will lead to the presumption that there was no justification for the appointment. In the above case the only reason given for the appointment of a weak

²⁰⁵ (2006) 27 ILJ 1811 (SE).

²⁰⁶ (2000) 21 ILJ 1119 (LC).

candidate to the position of Town Treasurer was because he was black. This action was considered unfair discrimination as the intention was not to promote equality, and not in line with the purpose of the Employment Equity Act. According to the court the decision to appoint Mr Masengana could not be justified on any basis, as he had the lowest score of the three candidates and the lowest of all the applicants in the internal test. He also lacked the relevant experience required to work in local government.

In *Department of Correctional Services v Van Vuuren*,²⁰⁷ the court opined that the Commissioner's decision to appoint a black man on the grounds of race, and relying on the Department's affirmative action policy was unfair. In this case the Department had not registered its affirmative action policy as stipulated by the Department's agreement with the unions. The Industrial Court held that the Commissioner had committed an unfair labour practice by implementing affirmative action before the registration of the scheme. On the other hand the Labour Appeal Court held that the Commissioner was bound by statute to do so.

In *Alexandre v Provincial Administration of the Western Cape Department of Health*,²⁰⁸ the applicant brought an order alleging that the Department had discriminated against him during an interview on the ground of his race. A coloured man was appointed to that position. The court invoked the provision of the Employment Equity Act which aimed at achieving equity in the workplace by equal opportunity and fair treatment of employees and applicants, and ensuring equitable

²⁰⁷ (1999) 20 ILJ 2297 (LAC) *op cit* note 24.

²⁰⁸ (2005) 26 ILJ 765 (LC).

representation of suitably qualified persons from designated groups in all categories and levels. However, employers were given the responsibility to accord proper weight to these factors as stipulated in the Act. In the above case though the successful candidate did not possess a certificated engineer qualifications, he on the other hand had extensive experience in many other competencies and other extensive managerial experiences required for the post. Therefore, the court was satisfied that the selection panel had attached proper weight to the successful candidate's proven skills and experience.²⁰⁹

3.4.4 Affirmative action and training

Section 15 (2) (c) (ii) of the Employment Equity Act provides that "affirmative action measures must retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of parliament providing for skills development". Therefore employers are under an obligation to provide training to their employees. The obvious problem realized is what constitutes training. The legislature did not stipulate how much training is required. This is because the employer might in some cases provide inadequate training to the employees. However, this implies that failure by an employer to provide training for his employees will constitute an unfair labour practice amounting to discrimination. For instance, in *Mitusa v Portnet*,²¹⁰ it was held that the employer had acted unfairly by refusing to train a group of employees.

²⁰⁹ Grogan, J. *opcit* note 141 p.125.

²¹⁰ (2000) 21 ILJ 2519 (CCMA).

3.4.5 Affirmative action and remuneration

The Employment Equity Act requires employers to adopt affirmative action programmes in all employment policies and practices. Remuneration has been another ground where unfair discrimination has been problematic. The general rule for remuneration is that all employees doing the same work should be similarly rewarded.²¹¹ Therefore, anything short of that amounts to unfair discrimination.

Employers will be found guilty of unfair discrimination as well as unfair labour practice where the employer in implementing affirmative action measures pays a designated employee a higher salary than his other counterparts, or gives him additional benefits over others in the same category. However, the court had been very strict against wage discrimination particularly where it is not based on skill and experience. This was illustrated in *SA Chemical Workers Union and Others v Sentrechem Ltd*,²¹² where the court found that wage discrimination based on race or any other difference between employees other than skills or experience was unfair.²¹³ Thus the Labour Relations Act and the Employment Equity Act prohibit wage differentiations or different conditions of service, among workers on the basis of unfair discrimination.²¹⁴

3.4.6 Affirmative action and religion

Religion is one of the listed ground against which persons should not be discriminated. This implies that an employee may not be discriminated against on

²¹¹ Grogan, J. *opcit* note 52 p.148.

²¹² (1998) 9 ILJ 410 (LC).

²¹³ See also *Chamber of Mines SA v Council of Mining Unions* (1990) 11 ILJ 52 (LC).

²¹⁴ Grogan *opcit* note 52 p.149.

the ground of his/her religion. Any discrimination on the grounds of a person's religion is treated in the same way as discrimination on any of the other listed grounds. In this case the employee bears the onus to establish that he was actually discriminated against on the ground of his religion. It should also be noted that employees should not be unfairly discriminated against because they do not belong to a particular faith.

In *Food and Allied Workers and Others v Rainbow Chicken Farm*,²¹⁵ a group of employees were charged with collective refusal to work on a gazetted public holiday. The employees argued that they were discriminated against on the basis of their religion. The court held that their actions were similar to that of any other employee who deliberately absents him/herself from work for any reason, despite the fact that they notified the company of their absence. In this case the employer had employed the employees' (a group of Muslims) to slaughter chickens according to the halaal standards. The company had also concluded an agreement with the employees' union under which they were entitled to 'reasonable' unpaid time off on major Muslim holidays, on condition that the employees made reasonable arrangement with the company. The agreement clearly stated that, due to operational requirements, not all the employees would be granted time off simultaneously.

The court found that the dismissal of the butchers was not automatically unfair.²¹⁶ This is because the butchers were employed by Rainbow to produce halaal

²¹⁵ (2000) 21 ILJ 615 (LC).

²¹⁶ Grogan, J. *opcit* note 141 p. 249.

chickens. Therefore, it will be unreasonable for them to prevent a days' production in this circumstance and also the hardship that loss of production would cause the company.

3.4.7 Affirmative action and retrenchment

Another area where the concept of affirmative action needs clarity is in the area of retrenchment. The question is whether employers may dismiss employees in order to promote affirmative action. Read carefully, the legislature has not specifically given employers the right to select employees for dismissals on a discriminatory basis to promote affirmative action measures.²¹⁷ On the other hand the Employment Equity Act provides that it is not unfair "to take any positive measures consistent with the purposes of this Act". The problem is whether the courts will allow a white employee to be dismissed in order to make way for a member from a designated group?²¹⁸

Thus, there are exceptional cases where retrenchments are required. In that case the "Last In First Out" (LIFO) principle might be allowed to circumvent the effects of affirmative action measures. The Employment Equity Act states that "positive' action required by the Act includes measures to retain employees from designated groups". This does not mean that white employees should be dismissed to make way for members from the 'designated group'. Thus, in *Thekiso v IBM South Africa (PTY) Ltd.*²¹⁹ In this matter, the court considered whether the employer's failure to

²¹⁷ Grogan, J. *opcit* note 141 p. 260.

²¹⁸ See for instance, *McInnes v Technikon Natal* (2002) 21 ILJ 1138 (LC).

