

**THE EFFECTIVENESS OF THE SOUTH AFRICAN
EMPLOYMENT EQUITY ACT 55 OF 1998 IN ADDRESSING THE PAST
INEQUALITIES IN THE WORKPLACE**

Mini-dissertation submitted in partial fulfillment of the requirements for the degree of
Masters of Laws in the Faculty of Law at the North-West University (Mafikeng Campus)

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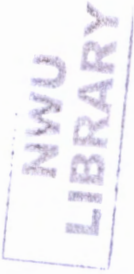
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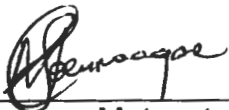
DEDICATION



This mini-dissertation is dedicated to my parents Tebogo Marumoagae and Reuben Marumoagae, my sisters Dineo Mamane and Ofentswe Marumoagae, my brother Edwin Mathope and my cousin Patrick Diale.

DECLARATION

I duly declare that this mini-dissertation for the Degree of Masters of Law (Labour) at the North-West University (Mafikeng Campus) hereby submitted has not been previously tendered by me for a degree at this institution or any other University. I further declare that this mini-dissertation is my own work in design, structure and execution and that all materials and sources contained herein have been acknowledged.



Marumoagae Motseotsile Clement

Date: 23 November 2009

Title: THE EFFECTIVENESS OF THE SOUTH AFRICAN EMPLOYMENT EQUITY ACT 55 OF 1998 IN ADDRESSING THE PAST INEQUALITIES IN THE WORKPLACE

Keywords: Affirmative Action, Apartheid, Black Economic Empowerment, Colonialism, Constitutionalism, Democracy, Discrimination, Employment Equity, Skills Development, Equality, Substantive Equality, Formal Equality, Inequalities, Injustices, Transformation, Transition.

Aim of the Study: The main aim of this study is to investigate and analyse the impact of labour and industrial legislative and policy frameworks on the marginalized groups in South Africa, particularly black people. This study aims to critically evaluate and examine the role played by the employment equity legislation and policy framework in addressing the effects of labour and industrial injustices and inequalities among the workers in South Africa, in order to make recommendations regarding the challenges and opportunities facing the various workplaces in South Africa. This study is based on the premise that the policies and legislation relating to employment equity in South Africa are better placed to eradicate the inequalities in the workplace and also to deal decisively with past injustices.

Research Methodology: This study constitutes an academic discussion and a critical analysis of the past inequalities experienced in the workplace and how the Employment Equity Act 55 of 1998 (EEA) is addressing them. A literature survey of the most important sources dealing with history, cases, legislation and policy documents was undertaken.

Conclusion and Recommendations: In South Africa, colonialism and its policy of segregation were designed to relegate black people to “second class” citizens who were not worthy of any basic rights, in particular the right to fair labour practice. During apartheid, racially repressive legislation which undermined the economic position of black people was introduced. As a result, black people were effectively forced into the “cheap labour” category and they were only able to be employed in unskilled job

categories. Majority of black people were impoverished and could not derive material economic advantages from their labour. On the other hand, the apartheid government laid a platform that ensured social and economic wellbeing for white people and disregarded that of black people. Black workers, the overwhelming majority of South Africa's working class, suffered from super-exploitation that was directly related to their racial oppression. One of the most fundamental right that was denied to blacks was the right to good quality of education that would have enabled them to compete in the labour market. Black people generally struggled to compete because of poor educational levels associated with inferior apartheid education.

In the late 1980s and the early 1990s, South Africa was in a period of transition from apartheid to democracy. During this period the apartheid government started to negotiate with the liberation movements in South Africa, such as the African National Congress (ANC), the South African Communist Party (SACP) and the Pan Africanist Congress of Azania (PAC). The negotiations produced the first democratic Constitution in South Africa. Section 9 of the 1996 Constitution advocates for the adoption of affirmative action measures and it also orders the enactment of national legislation which will prevent or prohibit unfair discrimination. As a result, the EEA was promulgated. The EEA aims to ensure that those who were denied opportunities during the oppressive regimes in South Africa are now afforded equal opportunities in employment and various workplaces through a policy of affirmative action.

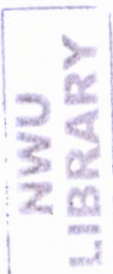
It is desirable that the South African labour market reflect the demographics of the entire South African society in various workplaces. In order to achieve this goal, the South African government must put measures in place in order to educate employees, prospective employees and employers about the importance of the measures advocated by the EEA. In order to achieve employment equity especially in managerial positions in various workplaces and in order to eradicate inequalities of the past, there must be well co-ordinated, effective and formulated skills development and training programmes. It is also important that any affirmative action programme has to be

accompanied by a process of human resource development to offset the problem of quality.

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LIST OF ABBREVIATIONS

A

ANC	African National Congress
ANP	Afrikaner Nationalist Party

B

BEA	Bantu Education Act
BBBEE	Broad Based Black Economic Empowerment
BBBEEA	Broad Based Black Economic Empowerment Act
BEEAC	Black Economic Empowerment Advisory Council
BHCA	Bantu Homelands Constitution Act

C

CA	Constitutional Assembly
CBA	Colour Bar Act
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CP	Cape Colony
CODESA	Convention for a Democratic South Africa

D

DEIC	Dutch East India Company
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E

EAP	Economically Active Population
EEA	Employment Equity Act
EEC	Employment Equity Commission
EC	Equality Court

F

FC	Freedom Charter
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G

GNU	Government of National Unity
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I

ICA	Industrial Conciliation Act
IC	Industrial Court
IC	Interim Constitution

L

LC	Labour Court
LRA	Labour Relations Act

M

MWA	Mines and Works Act
MPNP	Multi-Party Negotiation Process

N

NLA	Native Land Act
NLRA	Native Land Regulation Act
NP	National Party
NR	Native Reserve
NSDS	National Skills Development Strategy

O

OFS	Orange Free State
-----	-------------------

P

PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination ACT
PAC	Pan Africanist Congress of Azania

S

SACPC	South African Coloured People's Congress
SACP	South African Communist Party
SACTU	South African Congress of Trade Unions
SAIC	South African Indian Congress
SETA	Sector Education and Training Authorities
SDA	Skills Development Act

T

T Transvaal

W

WA Wage Act

WCE Wiehahn Commission of Enquiry

WTC World Trade Centre

U

UN United Nations

USA Union of South Africa

USA United States of America

CHAPTER 1: INTRODUCTION

1.1 BACKGROUND PERSPECTIVE

This study explores and discusses the efficiency of the Employment Equity Act (EEA),¹ in addressing the inequalities that occurred as a result of the colonial and apartheid regimes in the workplace. This study also demonstrates how the post-1994 government took initiatives to promote social and economic transformation in South Africa's workplaces. To achieve this objective, the democratic government introduced anti-discrimination and affirmative action policies. Furthermore, this study deals with the expectations as well as debates regarding the establishment and implementation of equity laws and policies in the workplace. Affirmative action as a policy intended to remedy the pre-1994 inequalities will be discussed in this study, thereby providing recommendations and suggestions on how it can be implemented effectively.

1.1.1 COLONIALISM

The period between 1652 and the late eighteenth century has been seen as formative for South African social development in two respects. On the one hand, colonial ideologies supportive of racial exclusivity and economic relations were founded upon racial stratification and economic relations. On the other hand, a development of Afrikaner nationalism had emerged on the early colony's frontier.² In formal terms, South Africa's colonial order overlapped into the newly unified South Africa when the country became an independent dominion within the British Empire in 1910.³ From 1910

¹ Employment Equity Act 55 of 1998. Herein referred to as the EEA.

² Lester *From Colonization to Democracy* 15. The most notable feature of South African social systems has been their marshaling of the "non-white" population into a labouring role for white employers. Also see Magubane *The Making of a Racist State* 27. Magubane argues that "the greatest asset which European powers possess for developing the resources of their African territories is the labour of the indigenous people themselves". This shows that the European settlers used South African natives to work on their own country to the benefit of white settlers. It was clear that the European settlers were interested in enriching themselves at the expense of Africans.

³ Glaser *Politics and Society* 27. It was during colonization period that formally regulated labour began. Both the Dutch and British settlers brought with them the laws of their countries of origin which regulated various fields of life, the English law and Roman Dutch law respectively. It was during the colonial times

onwards, discriminatory practices have been an integral part of the South African society. The real motive for the discrimination, especially in the labour market was to protect poor white Afrikaners against competition from black labour.

1.1.2 APARTHEID REGIME

The supremacy of whites had been traditionally accepted in South Africa prior to 1948. However, it was in the general elections of 1948 that DF Malan officially included the policy of apartheid in the Afrikaner Nationalist Party (ANP) platform, bringing his party to power for the first time.⁴ Discrimination on the basis of race and gender was one of the key pillars of apartheid. The black population was subjected to a despotic labour regime, centered on the circulation of contract migrant workers between Native Reserves (NR) later “Homelands” and the mines and industries of white South Africa. This also included restrictions upon black movement and settlement in urban areas and deliberate denial of what was called opportunities to all.⁵ As a result of the system of job reservation, certain “civilized” jobs and high-paying positions were reserved for white workers while black workers were largely confined to unskilled and low-paying positions.⁶

that forced labour and slavery were introduced in South Africa hence black people in South Africa were forced to work under unbearable and inhuman conditions.

⁴ Rive 1980 http://www.soweto.co.za/html/i_apartheid.htm 24 August 2009. In 1910, Britain withdrew from the government of South Africa and the country became a Union. The new Government adopted its new Constitution in 1910, which effectively gave rights to the white minority and took away the voting rights of the majority. On 31 May 1961, South Africa became a Republic and adopted its second Constitution. This ensured that the rights of the Blacks were taken away. In 1983, South Africa's third Constitution was signed and this created a tricameral Parliament. There was a separate Parliament for Whites, Coloureds and Indians. This Constitution excluded blacks and automatically made them citizens of the Bantustan where they were born and they had no rights outside these Bantustans. In 1994, twenty-six parties negotiated and adopted an Interim Constitution that gave the voting right to all South African citizens. This Constitution was in place for two years and during this time the newly elected African National Congress (ANC) led Government worked as the Constitutional Assembly and drew up the “final Constitution”. Former President Nelson Mandela officially signed the new Constitution of the Republic of South Africa, Act 108 of 1996 on 10 December 1996. This marked a new era of hope for the marginalized groups in South Africa.

⁵ Bezuidenhout 2002 <http://www.the.residency.gov.za/docs/pcsa/social/legacy/chap3a.pdf> 24 August 2009.

⁶ Zuma 2008 <http://www.dfa.gov.za/docs/speeches/2008/dzum0911.html> 11 September 2009.

The legacy of systematic racial ordering and discrimination under apartheid is that South Africa remained deeply radicalised. It is radicalised in cultural and social terms, as well as deeply unequal in terms of the distribution of income and opportunities.⁷ The South African labour market has the past of not affording equal opportunities to all South Africans. Arbitrary grounds such as race, gender, class, marital status and many others have been used to classify and differentiate people thereby denying them benefits that they would otherwise derive from employment. This led to the impoverishment of the majority of South Africans, particularly black people.

1.1.3 DEMOCRATIC DISPENSATION

The post-1994 democratic order had to intervene to bring about structural reforms to redress discrimination in employment, promote equity and ensure economic development, employment creation and poverty eradication.⁸ The new democratic dispensation was committed to a non-racial South Africa. This resulted in the promulgation of the Constitution of the Republic of South Africa⁹ with the subsequent enactment of the "Final" Constitution.¹⁰ These Constitutions guaranteed among others, the right to equality to everyone. This was a legal foundation within which these past inequalities in employment can be addressed. However, even with such interventions

⁷ Seekings 2008 *Journal of Contemporary African Studies* 11. Tighter job reservation for whites was a feature of the early apartheid years.

⁸ See generally Rospabe 1999 *The South African Journal of Economics* 185. In 1994, the onset of democracy in South Africa formally ended several decades of discriminatory policies and legislation, which deeply affected the structure and the efficiency of the labour market. However, it was clear that the legacy of apartheid was so strong that to achieve equality and a discrimination free society special measures had to be undertaken. The post-1994 democratically elected government was determined to unite a new democratic South Africa and eradicate all forms of inequalities that existed before it came to power. However, the government was soon faced with various challenges as majority of South Africans, particularly black people were living in abject poverty and were mostly uneducated and unemployed others even unemployable. The government had to take special measures aimed at addressing the specific needs of the category of people who were marginalized and not afforded opportunities to improve their social and economic positions by the pre-1994 South African governments. Affirmative action was chief amongst the policies that were adopted by the democratic government to remedy the inequalities of the past regimes.

⁹ Constitution of the Republic of South Africa Act 200 of 1993. Herein referred to as the Interim Constitution (IC).

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996. Herein referred to as the "Final" Constitution.

majority of black people still remain largely unemployed and those employed are not afforded equal and fair opportunities within various workplaces.

As part of its legislative and employment equity framework, the post-1994 government introduced affirmative action as a policy aimed at addressing employment inequalities experienced before 1994. This policy remains controversial as it is seen, particularly by white people as compensating black people for the hardships that they endured before 1994. On the other hand, majority of black people welcome it, even though there is evidence that only small number of black people are actually benefitting from it, particularly those who were not actually intended by the policy.

1.2 AIM OF STUDY

The aim of this study is to explore and analyse the legal and political dynamics of the labour market during the colonial and apartheid periods. This study will also provide a critical analysis of the impact of labour legislation and policy on the marginalized groups in the workplace of South Africa, particularly black people before 1994. Furthermore, the impact of constitutional democracy in the workplace will be explored and discussed. Critical evaluation and examination of the role played by the employment equity legislation and policy framework in addressing the effects of labour and industrial injustices and inequalities among black people in South Africa will also be discussed in this study. This study will also explore and analyse the implementation of the current employment equity legislation and policy framework with a view to make suggestions and recommendations on how it can effectively be implemented.

1.3 RESEARCH METHODOLOGY

This study is based on literature review of the relevant materials on the legal history of labour markets, the labour imperatives of constitutionalism and the content of affirmative action and employment equity. Furthermore, electronically assimilated information will also be used herein. This research will include analysis and review of case law, statutes and secondary sources.

CHAPTER 2: HISTORICAL DEVELOPMENTS OF THE LABOUR MARKET

2.1 INTRODUCTION

The first permanent settlement by the Europeans in South Africa was spearheaded by the Dutch East India Company (DEIC) under the leadership of Jan van Riebeeck on the 6th April 1652.¹¹ This marked the beginning of racial divisions at the Cape Colony (CP). The Dutch first came into contact with the Khoikhoi and the San people.¹² The Dutch settlement at the Cape experienced a chronic shortage of labour. As a result, the Khoikhoi and the San people were forced to provide labour to the Dutch settlers.¹³

However, for the purposes of this study only the developments in the labour market that occurred from 1910 onwards will be discussed. It is in this context that this chapter is limited to the period between 1910 and 1948. Furthermore, this chapter will also evaluate the effects that the policy of apartheid had in the labour market. Apartheid was formally introduced in South Africa in 1948.¹⁴ The past policies of segregation and

¹¹ Ross *Cape of Good Hope* 243. According to Ross, the main aim of Jan van Riebeeck, when he arrived at the Cape of Good Hope (CGH) was to establish a refreshment station for the DEIC's trading ships that were en route to East Asia. This event has been used consistently well into the second half of the twentieth century to justify the eventual colonization of what was to become known as South Africa. However, it is also important to note that the first white people to set their feet at the Cape were the Portuguese.

¹² Marks 1972 *Journal of African History* 60. In the Cape, Van Riebeeck first attempted to get cattle and labour from the Khoikhoi and San people by negotiation. However, soon as these negotiations broke down he turned to slavery. The Khoikhoi and the San people were an unwilling labour force. The Khoikhoi, were a pastoral people, as long as they had their lands, flocks of sheep and herds of cattle, they could not be pressed into service for the Dutch settlers. The settlers practiced a form of settled agriculture that came into direct conflict with the pastoral economy of the Khoikhoi, which involved regular and structured seasonal migration. Thus, as the Dutch settlement expanded, independent Khoikhoi communities were placed under unbearable pressure. Within 50 years of the establishment of the Dutch settlement, the indigenous communities near Table Bay, despite heroic struggles on their part, had been disposed of their lands and their independent means of existence had come to an end. Individual Khoikhoi men and women became incorporated into colonial society as low-status servants.