²¹⁹ (2007) 28 ILJ 177 (LC).

consider affirmative measures to retain a black female breached the general obligation on employers to implement affirmative action measures.

The applicant however, relied on section 15(2) of the EEA which states that affirmative action measures implemented by a designated employer must include measures to retain previously disadvantaged employees. The applicant further argued that the employer was obliged to retain her in preference to whites, provided she was suitably qualified as envisaged in section 20(3) of the EEA.

The Court rejected the applicants argument, referring to its earlier decision in *Dudley v City of Cape Town*, in which it was held that section 3 of the EEA did not bring about an individual right to affirmative action. Chapter three of the EEA could only be brought into operation in a collective environment.

3.5 Summary

This chapter has investigated the implementation of affirmative action measures in the public sector employment relations. The main purpose for this chapter was to show an in-depth understanding of affirmative action measures as implemented by employers. This was done by analyzing the concepts of formal and substantive equality. The above discussion indicates that formal equality failed to reduce systemic patterns of inequality as it benefits only members of previously advantaged groups and failed to protect the interest of previously disadvantaged groups who constitute a majority in South Africa. As a result, substantive equality had been given more preference because it addresses the socio-economic and legal

problems in the society. It is submitted that substantive equality is committed to the constitutional imperative of achieving equality than formal equality.

The above discussion also distinguishes between fair and unfair discrimination. On this premise, discrimination that is aimed at advancing the disadvantage group does not amount to unfair discrimination. Furthermore, an array of cases was discussed to demonstrate the actual application and implementation processes in the employment domain. In this area the strength and weaknesses of the implementation of affirmative action measures were examined and the manner in which the Labour Court has attempted to give an understanding of how these measures should be explicated. The cases demonstrate that employers must implement affirmative action measures in any employment practice and blacks (designated group) should be advanced in the workforce. Also the cases illustrate that employers are not to implement these policies arbitrarily.

In the next chapter a comparative study of the experiences in comparable jurisdiction in the United States of America is done. The intention is to compare the various modes of implementing affirmative action programmes and to find out if they are in line with international standards. Also, another reason is to bring out important lessons from both jurisdictions for the other to copy. The lessons are derived from the similarities and differences illustrated in the discussion.

CHAPTER FOUR: UNDERSTANDING AFFIRMATIVE ACTION: INTERNATIONAL PERSPECTIVE

4.1 Introduction

Affirmative action has remained a contested issue in the United States today. It is seen as a form of preferential treatment given to privileged groups, a form of reverse discrimination, a denial of meritocracy and social justice.²²⁰ This led to a division among member states of the Federations. African-Americans in the United States and Black South Africans who suffered from discrimination, segregation and settler colonialism faced major forms of inequality in all areas of life, including education, employment, political, social and the economic sphere.²²¹ Both countries have attempted to address these past policies through the implementation of affirmative action programmes.

President Kennedy once declared in his message on civil rights in 1963 that "our Constitution is colour blind..."²²² By this, he meant that there is a need to address the long-standing issues of segregation and discrimination in the United States. In South Africa as well as in the United States, affirmative action has been used as a necessary mechanism, especially by policy makers, to achieve a government that

²²⁰ Pauwels, M. (2011). "Does Affirmative Action have a Future in Barack Obama's America?", *Journal of International Studies*, 32(3) p.309-319.

²²¹ Naff, K. and Dupper, O. (2009). "Footprints Through the Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States", *International Journal of Comparative Labour Law and Industrial Relations*, 25(2) p.79-191.

²²² Hudson, B. (1999). "Affirmative Action and American Racism in Historical Perspective", *Journal of Negro History*, 84(3), p.260-274.

reflects the demographics of the population.²²³ The principal objective of affirmative action measures is the right to equal access to self-development²²⁴ which specifies that all persons have the right to equal access to socio-economic, political and cultural amenities.²²⁵

In both countries, affirmative action is intended to create an environment that might put an end to legacies of racial discrimination, by promoting and achieving equal opportunities in the workforce. In the United States, affirmative action was instigated by constant discriminatory practices against black Americans.²²⁶ The policy was later extended to other minorities such as women. It assisted socially disadvantaged groups to develop and become fully represented in the society. This concept was implemented in the United States to deal with systematic discrimination in hiring practices, career and educational opportunities.²²⁷

According to the American Association for Affirmative Action,²²⁸ this policy was intended to eradicate racial and gender discrimination, and expose previously disadvantaged groups to opportunities that might help them develop, perform, achieve and make positive contributions in the society. Affirmative action has open doors to education, employment and business development opportunities to

²²³ Naff, K. and Dupper, O. (2009). *opcit* note 221 p.79-191.

²²⁴ <http://www.answers.com/topic/affirmative-action> on 25/07/2011.

²²⁵ Msimang, S. (2007). "Affirmative Action in the New South Africa: The Politics of Representation, Law and Equality". *Isis International*, 15(56) p.1-10.

²²⁶ Dale, C. V. (2005). Federal Affirmative Action Law; A brief History, CRS Report for Congress, Order Code RS22256, p.1-6. See also <http://www.federalobserver.com/2011/01/17/affirmative-action-the-u-s-still-struggles-t...24/09/2011>.

²²⁷ Naff, K. and Dupper, O. (2009). *opcit* note 221 p.79-191.

²²⁸ American Association for Affirmative Action: Access, Equality, and Diversity at <http://www.affirmativeaction.org/about.html> on 10/10/2011.

qualified individuals who experienced long-standing and persistent patterns of discrimination.²²⁹ The justification for affirmative action is that it helps to compensate for past discrimination, persecution or exploitation by the ruling class or culture.²³⁰

This chapter focuses on an understanding of affirmative action in international perspective. This implies that a comparative analysis of the experiences in a comparable jurisdiction like that of the United States is at the heart of this chapter. To this effect, a brief historical background of the application of affirmative action measures in the United States is outlined, beginning with the segregationist policies that eventually led to the subsequent development of the concept of affirmative action. That discussion is followed by an analysis of the application and implementation of affirmative action measures in the employment sector using case law. This is done with a view to comparing and contrasting what obtains in the United States and South Africa.

The reason for the above choice is because both the United States and South Africa have similar historical paths of colonial invasion, past discrimination and segregationist policies. The aim is to draw important lessons from each jurisdiction to correct the other so as to achieve the purpose of affirmative action.

4.2 Brief historical background of affirmative action in the United States

In order to understand the origins of affirmative action policies in the United States, it is relevant to trace the beginning of segregationist policies that led to the

²²⁹ American Association for Affirmative Action, *ibid* note 228.

²³⁰ Sowell, T. (2004). **Affirmative Action Around the World: An Empirical Study**, Yale University Press: ISBN 0-300-10199-6.

development of affirmative action. The concept of segregation and discrimination began with the arrival of the first blacks in the Northern American colonies. They were made slaves to the white masters and their main occupation was that of agricultural labourers and domestic workers. Smelser *et al*, have posited that "legal racist practices were shaped by slavery and that enslavement powerfully reinforced prejudices".²³¹ This was met with lots of protest and antagonism resulting in an anti-slavery movement in the American colonies by the late 1700s. The result of this unrest led to the enactment of the Northern Ordinance in 1787, the aim of which was to prohibit slavery into territories north of the Ohio River. Subsequently, the American colonies were divided as slavery was abolished in the North while the Southern states refused to set their slaves free.

By 1877, the Jim Crow Laws were introduced. These laws reduced blacks to the status of second class citizens.²³² The first Supreme Court case, decided on the issue of slavery, was that of *Dred Scott v Sandford*,²³³ where the court held that in terms of the Constitution, a slave was the property of the master and not a full human being. The case concerned an action for trespass. Scott brought an action alleging that he and his family were assaulted by Sandford. The decision confirmed Jim Crow's ideology that slaves were mere properties and not American citizens.

²³¹ Smelser, N. *et al*, (2001). **American Becoming: Racial Trends and their Consequences**. Washington D.C: National Academy Press p.144.

²³² During this period railways and streetcars, public waiting rooms, restaurants, boarding houses, theatres and public parks were separated; schools, hospitals and other public institutions were separated.

²³³ *Dred Scott v Sandford* 60 US 393 (1856).

This clearly legalized the status of blacks as slaves. Several sources confirmed the view that the Dred Scott case provoked the American Civil War.²³⁴

The American civil war was initiated by Abraham Lincoln, then a Republican President. The outbreak of the civil war eventually reversed the Dred Scott's decision by liberating all slaves in both American colonies. Thus a number of anti-slavery amendments to the Constitution were proposed by the Congress of the United States.²³⁵ According to Deane, three constitutional amendments were recommended during that period namely: to end slavery; to extend rights of citizenship to freed slaves; and to guarantee their voting rights.²³⁶ The origin of these constitutional commitments could be traced to the end of the Civil War when African-Americans were granted the right to full citizenship. These amendments were commonly referred to as the 'Civil War Amendments' or the 'Three Reconstruction Era Amendments' as they were enacted following the end of the Civil War.

The Thirteenth Amendment was aimed at abolishing slavery by bringing to an end the major political issues in the United States. The Fourteenth Amendment, ratified in 1868, incorporated the Privileges or Immunities Clause and Due Process and Equal Protection Clauses.²³⁷ The Fourteenth Amendment over-ruled the Dred Scotts decision by providing a broad definition to the term "citizenship". The Fifteenth Amendment proposed in 1869 and ratified in 1870, granted voting rights to

²³⁴ <http://www.slaveryinamerica.org> accessed on 29/09/2011 at 2.42.

²³⁵ Deane, T. (2009). "An Historical Overview of Affirmative Action in the United States of America", **Fundamina: Journal of Legal History**, 15 p.75-91.

²³⁶ Deane, T. (2009). *ibid* note 235 p.75-91.

²³⁷ Deane, T. (2009). *ibid* note 235 p.75-91.

all regardless of “race, colour, sex and national origin”.²³⁸ It also granted the right to blacks to be represented in Congress.²³⁹ Section 1 of the 14th Amendments states, inter alia,

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4.2.1 The Origin and Development of the Concept of Affirmative Action in the United States

Affirmative action originated in the United States as a result of the civil rights movement in the 1960s. In the context of labour laws, the National Labour Relations Act was the first piece of legislation.²⁴⁰ After the civil war the former slave population in the South was virtually left with nothing to earn a living. This is because, for many years, African-Americans were denied access to many social amenities; they only had access to segregated and inferior social facilities.²⁴¹ Initially, the civil rights programme was initiated to help African-Americans become full citizens of the United States.²⁴² Eventually other minority groups namely, Latinos, Asians/Pacific

²³⁸ Dean, T. (2009). *opcit* note 235 p 75-91.

²³⁹ Gerstle, G. (2010). “A State both Strong and Weak”, **American Historical Review**, p. 779-785.

²⁴⁰ Also known as the Wagner Act of 1935.

²⁴¹ Naff, and Dupper, (2009). *opcit* note 221 p.79-191.

²⁴² Berry, M.F. (2009). “And Justice for all: The United States Commission on Civil Rights and the Continuing Struggles for Freedom in America”, **Journal of African American**, New York: Alfred A. Knopf, p. 339.

Islanders, and Native Americans, including women consequently joined the demand for equality. *Brown v Board of Education*²⁴³ was the first case decided after the civil rights movement where the Supreme Court held that segregation in public schools was unconstitutional. The decision in this case put an end to segregation in schools in the United States. This case concerns a denial to admit several black children into public schools that permitted segregation based on race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. The plaintiffs further contend that segregated public schools are not "equal" and cannot be made "equal", because they are deprived of equal protection of the laws.

Despite several efforts to eliminate discrimination by statutory provisions and executive orders in 1940, it became evident that the above mechanisms were insufficient to level the playing fields, thus more proactive measures were required to put an end to discriminatory practices. Therefore, the enactment of the Civil Rights Act of 1964 placed non-discrimination on statutory grounds by establishing the Equal Employment Opportunity Commission (EEOC) aimed at supervising the enforcement of the Act.

Affirmative action was first introduced by John F. Kennedy's Executive Order 10925 in 1961. This order required federal contractors and subcontractors to 'take affirmative action' to ensure that applicants were employed and that employees were treated...without regard to race, creed, colour or national origin.²⁴⁴

²⁴³ 347 US 483 (1954).

²⁴⁴ Section 301 (1) of the Executive Order 10925.

Furthermore, the Order imposed a responsibility on the President's Committee on Equal Opportunity to ensure that all United States Departments and agencies consider 'affirmative steps' to eliminate discrimination.²⁴⁵ Kellough posits that, these measures required the active recruitment of minorities from high schools and colleges. It also included the provision of skills development programmes, as well as the assessment of qualification requirements that were job-related.²⁴⁶

Title VI and VII of the Civil Rights Act are significant as they influenced the enforcement of civil rights and measures concerning affirmative action.²⁴⁷ According to Deane, the Act prohibited employers from discriminating against any person on the basis of race, colour, religion, sex, or national origin.²⁴⁸ Thus, the Executive Order 11246, as amended, was issued to give effect to Title VII of the Civil Rights Act. This Order required government contractors to take affirmative action measures to end discrimination, thereby achieving the goal of equal employment opportunity.