¹³ Clift *Assimilation of the Khoikhoi* 22. The Dutch settlers started trading with the indigenous people of South Africa. These settlers were dishonest in their conduct of trade and often robbed the indigenous people of their wealth and they became economically powerful. According to the DEIC decree, the colonists were forbidden to enslave the indigenous people of the Cape. At the same time the Khoikhoi's growing economic vulnerability prompted them to look for work on farms and in rural households. The Khoikhoi gathered firewood and did temporary work on farms in exchange for tobacco, rice, bread and alcohol but for the most they remained livestock owners and initially had the choice not to do hard manual labour for the colonists.

¹⁴ Houghton *South African Economy* 147. Apartheid officially became law in South Africa when the reunited National Party (NP) won the white minority elections on the 28th May 1948. The apartheid policy

discrimination left a legacy of inequality and poverty as well as low economic growth for blacks in South Africa.¹⁵

Labour market policies were aimed at protecting the position of white workers through active policies such as job reservation, while inferior education and influx control ensured little competition from other races.¹⁶ It is argued in this chapter that colonialism and its policy of segregation were designed to relegate black people to inferior people who were not worthy of any basic rights. The colonial and apartheid governments did not concern themselves with the concept of equity. Furthermore, this chapter will show that the policy of apartheid was an effective implementation of such a strategy. This chapter will also demonstrate how blacks' access to employment and economic resources was restricted through legislative enactments.

2.2 COLONIAL ERA

On 31 May 1910 the British colonies of the Cape Colony (CP), Natal, Orange Free State (OFS) and Transvaal became the Union of South Africa (USA) under Prime Minister Louis Botha. It is generally agreed that the 1910 government policy was the policy of segregation. Segregation was the name coined in early twentieth century South Africa for the set of government policies and social practices which sought to regulate the relationship between white and black, colonized and colonizer.¹⁷ Segregation denotes a complex amalgam of political, ideological and administrative strategies designed to maintain and entrench white supremacy at every level.¹⁸ The exclusion of blacks from

was designed to separate black and white South Africans, to oppress, dominate and control blacks and in the same breath to enrich white South Africans at the expense of the oppressed black people.

¹⁵ Woolard 2002 <http://www.sarpn.org.za/documents/e0000006/SA.pdf> 30 August 2009.

¹⁶ Ibid.

¹⁷ Beinart and Dubow *Segregation and Apartheid* 1. After the coming into being of the Union government in 1910, white power was used to forge one of the most extensive forms of racial discrimination in the twentieth century world. Segregation was more than panoply of restrictive legislation; it refers as well to a composite ideology and set of practices seeking to legitimize social differences and economic inequality in every aspect of life.

¹⁸ Dubow *Racial Segregation* 1. The adoption of segregation as a national political programme represented an attempt to systematize relations of authority and domination in a heterogeneous society which had only recently been conquered and unified into a single state. Historians hold a multiplicity of views as regards the historical origin of segregation. Some writers like Marian Harvey and Richard Pary, trace segregation back to the nineteenth century Cape and the provisions of Cecil John Rhodes 1894

skilled labour and especially from the exercise of supervisory functions over whites was determined by custom as well as legislative bars.¹⁹

The USA which was established in 1910 further entrenched racial divisions that were experienced since the arrival of Dutch settlers in South Africa. Black people retained the same inferior status they had under colonial rule.²⁰ Black people under the Union government were still treated as inferior group with no rights and they were mainly seen by whites as labourers who could be used to further enrich white people in South Africa. During this period, racially repressive legislation which undermined the economic position of black people was introduced.²¹ Labour was a specific area of discrimination and in 1911 the Mines and Works Act²² was enacted and reserved certain skilled positions for whites. This piece of legislation was better known as the 'Colour Bar Act' (CBA). The CBA was seen as the cornerstone of job reservation and the allocation of jobs on the basis of race.²³

The CBA became the cornerstone of racial discrimination and inequality in the mining sector in the allocation of jobs. The CBA put a wide range of skilled jobs beyond the 'competency' of blacks.²⁴ This legislative arrangement illustrates the fact that black people were not given a chance to improve on their skills and to be active participants in the labour market and the economy at large. The CBA further prohibited any person of colour from obtaining certification for their skills.²⁵ As a result, coloured and black people were effectively forced into the 'cheap labour' category. They were only able to

Glen Grey Act. It has been suggested too, that the experience of British rule in Basutoland provided a model for some of the early theorists of segregation. Generally, regarding the latter view, see Rich *Race and Empire in British* 21 and Brooks *Native Policy in South Africa* 12.

¹⁹ Beinart and Dubow *Segregation and Apartheid* 4. Rigid forms of racial discrimination have helped to facilitate capitalist growth and to provide whites with material and political benefits.

²⁰ Saunders and Southey *South African History* 12.

²¹ Terreblanche and Natrass *Political Economy* 7.

²² Mines and Works Act 12 of 1911 (MWA). The MWA was amended in 1926; the revised legislation mirrored the belief that whites would suffer significantly if non-whites were not legislated out of the market, as they were seen as unfair competition.

²³ Saunders and Southey *South African History* 8.

²⁴ Saunders *Readers Digest* 316.

²⁵ Adam and Giliomere *Ethnic Power Mobilized* 14.

be employed in unskilled job categories.²⁶ This legislative initiative was a foundation of discriminatory laws and policies that characterized the administration of the USA. The Union government made its intentions very clear that whites were not to be regarded as equal to blacks but as superior to blacks. Blacks were relegated to inferiority by the type of work that they were eligible to have under the Union government.

The CBA had far reaching effects on black workers in South Africa. Not only were highly skilled artisans relegated back to being unskilled labourers but wages became much lower too.²⁷ This impacted very negatively on the morale of the African community. It also meant that women had to start seeking employment to try and fill in the wage shortfall, negotiating on their housekeeping responsibilities.²⁸ Confined to temporary status, black workers were robbed of any realistic chance of building up human capital to challenge the whites directly in the labour market. In addition, working conditions were often inhumane and dangerous.²⁹

The Native Land Regulation Act³⁰ (NLRA) further discriminated against blacks by 'consolidating regulations on the recruitment and treatment of African contract labour as well as specifically making strike action by black workers on mines a crime despite their continued exclusion from arbitration mechanisms'.³¹ This meant that black workers were

²⁶ Gigaba 2005 <http://www.home-affairs.gov.za/speeches.asp?id=147> 30 August 2009. Whites used unfair and immoral means to attain economic dominance over the indigenous Africans and later all people of colour in the country. The black majority was expected to reproduce itself as cheap labour, to sustain the colonial economic system that itself founded upon, under-girded and sustained by racial supremacy and super-exploitation.

²⁷ Terreblanche and Natrass *Political Economy* 14.

²⁸ Callinicos 1940 <http://www.sahistory.org.za/pages/governance-projects/liberation-.htm> 30 August 2009.

²⁹ Ibid.

³⁰ Native Land Regulation Act 15 of 1911. The Union government also enacted the Native Land Act 27 of 1913 (NLA). The NLA was passed because of constant pressure by whites to prevent the encroachment of blacks on white areas. The law created reserves for blacks and prohibited the sale of white territory to blacks and vice versa. This Act stipulated that black people could live outside the reserves only if they could prove that they were in white employment. According to debates in Parliament, the NLA was passed in order to limit friction between white and black, but blacks maintained that the aim of this Act was to meet demands from white farmers for more agricultural land and force blacks to work as labourers. Also see Davenport *Modern History* 234. Davenport argues that 'the Native Land Act provided the base for territorial separation of white and black in the rural areas. This Act was a source of one of the chief black grievances against the white government, that blacks were not given enough rights to own property so as they can be self sufficient'. Also see Muller *History of South Africa* 393.

³¹ Pogue 2005 http://www.globelics2005africa.org.za/papers/p0045/Globeitics2005_Pogue.pdf 01 September 2009.

just supposed to be grateful that at least they were working. They were not supposed to complain about their working conditions and their wages. By prohibiting black workers from striking, the Union government made them vulnerable to exploitation as they were supposed to accept any condition of employment that was imposed on them. This was a bare denial of their basic human right, the right to strike.

In 1924, the Union government passed the Industrial Conciliation Act³² (ICA) which was in many respects an admirable piece of legislation. It provided machinery for consultation between employers' organizations and trade unions for the determination of wages and conditions of work by collective bargaining and provided for arbitration in the cases of disputes.³³ However, the ICA further entrenched the inequalities amongst black and white in South Africa. It created job reservation for whites and also made provision for the exclusion of black South Africans from membership of registered trade unions.³⁴ The ICA excluded black "pass-bearing" workers once again from the definition of "employee".³⁵

It was not surprising therefore, that low wages were the main grievance of black workers. In 1925, the Wage Act³⁶ (WA) was passed and laid down minimum wages for unskilled workers excluding public servants, domestic servants and farm labourers. The WA was also designed to help unskilled white labour, in particular poor whites. It

³² Industrial Conciliation Act 11 of 1924.

³³ Houghton *South African Economy* 145.

³⁴ Ibid 146.

³⁵ *Maylan African People* 143. The ICA excluded black people from the definition of an employee. The ICA defined an employee as "Any person (other than a Bantu) employed by or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a Bantu) who in any manner assist in carrying on or conducting of the business of an employer. It further defined a "Bantu" as 'a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa'. This shows the extent of racial divisions and stereotypes that were perpetrated by white people against black people particularly in the labour market. They referred to blacks as "aboriginal" hence illustrating categorically and unequivocally that they (whites) did not recognize black people as full and complete human beings worthy of basic human rights. Passes and pass laws have a long and brutal history in South Africa. Passes were not merely instruments to control the movement of black people. They were at the hub of a repressive system and labour coercive laws aimed at compelling the black (African) peasant to join the modern labour force. A pass bearing native, could not change his job without government permission, could not move from one place to another without permission, was not recognized as an employee in terms of the law and consequently could not benefit from any industrial conciliation decisions.

³⁶ Wage Act 27 of 1925.

effectively kept black labour out of the industrial system by only allowing their participation in unskilled labour activities. This piece of legislation permitted differentiation between categories of employees on the grounds of sex and race and laid the basis for discriminatory wage determination.³⁷

Discriminatory wage determinations further entrenched inequalities among black and white South Africans. As a result, the majority of black people were impoverished and could not derive material and economic advantages from their labour. The extent of poverty that was prevalent among black people was due to the colonial laws relating to job reservation in favour of white people. The racial allocation of jobs, racially unequal wages and poor black occupational mobility rested at the core of the black poverty in South Africa.³⁸

2.3 APARTHEID DISPENSATION

In 1948, the National Party (NP) under the leadership of DF Malan was voted into power and formally introduced the policy of Apartheid in South Africa.³⁹ Apartheid called for the separate development of different racial groups in South Africa. On paper, it appeared to call for equal development and freedom of cultural expression, but the way it was implemented made this impossible.⁴⁰ Apartheid government made laws that forced the

³⁷ Murray 1985 *ILJ* 47. It is evident therefore, that the concept of employment equity was non-existent during the colonial era. This era was categorized by great inequality in the labour market and afforded white people living in South Africa social and economic benefits. Black people living in South Africa were reduced to an inferior group and they were not given such benefits. They were merely seen as tools and instruments that can be used to work for the superior white masters. As a result, majority of black people could not compete equitably with whites for better employment. They were incapacitated from accumulating wealth on the same basis as white people could.

³⁸ Ross *History of South Africa* 23.

³⁹ Robinson *The Power of Apartheid* 1. Apartheid, a universal signifier of political and racial domination is a social system founded upon the setting apart in spare of different race groupings. People often wonder why such a policy was introduced and why it had so much support. Various reasons can be given for the introduction of apartheid in South Africa. The main reason lies in the ideals of racial superiority and fear. Across the world, racism is influenced by the idea that one race must be superior to another. Such ideals are found in all population groups. The other reason for apartheid was fear, as in South Africa, white people are the minority and many were worried that they would lose their jobs, culture and language. This is obviously not a justification for apartheid, but nonetheless provides some understanding of how people were thinking.

⁴⁰ Anon 2005 <http://www.sahistory.org.za/pages/governance-projects/apartheid-repression/history01.htm> 02 September 2009.

different racial groups to live separately and develop separately. These laws were grossly unequally too.⁴¹ The apartheid policy was designed to separate black and white South Africans, to oppress, dominate and control blacks. At the same breath, apartheid was designed to enrich white South Africans at the expense of the oppressed black people.⁴²

The apartheid era saw a vast disparity in the distribution of wealth in South Africa. The apartheid government laid a platform that ensured social and economic well being for white people and disregarded that of black people. On the employment front, job reservation ensured jobs for white people, especially in the civil service, mines, factories and public utilities.⁴³ Black workers, the overwhelming majority of the South Africa's working class, suffered from super-exploitation that was directly related to their racial oppression. Deprived of their political rights, historically dispossessed of their land, accorded inferior status, racially separated and systematically oppressed by the white minority, black workers entered the labour market severely disadvantaged.⁴⁴ Basebenzi Phakamani convincingly argues that:⁴⁵

The denial of political rights to the African majority and the granting of merely token rights to the rest of the black population, coupled with the rigid and complex system of controls over movement, residential and job seeking rights are major factors in maintaining massive and systematic inequalities in South African society. Whites in South Africa enjoy one of the highest standards of living in the world. Black workers, on the other hand, are bound into a system that enforces an extremely high level of exploitation. The economy is run in the interest of the white minority and the large number of multinational companies that are operating in

⁴¹ Howarth and Norval *South Africa in Transition* 13. Apartheid did not differ that much from the policy of segregation of the South African government existing before the Afrikaner Nationalist Party (ANP) came to power in 1948. The main difference is that apartheid made segregation part of the law. Apartheid cruelly and forcibly separated people and had a fearsome state apparatus to punish those who disagreed and opposed it. Another reason why apartheid was seen as much worse than segregation, was that apartheid was introduced in a period when other countries were moving away from racist policies.

⁴² Anon 1992 http://www.rebirth.co.za/apartheid_history1.htm 02 September 2009.

⁴³ Jackman 2008 <http://www.thoughtleader.co.za/tonyjackman/2008/04/04/job-reservation-and-egg-on-my-blackface/> 02 September 2009.

⁴⁴ Millin *The South Africans* 152. By providing Black people with education of less quality, it was a strategy of the apartheid government to ensure that black people will not be able to compete for skilled work in South Africa.

⁴⁵ Phakamani 2006 <http://www.anc.org.za/ancdocs/history/basabenz.html> 02 September 2009.

South Africa. Apartheid is the political system of control that makes this possible.

One of the most fundamental right that was denied to blacks was the right to good quality education that would have enabled them to compete in the labour market. Black people generally struggled to compete because of poor educational levels associated with inferior apartheid education.⁴⁶ Apartheid education left a legacy of inequality, poor physical and human infrastructure and a racially divided and contested system.⁴⁷

In 1953 the apartheid government passed the Bantu Education Act⁴⁸ (BEA) which was mainly intended to separate black South Africans from the main, comparatively very well-resourced education system for whites. Seekings and Nattrass argue that 'public education was central to the state's project of ensuring that all white people enjoyed advantaged positions in society'.⁴⁹ It must further be noted that, unemployment amongst black parents forced children to leave school and therefore to lose out on education and job opportunities that went along with it. White children on the other hand, were encouraged to go to school with no economic and social issues to force them out of school. These white children were being prepared to strengthen white racial South Africa and to further advance levels of inequalities in South Africa.

Discriminatory measures were imposed in respect of certain categories of labour, promotion opportunities, remuneration, wage negotiation, unionization, skills and in-service training.⁵⁰ These measures were carefully planned in order to ensure that a

⁴⁶ Bloch " Education isn't just Education" 23-46.

⁴⁷ Jasen 2000 *Journal of Education Policy* 56.

⁴⁸ Bantu Education Act 47 of 1953. This legislation established a Black Education Department in the Department of Native Affairs. This department was tasked with the compilation of a curriculum that suited the nature and requirements of the black people as determined by the white government. African children students were to be educated in a way that was appropriate for their culture. The stated aim of this legislation was to prevent Africans receiving an education that would lead them to aspire to positions they wouldn't be allowed to hold in society.

⁴⁹ Seeking and Nattrass 2007 *BDSA Development Report* (Unpublished).