The discussion that follows below is an evaluation of the mode of application and implementation of affirmative action measures in employment relations in the United States.

²⁴⁵ Section 201.

²⁴⁶ Kellough J. E. (2006). **Understanding Affirmative Action: politics, discrimination and the search for justice**. Washington D.C: Georgetown University Press, p.130.

²⁴⁷ Deane T. *opcit* note 235 p. 75-91.

²⁴⁸ Deane, T.*opcit* note 235 p.75-91.

4.3 Understanding affirmative action in the United States: Application and Implementation with reference to employment relations

4.3.1 Affirmative action and promotions

The application and implementation of affirmative action programmes in promotions remained problematic since its inception in the 1960s. It is a central issue in the articulation of discriminatory practices in employment relations. As far as promotion is concerned, affirmative action measures must involve employment practices that are not intentionally discriminatory and do not have a "negative impact" on affected groups, as it might be considered a violation of the civil rights regulations.

Another major issue is whether members of affected groups could receive preferential treatment in promotions and, if so, the means by which they could be preferred during employment practices. These issues are commonly known as the debate over quotas and were clarified in the Supreme Court judgment of *Fullilove v Klutznick*.²⁴⁹ The legal issue in that case concerned the constitutionality of a provision in the Public Works Employment Act which required that 10% of all federal grants awarded by the Department be given to minority business enterprises. The majority of the Supreme Court found that the Act met constitutional muster and that there were no evidence of specific discrimination.²⁵⁰

Subsequently, sub-section 703(a) of the Civil Rights Act declared unlawful any employment practice that restricted employees from employment opportunities or

²⁴⁹ 448 US 448 (1976).

²⁵⁰ In *State of Connecticut v Teal* 457 US 404 (1982) where the bottom-line principle was rejected and it opened scrutiny to individual test components.

may negatively affect them on the grounds of colour, religion, race or national origin.²⁵¹ However, in *Griggs v Duke Power Company*,²⁵² a group of Negro employees brought an action alleging that the respondents' change of policy that required employees to have a high school diploma and pass an 'aptitude test' in order to be promoted or transferred between departments unfairly discriminated against them. According to black employees, these requirements had a negative impact on them. The Supreme Court ruled that employers were prohibited from practices that discriminated against blacks and restricted the use of test scores and educational requirements that were considered irrelevant to job performance.²⁵³

An employment policy or practice regarding promotion is commonly referred to in the United States as the employer's 'bottom line defense'. Most employers argued that the appointment process in itself did not have a disproportionate impact on the protected group. Thus, in *Connecticut v Teal*,²⁵⁴ the US Supreme Court had to consider an employer's multi-component selection process for promotion. It was argued that the test had a disproportionate impact on the plaintiff's minority group. This case involved the first component of a scored test constituting a 'pass/fail' barrier to consider if the applicant was being considered for supervisory positions. The US Supreme Court found that the theory of indirect discrimination focused more on requirements that created a discriminatory barrier to opportunities and not on the

²⁵¹ Title VII of the Civil Rights Act.

²⁵² 401 US 424 (1971).

²⁵³ For example in *Albermarle Paper Co v Moody* 422 US 405 (1975) 431 the Supreme Court held that employers might use testing programmes as an alternative means to advance blacks in to the workforce.

²⁵⁴ 457 US 440 (1982) *supra*.

overall minority employees or females hired or promoted. In this line of cases the US Supreme Court rejected the notion of bottom-line defense by the employer.

In *Firefighters Local Union No. 1784 v Stott*,²⁵⁵ the majority of the employees brought an action against the City of Memphis and its Fire Department alleging racial discrimination in hiring and promotion practices. According to 1980 consent decree, new hirings and promotions were offered to blacks. In this regard, once layoffs were imposed, African-Americans would lose their positions as they were the "last hired" and so must be "first fired". The District Court had enjoined the City of Memphis from laying-off black employees. The aim was to protect African-Americans, who recently gained employment, so as to reduce the adverse impact of discriminatory practices. The court held that the purpose of race-conscious relief was to correct the effects of past discrimination, and not to discriminate against identified members of that class.

In *Police Officers' Association v Young*,²⁵⁶ the Detroit Police Department considered the fact that blacks were under-represented in the Department, and, therefore, adopted a voluntary affirmative-action plan. This plan allowed the promotion of black patrolmen to the rank of sergeant ahead of white patrolmen who were considered the most suitable on the list. White officers challenged this plan on the ground that it violated Title VII and the Equal Protection Act. The Sixth Circuit Court of Appeal held that though there has been no prior judicial determination of racial

²⁵⁵ 467 U.S. 561 (1984).

²⁵⁶ 608 F.2d 671 (6th Cir), cert. denied, 452 U.S. 938 (1979).

discrimination, the Department's own determination of racial disparities justified the voluntary plan.

4.3.2 Affirmative action and race

Racially-based affirmative action plans have been adopted to offer a similar understanding of affirmative action in employment practices in the United States of America. They were adopted as a court-ordered involuntary remedy for victims of racial discrimination in employment.²⁵⁷ Affirmative action has been appreciated as an answer to racial inequality.²⁵⁸ The concept was also adopted to eliminate traditional patterns of racial segregation in specific job titles.²⁵⁹ Section 703(e) of the Civil Rights Act restricted the use of race and colour as a defence to actions alleging discrimination. Despite the Civil Rights Act, there existed other equal opportunity protection laws that were enacted to prohibit discrimination. For instance, the Voting Rights Act of 1965 which was adopted after Congress found that racial discrimination in voting was a "dangerous and persistent evil".²⁶⁰ The Equal Employment Opportunity Commission of the United States revised its race and ethnicity categories for the purposes of achieving affirmative action goals.

That notwithstanding, the policy could not be implemented in such a way that the faults superseded its good intentions. For instance, in the case of *Regents of the*

²⁵⁷ See for instance *Franks v Bowman Transp. Co.*, 424 U.S. 747 (1976). The case concerned a class action suit alleging discriminatory hiring practices; the plaintiffs were awarded priority consideration for employment.

²⁵⁸ Brunner, B. Affirmative Action History: History and Timeline of Affirmative Action at <http://www.infoplease.com/sport/affirmative1.html> on 16/10/2011.

²⁵⁹ See *United Steelworkers v Weber*, 443 U.S. 193 (1979).

²⁶⁰ Sykes the Origins of Affirmative Action (1995) p. 14 as cited by Deane, T. *opcit* note 226 p.75-91.

University of California v Bakke,²⁶¹ a white male was turned down regularly for two years by a medical school, while less qualified minorities were accepted. The school had reserved sixteen out of one hundred places for minority students. The Supreme Court found that the quota system was inflexible as the medical school intended to discriminate against white applicants. Therefore, the University of California had violated the Equal Protection Clause. However, the court upheld the legality of affirmative action. The majority decision found that in order to achieve a diverse student body, colleges and universities could consider an applicant's race as a factor in determining admissions. Thus, private employers were allowed to use racial preferences in hiring and promotions by implementing voluntary affirmative action plans as a means to correct past injustices.²⁶²

Racially-based affirmative action issues continued to increase public debates over injustice in the United States. In *Wygant v Jackson Michigan Board of Education*,²⁶³ the University of Michigan had entered into a collective bargaining agreement which permitted the layoff of senior non-minority employees while junior-minority employees would be retained. The court found that such a plan discriminated against non-minority employees and violated the Equal Protection Clause of the Fourteenth Amendment.

In *Johnson v Transportation Agency of Santa Clara County*,²⁶⁴ the court upheld the idea of favouring women and minorities over better qualified men and whites as a

²⁶¹ 438 US 265(1978).

²⁶² See also *Kaiser Aluminum Company and United Steel of America v Weber* 443 US 193 (1979).

²⁶³ 476 US 267(1986).

²⁶⁴ 480 US 616 (1987).

means to improving a balance in the workforce. However, this decision was overruled in *City of Richmond v JA Croson*,²⁶⁵ where the Supreme Court turned down the City's minority-contracting programme and declared it unconstitutional, by requiring that a state or local affirmative action programme be supported by a "compelling interest" and be narrowly tailored to ensure that the programme furthered that interest.

In *Los Angeles Department of Water and Power v Manhart*,²⁶⁶ the Department's formal policy discriminated between men and women. In this case the Department of Water and Power resolved that two thousand female employees might live longer than ten thousand male employees, for that reason, female employees were to pay larger contributions to the pension funds than their male counterparts. The court challenged the Department's policy and stated that the policy discriminated directly against women. The court held that not all individuals shared the same characteristics; in some cases many women die earlier than men.²⁶⁷

4.3.3 Affirmative action and appointments

The aim of implementing affirmative action in the United States Civil Rights Act of 1964, as amended (1991), was to ensure that hiring goals were considered whenever hiring decisions were made within job groups where a workforce disparity existed. This implied that qualified blacks, women and other minority groups could be given preference during appointments. Therefore, agencies had an obligation to

²⁶⁵ 488 US 469 (1989).

²⁶⁶ 435 US 702 (1948).

²⁶⁷ Dupper, O. and Garbers, C. *opcit* note 154 p.40.

act "affirmatively" in recruiting and hiring a diverse workforce, especially where a disparity existed.

In the case of *Adarand Constructors Incorporated v Federico Pena*,²⁶⁸ this case concerned the offer of a sub-contracting job to Mountain Gravel at a lower rate for a government highway project. However, the general contractor offered the job to Gonzales Construction a small business controlled by a "socially economically disadvantaged" person, in order to benefit from financial incentives offered by the Department of Transport. The defendant instituted a claim alleging that the decision of the plaintiff to award the job to Gonzales Construction and that the financial incentive for hiring such companies was unconstitutional. It was held that racial classifications should be analyzed under a strict scrutiny and were to be considered constitutional if they are narrowly tailored measures that advance compelling governmental interests.

The court opined further that the issue was not determined by which party was discriminated against but whether discrimination actually occurred. Thus, racial classifications under the Equal Protection Clause of the Fifth Amendment and the Fourteenth Amendment cases are analyzed under strict judicial scrutiny. According to the court, good intentions alone are insufficient to sustain an allegedly compassionate racial classification. The court held that all governmental actions based on race should be subject to detailed judicial scrutiny so as to ensure that the personal right to equal protection had not been infringed and there was no violation of the constitutional obligations.

²⁶⁸ (1995) 515 US 200.

4.3.4 Affirmative action and remuneration

The Equal Pay Act²⁶⁹ aimed at abolishing wage disparities based on sex. Accordingly, section 206(d) (1) of Title 29 of the United States Codes prohibits employers from discriminating against their employees by instituting different wages for the same job based on gender. This implies that equal work must attract equal pay irrespective of sex, except where emoluments were based on a seniority system, merit, quality and quantity of production or other based differentiation.

Prior to the passage of the Equal Pay Act, several Presidential administrations had proposed legislation to eliminate gender based wage discrimination.²⁷⁰ The principle of equal pay for equal work implies that the job performed requires equal skill, effort and responsibility, and should be performed under the same conditions. This subject remains a contested issue in the United States and the onus is on the employer to justify different levels of pay.

In *Corning Glass Workers v Brennan*,²⁷¹ the Secretary of Labour brought an action against the plaintiff company alleging that Corning Glass had violated the Equal Pay Act of 1963. In this case, male employees at the Corning Glass Works who performed night shift inspections were paid higher than their female counterparts performing day shifts. After the new "job evaluation" or wage rate, all hired inspectors were to receive the same wage rate higher than the previous night shifts rate irrespective of gender. Subsequently, employees hired before that date, and

²⁶⁹ The Equal Pay Act of 1963 amended the Fair Labour Standard Act by the United States Federal Law.

²⁷⁰ <http://www.answers.com/topic/equal-pay-act-of-1963> on 18/10/2011.

²⁷¹ 417 US 188, 208 (1974), See also *Yant v United States*, 85 Fed. Cl. 264, 268 (2009).

who were working night shifts continued to receive higher salaries, thus perpetuating the previous differentials in wages paid between day and night inspectors. The Supreme Court held that the employer could not escape the Equal Pay Act liability by leaving the wage disparity in place and simply permitting lower-paid women in the day shifts to 'bid for jobs" in the higher-paid night shifts.²⁷²

In *Lynda Fallon et al v States of Illinois*,²⁷³ the plaintiff sued the defendant under the Equal Pay Act and Title VII of the Civil Rights Act because the Veterans Services Officer ("VSO") and the Veterans Service Officer Associate ("VSOA") both performed the same job but the VSO who were males were substantially paid higher than their female counterparts, the VSOA. The plaintiffs based their claims within the meaning of the Equal Pay Act,²⁷⁴ that males and female should have equal pay where the job performed by both sex was similar and that no other factors justified the pay differentials other than sex. The District Court held that the State had violated the Equal Pay Act and rejected the argument that the VSO had additional responsibilities.²⁷⁵

4.3.5 Affirmative action and training

Training is another major issue in the United States' attempt to redress the imbalances of the past. It is evident that the segregationist practices in the United States rendered the majority of blacks and women uncompetitive in the job market.

²⁷² http://www.law.com/jsp/decision_friendly.jsp?id=1202437099361 on 18/10/2011.