⁵⁰ Terreblanche *History of Inequality* 12.

black person in South Africa did not enjoy the fruits of his own country. Houghton observes that:⁵¹

Since 1948 the government has introduced further measures for the protection of white workers in the industry, the most important of which was the Labour Relation Act 28 of 1956. This Act retained the general principles of the earlier Industrial Conciliation Acts (11 of 24 and 36 of 1937) but contained two new and highly contentious provisions. The first was the principle of job reservation- the Act provided for the establishment of an Industrial Tribunal consisting of five members appointed by the minister of Labour and section 77 gave the minister wide powers to reserve on the recommendations of the tribunal, certain jobs for members of a particular race to specify the percentage of workers of a particular race to be employed. The second new provision was the principle of enforced racial separation in the trade unions.

It is evident that the apartheid government did not make it a secret that its agenda was to emancipate and better the lives of white people, particularly Afrikaners living in South Africa. This government disregarded the interests of black workers and further impoverished them. The apartheid government did not take any initiative to emancipate black people in order for them to feel like they were indeed in their country. They were made to feel like they were in a foreign country without any human rights.

There was a growing resistance of apartheid policies. On the 26th June 1955 the African National Congress (ANC) and other liberation movements adopted the Freedom Charter (FC).⁵² The FC promised among other things that, all national groups shall be

⁵¹ Houghton *South African Economy* 147. One of the most tragic features of South African history is the variety of ways in which the apartheid government used the political and economic power at its disposal to deprive indigenous groups of reasonable opportunities for social, economic and entrepreneurial development. Although indigenous people were not deprived of all opportunities, the opportunities allocated to them were far fewer as compared to those that were available and given to whites.

⁵² Anon 2007 http://www.sahistory.org.za/pages/governance-projects/freedom-charter/01_history.htm 02 September 2009. As the struggle for freedom reached a new intensity in the early fifties, the ANC saw the need for a clear statement on the future of South Africa, that of non-sexiest, non-racial and equal South Africa where all South Africans can live in harmony. The idea of the FC was born and the Congress of the People Campaign was initiated. During this campaign, the ANC and its allies invited the whole of South Africa to record their demands so that they could be incorporated in a common document. The document that would be accepted at the Congress of the People and would effectively become the FC. The campaign for the Congress of the People and the FC united most of the liberation forces in South Africa. Nothing in the history of the liberation movement in South Africa quite caught the popular imagination as the Congress of the People campaign. This campaign served to consolidate an alliance of the anti-

equal before the law, there shall be work and security, the doors of learning shall be opened to all, there shall be peace and friendship and that the people shall share in the country's wealth. Equality and non-discrimination were among the fundamental ideals that were sought after by the ANC. The FC was a significant document and it gave hope to the black people and those who were fighting apartheid in South Africa. This Charter was a commitment by leaders of the black people to carry out the mandate that was derived directly from the people. However, even with this initiative by the ANC, the white ruling class of the apartheid era continued with their discriminatory laws and practices.

Verwoerd became Prime Minister of South Africa in 1958. In 1952 when he was the minister of the Native Affairs Department, he introduced a comprehensive system of migrant labour for the manufacturing industries in urban areas via stricter influx control measures, pass laws, labour bureaux, Bantu administration boards and single sex living quarters.⁵³ The purpose of this system was to supply cheap and docile labour to emerging Afrikaner entrepreneurs without compromising efforts to keep South Africa white.⁵⁴ To make that kind of labour even cheaper, a system of industrial decentralization and commuter labour was also introduced. This version of labour repression was also based on the principle that, despite the appalling conditions in those areas, the Bantustans⁵⁵ of South Africa provided migrant labourers.⁵⁶ The doctrine of "Separate Development" was the key concept during the apartheid rule.⁵⁷

apartheid forces of the 1950s which composed of: the African National Congress (ANC), the South African Indian Congress (SAIC), the South African Coloured People's Congress (SACPC) and the South African Congress of Trade Unions (SACTU) into a non-racial united front known as the Congress Alliance.

⁵³ Terreblanche *History of Inequality* 13.

⁵⁴ Anon 2009 <http://www.sahistory.org.za/pages/people/bios/verwoerd-hf.htm> 02 September 2009.

⁵⁵ Bantu Authorities Act 68 of 1951, provided for the establishment of black homelands (also known as Bantustans i.e. Bophuthatswana, Venda, Ciskei and Transkei) and regional authorities and, with the aim of creating greater self-government in the homelands, abolished the Native Representative Council. In 1959 the apartheid government passed the Promotion of Bantu Self-Government Act 46 of 1959. This Act entrenched the government policy of separate development as it provided the political and geographical shape of South Africa. This map saw South Africa as a White center with a cluster Black states along its borders. The principle of ethnicity became established in law. The introduction to the Act read "The Bantu people of the Union of South Africa do not constitute a homogenous people but form separate national units on the basis of language and culture". The apartheid government also passed the Bantu Homelands Citizens Act 26 of 1970 which compelled all black people to become a citizen of the homeland that responded to their ethnic group, regardless of whether they have ever lived there or not and this Act also

Blacks were effectively regarded as migrants in their own country and they had to go around carrying passes. The apartheid government was aware that most black people were desperate to find employment due to the conditions that they were living under in their respective Bantustans. This provided the apartheid government within its various workplaces with the opportunity to exploit black workers without affording them equitable payment for the work that they did. Suffice it to mention that black people played a pivotal role in the self enrichment of the white community in South Africa.⁵⁸

It is important to note at this particular juncture that, an attempt to take advantage of cheap black labour without conceding the franchise and other commonly accepted rights of citizenship was founded on the fact that labour unlike other commodities, had a human embodiment that could not be denied.⁵⁹

Although black trade unions were not legally recognized, they played a pivotal role in the fight against job discrimination and unequal treatment of black workers.⁶⁰ They used strikes, as a mechanism to obtain equal rights for black workers in the South Africa's workplace. They used strikes as a tool to destabilize the economy, as strikes provided a

removed their South African citizenship. The government also passed the Bantu Homelands Constitution Act 21 of 1971 (BHCA) which made provision for all the homelands to become self-governing states. This meant that each homeland would have its own legislative assembly.

⁵⁶ Terreblanche *History of Inequality* 13.

⁵⁷ Butler *Comparative Politics* 22. The doctrine of 'Separate Development' provided the economic and territorial rational for these Bantustans and itself rested on the bizarre notion that ethnicity (or tribe) might be ascribed to all African South Africans. See also Hill *Change in South Africa* 8. Hill explains 'Separate Development' as the name officially given by white South Africans to the policy of keeping races apart. Black people were restricted to their respective Bantustans. The policy of 'Separate Development' seemed for many years both to meet the demands of the whites as far as the economy is concerned and to satisfy the believe of white South Africans that uniting races was socially dangerous and morally wrong. On the other hand, the two races have been inextricably entwined in the development on the economy. South Africa's assets, minerals, agriculture, industry, commerce and finance have been created (or in the case of natural resources exploited) by a combination of black physical labour and white management, since blacks have until lately not been allowed access to managerial or even skilled positions outside their Bantustans.

⁵⁸ Black people were used to extract minerals from the ground and the white man was the one selling those minerals and making huge profits. This is an illustration of clear capitalist tendencies that the apartheid government had.

⁵⁹ Smit *Apartheid City* 6.

⁶⁰ Slabbert *South African Trade Unions* 23. Resistance erupted from black working groups in the form of trade unions. As a result, unions became the most significant driving force in the fight against workplace exploitation. They played a pivotal role as a mechanism for change.

platform for workers to fight apartheid government's unjust and repressive laws.⁶¹ The apartheid government saw unregistered black trade unions as a possible threat to industrial, social and political harmony in South Africa. Black trade unions exerted pressure on the apartheid government. As a result, in 1979 the government appointed the Wiehahn Commission of Enquiry (WCE) on labour relations.⁶² The high levels of industrial and political conflict that erupted in the 1970s as a result of discriminatory practices, also contributed to the appointment of the Commission.⁶³ Marie and Budlender observed that:⁶⁴

Shortage of skilled manpower was another factor because it threatened to bring down the generation of economic wealth which was essential to sustain capitalism and white domination. The state could not stand international pressure which was mounting against racial discrimination in South Africa. Possible sanctions were also looming which could harm and disrupt any future investment in South Africa. As a result of all these, the apartheid regime realised that fundamental changes were necessary to regain control on the ground.

The WCE played an important role in the recognition of all trade unions in South Africa, particularly black trade unions. The Commission recommended the establishment of the Industrial Court (IC) that would interpret labour laws and adjudicate on issues such as unfair labour practices.⁶⁵ However, regardless of the significance of the WCE, there were others who felt that it did not contribute much to the establishment of a sound collective relationship between employees and employers.⁶⁶ Even though it had its own

⁶¹ Mabelebele 2008 <http://blogs.uct.ac.za/blog/ketumetse-mabelebele/2008/05/10/the-fall-of-apartheid-regime-and-wiehahn-commission> 03 September 2009.

⁶² Maree 1985 *Labour Capital and Society* 283. State control and prohibition of black unions through suppression and intervening in industry relations contributed to the establishment of Wiehahn commission. In other words, political threat of African unions led to the establishment of this commission.

⁶³ Maree and Budlender *State Policy and Labour Legislation* 116.

⁶⁴ Ibid 117.

⁶⁵ Maree and Budlender *State Policy and Labour Legislation* 118. The two authors states that, the Industrial Court (IC) delivered harsh judgments against employer's victimization of its employees as well as arbitrary dismissals and retrenchments. The commission also extended the definition of an "employee" to include African workers with permanent resident rights.

⁶⁶ Slabbert *South African Trade Unions* 25. According to Slabbert, the Wiehahn commission did not contribute much to foster a sound relationship between African workers and businesses. This was due to the reluctance of organized businesses to accept "militant" black trade unions as part of the employment relations systems in companies. Thus the recommendations of this commission served as a mere frame of reference for conflict-handling whereby employers tried to restrict conflict and the Government of the



shortcomings, this commission was nevertheless important as it laid a strong foundation for black trade unions participation in South Africa.

In the 1980s, South Africa began to experience fundamental changes. The apartheid vision of 'Separate Development' for separate groups was critically blurred by major constitutional changes in the early 1980s.⁶⁷ On 02 February 1990, F W de Klerk made his historic speech unbanning political organizations and promising the release of political prisoners. In doing so, De Klerk launched on the path of a negotiated transition to a new political system.⁶⁸ From 1991 to 1993, negotiations leading to the end of apartheid and the establishment of a democratic South Africa were well under way. These negotiations, among others, were aimed at creating South African labour market that is based on the principle of equity.

2.4 CONCLUSION

Discriminatory practices have been an integral part of South African society. The real motivation for discrimination especially in the labour market was to protect the interests of white workers and potential competition from black workers. South African society, like the country's political and economic systems is a product of colonial conquest and apartheid laws. White people in South Africa have enjoyed economic and educational

day tried to buy time. He further saw this commission as an inquiry which only served the interest of people working on the formal private sector. As it only looked at workers in factories but ignored the fact that there were similar people who were also victimized by the state, suppressed by racial laws as well as victimized by their employers, but it did not take them into consideration. For example this commission excluded domestic workers, teachers and farm labourers who still endured unjust treatment and unfair labour practices.

⁶⁷ Smith *Apartheid City* 7. The constitutional reforms of the early 1980s led to four stages of political change that ultimately and irrevocably transformed the South African political system. First, the 1983 Constitution's new political representation for coloureds and Indians made the glaring lack of participation by the country's black majority even more obvious. The second phase of change was a series of secret meetings between NP officials and the imprisoned ANC leaders. These meetings occurred between 1984 and 1989. These talks led to the third and the most transforming phase in recent politics, beginning with the then South African President F W de Klerk's historic speech of February 2, 1990.

⁶⁸ Tucker and Scott *Successful Transition* 12. Since February 1990, South Africa has been in the process of liberalizing an authoritative political regime as well as abandoning its policy of racial separation. At the same time, extra parliamentary forces have been demanding significant changes in the economic system. The transition has been attempting to achieve a more acceptable economic and social system as well as a more democratic system of governance.

opportunities and social security services, while the same was effectively denied to black people who make up the majority of the citizens of South Africa.⁶⁹

It was shown in this chapter that both the colonial and apartheid governments promulgated a number of statutes which were discriminatory, preventing blacks in particular from doing skilled and high paid work.⁷⁰ It was also shown that from 1948, South Africa was governed and administered through the policy of apartheid. It was during this period that blacks were discriminated in employment as certain jobs were reserved for whites. Blacks were also afforded poor education to ensure that they would be unable to compete with the white people in the labour market. This chapter also discussed the role of black trade unions and the significance of the WCE. It has also transpired from the above that in the 1980s, South Africa began its transition journey leading to the 1990s negotiations that led to the achievement of democracy in South Africa.

⁶⁹ Smith *Apartheid City* 95. Increased educational opportunities would be essential for a successful South Africa.

⁷⁰ Dubow *Racial Segregation* 1.

CHAPTER 3: THE TRANSFORMATION OF THE LABOUR MARKET IN THE POST-APARTHEID ERA

3.1 INTRODUCTION

Throughout the colonial and apartheid rule in South Africa, black South Africans have always sought a political transition. The political transition sought, from a society characterized by conflict and violence to a society where the rule of law prevails and human rights are protected and respected. In the 1980s, a dream of a democratic South Africa started to be realised. This chapter discusses the transition from apartheid to democracy that occurred in South Africa.

Furthermore, this chapter will reflect upon the negotiations that led to the adoption of a democratic Constitution in South Africa. The provisions of both the 1993 and 1996 Constitutions that have some significance to the labour market will be analyzed. The impact of the constitutional enactments in redressing the inequalities that resulted from the colonial and apartheid laws in the labour market of South Africa will also be discussed. Furthermore, this chapter asserts that despite the advent of the new democratic era, South Africa's workplaces remain largely unequal due to factors such as race and gender.

3.2 TRANSITIONAL DISPENSATION AND NEGOTIATIONS

South Africa has a painful history and has undergone momentous changes in the last two decades.⁷¹ In the late 1980s and the early 1990s, South Africa was in a period of transition from apartheid to democracy, from minority rule to liberation.⁷² Oppressed

⁷¹ Howarth *South Africa in Transition* 1. According to Howarth, at the end of 1989, the NP) embarked on a process that ended white minority rule. The dramatic unbanning of the ANC, the SACP and other proscribed organizations on 2nd February 1990, took place in an international and domestic context in which there were both new opportunities and pressures for democratization. However, it is submitted therefore, that apartheid became very expensive to maintain as international pressure was mounting on the apartheid government. This government was pressurized by the conditions that prevailed during the late 1990s to start negotiating with the liberation movements of South Africa. They did not negotiate because they wanted to, but because of international and domestic pressured.

⁷² Anon 1993 www.sahistory.org.za/pages/library-resources/ /chapter1.htm 15 September 2009. This was one of the most important turning points in South Africa's history. The end of apartheid and the surrender of political power by the white minority to the majority constitutes, in the long perspective of history, a key

South Africans, together with those who were sympathetic to their course agreed that there would be a period of transition in South Africa where the process of the destruction of apartheid and the building of the new South Africa would commence.⁷³

South Africans, supported by the people of the world, set themselves the mammoth task of building a democratic, non-racial, non-sexist society.⁷⁴ Even though the transition to democracy was generally believed to have been a peaceful one, it is worth noting that in some parts of the country extreme violence erupted.⁷⁵

F W de Klerk's momentous speech which was delivered in 1990 has been said to have effectively "annihilated" apartheid and also opened the way for official negotiations with the liberation movements in South Africa.⁷⁶ The goal of the negotiations might have

turning point and one of the world historical importance. In no other country where settlers established themselves in power had such a transition occurred. Because of its relatively peaceful nature and because it took the country from one of the most hated systems of rule ever devised to a democratic order, the transition is frequently regarded as so remarkable, unexpected and successful as to warrant the term "miracle". There can be no doubt that the transition meant a dramatic and sweeping transformation. The transition was not derailed, as many expected and often seemed likely, but successfully completed and it ushered in an era of political stability. The road to political change in South Africa was long and arduous. It was marked by enormous sacrifice and suffering with the end of the Cold War, persistent international pressure, the stand-off between contending forces in South Africa and the escalating and crippling human and financial costs of apartheid. It became clear to South African leaders, black and white that the only way out was through broad-based negotiations. With the encouragement and support of members of the United Nations (UN) and the international community, South Africans decided at long last to resolve their differences peacefully, setting in the process a remarkable example for other countries beset by political, ethnic and other forms of internal conflict.