²⁷³ 882 F.2d 1206, 91989).

²⁷⁴ 29 U.S.C Section 206 (d).

²⁷⁵ See also *Grove v. Frostburg National Bank* 549 F. Supp. 922.940 D. md. 1982, where the district court held that the employer's bank failed to justify the higher salary it paid a male bank teller by claiming it was a reward for his prior military service.

As such one of the objectives of the Civil Rights Act of 1964 was to provide training to employees in order to accommodate employees during hiring processes. The question that remained unanswered is whether members of the majority group (whites) should as well benefit from these training programmes?

That question was answered in the case of *United Steelworkers of America v Weber*.²⁷⁶ One Kaiser had entered into a collective agreement which covered an affirmative action plan designed to eliminate racial imbalances by reserving 50% of the openings in-plant craft training programmes to raise the percentage of blacks in the local labour force. Weber then instituted a claim alleging that the affirmative action plan gave preference to junior black employees by receiving training over white senior employees. The respondent and other white employees had been discriminated against in violation of the provisions of 703(a) and (d) of Title VII of the Civil Rights Act. More so, the training would have increased his pay package.

The majority of the Supreme Court held that the affirmative action plan was lawful and that the Civil Rights Act of 1964 did not prohibit all kinds of affirmative action programmes. The court held that an affirmative action plan had to be necessary, and aimed at correcting a statistical imbalance, and should be flexible for hiring of non-minorities.

4.3.6 Affirmative action and sexual orientation

Homosexuals have realized very slow progress in their attempt for equal rights in the United States. This means that discrimination against homosexuals is still

²⁷⁶ 443 US 193 (1979) para 49.

sanctioned in many ways. Title VII of the Civil Rights Act had been held not to apply to discrimination against homosexuals.²⁷⁷ Therefore, many states and agencies have adopted sexual orientation anti-discrimination laws. For instance, Executive Order 13087 was issued reaffirming the Executive Branch's longstanding policy that prohibits discrimination based on sexual orientation within Executive Branch civilian employment.²⁷⁸ This Executive Order added sexual orientation the list of categories for which discrimination is prohibited, such as race, colour, religion, sex, national origin, handicap and age. The above Order states further that a person's sexual orientation should not be the basis for the denial of a job in any employment decisions.²⁷⁹ Thus, Federal employees should be able to perform their jobs in workplaces free from discrimination.²⁸⁰

4.4 Similarities and differences of the policy in both Jurisdictions

4.4.1 Similarities

There exist ample similarities surrounding the discourse of affirmative action in South Africa and the United States. The subject has evolved in similar ways in both jurisdictions. As it is, the provisions and ideas about the concept of affirmative action enshrined today into many law books in South Africa were borrowed from the USA experience. For instance, in the USA the focus of affirmative action was on education and employment. The purpose was to ensure that active measures were

²⁷⁷ <http://www.enotes.com/bowers-v-hardwick-reference/bowers-v-hardwick> on 10/April/2012.

²⁷⁸ U.S. Office of Personnel Management (1999) "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employees Right". OWR-25. p.1-17.

²⁷⁹ <http://www.civilrights.dot.gov/.../procedures-processing-complaints-discrimination-sexual-orientation> on 09/April/2012.

²⁸⁰ U.S. Office of Personnel Management (1999), *ibid* note 273 p.1-17.

taken to ensure that blacks and other minorities enjoyed similar opportunities that they were deprived of in the past, namely; promotions, salary increases, career advancement, school admissions, scholarships, and financial aid.

Similarly in the South African context, affirmative action measures in education and employment and in the political sphere were aimed at leveling the playing fields. Thus, the new government realized that it will be unfair to allow all races to compete equally for jobs, as blacks, women and people with disabilities were not given the same educational and career advancement opportunities as their white counterparts during apartheid.

A major similarity in both jurisdictions examined above is the high rate of gender inequality. Gender inequality is a common practice as women in both countries were denied access to social amenities. Therefore, it is not common to find women outnumbering men in the employment domain despite all efforts to eliminate discriminatory practices. Even where women dominate the employment sector, their wages are considerably low as compared to those of their male counterparts. For instance, in the United States gender pay gaps has increased considerably. There has been a decrease in women's wages, which is from, 80.25% in 2007 to 79.9% in 2008.²⁸¹ According to Walt *et al*, the female-to-male earnings ratio was 0.77 not different from that in 2008.²⁸² This implies that in 2009, female Full-time, year-round

²⁸¹ Global Wage Report (2009), International Labour Office, Geneva: Switzerland, p. 1-16 at <http://www.ilo.org/travail> on 18/11/2011.

²⁸² Walt *et al*, (2009). "Income, Poverty and Health Insurance Coverage in the United States": US Census Bureau, Current Population Reports, p.60-238. US Government Printing Office, Washington, DC, 2010, p. 7-50.

(FTYR) employees earned 23% lesser than male FTYR. Also, poverty and illiteracy remained a necessary evil among the disadvantaged groups in both jurisdictions.

Just like in South Africa, affirmative action preferences in the United States are intended to be adequately flexible, temporary in duration, and 'narrowly tailored' to become inflexible measures. This assertion is true looking at the decision in *United States v Paradise*.²⁸³

Also in the USA, the Office of the Federal Contract Compliance Programmes under the Executive Order 11246 requires employers with 50 or more employees, with contracts in excess of \$50,000 to file written affirmative action plans with the government. Similarly, in South Africa the Employment Equity Act requires employers with 50 employees and above to have a concise affirmative action programmes.

Another major similarity is that the Civil Rights Act of 1964 in the USA imposed a duty on public and private employers with an average of fifteen or more employees to conform to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 Act.²⁸⁴ In line with the above Act, the Judiciary has absolute power to order monetary compensation and injunctive relief to victims of discrimination resulting from the failure to implement affirmative action measures. The same applies to employers in South Africa who deliberately fail to implement the policy under the Employment Equity Act.

²⁸³ (1987) 480 U.S. 149, see also *Johnson v Transportation Agency* (1987) 480 U.S. For further reading, see CRS Report RL30470, Affirmative Action Revisited, A legal History and Prospectus, p.35-45.

²⁸⁴ 42 U.S.C. ss 2000e et seq.

Furthermore, both countries also have a similar historical background as they all experienced government-sanctioned racial discrimination and segregation.²⁸⁵ Deane has argued that 'both the US during the slavery era of 1865 and that of Reconstruction after 1876 following the civil rights, and South Africa, during the apartheid era, passed laws requiring or permitting the segregation of races in daily life'.²⁸⁶ The above policies in both countries resulted to prohibitions against inter-racial marriages and laws that prohibited the hiring of people of a particular race in white color jobs but rather in menial positions.²⁸⁷

Both countries recognized the injustices of past discrimination and instituted a means of implementation of remedial policies. Eventually affirmative action was made legal in both jurisdictions through legislation that were enacted.

4.4.2 Differences

In South Africa, colonialism, patriarchy and apartheid resulted in racist and sexist practices and laws resulting in systemic, structural discrimination and inequality.²⁸⁸ The policy of apartheid divided South Africans along racial lines and led to segregated societies for blacks, whites and coloureds. The evidence of this is seen in the introduction of pass laws aimed at controlling the free movement of African people²⁸⁹. In addition, racial classification was another evil introduced by apartheid practices. It prohibited inter-marriages between whites and people of other races.

²⁸⁵ Deane, T. *opcit*, note 235 p.75-91.

²⁸⁶ Deane, T. *opcit*, note 235 p.75-91.

²⁸⁷ Deane, T. *opcit* note 235 p.75-91.

²⁸⁸ Davis, D.M. and Haysom, N.R.L. (2002). **South African Constitutional Law: The Bill of Rights**. Durban: Butterworths, p.53-54.

²⁸⁹ McGregor M. (2006). "Affirmative Action and non-discrimination: South African Law", XXXIX **CILSA**, p. 285-404.

There were also separate and unequal educational systems, health facilities and civic amenities as well as racially segregated, zoned living areas.²⁹⁰

Unlike in South Africa where the vulnerable group constituted the majority, those of the United States are made up of a minority group. The reason for this difference is that in South Africa the white settlers invaded and colonized the inhabitants who were the original inhabitants of the land, whereas in the United States the blacks who arrived in the Northern American colonies were a small number, who were transformed into slaves and considered second class citizens.

Another important difference is that the endorsement of affirmative action in South Africa is supported by a Bill of Rights with specific emphasis on the protection of group rights, while in the United States the endorsement of affirmative action programme is supported by the Equal Protection Clause with specific emphasis on the protection of individual rights.

The South Africa legislation explicitly explained affirmative action, its purpose and its implementation, while the term was omitted in the USA legislation.²⁹¹ Jaarsveld, explained that the aim was to broaden the application of affirmative action as much as possible in South Africa.

²⁹⁰ McGregor (2006). *ibid* note 289 at p. 285-404.

²⁹¹ Van Jaarsveld, *opcit* note 164 p.1-48.

Another difference is derived from the racial demographics from both jurisdictions. The difference in racial demographics has affected the identities and policies of political and judicial authority and their subsequent decision making.²⁹²

4.5 Lessons to be learnt from both Jurisdictions

From the discussion above it is evident that there are some important lessons to be learned from both jurisdictions. In the United States, the implementation of affirmative action measures focused mostly on racially-based and educational issues meaning that the policy is handled in a disorganized manner.²⁹³ This implies that very little is done on the other aspects. In South Africa, affirmative action is implemented in almost all areas of life. As such the United States should “borrow” from South Africa by ensuring that the concept of affirmative action is aimed at achieving equitable representation in all aspects of life, not just race and education.

In the United States the Supreme Court has upheld affirmative action programmes undertaken voluntarily by public and private agencies as necessary and fair. The Supreme Court held that these measures were consistent with Title VII of the Civil Rights Act. In deciding *Weber and Johnson supra*, they noted that it was legitimate for an employer, private or public, to implement an affirmative action programme for any number of 'forward looking reasons'.²⁹⁴ It is recommended that South African jurisdiction can borrow from this position as in South Africa employers in most cases

²⁹² Higginbotham, MF. (2000). “Affirmative action in the United States and South Africa: Lessons from the other side”, **Temple International and Comparative Law Journal**, 13(2) at SSRN: <http://ssrn.com/abstract=1509545> on 24/ 11/2011.

²⁹³ Van Jaarsveld *opcit* note 164 p.1-48.

²⁹⁴ Naff and Dupper *opcit* note 221 p.157-189.

are required to implement an affirmative action programmes only when there is an affirmative action plan or policy in place.

4.6 Summary

This chapter has examined the historical background of affirmative action in the United States beginning from segregation to the origin and development of affirmative action. The reason for this was to compare and contrast what is obtained in the USA and South Africa, and to ensure that affirmative action measures are uniformly implemented. Another reason is that some important lessons can be drawn from both jurisdictions that might enable each other to fine-tune the implementation of affirmative action programmes. However, from the discussions above it is evident that despite the central role of affirmative action in employment practices, there still exist some major challenges.

It is on the basis of the above discussion that the next chapter examines some challenges and possible recommendations for policy and law reform.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

It is common knowledge that the liberation struggle in South Africa focused on ending discriminatory practices which predominantly involved the exclusion of Blacks from the workplace.²⁹⁵ After the enactment of the Final Constitution, a fully democratic and non-racial government was instituted. The objectives of most law reforms in the employment sphere were to redress the wrongs left by past laws. Thus, the Employment Equity Act and Broad-Based Black Economic Empowerment (BBBEE) Act aimed at redressing the injustices that were caused by the apartheid era.²⁹⁶

The preamble to the Employment Equity Act also recognizes that, apart from apartheid and other discriminatory laws and practices, there exist disparities in employment practices and income within the national labour market. As such, the Employment Equity Act seeks to ensure that affirmative action measures are implemented to redress the effects of past discrimination and to create a diversified workforce.

Despite these efforts, inequality, poverty and racial imbalances continued to dominate the twentieth century.²⁹⁷ Even though much has been written on the

²⁹⁵ Burger, R. and Jafta, R. (2010). "Affirmative action in South Africa: an empirical assessment of the impact on the labour market outcomes" **CRISE Working Paper** No.76 p.1-25.

²⁹⁶ Spiegel, A. (2008). "Racism as epithet in the context of post-apartheid's demographic parity goals". **Anthropology Southern Africa**, 31 (3&4) p.103-113.

²⁹⁷ Leibbrandt, M. *et al*, (2007). "Poverty and Inequality Dynamics in South Africa: Post-apartheid Developments in the Light of the Long-Run Legacy". **Southern Africa Labour and Development Research Unit**, South Africa: University of Cape Town p.1-20.

implementation of affirmative action measures as a means to eradicate these imbalances many questions still remain unanswered.

As captured in the problem statement, the central question for this study is whether affirmative action is a form of reverse discrimination or another form of apartheid in disguise as perceived by the "whites" who are strong opponents of the policy. Therefore, this discussion set out to investigate the implementation of affirmative action in South Africa. The reason was to ensure that South Africans are fully represented in the public service as anchored by the Employment Equity Act in order to promote and achieve equality.