⁷³ Keke 2009 www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo19/transition 12 September 2009.

⁷⁴ Ibid September 2009. In building a new society, South Africans needed to look no further, because the same tools to destroy apartheid bore the seeds of transformation. These tools were to be redesigned to suite the new challenges of building a new society. There was not going to be any indentured labour or brigades of volunteers from outside South Africa that were to be organised to help build a new South Africa. As they brought about the demise of apartheid, South Africans were expected to bring about a new society.

⁷⁵ Taylor *Dying Days of Apartheid* 13. Taylor states that 'as the negotiations to establish a new constitutional order in South Africa were underway during the period 1990 to 1994, over 16 000 people were to lose their lives in violence which centered on Kwa-Zulu Natal and the Reef. In fact in the transitional period the violence claimed far more lives than did the fight against apartheid itself'. Even though it might be true that the transitional period claimed the lives of some South Africans, one cannot merely accept that this period claimed more lives than the period from 1948 to the 1980s because no empirical evidence has been presented in this regard.

⁷⁶ Kriel *Transformation in South Africa* 27. By August 1990, the ANC declared an end to its 30 year old struggle in favour of a new atmosphere of tolerating opponents and negotiations. In 1991, the Convention for a Democratic South Africa (CODESA) was convened in Johannesburg. Expectations of this convention were too ambitious and CODESA came to a halt barely six months of its inception. CODESA II started in May 1992, but positions hardened between ANC and the NP. The failure of CODESA led to a complete different format: the Multi-Party Negotiations Process (MPNP) in 1993. In April 1993, twenty six political parties gathered at the World Trade Centre (WTC) in Johannesburg to restart talks on the political

been purely a political shift from a discriminating racist minority regime to a Constitution-bound majority government which embraces the values of equality, human dignity and fundamental freedoms and rights. However, these negotiations were aimed at social, economic and political transformation.⁷⁷ These negotiations were also aimed at, among others, to discuss the hardships that black people were exposed to at various workplaces and negotiated the new constitutional dispensation. Furthermore, it was essential for liberation movements' leaders to negotiate terms that will abolish all forms of inequalities that were experienced in the labour market generally and various South African workplaces.

During the negotiations, the ANC delegation emphasized the importance of affording all South Africans human rights. Though increasingly won over the language of rights, ANC thinkers like Albie Sachs were keen to redefine rights in a way that extended the protection thus afforded more explicitly to the poor and other subordinate social categories.⁷⁸ The ANC's new constitutionalists proposed certain types of rights extension which included; instead of treating citizens as abstractly equivalent subjects, rights documents should specify categories of citizens requiring special kinds of protection or affirmative action, groups like workers, women, children and the black majority more generally.⁷⁹ This shows that amongst the ANC delegation in the negotiations, there were those who were conscious of the importance of equity and affirmative action measures.

3.3 1993 CONSTITUTIONAL PROVISIONS

On 2 April 1993, the Multi-Party Negotiation Process (MPNP) began in Kempton Park. At these multiparty negotiations, an agreement was reached on the need to establish a Government of National Unity (GNU) and on the formulation of a democratic non-

future of South Africa and by mid-1993 it became apparent that South Africa was going to hold its first fully democratic elections on 27 April 1994.

⁷⁷ Kriel *Transformation in South Africa* 27.

⁷⁸ Glaser *Changing Discourse* 41.

⁷⁹ *Ibid.*

discriminating Constitution.⁸⁰ The Interim Constitution (IC) was a decisive foundation that ensured that South Africa was now to be regarded as a non-sexiest and a democratic country where all within it could fully reach their potential without any arbitrary categorization. This effectively meant that all South Africans irrespective of their colour could now seek employment and be employed without prior arbitrary categorization. The IC had a profound impact in the labour market and various workplaces by laying a foundation for the eradication of all forms of unfair discriminations and inequalities. The preamble of the IC states that:⁸¹

We, the people of South Africa declare that- whereas there is a need to create a new order in which all South Africans will be entitled to a common citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

This was an effective commitment that South Africans made in order to live in peace and harmony and being able to equally enjoy human freedoms and rights. This included the opening of the employment doors to all South Africans. The Preamble proclaimed "equality" between people of all races. This proclamation marked a decisive shift from the past regimes (colonial rule and apartheid) to the new democratic order in South Africa. This was an illustration of the fact that all people irrespective of their race are all human beings with rights worthy of being respected and protected. Chapter Three of the IC provided among others that:⁸²

8 (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular:

⁸⁰ Constitution of the Republic of South Africa Act 200 of 1993. Herein referred to as the Interim Constitution (IC). The IC was the supreme law of the Country. Any law or conduct which was inconsistent with the spirit of the Constitution would be declared null and void. The ANC led government took the transformative opportunities created by the IC to eliminate inequalities at the workplace through the promulgation of legislation and policies. The ANC government was faced with a huge task of remedying the injustices of the pre-1994 oppressive governments. The ANC government had to abolish all immoral laws that differentiated between people in terms of their race from the statute books. In 1994, the onset of democracy in South Africa formally ended several decades of discriminatory policies and legislation which deeply affected the structure and the efficiency of the labour market.

⁸¹ The Preamble of the IC.

⁸² Section 8 of the IC.

race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms

The IC was a symbol of change and the beginning of a new dawn where all South Africans can really feel at home and benefit from the resources that are at their disposal in their country. Even though discrimination may be warranted in particular instances, the IC would only allow the discrimination that is fair and justifiable on constitutional grounds. Section 8 (3) (a) of the IC also shows the change in thinking of the South African government, that it was now prepared to adopt measures that were aimed at advancing persons disadvantaged by unfair discrimination in the past.⁸³

It is evident therefore, that the IC was committed to a new constitutional order premised upon an open and democratic government and the universal enjoyment of fundamental human rights including the right to choose one's labour.⁸⁴ Mahomed J outlined the importance and the role of the Constitution in *S v Makwanyane*.⁸⁵

⁸³ Measures that were to be adopted by the South African government regarding the advancement of the previously marginalized sectors of the South African society included among others the affirmative action measures. The policy of affirmative action together with its legislative framework will be discussed in subsequent chapters of this study. However it suffices at this stage to mention that, affirmative action is defined and based on the unique dynamics of each country. Affirmative action measures include preferential treatment regarding recruitment, selection and promotion of all categories of non-white employees.

⁸⁴ *In re: Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC) 1277.

⁸⁵ *S v Makwanyane* 1995 (3) SA 391 (CC) Mahomed J went on to say that 'the South African Constitution seek to articulate, with differing degrees of intensity and detail; 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 the 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. The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably recognizes the clear justification for the reversal of the accumulated legacy of such discrimination. Such a jurisprudential past created what the post-amble to the Interim Constitution

In some countries, the Constitution only formalises, 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 ranging 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 institutionalised and the legitimised racism.

These constitutional changes were translated to every sector in the country including the labour market and various workplaces. It was important that various workplaces transform in order to be in line with the constitutional requirements. Constitutionally speaking, this meant that black people in South Africa could now start competing for skilled jobs with their white counterparts. They could also seek promotion in their respective workplaces as well as better wages. Section 27 of the IC dealt with labour rights. It guaranteed every person the right to fair labour practices.⁸⁶

This was a clear instruction by the IC that irrespective of your race or gender one must be treated fairly in the workplace. However, the reality was that even with the enactment of the IC, employment inequalities continued to exist in South Africa. There was therefore, a need for the government to employ special measures to eradicate these inequalities so that all South Africans can compete equitably in the labour market. The post-amble to the IC reminds us that the Constitution is a:⁸⁷

“...historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and

recognizes as a society “characterized by strife, conflict, untold suffering and injustice”. What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex’.

⁸⁶ Section 27 (1) of the IC. This section also guaranteed workers’ rights such as; the right to organize, collective bargaining, to form and join trade unions and the right to strike.

⁸⁷ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC). In a nutshell, these are the underlying values and objects of the Constitution. These are the imbalances which the Constitution seeks to redress.

a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”

This was the kind of bridge that most black South Africans have always dreamt and aspired for. Such a transition brought hope to the black people that the doors of the labour market will be opened on an equitable basis without regard to arbitrary categorization such as race. However, most black people were severely affected by the apartheid regime. They found themselves being poor with inadequate education and lacking necessary skills that will enable them to compete effectively in the labour market with their white counterparts.⁸⁸

A political transition with a constitutional transformation in South Africa saw a democratic government coming out with a clear objective. The government was committed to eradicating racial inequalities in accessing education, thereby increasing particularly educational attainment among blacks.⁸⁹ This was a new government's initiative of ensuring that black people were empowered with education thereby enhancing their skills in order to effectively enable them to access the labour market.

3.4 1996 CONSTITUTIONAL SETTLEMENT

3.4.1 1996 CONSTITUTION

From the date of the adoption of the IC, the Constitutional Assembly (CA) was tasked with the drafting of a new Constitution. This Constitution has widely been viewed as the 'final' Constitution of South Africa.⁹⁰ In terms of section 2, this Constitution is the

⁸⁸ Dias and Posel "Unemployment" 120. Differential access to education across race groups was one of the defining features of apartheid South Africa, entrenching large inter-racial differences in economic status.

⁸⁹ Ibid. Given the legacy of apartheid, educational attainment of black people during the mid 1990s remained lower on average.

⁹⁰ Anon 2007 <http://www.southafrica.info/about/democracy/constitution.htm> 27 September 2009. The Constitution of the Republic of South Africa, Act 108 of 1996 was drafted in terms of Chapter 5 of the Interim Constitution (Act 200 of 1993) and was first adopted by the Constitutional Assembly on 8 May 1996. This Constitution was certified by the Constitutional Court; the objective of this certification process was to ensure that the 'final' Constitution is legitimate, credible and accepted by all South Africans. The process of drafting the Constitution involved many South Africans in the largest public participation

supreme law of the country and law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.⁹¹ With the advent of the 1996 Constitution, the Republic of South Africa is a sovereign and a democratic state which is based on the fundamental values of human dignity, equality and the advancement of human rights and freedoms.⁹²

The 1996 Constitution commands that 'no one may be subjected to slavery, or forced labour'.⁹³ These were practices that the past oppressive governments in South Africa were well known for. Black people in particular, were often exposed to these practices under the oppressive rule in South Africa. The 1996 Constitution also guarantees the right of everyone to freedom of association.⁹⁴ In the context of labour law, this effectively means that every worker may now associate himself or herself with other workers in order to deal with matters of their mutual interests, namely; to demand better working conditions and wages.

'Every citizen has a right to choose their trade, occupation or profession freely'.⁹⁵ Every South African citizen can decide which particular trade he or she will follow without prior consultation with government officials. Another important section of the 1996 Constitution in relation to the labour market is section 23. This section guarantees every

programme ever carried out in South Africa. South African Constitution was the result of remarkably detailed and inclusive negotiations, difficult but determined that were carried out with an acute awareness of the injustices of the country's non-democratic past. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. This Constitution is the supreme law of the land, the yardstick by which all other laws are judged. It sets out the rules by which government is obliged to function and how it will be accountable to the ordinary people who elect it. Any citizen who is aggrieved by any law or any other aspect of the conduct of government is entitled to seek the assistance of one of several institutions, including the Constitutional Court, that have been established specially to uphold the Constitution and safeguard their interests. The 'final' Constitution is widely regarded as the most progressive Constitution in the world, with the Bill of Rights second to none. This Constitution came into effect on the 4 February 1997.

⁹¹ Constitution of Republic of South Africa Act 108 of 1996. Herein referred to as the 'final' Constitution.

⁹² Section 1 of the 1996 Constitution.

⁹³ Section 13 of the 1996 Constitution.

⁹⁴ Section 18 of the 1996 Constitution.

⁹⁵ Section 22 of the 1996 Constitution.

worker rights such as: the right to fair labour practice⁹⁶, the right to strike⁹⁷, the right to organize⁹⁸ as well as the right to join or form a trade union.⁹⁹

These are fundamental human rights that black people did not enjoy under the apartheid regime. With the addition to the above guarantees, the Constitution effectively demonstrated the commitment of a democratic government to distance itself from the practices that were carried out by the pre-1994 governments. All South Africans are now assured through the Constitution that their dignity¹⁰⁰ will be respected by being eligible to seek employment in all sectors where they qualify to work. The 1996 Constitution further serves as assurance to all South Africans that they will be treated with dignity and also equally in various workplaces. Also that their basic human rights will be advanced and respected as well as protected.

South Africans, particularly black people were now free to reach their full potential by attaining the necessary skills that will help them compete for better jobs in South Africa. The 1996 Constitution also has a fundamental impact in the transformation of the South African labour market and various workplaces. Just as the IC did, the 1996 Constitution also emphasized the need to promote equality in South Africa. The 1996 Constitution thereby provides the government with the necessary tools to effectively eradicate all inequalities in the labour market. South Africa's labour market has undergone a transformation since 1994, with an emphasis being placed on strategies that would

⁹⁶ Section 23 (1) of the 1996 Constitution.

⁹⁷ Section 23 (2) (c) of the 1996 Constitution.

⁹⁸ Section 23 (4) (b) of the 1996 Constitution.

⁹⁹ The apartheid government did not recognize black people's freedom of association, their right to organize as well as their right to form and join trade unions. The realities of apartheid rendered black workers and their dependents exploited both as workers i.e. sellers of labour power and as disenfranchised citizens of South Africa. The South African 1996 Constitution therefore recognizes the need for workers to associate together in order to fight such exploitation. See Slovo *No Middle Road* 1976. Slovo argues that 'in a struggle for a democratic society free from all forms of exploitation and oppression, the black working class must obviously be the driving force of the revolution. They must be organized industrially into disciplined and militant trade unions, and they as a class, must be mobilized to wage mass resistance and struggle against the ruling class and its imperialists partners at all possible levels. Their participation, spirit of militancy and leadership will not only shape the parameters of struggle but also the contours of a liberated South Africa. As we have seen, insofar as black workers suffer the double yolk of national oppression and class oppression, their emancipation from both is a necessary condition for the freedom of not only their class but of all South Africans'. It really is against the sentiments expressed by Joe Slovo that the 1996 Constitution recognizes the need for the working class to organize themselves into one entity and deal with matters of mutual interest.

¹⁰⁰ See in this regard, section 10 of the 1996 Constitution.

effectively eliminate all the labour inequalities of the past and improve general working conditions for all South Africans.

Chapter 2 of the 1996 Constitution provides through section 9, among others, that:¹⁰¹

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

(3) The state may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

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

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

Section 9 of the 'final' Constitution goes further than section 8 of the Interim Constitution as far as the eradication of inequalities and discrimination is concerned. The 1996 Constitution mandates the legislature to enact a national legislation that will effectively prohibit and prevent unfair discriminatory practices in South Africa.¹⁰² This Constitution also empowers the state to take progressive steps to empower those who were

¹⁰¹ Section 9 of the 1996 Constitution. The importance of this section cannot be overemphasized as South Africa is a country that is burdened by great inequality, poverty and unemployment. Our past saw large-scale discrimination against black people and the consequences of this will be felt for a long time to come. The ANC government has overwhelming political power, but more than half of its support base can be classified as poor and unemployed. It is therefore in the interest of both the government and the country that the problem of widespread black poverty and unemployment should be addressed as rapidly and as effectively as possible. It should be a priority for all South Africans, regardless of race or political persuasion, actively to support a large national project to alleviate the suffering of so many millions of their fellow South Africans. Those who think that the distress of their fellow South Africans does not concern them, they neither appreciate nor understand the meaning of brotherly compassion and most importantly patriotism. The equality clause in the 1996 Constitution therefore provides South Africans with a solid foundation in which they can achieve these aspirations.

¹⁰² Section 9 (4) of the 1996 Constitution.

marginalized before 1994, by taking legislative and other measures that will protect and advance their social and economic standing as well as their equality.¹⁰³

3.5 EQUALITY CLAUSE AND SUBSTANTIVE EQUALITY

It is generally accepted that discriminatory practices are deeply rooted in South Africa's past. In a society where racial discrimination was the norm, discrimination and inequality became pervasive features of employment relations in all sectors.¹⁰⁴ The Constitution establishes a new democratic order based on 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.¹⁰⁵ These are the values on which South Africa is founded upon. In order to carry out the mandate of promoting the achievement of equality, the Constitution allows the promulgation of legislative and other measures to protect and advance persons disadvantaged by unfair discrimination.¹⁰⁶

'Everyone is equal before the law and has the right to equal protection and benefit of the law'.¹⁰⁷ Kriegler J outlined the significance of equality in the Constitution in the case of *The President of the Republic of South Africa and another v Hugo*:¹⁰⁸

The importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.

¹⁰³ Section 9 (2) of the 1996 Constitution.

¹⁰⁴ Du Toit *A Comprehensive Guide* 571.

¹⁰⁵ Section 1 of the 'final Constitution'.

¹⁰⁶ Section 9 (2) of the 'final' Constitution.

¹⁰⁷ Section 9 (1) of the 'final' Constitution.

¹⁰⁸ *The President of the RSA and another v Hugo* 1997 (4) SA 1 (CC).

Equality is one of the most fundamental rights that should not be compromised and should always be protected. In the labour context, it is important that employees and those seeking employment are treated equally in order to ensure that opportunities that arise are distributed equitably amongst them.

It has generally been accepted that our Constitution embodies a substantive view of equality as opposed to formal equality. Formal equality is a principle of equal treatment. Individuals who are alike are treated alike, according to their actual characteristics rather than stereotypical assumptions made about them. It is a principle that can be applied either to a single individual, whose right to be treated on his or her own merits can be viewed as a right of individual autonomy, or to a group, whose members seek the same treatment as members of other, similarly situated groups.¹⁰⁹ Formal equality fails to recognize social and economic disparities among those compared hence it can result in great disadvantage for those in vulnerable positions. For example, treating those who have been exposed to better job opportunities the same as those who were not in the past can disadvantage the latter group as they run a risk of not receiving adequate training.

It has been argued that our Constitution imposes a positive duty on all organs of state to promote the achievement of substantive equality.¹¹⁰ The notion of substantive equality requires all concerned to identify social differentiation and systemic under-privilege which still persists in our society. It also requires the undertaking of active steps to dismantle these and prevent new patterns of disadvantage emerging.¹¹¹ Substantive

¹⁰⁸ De Vos 2000 *THRHR* 6.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* It has been accepted that equality can be divided into formal and substantive equality. The formal approach to equality is usually understood to demand the equal treatment of individuals regardless of their actual circumstances. Formal equality presupposes that all persons are equal bears of rights within a just social order. According to this view, inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same "neutral" norm or standard. For supporters of substantive equality, a formal conception of equality is a dangerous tool in the hands of the status quo. They argue that formal equality is blind to entrenched structural inequality. It ignores actual social and economic disparities between people and constructs standards that appear to be neutral, but which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Reliance on formal equality may therefore exacerbate inequality. Substantive equality on the other hand, requires courts to examine the actual economic, social and political conditions of groups and

equality recognises that inequality is embedded in social and legal differentiation, often along the lines of race, gender and class but also other forms of systemic under-privilege.¹¹²

Substantive equality accordingly pays attention to history, to the context in which a particular claim is located and to the impact of the alleged equality violation on the complainant. It also pays attention to harm rather than difference, to disadvantage as well as to the purpose of equality as understood within the South African Constitution as a whole.¹¹³ Substantive equality seems to be favoured over formal equality. This is because the latter model of equality fails to acknowledge the actual social and economic disadvantages that certain groups experienced. Formal equality also fails to acknowledge how these disadvantages may be reinforced through laws, policies and practices that seem to be neutral but in fact maintain other groups' positions of privilege.¹¹⁴ Formal equality fails to accommodate special measures that are designed to emancipate people who were marginalised and disadvantaged in the past; namely affirmative action. On the other hand substantive equality provides a justification for the adoption of such emancipatory measures.¹¹⁵

individuals in order to determine whether the Constitution's commitment to equality is being upheld. Such an inquiry reveals a world of systemic and pervasive group-based inequality, which needs to be taken into account in the formulation of jurisprudential approaches to equality rights. See Dupper 2002 *SA Merc LJ* 278. Dupper advances a third model of equality, that of "Equality of Opportunities". The basic principle informing this model is the recognition that 'true equality cannot be achieved if individuals begin the race from different starting points'. Like formal equality, this model continues to adhere to the importance of individualism, but it distinguishes itself from formal equality by recognising that structural discrimination distorts life chances of individuals because of their group membership. So race and sex based policies may be used as transitional remedial measures according to this model, but only insofar as they operate to equalize the starting points of actors in the market. It is at this point that the primacy of the individual reasserts itself within the model.

¹¹² *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

¹¹³ *Albertyn and Goldblatt Equality* 560.

¹¹⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

¹¹⁵ See generally *City Council of Pretoria v Walker* 1998 (2) SA 363 at 373. The Constitutional Court held that formal equality mandates that everyone should be treated alike, irrespective of his or her starting point. Substantive equality takes into account the different starting points of each person and mandates that in order to treat people equally, different treatment may be needed. In this case the CC found that a flat rate for municipal services in a township adjacent to a formerly white suburb that had to pay metered rates was not unfair race discrimination because the measure was aimed at addressing an historical inequality suffered by black residents of urban areas.

It is evident therefore that the approach to equality in South Africa is one aimed at achieving substantively equal outcomes, with affirmative action being the measure used to bring this about. This approach is one which seeks to achieve the goal of affording each human being equal treatment on the basis of equal worth and freedom. It 'requires a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not'.¹¹⁶

The Constitutional Court has also developed its equality jurisprudence along the line of substantive equality. By so doing the Constitutional Court now recognizes that treating people equal, thereby adopting a formal equality approach can lead to even greater inequality. Substantive equality seeks to emancipate those who have been met with great disadvantages in the past. In *Bhe and Others v Khayelitsha Magistrate and Others*¹¹⁷ the Constitutional Court held that:¹¹⁸

The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and no-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9 (3) of the Constitution prohibits unfair discrimination by the state "directly or indirectly against anyone" on grounds which include race, gender and sex.

The Constitutional Court has also found that 'legislative and other measures that properly fall within the requirements of section 9(2) of the Constitution are not presumptively unfair'.¹¹⁹ The Constitutional Court was making it clear that; substantive equality model is the preferred equality model to advance the rights of those who were

¹¹⁶ Cooper 2004 ILJ 813.

¹¹⁷ *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

¹¹⁸ Ibid.

¹¹⁹ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC).

marginalised and disadvantaged in the past. Moseneke J (as he was then) also held that:¹²⁰

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.

Moseneke J further found that 'remedial measures are not derogation from, but a substantive and composite part of section 9 and of the Constitution as a whole'.¹²¹ It is submitted that, the differentiation between persons or any categories of persons aimed at protecting or advancing persons disadvantaged by unfair discrimination in the past is warranted provided the measures are shown to be in conformity with section 9(2) of the Constitution. Furthermore, it is beneficial to the society as a whole to interpret section 9 of the Constitution as encompassing substantive equality. South African high courts also seem to be following the equality jurisprudence of the Constitutional Court. In *Stoman v Minister of Safety & Security & Others*¹²² the court held that:¹²³

Analysts and theorists often stated that the South African Constitution recognises and embodies the concept of substantive equality, as opposed to mere formal equality. Without attempting to go into a detailed academic discussion of those concepts, it would perhaps suffice to say that the recognition of substantive equality *inter alia* means that equality is more than mere non-discrimination. When a society, and perhaps the particular role

¹²⁰ Ibid.

¹²¹ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC).

¹²² *Stoman v Minister of Safety and Security and Others* (2002) 23 ILJ 1020 (T).

¹²³ Ibid.

players in a certain place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination. This also applies to possible applicants for appointment or promotion. Therefore the Constitution explicitly states that equality includes the full and equal enjoyment of all rights and freedoms and that legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken, in order to promote the achievement of equality.

This notion of substantive equality has also been transferred to various workplaces after the adoption of the 1996 Constitution and the coming into power of the new democratic administration in South Africa. This effectively ensured that employees who were denied opportunities in the past were now being recognised and afforded those opportunities. Those within our society who could not access certain jobs due to political reasons were now free to pursue those particular jobs.

3.6 CONCLUSION

Pre-1994 oppressive governments ensured the effective division of the entire society through the enactment of legislation that favoured the white minority in South Africa. As already highlighted above, this was also the position in the labour market as it was characterized by great inequalities. There was a need to change the *status quo* in South Africa and in the 1990s, South Africa experienced the period of change from oppression to liberty. During the 1990s, inequalities in various sectors of the South African economy were still entrenched. Negotiations between the apartheid government and South African liberation movements were, among others, aimed at eradicating these inequalities.

It was shown in this chapter that the 1990s was an important period in South Africa as it saw the effective death of apartheid. It was during this period that the apartheid government started to effectively engage the liberation movements in South Africa in order to pave a way for democracy in the country. During 1990 and 1993 various negotiations were undertaken. As a result, the 1993 IC was enacted. It was shown in this chapter that the Preamble to the IC commanded that there should be equality

between people of all races so that they shall be able to enjoy and exercise their fundamental rights and freedoms. Section 8 of the IC also prohibits unfair discrimination on any of the listed grounds or any arbitrary ground against anyone.

The IC paved a way for the 1996 Constitution. Section 9 of the 1996 Constitution advocates for the adoption of affirmative action measures and it also orders the enactment of the national legislation which will prevent or prohibit unfair discrimination. Furthermore, the South African constitutional developments discussed in this chapter in relation to the labour market were demonstrated. The important role played by the IC and 1996 Constitutions in the eradication of inequalities in the South African labour market were also demonstrated in this chapter. The importance of the Constitution in relation to the right to equality has been emphasized in this chapter. It was illustrated that substantive equality is the preferred model of equality in South Africa. As such, it is able to take the actual difference and disadvantage of those who were marginalized in the past into consideration thereby enhancing their status.

CHAPTER 4: LEGISLATIVE FRAMEWORK OF EMPLOYMENT EQUITY

4.1 INTRODUCTION

The post-1994 era is generally regarded as a democratic era in South Africa, where all South Africans are now at liberty to pursue employment opportunities they desire. However, even though South Africa is now governed by a new democratic order, historical workplace inequalities still need to be addressed.¹²⁴ The national parliament was mandated by the Constitution¹²⁵ to promote the achievement of equality by taking legislative measures which are aimed at advancing those disadvantaged by unfair discrimination in the past.¹²⁶ In an effort to narrow the gap between those who were previously in an advantageous position and those who were previously disadvantaged, the post-1994 democratic parliament enacted the Employment Equity Act (EEA).¹²⁷

The introduction of the EEA aims to achieve equality in the workplace and equitable representation of disadvantaged groups in all occupational categories and levels in the workforce. The EEA also aims to prohibit discrimination and provide for affirmative action measures and employment equity planning.¹²⁸ This chapter discusses the content of the EEA thereby providing a critical analysis of some of its major provisions. Furthermore, this chapter discusses how the courts have interpreted this legislation in the light of the Constitution. Reference will also be made to the Broad-Based Black Economic Empowerment Act¹²⁹ (BBBEEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).¹³⁰ Suffice to mention that the South

¹²⁴ Thomas and Robertshaw *Achieving Employment Equity* 1.

¹²⁵ 1996 Constitution.

¹²⁶ Section 9 (2) of the 1996 Constitution. The South African government was also motivated by the International Labour Organization through the "International Labour Organization Discrimination (Employment and Occupation) Convention (1958) No 111" to enact laws that would prohibit inequalities hence promote the social and economic advancement of the majority of South Africans.

¹²⁷ Employment Equity Act 55 of 1998. Herein referred to as EEA.

¹²⁸ Grogan *Workplace Law* 279. The EEA aims to correct the demographic imbalances in the nation's workforce by compelling employers to remove barriers to the advancement of those who were previously disadvantaged.

¹²⁹ Broad-Based Black Economic Empowerment Act 53 of 2003. Herein referred to as BBBEEA.

¹³⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Herein referred to as PEPUDA.

African labour market has undergone significant transformation since 1994. The introduction of strategies aimed at the elimination of the labour inequalities of the past and the improvement of the general working conditions for all South Africans, bear testimony to this assertion.

4.2 EMPLOYMENT EQUITY ACT (EEA)

The 1996 Constitution enjoins the enactment of national legislation that will prevent or prohibit unfair discrimination.¹³¹ In the labour context, such command by the Constitution led to the enactment of the EEA. The EEA applies to all employers, workers and job applicants, but not to the members of the, National Defence Force, National Intelligence Agency and South African Secret Services.¹³² The provisions relating to affirmative action as contained in Chapter Three of the EEA apply to, employers with 50 or more workers¹³³ or whose annual income is more than the amount specified in Schedule 4 of the Act (municipalities, organs of State, employers ordered to comply by a bargaining council agreement and any employer who volunteer to comply). These categories of employers are regarded as designated employers. Every designated employer is obliged by the EEA to implement affirmative action measures for people from designated groups in order to achieve employment equity in his or her workplace.¹³⁴

The EEA is indeed one of the active steps by the South African government to dismantle patterns of disadvantage that has characterized the majority of South Africans, black people in particular. 'The overall objective of the EEA is the achievement of substantive equality in the workplace, thus reflecting the approach in constitutional jurisprudence. Its main thrust is transformative in nature, as such it is both retrospective

¹³¹ Section 9 (4) of the 'final' Constitution.

¹³² Section 4 of the EEA.

¹³³ Section 12 of the EEA. Employers with 50 or more workers; a person who employs fewer than 50 employees but has a total turnover that is equal to or above the applicable turnover of a small business in terms of schedule 4 of the EEA; a municipality, an organ of state, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Services and an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relation Act. These employers are regarded by the EEA as designated employers.

¹³⁴ Section 13 of the EEA.

and prospective. It looks to eradicating inequality in all its forms, including systemic inequality'.¹³⁵

The EEA also seeks to bring to an end to decades of inequalities that are as a result of the colonial regime and apartheid rule as well as societal prejudices and stereotypes. The EEA aims to ensure that those who were denied opportunities during the oppressive regimes in South Africa are now afforded equality of opportunities in employment in various workplaces. There are two main sections which are central to promoting equity in the workplace, the prohibition of unfair discrimination and affirmative action contained in Chapters Two and Three of the Act respectively.¹³⁶ This Act recognises that:¹³⁷

As a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws, therefore, in order to promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation.

The EEA seeks to achieve equity in employment through promoting equal opportunities and fair employment practices.¹³⁸ To achieve this objective the EEA requires employers to eliminate unfair discrimination in their employment policies and practices.¹³⁹ The elimination of unfair discrimination and the implementation of employment equity are measures designed to complement each other. The elimination of unfair discrimination

¹³⁵ Cooper 2004 *ILJ* 813.

¹³⁶ Grogan *Workplace Law* 279.

¹³⁷ Preamble to the EEA.

¹³⁸ Du Plessis and Fouche *A Practical Guide to Labour Law* 79.

¹³⁹ Section 5 of EEA.

at the workplace alone does not redress the effects of previous denial to access jobs, education and skills.¹⁴⁰

The EEA also aims to implement affirmative action measures in order to redress the disadvantages in employment that have been experienced by those discriminated against in the past. The EEA ensures their equitable representation in all occupational categories and levels in the workplace.¹⁴¹ The achievement of employment equity is at the heart of the EEA. This Act also sets out to achieve equity by promoting the constitutional right to equality as well as the exercising of true democracy in the workplace. The broad purpose of the EEA is to promote the constitutional right to equality, to eliminate unfair discrimination in employment,¹⁴² to ensure the implementation of employment equity, to redress the effects of discrimination and to achieve a diverse workforce broadly representative of the diversity of the South African people.¹⁴³

4.2.1 PROHIBITION OF UNFAIR DISCRIMINATION UNDER THE EMPLOYMENT EQUITY ACT

One of the primary goals of the post-apartheid state is to overcome the legacy of racial, gender and disability discrimination.¹⁴⁴ The EEA enjoins every employer to adopt measures that are aimed at the promotion of equal opportunity in the workplace. Such measures should ensure the complete elimination of unfair discrimination in any employment policy or practice.¹⁴⁵ The employer as the owner of the means of production has an obligation to create a working environment that is free from discriminatory practices. The employer bears the onus of ensuring that all employees within his or her workforce are treated with respect and dignity and are not exposed to

¹⁴⁰ Anon 2007 http://www.sahrc.org.za/sahrc_cms/Equality_June%202007.pdf 15 October 2009.

¹⁴¹ Section 2 of the EEA. The Act uses the term "designated Groups" to mean black people, women and people with disabilities.

¹⁴² Section 5 of EEA.

¹⁴³ The Preamble to the EEA.