The study was done by looking at the South African equality jurisprudence, which prefers substantive equality as opposed to formal equality. The discussion was followed by a comparison in comparable jurisprudence between South Africa and the United States. The rationale behind this comparative study was to determine if there are any important lessons to be learnt by South Africa.

It is hoped that this study has achieved the purpose for which it was set out, as it endeavoured to make recommendations on the existing gaps identified in the literature review.

This chapter seeks to identify the emerging challenges implicated by the implementation of affirmative action measures in the public service in both jurisdictions, followed by recommendations for policy and law reforms.

5.2 Challenges

The new political dispensation brought major progress in the field of education, health care, housing and other social amenities to the previously disadvantaged.²⁹⁸ It adopted a broad pro-poor policy framework that has to be achieved through the implementation of affirmative action.²⁹⁹ Henceforth, there has been a dramatic increase in government expenditure on social services. However, poverty, inequality and income disparity remain prevalent in our society. Statistical evidence reveals that about 18 million people live in poverty which is 40%, while 10 million people classified as ultra-poor constitute 20% of the population.³⁰⁰ Most of the poor are found in rural areas which constitute about 72% of the total population. According to Agüero *et al*, the poverty rate among Black Africans is 61%, 38% for Coloureds as compared to 5% for Indians and 1% for Whites.³⁰¹

The new government instilled hope in citizens after the collapse of apartheid. South Africans were to be fully represented in the public and private sectors, were given preferences in employment due to the implementation of affirmative action measures. Moreover, there have also been spectacular political changes in South Africa after the end of the apartheid regime. This is true in that the apartheid era witnessed continued political instability in which blacks were not allowed to take part in decision-making and electoral processes. Though political violence has subsided,

²⁹⁸ Harsch, E. (2001). "South Africa tackles social inequalities": Some gains, but still a long way to go in overcoming apartheid's legacy". **Africa Recovery, United Nations**. 14 (4) New York: USA p.1-13.

²⁹⁹ Agüero, J. *et al*, (2007). "Poverty and Inequality in the First Decade of South Africa's Democracy: Evidence from Kwazulu-Natal". **Journal of African Economics**. 16(5):782-812.

³⁰⁰ Agüero, J. *ibid* note 299 p.782-812.

³⁰¹ Agüero, J. *ibid* note 299 p.782-812.

unemployment and the sale of illegal firearms amongst the black population have contributed to an increase in crime and other forms of social conflicts.³⁰²

In the United States of America, the Civil Rights Act of 1964 has uplifted the status of blacks. They are now considered full citizens, contribute in all political decision making processes in the country and are given preference in all employment practices with the implementation of affirmative action measures. However this policy has been deemed undemocratic and unconstitutional as it discriminates against the majority.³⁰³

Affirmative action is applauded for creating a balance in the workforce thus far. Presently, Black South Africans are represented in the public and private sectors. However, this concept has been criticized by others especially the "white community". To them, it is not the best way to attain equality. In the same vein, black female employees are still marginalized in the realm of employment. They retain lower positions in organizations and find it difficult to rise to senior management levels.³⁰⁴

In the South African context, the Constitutional Court has ruled that where two members from different designated groups compete for the same position a black (African) should be given preference. For instance in the case of *Fourie v Provincial*

³⁰² Harsch, E. *ibid* note 298 p.1-13.

³⁰³ Langston, L. (1997). "Affirmative action, A look at South Africa and the United States: A Question of Pigmentation or Levelling the Playing Field"? **American University International Law Review**. 13 (2): 333-377.

³⁰⁴ Mathur-Helm, B. (2005). "Equal Opportunity and Affirmative Action for South African Women: a benefit or barrier"? **Women in Management Review**. 20 (1) Bellville: South Africa 56-71.

*Commissioner of the SA Police Service (North West Province) and another*³⁰⁵, the court decided that where two members of the same designated group competed for employment the employer should consider degrees of past discriminations. The justification is that blacks suffered more during the apartheid era in comparison to other groups so they should be considered first in hiring practices.

There have been questions about how long the remedial programme of affirmative action will last. This issue remains an emerging challenge to the policy of affirmative action. There is no certainty as to the end of this policy or when equality will be achieved as well as who will put an end to the programme. These aspects are central to the problem statement of this study.

From the discussion, it is evident that the concept of affirmative action in South Africa has brought a remarkable change to the society, from what it used to be, to a strong and powerful society fully represented with Black South Africans in the workforce in all spheres of life. However, below are some of the recommendations for law reforms.

5.3 Recommendations

The state should embark on effective transformative measures. This implies that the government should impose a responsibility on all employers in public and private sectors to promote economic and social policies to enhance the participation of black (Africans) in the economy. This entails the design and implementation of

³⁰⁵ 2004 25 ILJ 1716 (LC) (supra).

training schemes to provide Black South Africans with the necessary skills and knowledge which makes them competitive for employment.

Affirmation action measures should not be implemented irrationally, so as to have a negative impact on the non-protected group during employment practices. Human, recommended therefore that more entrepreneurs are needed, and not a replacement of white entrepreneurs for blacks.³⁰⁶ Therefore, the Act should not be implemented religiously to favour a particular group, as the new Urban-rich black elite grow richer than the overwhelming majority.³⁰⁷

The absence of specified time limits for affirmative action is another challenge in the concept of affirmative action. Thus government should set up a time frame for the implementation of affirmative action measures. If a particular time frame is set financial resources allocated for the running of this programme will be used to boost the economy.

Another recommendation is that the Department of Labour, including Labour inspectors in South Africa, should be adequately trained. This will ease the monitoring of the affirmative action programmes. In addition, awareness should be created so that the illiterate population will be informed of what affirmative action entails.

³⁰⁶ Human Desme, (2006). "Implementation of Affirmative Action and Black Economic Empowerment (BEE) in the Construction Industry, A Paper for the quantity surveying industry, University of the Free State, Bloemfontein, South Africa at p.1-14, available at http://www.icoste.org/ASAQS_Human.Pdf on 5 November 2011.

³⁰⁷ Human, *ibid* 306 p.1-14

5.4 Summary

In this chapter the challenges facing the implementation of affirmative action measures were discussed. Some recommendations were proposed for policy and law reforms. The study captured a range of issues with regard to the affirmative action policy. It assesses the challenges of both provisions and the implementation of affirmative action measures in South Africa and the United States. Major similarities and differences were highlighted. The discussion exposed the fact that despite the enactment of constitutional and other legislative measures to solve societal ills, there are some areas that still pose a challenge.

On a positive note, Affirmative action measures have improved the socio-economic well-being of most South Africans over the past years. Therefore, it would not be wrong to state that the concept of affirmative action is an immense success.

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