¹⁴⁴ Habib and De Vos: *Human Rights* 24.

¹⁴⁵ Section 5 of the EEA.

discrimination. It is equally important for the employer to ensure that those seeking employment in his or her workplace are also not met with discrimination when they have entered his or her workplace.

There are two forms of discrimination related to unfair discrimination that may be experienced in the workplace namely, direct discrimination and indirect discrimination. Direct discrimination occurs when a person is subject directly to unequal treatment on one or more of the grounds listed in section 9(3) of the Constitution or on unlisted grounds. Indirect discrimination arises when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain group, for example, women.¹⁴⁶ The notion of equal treatment underpins direct discrimination provisions and is based on the familiar principle that like should be treated alike. Indirect discrimination, on the other hand, recognises that equal treatment might produce unequal results if the relevant subjects are socially unequal to begin with.

It is indeed true that whether an act is discriminatory is a relevant question. However, it does not necessarily involve actual prejudice to the individual concerned.¹⁴⁷ It is measured rather against the treatment accorded others. Grogan convincingly argues that 'discrimination may therefore be said to exist where others are granted benefits that the victim is denied, even though the discrimination entails no actual prejudice to the victim'.¹⁴⁸ Thus, employees denied promotion lose nothing in an objective sense; they

¹⁴⁶ Tobler *Indirect Discrimination* 3. Direct discrimination is usually easy to establish. For example when a job applicant is asked at a job interview whether he or she has children; When such job applicant tells the interviewer that he or she has children, then the interviewer makes a remark about that applicant needing a lot of time off work if the children are sick, and says that that applicant is not suitable for the position. That will amount to direct discrimination. On the other hand, the use of apparently neutral criteria may lead to indirect discrimination. This form of discrimination is often less obvious. For example when all the important information regarding i.e. occupational injury and diseases and its related social insurance benefits, are posted by the employer but they are printed in Afrikaans in a workplace which majority of its employees are not Afrikaans first language speakers and majority of whom do not understand Afrikaans. It is important to note that, the motive, purpose or intention of the discrimination, whether direct or indirect is irrelevant to the question of whether there has been discrimination. Discrimination in itself is however not actionable in South African law. Only when the discrimination is unfair, may a litigant be entitled to relief. One of the ways in which an employer can prove that the discrimination was not unfair, is to prove that the discrimination was necessary in order to implement and promote affirmative action measures consistent with the purpose of the EEA.

¹⁴⁷ Grogan *Workplace Law* 281.

¹⁴⁸ Ibid.

are merely denied benefits accorded to those who are promoted'.¹⁴⁹ The relative disadvantage becomes unfair only when there is no objective justification for distinguishing the allocation of benefits, such distinction may then be said to be "arbitrary".¹⁵⁰

The Constitutional Court has formulated a test that establishes when a differentiation will amount to unfair discrimination. According to the Constitutional Court in *Harksen v Lane No and Others*¹⁵¹, the determination as to whether differentiation amounts to unfair discrimination acquires a two-stage analysis, "Firstly, the question arises whether the differentiation amounts to discrimination and, if it does, whether, secondly, it amounts to unfair discrimination". The approach by the Constitutional Court shows that discrimination is not prohibited and it can be allowed, however, such discrimination should not be unfair.

In the labour court, Trengove AJ held that 'an allegation that an employer unfairly discriminated against an employee on the ground of race, involves at least three components. The first is that, the employer differentiated by treating the particular employee less favourably than other employees. The second is that, the employer made the differentiation on the ground of race. The third is that, it was unfair for the employer to do so'.¹⁵² In *Prinsloo v Van der Linde and Another*¹⁵³ the Constitutional court held that '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'.

The EEA also prohibits unfair discrimination in the workplace. In terms of the EEA:¹⁵⁴

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice,

¹⁴⁹ Grogan *Workplace Law* 281.

¹⁵⁰ Ibid.

¹⁵¹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

¹⁵² *Mafomane v Rustenburg Platinum Mines Limited* [2003] 10 BLLR 997 (LC).

¹⁵³ *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC).

¹⁵⁴ Section 6 of the EEA.

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.

This section is the basic protection of all employees against unfair discrimination. This protection is not afforded to employees as against only the employer. Discrimination in the workplace is not only perpetrated by employers. However, the employer must see to it that all employees within his or her workplace are not unfairly discriminated against by their fellow co-workers or customers and clients. Should a co-worker or a customer discriminate unfairly against an employee, an employer will be held vicariously liable for the discriminatory acts of its employees or customers on the discriminated employee.¹⁵⁵

The grounds listed in section 6 of the EEA are not the only grounds on which unfair discrimination can be established. The use of the word 'including' in section 6 of the EEA lays down the basis for other possible unlisted grounds which can be used to establish unfair discrimination. Therefore, section 6 of the EEA does not contain a closed list of grounds which will amount to unfair discrimination.¹⁵⁶ If the employee alleges that he or she was discriminated against on an unlisted or unspecified ground, such discrimination must be 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them in a comparably serious manner'.¹⁵⁷

¹⁵⁵ Section 60 of the EEA.

¹⁵⁶ *Numsa and Others v Gabriel (Pty) Ltd* [2002] 23 ILJ 2088 (LC). In paragraph 5, the court held that in terms of section 6 (1), if a party differentiates between two persons, or categories of persons on the ground listed therein, then such differentiation will amount to discrimination. The use, however, of the term "including" indicates that the grounds as listed in section 6 are not exhaustive, and that there may be grounds which are not listed, which can constitute discrimination. Hence, in dealing with section 6 (1) of the EEA, one could deal with either the listed or unlisted grounds of discrimination. The court further observed that, section 6 (1) of the EEA, loosely mirrors section 9 (3) of the Constitution of the Republic of South Africa Act 108 of 1996. The court concluded that 'because of the similarity between section 6 (1) of the EEA and section 9 (3) of the Constitution, guidance can be sought from the decisions handed down by the Constitutional Court in determining when differentiation which is not based on any of the grounds listed in section 6 (1) of the EEA will amount to discrimination.

¹⁵⁷ *Harksen v Lane* 1998 (1) SA 30C (CC). The Constitutional Court held that 'where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8 (2) of the IC. Other forms of differentiation, which in some other way

Du Toit argues that 'the unfair discrimination provisions in the EEA must be interpreted *inter alia* in compliance with the Constitution, with particular reference to the right to equality enjoined by the preamble to the Act and with ILO Convention 111'.¹⁵⁸ It is indeed imperative for the EEA to be interpreted and applied in compliance with the Constitution so as to give effect to its purpose and also taking into account any relevant code of good practice issued in terms of this Act or any other employment law. It is worth noting at this particular juncture that it will not amount to unfair discrimination when the employer is taking affirmative action measures that are consistent with the EEA.¹⁵⁹ Similarly, to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job does not amount to unfair discrimination.¹⁶⁰

The EEA further prohibits medical testing of an employee, unless there is a legislation that permits or requires such testing.¹⁶¹ Medical testing is identified in the EEA as a form of discrimination. This is because employers can conduct a pre-employment medical testing in order to screen and thereby exclude certain persons from employment. Psychometric testing and other similar assessments of an employee will only be allowed

affect persons adversely in a comparably serious manner, may well constitute a breach of section 8 (2) of the IC as well.

¹⁵⁸ Du Toit *A Comprehensive Guide* 544.

¹⁵⁹ Section 6 (2) (a) of the EEA.

¹⁶⁰ Ibid. The fact that a particular requirement is an inherent requirement of that particular job is therefore a justification to an allegation of unfair discrimination against the employer. The employer will be required to prove that the requirement is an inherent requirement, and that the discrimination was as a result of the inherent requirement. If the employer succeeds in doing so the discrimination may be held to be fair. By including a provision providing a justification for discrimination on the ground of the inherent requirements of the job, the legislature has applied international convention in the form of article 1 (2) of the Discrimination (Employment and Occupation) Convention no 111 of 1958. A narrow interpretation of this justification was applied in *Association of Professional Teachers & Another v Minister of Education & Others* [1995] 16 ILJ 1048 (IC) where the court held that 'a differentiation based on the inherent requirements of a particular job should only be allowed in very limited circumstances and should not be allowed in circumstances where the decision to differentiate is based on a subconscious (or worse, a conscious) perception that one sex is superior to the other. Also, where a differentiation is based on a stereotype notion about women, such distinction should also be outlawed as unfair discrimination. Perceptions such as these which are used as a basis on which to differentiate men and women, often lead to a women's not being employed or promoted or in receiving less benefits than she would have received had she been a man'[at 1081]. In *Whitehead v Woolworths* (1998) 8 BLLR 862 (LC), the labour court found that "an inherent requirement of the particular job implies that the job must have 'some indispensable attribute which is 'so inherent that if not met an applicant would simply not qualify for the post'".

¹⁶¹ Section 7 of the EEA. Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of the EEA.

if they are shown to be valid and reliable, can be applied fairly to employees or are not biased against any employee or group.¹⁶² Otherwise such testing is regarded as discriminatory and therefore prohibited. For the purposes of Chapter Two of the EEA, the word 'employee' includes an applicant for employment.¹⁶³ As a result, all the provisions under Chapter Two of the EEA apply equally to job applicants. The Commission for Conciliation, Mediation and Arbitration (CCMA) is the appropriate forum in which disputes arising under Chapter Two of the EEA may be referred.¹⁶⁴

4.2.2 AFFIRMATIVE ACTION

The requirements associated with the goal of employment equity form a key part of the drive towards socio-economic transformation in South Africa.¹⁶⁵ A true transformation can only be achieved when special measures are adopted that will advance those within our society who were denied opportunities in the past. Affirmative action is one such measure that effectively advances the previously disadvantaged in our broader society. Chapter Three of the EEA provides a legal framework for the adoption of affirmative action measures in South Africa.¹⁶⁶ This Chapter applies only to designated employers.¹⁶⁷ In terms of section 13 (1) of the EEA:

Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.

¹⁶² Section 8 of the EEA.

¹⁶³ Ibid.

¹⁶⁴ Section 10 of the EEA.

¹⁶⁵ Du Toit *A Comprehensive Guide* 629.

¹⁶⁶ Section 9(2) of the Constitution provides a constitutional framework for the adoption of Affirmative action measures in South Africa.

¹⁶⁷ Section 12 of the EEA. Employers with 50 or more workers; a person who employs fewer than 50 employees but has a total turnover that is equal to or above the applicable turnover of a small business in terms of schedule 4 of the EEA; a municipality, an organ of state and an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relation Act. These employers are regarded by the EEA as designated employers.

It is evident that the EEA obliges every designated employer to implement affirmative action measures for people from designated groups, in order to achieve employment equity in the workplace.¹⁶⁸ In terms of section 15 (1) of the EEA:¹⁶⁹

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

Members of designated groups have been subjected to severe disadvantage in the past. However, only suitably qualified members of designated groups will be able to benefit from affirmative action measures. In terms of the EEA, a person may be suitably qualified for a job when he or she possesses; formal qualifications, prior learning, relevant experience or capacity to acquire within a reasonable time the ability to do the job.¹⁷⁰ The employer when deciding to hire an applicant from one of the designated groups may not discriminate unfairly against the applicant solely on the ground that he or she lacks relevant experience.¹⁷¹

The beneficiaries of affirmative action measures must, therefore, be shown to have been people disadvantaged by unfair discrimination.¹⁷² They must fall within a group, members of which have been denied employment opportunities in the past. More often than not, the accommodation of all disadvantaged groups is impossible and an employer will frequently have to choose between members of such groups. Preferences for one of a number of suitably qualified members of disadvantaged groups cannot constitutionally be based on automatic preferences for certain categories or combinations of categories of disadvantage. Such preference must be made on careful

¹⁶⁸ Section 13 of the EEA. Designated groups means 'blacks, women and people with disabilities'.

¹⁶⁹ Section 15 (1) of the EEA.

¹⁷⁰ Section 20 (3) of the EEA.

¹⁷¹ Section 20 (5) of the EEA.

¹⁷² *Fourie v Provincial Commissioner of the South African Police Service (North West Province) and Another* (2004) 25 ILJ 1716 (LC).

consideration of what is reasonable and justifiable in the circumstances of each individual case.¹⁷³

It is submitted that, even though it is desirable to make a careful consideration under these circumstances, one has to bear in mind that black people have suffered great injustices than any other group falling within the designated groups. As such they should by and large be preferred in matters relating to employment equity. Even though it does not seem advisable or indeed possible to attempt any abstract ranking of forms of disadvantage in order to devise an order of preference regarding designated groups. However, as far as black people are concerned exceptions can be made.¹⁷⁴ It has been argued that, although the degree of disadvantage or vulnerability of the complainant group is a factor to be considered in the assessment of the fairness of a discriminatory act, the determination of disadvantage or vulnerability needs to be done in a differentiated and contextualized way.¹⁷⁵

In concrete individual cases, an assessment of the relative importance of different individual or collective profiles of disadvantage in a particular employment context may, therefore, be relevant for affirmative action decisions.¹⁷⁶ For instance, the composition of the workforce of a specific employer may show that some groups are more disadvantaged than others, justifying special preferences in their favour.¹⁷⁷ Since this “preference” is based on demonstrable need and not on any arbitrary form of hierarchical “ranking” of the groups, it should be protected from challenges in terms of either section 9 of the 1996 Constitution or the EEA.¹⁷⁸

The designated employer’s affirmative action measures must include measures which will identify and eliminate employment barriers, further diversity and make reasonable

¹⁷³ Ibid.

¹⁷⁴ *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC).

¹⁷⁵ Ibid.

¹⁷⁶ Anon 2008 [http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm](http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates$fn=default.htm) 15 October 2009.

¹⁷⁷ Anon 2008 [http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm](http://butterworths.nwu.ac.za/nxt/gateway.dll?f=templates$fn=default.htm) 15 October 2009

¹⁷⁸ *Fourie v Provincial Commissioner of the South African Police Service (North West Province) and Another* (2004) 25 ILJ 1716 (LC).

accommodation for people from designated groups in the workplace.¹⁷⁹ Affirmative action is usually viewed as intended at the removal of discrimination. The removal of discrimination would include removing obstacles or barriers necessary for the advancement of designated groups.¹⁸⁰

A barrier exists where a policy, practice or an aspect of work environment limits the opportunities of employees because they are from designated groups.¹⁸¹ It is also important that every workplace reflect the demographics of the South African society. Diversity within the workplace, embraces the differences between men, women, cultures and races in order to foster tolerance of such differences so that the workplace can embrace these differences.¹⁸² By so doing, the workplace will be striving towards harmonious interaction.

The designated employer is also mandated to 'prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workplace'.¹⁸³ This plan must state the objectives to be achieved for each year of the plan. It must also state affirmative action measures that are to be implemented and the number of people from the designated groups that will be benefited by such affirmative action measures.¹⁸⁴ The purpose of the plan is to set out practical steps that a designated employer will take in order to achieve reasonable progress towards employment equity in the workplace.

Furthermore, the employer has a duty to inform employees about the provisions of the EEA. This can be done by displaying at the workplace a notice containing information relating to the EEA.¹⁸⁵ The employer also has to display at the workplace, where

¹⁷⁹ Section 15 of the EEA.

¹⁸⁰ Booysen 2007 *SAJLR* 55.

¹⁸¹ *Ibid.*

¹⁸² Anon 2000 <http://www.seedprog.co.za/content/SchoolMng/pdf> 15 October 2009.

¹⁸³ Section 20 (1) of the EEA.

¹⁸⁴ Section 20 (2) of the EEA. The employment equity plan should further state the time: table within which its objectives are to be achieved, the duration of the plan, the procedures that will be used to monitor and evaluate the implementation of the plan, internal dispute resolution mechanisms and the persons in the workforce who are responsible for monitoring and implementing the plan.

¹⁸⁵ Section 25 of the EEA.

employees can read it, a summary of the EEA.¹⁸⁶ Secondly, a designated employer must also in each of its workplace prominently display in locations accessible to all its employees, the most recent report submitted by that employer to the Director-General. The employer must also display any compliance order, arbitration award or order of the Labour Court (LC) concerning the provisions of the EEA in relation to that specific employer. The employer must further display any other document concerning the EEA as may be prescribed.¹⁸⁷

Employees of the designated employer must be aware not only of the relevant provisions of the EEA, but also the contents of the employment equity of their employer.

In terms of section 21 of the EEA, every employer must submit a report or reports, depending on whether it has selected to submit a separate or consolidated report in terms of every workplace. A designated employer with more than 150 employees must submit its first report within six months after the commencement of the Act. Employers with less than 150 employees must submit their first report within twelve months after the commencement of the Act.¹⁸⁸ It is important however, to note that an employer must not take any decision concerning an employment policy or practice that will make it impossible for the prospective or continued employment or advancement of people who are not from the designated groups.¹⁸⁹

Section 28 of the EEA establishes the Commission for Employment Equity. The function of this commission is to advise the minister among others in issues relating to policy.¹⁹⁰ The Commission is mandated by the Act to do research in order to develop norms and benchmarks for the setting of numerical goals. The policy instruments formulated by the commission provide a foundation for accelerating the implementation of the Act.¹⁹¹ The regulations, codes of good practice, and technical assistance guides already in place, provide guidance to both employers and employees in their efforts to transform the

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Section 21 (2) of the EEA.

¹⁸⁹ Section 15 (4) of the EEA.

¹⁹⁰ Section 30 of the EEA.

¹⁹¹ Commission for Employment Equity Annual Report 2005 – 2006

workplace.¹⁹² The commission aim to implement strategies to increase procedural and substantive compliance with the Act by employers, also to create mechanisms to interface education and training with employment equity.¹⁹³

The EEA makes provision for a system of monitoring not only by officials of the Labour Department but by employees and trade unions as well.¹⁹⁴ Employees and trade union representatives can thus be seen as the “first line of inspectors”. In order to facilitate the monitoring by employees, the Act burdens an employer with a duty to inform.¹⁹⁵ An employer, who has an employment equity plan, must also make a copy of the plan available to its employees for copying and consultation.¹⁹⁶

4.3 PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT¹⁹⁷ (PEPUDA)

The efforts to eliminate unfair discrimination are strongly reflected in PEPUDA. The purpose of PEPUDA is to prevent and prohibit unfair discrimination, harassment and hate speech. Persons who do not fall under the ambit of EEA can institute their claim of unfair discrimination under PEPUDA. PEPUDA extents unfair discrimination to cover instances where unfair discriminatory practices fall outside the scope of employment policy or practice.¹⁹⁸ PEPUDA does not only apply in the workplace but also applies to the state and all the individuals within it.¹⁹⁹ As such, it has become an important mechanism that addresses continuing unfair discrimination that arises out of the social intercourse between individuals in the workplace.²⁰⁰

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Section 34 of the EEA.

¹⁹⁵ Section 25 of the EEA.

¹⁹⁶ Ibid.

¹⁹⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Herein referred to as PEPUDA.

¹⁹⁸ Anon 2007 www.sahrc.org.za/.../Equality%20Update_%20Jan_June%202007.pdf 15 October 2009.

¹⁹⁹ Deane *Comparative Study* 92. The scope of the legal standing of PEPUDA is very broad, so that any person can bring a claim of discrimination to the courts in the public interest, even if they are not directly affected themselves.

²⁰⁰ Anon 2007 www.sahrc.org.za/.../Equality%20Update_%20Jan_June%202007.pdf 15 October 2009.

This Act has turned every high court in South Africa into an Equality Court (EC).²⁰¹ These ECs have all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.²⁰² An employee can officially lodge a case with the EC, if he or she believes that someone or an organization has harmed his or her rights that he or she want to fight for. To bring a case is free and both sides should normally fund their own costs.²⁰³

PEPUDA defines only four acceptable defenses against a claim of discrimination: that the discrimination was not of the type specifically ruled out by the law, that it was reasonable and justifiable, that it was part of affirmative action programme or that it was justified due to the specific demands of a particular task.²⁰⁴

4.4 BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT²⁰⁵ (BBBEA)

Black economic empowerment is driven by legislation and regulation.²⁰⁶ The BBBEA was enacted in order to promote the achievement of the constitutional right to equality. It was also enacted to increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution in South Africa.²⁰⁷ Black economic empowerment is not affirmative action, although employment equity forms part of it. Nor does it aim to take

²⁰¹ Section 16 (1) of the PEPUDA.

²⁰² Section 21 (5) of the PEPUDA.

²⁰³ Anon 2009

<http://www.thru.org.za/equality.htm> 15 October 2009.

²⁰⁴ Deane *Comparative Study* 156.

²⁰⁵ Broad-Based Black Economic Empowerment Act 53 of 2003.

²⁰⁶ Anon 2008 HYPERLINK

<http://www.southafrica.info/business/trends/empowerment/bee.htm> 15 October 2009.

²⁰⁷ The preamble to the BBBEA. Under apartheid regime, race was used to control access to South Africa's productive resources and access to skills. South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills. South African economy performs below its potential because of the low level of income earned and generated by the majority of its people. To remedy this situation the BBBEA establishes a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and access to government services.

wealth from white people and give it to blacks.²⁰⁸ It is essentially a growth strategy, targeting the South African economy's weakest point, inequality.

The BBBEA aims to facilitate broad-based black economic empowerment by promoting economic transformation. It also aims to achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.²⁰⁹ It further aims to promote investment programmes that will lead to broad-based and meaningful participation in the economy by black people and promoting access to finance for black economic empowerment.²¹⁰ This Act led to the establishment of the Black Economic Empowerment Advisory Council (BEEAC).²¹¹ The main functions of this council are to advise government on black economic empowerment and to review progress in achieving black economic empowerment.²¹²

It is submitted that the BBBEA is a welcome initiative by the South African government. This piece of legislation aims to restore dignity into the lives of black people. Black people are today not seen as mere tools that provide labour but as business people who can own and direct the means of production. Today, business opportunities are opening up for the greater majority of South Africans as a result of BBBEA. The BBBEA plays a significant role in increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training.²¹³ This Act, however, has not escaped criticism from some sectors of our broader society. It has been criticized for benefiting the minority and political elites, more especially those who support the ruling party. Furthermore, that it has marginalized the poorest of the poor thereby extending the gap between the rich and the poor.

²⁰⁸ Anon 2008 HYPERLINK
<http://www.southafrica.info/business/trends/empowerment/bee.htm> 15 October 2009.

²⁰⁹ Section 2 of the BBBEA.

²¹⁰ Ibid.

²¹¹ Section 4 of the BBBEA.

²¹² Section 5 of the BBBEA.

²¹³ Section 2 of the BBBEA.

However, government has defended its position and it seems keen in retaining the policy advanced by the BBBEA.

4.6 CONCLUSION

The democratic government in South Africa inherited a racially segmented labour market that characterized the apartheid society, where discrimination and inequalities were prevalent. As a result, the new administration embarked upon a process of eradicating such discrimination and inequalities especially in the labour market. This process led to the enactment of the EEA.

In this chapter, it was shown that the EEA is essentially divided into two main parts, prohibition of unfair discrimination and the implementation of affirmative action measures. Chapter Two of the EEA applies to employees and job applicants thereby protecting them from unfair discrimination. Chapter Three applies to designated employers. Designated employers are obliged to implement an affirmative action and employment equity plans. These plans must be aimed at advancing categories of people who were denied opportunities in the past. It is worth noting however, that an affirmative action plan that simply amounts to the promotion of blacks, disabled or women without regard to the operational needs of the organization and without affording non-beneficiaries any chance whatsoever of competing, may well not pass constitutional muster.²¹⁴

It is therefore, important to distinguish between the aim of employment equity and the manner in which one goes about achieving it. Whereas the ends of employment equity legislation are largely uncontroversial, the means of achieving it are controversial. As a result, constitutional challenges can be expected on some aspects of the EEA as well as the employer's interpretation and implementation thereof.²¹⁵ PEPUDA was also discussed in this chapter and it has been shown that this Act establishes Equality

²¹⁴ *Public Servants Association of South Africa and Another v Minister of Justice and Other* 1997 (5) BCLR 577 (T).

²¹⁵ Du Plessis and Fouche *Labour Law* 79.

Courts (EC) which are free of charge. This chapter also made a reflection on BBBEA, thereby showing that the government is attempting to redress past injustices by making sure that black people make advancement to the positions that will eventually allow them to participate meaningfully in the economy.

CHAPTER 5: POLICY FRAMEWORK OF AFFIRMATIVE ACTION AND BLACK ECONOMIC EMPOWERMENT

5.1 INTRODUCTION

South Africa's general elections in 1994 paved a way for social, economic and political transformation in South Africa. Most importantly, this transformation was also to take place in the labour market. However, this transformation has been slow. As a result, the South African government has thus taken on the responsibility of speeding up the transformation of areas it believes will put South Africa back on the road of global competitiveness.²¹⁶ The government has adopted employment equity measures which include policies relating to affirmative action. Since 1994, affirmative action has occupied a prominent place on the South African legal landscape.²¹⁷ The requirements associated with the goal of employment equity form a key part of the drive towards socio-economic transformation in South Africa.

This chapter discusses the efficiency of the policy of affirmative action in its quest to deal with past inequalities. The origin, nature and the purpose of affirmative action will also be demonstrated in this chapter. This chapter also provides an analysis of arguments that are provided for and against affirmative action. Furthermore, it demonstrates how South African courts have dealt with cases relating to affirmative action. This chapter will also reflect briefly on the policy of Broad Based Black Empowerment policy.

²¹⁶ Leonard *Communicating Affirmative Action* 1. It common cause that the linchpin of the apartheid political, economic and social regime was the purposive control and manipulation of the labour market in a manner which privileged the white minority while disadvantaging and discriminating against the black majority. There was therefore, a need for rigorous transformative measures to change the *status quo*. As it was shown in Chapter four of this study, the South African government enacted the EEA which plays a significant role in fostering transformation in South Africa. According to Leonard, 'the EEA has a specific significance against the background of organizational transformation. Employment Equity, as the overarching vision, is the fair reflection of different categories of people in society in the workplace. This EEA describes measures through which organizations should speed up their transformational efforts. These measures are collectively known as affirmative action'.

²¹⁷ Dupper 2006 *VRU* 138. Dupper states that 'despite explicit constitutional and legislative endorsement, affirmative action remains deeply controversial. Many legal challenges have been launched against affirmative action programmes over the past number of years.

5.2 THE POLICY OF AFFIRMATIVE ACTION

5.2.1 AN OVERVIEW

The democratic government's commitment to the national achievement of equality led to the adoption of an affirmative action policy.²¹⁸ The phrase "affirmative action" is used in many different ways and it is not readily apparent what a person means when employing the term which leads to confusion at times. To add to the confusion, many alternative terms are also used such as "black advancement", "transformation" or "restructuring".²¹⁹

The idea of affirmative action is reflected in Section 9(2) of the 1996 Constitution. This section provides that measures may be taken to address past discrimination so as to promote the achievement of equality. It has been made clear in this study that affirmative action is one of the measures taken to address past discrimination, thereby ensuring that those who were denied opportunities in the past are now afforded those opportunities.

Section 9(2) of the 1996 Constitution clearly indicates that affirmative action does not infringe on a person's fundamental right not to be discriminated against on the basis of race, gender, religion, etc.²²⁰ The 1996 Constitution provides a clear indication of what affirmative action policy aims to achieve; the empowerment of those affected by past political injustice.²²¹ Indeed, equality is one of the overarching goals laid down in the first

²¹⁸ Gerber *et al Human Resource Management* 24. Affirmative action can be viewed as an instrument in the process of national reconstruction to eliminate the existing inequalities due to discrimination in the past. Affirmative action in the context of this study should be understood as a means of assisting persons who were previously disadvantaged to obtain skills that they would need to be able to compete on an equal footing. Furthermore, affirmative action is the means of correcting historical injustices and leveling the playfields to enable all people to gain access to opportunities from which they were previously restricted. Affirmative action should be used in the national interest with the aim of supporting those people in the population who have been disadvantaged by discriminatory laws and regulations, enabling them to maintain themselves in society. See generally Luhabe 1993 *Peoples Dynamics* 55

²¹⁹ Coetzee *Fairness of Affirmative Action* 21.

²²⁰ Brand and Stoltz 2001 *SAJEMS* 118.

²²¹ Dupper 2006 *VRU* 141. Affirmative action policy aims to achieve equality.

article of the Constitution.²²² It was indeed necessary for the South African democratic government to foster the value of equality among the populace. Affirmative action was a necessary tool that would help realize the intended goal of equality in South Africa. It laid a platform that enabled the government to prefer those who have experienced grave inequalities in the past in order to emancipate them.

The fundamental issue surrounding the concept of equality is whether or not the use of affirmative action programme does in fact amount to justice or equality.²²³ Van Jaarsveld argues that 'defining affirmative action without reference to justice and equality is impossible'.²²⁴ To obtain justifiable affirmative action programmes, preferences should be given to deserving individuals thus balancing the gains of individuals with those of society. Affirmative action can only equal justice if it is applied in favour of people who have actually been deprived of opportunities in the past.²²⁵

The concept of justice accepts affirmative action as a form of restitution for the past wrongs. Van Jaarsveld further argues that 'the desert principle of justice indicates that by allocating goods to deserving individuals based on what has previously been done to them can justify the unfairness of affirmative action'.²²⁶ It has been argued that 'justice is an ethical standard of virtue in social and public relationships and consists of the observance in the rules of equality'.²²⁷ This implies the giving of favoured treatment to those who are governed by unfavourable circumstances and thus lacking in resources, opportunities, incentives and the background needed to achieve success in terms of formal equality.²²⁸

²²² Section 1 (a) of the 1996 Constitution.

²²³ Miller *Social Justice* 19.

²²⁴ Van Jaarsveld 2000 *Managerial law* 6. Van Jaarsveld states that, the concept of justice can be divided into two categories: distributive justice which refers to an obligation to expand actions for the beneficiaries (give them the chance they should have had) and correctional justice which refers to equitable conduct in order to achieve the goal of equality. Equality refers to the principle of similar treatment irrespective of background or race.

²²⁵ Van Jaarsveld 2000 *Managerial law* 7.

²²⁶ Ibid.

²²⁷ Deane *Comparative Study* 394.

²²⁸ Ibid.

It is submitted that affirmative action does encompass both the concept of equality and justice, in particular, social justice. By preferring previously disadvantaged groups in South Africa and affording them opportunities they were previously not exposed to, affirmative action serves as a form of social justice to those particular groups. They now can claim that they truly belong in South Africa as legal citizens. By so doing, it also elevates their status thereby making them to be equal to other privileged groups of South Africa.

According to Mkhwanazi, affirmative action 'is a deliberate and sustainable interim strategy aimed at enhancing the abilities and capacities of disadvantaged groups to enable them to compete on an equal footing with those who benefited from apartheid'.²²⁹ It further, entails drawing up preferential policies to ensure the employment, upgrading and retention of members of certain less fortunate groups of society.²³⁰ However, in the South African context, affirmative action measures are said to be a means to promote the achievement of substantive equality, and not as an exception to a notion of formal equality.²³¹ Meaning that, in order for there to be equality, special measures preferring those who were previously marginalized must be adopted. This is to ensure that they are able to attain the same level of equality with those who were advantaged by the practices of oppressive regimes of the past in South Africa.

The overall consequences of the legacy of apartheid are deeply embedded in the polity, society and economy of the country and will not be resolved overnight. Even in the face of the political transformation that has occurred and the elimination of overtly discriminatory laws and regulations.²³² The legacy of apartheid can be said to be structural in the sense that it tends to be self-reproducing and self-reinforcing in the

²²⁹ Mkhwanazi 1993 *Human Resource Management* 15. Affirmative Action is seen as a set of procedures aimed at proactively addressing the disadvantages experienced by sections of the community in the past. Affirmative action is a form of positive discrimination used as a measure to correct imbalances created by generations of oppression.

²³⁰ Andrews 1993 *SAIPA* 37.

²³¹ Dupper 2006 *VRU* 138. See chapter four of this study for a detailed discussion on substantive equality.

²³² Anon 1997 <http://www.polity.org.za/polity/govdocs/commissions/fin8.htm> 23 October 2009.

absence of concerted policy interventions to reverse this legacy.²³³ In particular, non-discrimination or equal opportunity cannot by itself produce equity in employment in a reasonable time frame. This observation provides the fundamental justification for corrective measures or affirmative action.²³⁴

It is worth noting however, that the concept of affirmative action is not unique to South Africa nor does it originate in South Africa. It is well recorded that "affirmative action" is a term that originates in the United States of America (USA).²³⁵ Dupper states that 'at its inception affirmative action was meant to redress state-sponsored discrimination and was an attempt to remove government erected barriers to the fair and equal treatment of individuals.'²³⁶ It is essential to bear in mind that the circumstances leading to the adoption of affirmative action measures, even though there may be common features, are however, unique to different countries.²³⁷ This essentially means that each country

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Dupper 2006 *VRU* 140.

²³⁶ Ibid.

²³⁷ See generally regarding comparative analysis of affirmative action: Deane *Comparative Study* 92. Most people in the US became familiar with the term affirmative action in the late 1960s and early 1970s when the federal contractors were first required to design and carry out affirmative action programmes. EO 11246 which was signed by President Lyndon Johnson on 24, September 1965 which required that federal contractors "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, colour, religion, sex or national origin". Title 41 of Chapter 60 of the Federal Regulations defined affirmative action programme as 'a set of specific and result oriented procedures to which the contractor commits itself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Some commentators in the US have characterized affirmative action as a policy 'designed to right the wrongs of the past', as a quota system or a set of remedial programmes aimed to compensate for inadequacies of people of colour or of women. See generally Dworkin *A Matter of Principle* 317-331 and Belz *Equality Transformed* 23. Affirmative action can be identified as a programme that became law in the US with the passage of the Equal Employment Opportunity Act of 1972. Affirmative action became government programme intended to ensure minorities of equal hiring, education and other admission opportunities. The original reasoning behind affirmative action in the US was conceived as a means to compensate African Americans for centuries of slavery, as newly granted legal equality was considered insufficient to redress African Americans grievances. This initiative however, quickly expanded to encompass various other minorities that have never suffered from slavery but were victims of other forms of discrimination: groups such as American Indians or Native Americans and Asians. Another country which has a somewhat rich jurisprudence on affirmative action is India. Dean, further states that, although many nations of the world are characterized by social inequality, perhaps nowhere else in the world has inequality been so elaborately constructed as in the Indian institution of Caste. Caste has long existed in India and has undergone significant change since independence, but it still involves millions of people in India. Caste is the basis for the definition and for the exclusion of distinct population group by reason of their descent. Caste imposes enormous obstacles to their full attainment of civil, political, economical, social and cultural rights. In its preamble, India's Constitution forbids negative public discrimination on the basis of Caste. Like race, Caste is something one is born into. In India, attention has focused on protective discrimination

that has adopted progressive remedial measures that include affirmative action has done so with due regard to its own history as a country. Most countries of the world have adopted affirmative action in order to emancipate the minority groups in their country. However, in South Africa, such measures were adopted to benefit the majority group (blacks) who have been subjected to abject injustices in the past.

5.2.2 AFFIRMATIVE ACTION AND EMPLOYMENT EQUITY

It should be clear that the underlying idea behind affirmative action measures is not necessarily to further the interests of a particular group but to eliminate discrimination that may be a barrier in that group realising its interests.²³⁸ Affirmative action programmes should also be seen as temporary intervention designed to achieve equal employment without lowering standards and without unfairly hindering the career aspirations of current organisation members who are competent on their jobs.²³⁹ It is indeed true that affirmative action measures are not intended to be permanent, as opposed to equity which is an ongoing process which will end once the broader goal of workplace equity has been achieved.²⁴⁰

One of the main purposes of affirmative action is the achievement of employment equity in the workplace. The essence of employment equity is to eradicate all forms of unfair discrimination in terms of employment policies. It also aims to initiate steps that will encourage employers to implement programmes to accelerate the training and

or preferential treatment of three major classes of minorities in India. In India, affirmative action is known as "preferential treatment", "protective discrimination" or "reverse discrimination". The Indian government's policy of compensatory discrimination comprises of various preferential schemes. The policy initiatives used in India to offset the inequalities of society is a policy of reservations. See Tummala 1999 *Public Administration Review* 595-508. The term "reservations" denotes a set quota of public service positions for recognised minorities and includes reservation of seats in educational institutions. From the above it can be concluded therefore, that affirmative action in the US was initiated to rectify past injustices caused by racism. In India, such measures were implemented to end Caste discrimination. In these two countries, affirmative action measures are mainly aimed at the minority groups found in these respective countries. However, in South Africa, affirmative action programmes are primarily aimed at the black majority who has historically suffered great injustices due to the colonial and apartheid systems. According to Dean, 'affirmative action in these three countries is unavoidable when looking at the extent of past discriminatory practices in these respective countries.

²³⁸ Motumi *Implementation of Affirmative Action* 2.6.

²³⁹ Ibid.

²⁴⁰ Deane *Comparative Study* 100.

promotion of historically disadvantaged people.²⁴¹ Employment equity has the following essential components: the removal of discriminatory barriers to employment and promotion;²⁴² the introduction of positive policies and practices and the establishment of internal goals. It also contain timetables towards the achievement of employment equity by increasing the recruitment, hiring, training, and promotion of designated group members and the improvement in the participation of designated group members throughout the contractor's organization through hiring, training, and promotion.²⁴³

5.2.3 BENEFICIARIES OF AFFIRMATIVE ACTION IN SOUTH AFRICA

Affirmative action measures aim to identify and eliminate employment barriers, including unfair discrimination. Also to create diversity in the workplace based on equal dignity and respect for all. As well as making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.²⁴⁴ Generally, affirmative action is directed at those people, groups of people, who, in most cases have suffered past social, economic, political or educational disadvantage.²⁴⁵ In a nutshell, affirmative action is intended to redress the employment disadvantages of black people, women and people with disabilities.

The EEA has identified black people, women and people with disabilities as the beneficiaries of affirmative action measures. These groups are referred to as the "designated groups" in the EEA.²⁴⁶ Affirmative action provisions in the EEA only apply to "designated groups". In the context of the EEA, black people refer to Africans, Coloureds and Indians. These people or groups consist of individuals who all have a

²⁴¹ Ibid.

²⁴² Anon 1989 <http://hrehp.dal.ca/Human%20Rights%20and%20Equity/Employment> 23 October 2009. This includes the elimination or modification of all human resource practices and systems, not otherwise authorized by law, which cannot be shown to be *bona fide* occupational requirements.

²⁴³ Ibid.

²⁴⁴ Section 15 (2) of the EEA.

²⁴⁵ *Faundes Affirmative Action* 34. The only beneficiaries of affirmative action ought to be 'persons or categories of persons disadvantaged by unfair discrimination'. This is done with a view to promoting substantive equality.

²⁴⁶ Section 1 of the EEA.

characteristic in common on which their membership of a particular group is based and who find themselves in a disadvantage.²⁴⁷

It is an uncontested fact that not each and every group in South Africa experienced grave inequalities and disadvantage during the colonial and apartheid regimes. Even though Coloureds and Indians have suffered some form of discrimination, the extent of such discrimination was not the same as that which was experienced by black people in South Africa. However, the courts will scrutinize the process by which employers reach their decisions hence the failure to follow existing policies and procedures will result in the procedure for appointing even a person from a designated group being declared unfair.²⁴⁸

It follows therefore, that those groups that were advantaged during the apartheid era in South Africa could not be targeted by affirmative action initiatives. Affirmative action measures are not meant to benefit all citizens of South Africa. Kentridge states that 'the legitimate beneficiaries of affirmative action are those disadvantaged by unfair discrimination, people who are or who have been disadvantaged by measures that impair their fundamental dignity or adversely affect them in a comparably serious manner'.²⁴⁹

²⁴⁷ *McGregor Application of Affirmative Action* 3.

²⁴⁸ Rycroft "Appointments and Promotions" 3. See also *Baxter v National Commissioner: Correctional Services & another* (2006) 27 ILJ 1833 (LC). In this case, the applicant, a coloured man, had applied for, been short listed and interviewed for the post. The selection panel had recommended that he be appointed. However, the equity manager, relying on the national statistical records, rejected the recommendation of the selection committee. He said there was a gap for one African man and not a coloured man at that salary and management level. It was not clear if the national commissioner had approved or disapproved the appointment but he did ask for the post to be re-advertised. The court found that the national commissioner had failed to comply with the preemptory requirements of the Public Service Regulations that required that he give reasons for his decision not to approve the appointment of the applicant. It appeared that he had relied on a memorandum from the equity manager who had relied on the national and not the provincial equity plan as was required. In terms of the provincial plan the appointment of a coloured male was favoured and so there was no need to deviate from this plan. This was found to have been unfair. The failure to appoint the applicant was found to be unfair discrimination.

²⁴⁹ Kentridge *Equality* 14-60. She argues that a restrictive interpretation of the words 'disadvantaged by unfair discrimination', would be at odds with the conception of substantive equality espoused by the Constitution. The Constitution appreciates the systemic and self-perpetuating nature of discrimination in the country and the need to redress such discrimination through positive measures. The words 'disadvantaged by unfair discrimination' clarify that it is not necessary to prove present unfair discrimination against the beneficiaries of an affirmative action policy. Past discrimination, the effects of

It does not follow however, that the mere fact that one falls within one of the designated groups, means he or she will automatically benefit from affirmative action measures. Affirmative action initiatives will only benefit suitably qualified people from these designated groups in order to afford them equal employment opportunities, to ensure that they are equitably represented in all occupational categories and workforce levels of the designated employer.²⁵⁰ This effectively means that in order for any member of a designated group to be eligible to benefit from affirmative action, he or she must possess some level of competency required or at least be capable of acquiring such competency within a reasonable time.²⁵¹

Affirmative action measures are designed to ensure that suitably qualified people from designated groups enjoy equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.²⁵² This entails that affirmative action is confined to the preferential treatment of suitably qualified persons from designated groups who are at most better placed to do the job at hand. Nothing in the EEA requires an employer to recruit or promote a person who lacks competence to do the work. However, the employer is allowed to prefer an applicant from a designated group above the one from a privileged group of society, even though the one from a designated group is less qualified, provided he or she is suitably qualified.

The EEA does not contain the notion of degrees of disadvantage and in principle no hierarchy of designated groups exists.²⁵³ However, there are cases of affirmative action

which are currently felt, is sufficient. It is not necessary that each beneficiary of such measures be shown to have been disadvantaged by unfair discrimination. The purpose of affirmative action measures is to give their beneficiaries access to 'full and equal enjoyment of all rights and freedoms'. The Constitution looks to the future, not simply at the past.

²⁵⁰ Section 13 (1) of the EEA.

²⁵¹ In terms of Section 20(3) and (4) of the EEA, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's: formal qualifications, prior leaning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job. When determining whether a person is suitably qualified for a job, an employer must review all these factors and determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

²⁵² Section 15 of the EEA.

²⁵³ However section 54(1) (a) of the EEA provides that a code of good practice may provide guidelines for the prioritization of certain designated groups.

were the notion of degrees of disadvantage were established.²⁵⁴ McGregor argues that.²⁵⁵

It seems that any abstract ranking of different forms of disadvantage in order to establish an order of preference for the designated groups is neither advisable nor necessary in practice. It has been mooted that an assessment of the relative importance of different individual or collective profiles of disadvantage in a particular employment context is relevant. In this regard, in a particular workforce, some groups may prove to have been more disadvantaged or under-represented than others, and special preference that is given to them may be justified. Such preference will then be based on 'need' and not on any arbitrary rank order in respect of the groups. Appropriate contextualised approach is therefore necessary. In terms of this approach, the nature of the position, the demographic profile of a particular department or

²⁵⁴ *Motala v University of Natal* [1995] 3 374 (D) 383D. This case is not related to the workplace. In this case, an Indian student with an excellent academic record was refused admission to the medical school in favour of an African student. The court was satisfied that the respondent's affirmative action policy relating to its selection of first year medical students complied with section 8(3)(a) of the IC. It held that the degree of disadvantage to which African pupils were subjected by the previous four-tier education system was 'significantly greater' than that suffered by their Indian counterparts and so established a notion of degrees of disadvantage. See generally McGregor *Application of Affirmative Action* 142. McGregor in her thesis, she further refer us to De Waal et al *Bill of Rights Handbook* 225. These authors hold that 'it is perfectly legitimate to apply affirmative action measures in proportion to the degree of disadvantage suffered in the past'. The authors believe that when the effect of a programme is to disadvantage, on the basis of race people who, previously were also the victims of discrimination, the court ought to focus on whether the programme is reasonable and carefully constructed to achieve equality. The authors argue that the court failed to do so in *Motala v University of Natal*, it accepted that the programme was valid simply because Africans had been more disadvantaged than Indians. Also see *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T) 1035 F. The court also touched on the issue of degrees of disadvantage. The court accepted that African people had been severely discriminated against under apartheid, as had other non-white groups, although not necessarily to the same extent. It also accepted that the detailed circumstances of individual members of any group might differ. Whereas some individuals might have had access to relatively better educational and other facilities, others might have been unfortunate enough to have been subjected to the worst possible discriminatory practices that had occurred during a certain era. Also see *Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another* (2004) 25 ILJ 1716 (LC) 1735. In this case, a white female inspector was refused promotion to the post of captain. A black male colleague was appointed instead. The police station in question had no black officers and the quota of white females in terms of the employment equity plan had in fact been exceeded. The court accepted that white women had been discriminated against under apartheid, but not to the same extent as black people and in particular African people. The court held that white women had access to better educational and other facilities. Landman P (as he was then known) accepted the view in *Stoman* that the aim was not to punish the applicant as an individual, but to diminish the over-representation her group had been enjoying as a result of previous unfair discrimination. The court emphasized that note should be taken of the history of South Africa, of the imbalances of the past, of the purpose of the EEA, of the fact that the apartheid system had been designed to protect white people and the fact that African people had suffered the "brunt" of discrimination. The matter could thus not be considered in the vacuum. The court accepted that a black man appointed to the rank of captain, was a suitable person.

²⁵⁵ McGregor *Application of Affirmative Action* 149. Also see Pretorius *Affirmative Action* 24.

section in a workplace, and the qualifications and work experience of the candidates should all be relevant in deciding whom to appoint.

It is indeed true that arbitrary ranking of disadvantage among designated groups is undesirable. But in order to effectively implement and foster employment equity, groups should be ranked according to their respective degrees of disadvantage. This ranking must be justified in order for it to be in conformity with the Constitution. This ranking should not be used to discriminate unfairly against those who fall within the previously advantaged group.

The evaluation of the applicants must be rationally done through testing whether the applicants meet the minimum requirements for the job. It will be undesirable to appoint someone from a designated group over the one from non-designated group, when he or she does not meet the requirements of that particular job. Should such persons be appointed, it will lead to lack of productivity in various workplaces. It is submitted therefore, that only competent or people who can acquire competency within a reasonable time be the beneficiaries of affirmative action. However, it is important that training and education of members from designated groups be intensified in order to tool them and enable them to compete effectively in the workplace.

It is important that some balance be struck between the goals of equality and those of efficiency. The decision to appoint an affirmative action candidate must be rationally defensible. When affirmative action is applied, it is important that the rights of other members of the community are not undermined and efficiency should not be compromised.²⁵⁶ It was held in *Stoman v Minister of Safety and Security & another*²⁵⁷ that:

Some tensions may in certain circumstances exist between ideals such as efficiency and 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

²⁵⁶ Grogan *Workplace Law* 287.

²⁵⁷ *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T).

aims. They are linked and often interdependent. 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 this situation where society emerges from a history of unfair discrimination. The advancement of equality is inevitably part of the consideration of merits in such decision making processes. The requirement of rationality remains; however, and the appointment who are wholly unqualified, or less than suitably qualified or incapable, in responsible positions cannot be justified.

A situation where a person is placed to do a particular job which he or she does not know anything about merely because he or she is from a designated group is discouraged and should at all costs be avoided. It is essential that only people with the necessary capacity to do a particular job are appointed to do that particular job. This however, should be treated with caution and employers should not be allowed to abuse the system and deny members of designated groups jobs solely on the basis that they are not suitable for those particular jobs. There should be proper assessment whether a particular applicant is suitable or not.

For affirmative action to survive judicial scrutiny there must be a policy or programme through which affirmative action is to be effected. That policy must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.²⁵⁸ In the absence of an affirmative action programme specifically designed in terms of the collective agreement, any appointment on purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be tested.²⁵⁹

²⁵⁸ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC), The court held that 'these requirements ensures that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme.

²⁵⁹ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC),

5.2.4 AFFIRMATIVE ACTION AND THE JUDICIAL APPROACH

The case which defined the early approach of affirmative action was *Public Servants of Association of South Africa & Others v Minister of Justice & Others*.²⁶⁰ It was held in this case that affirmative action policies are recognised as discriminatory and this fixes the onus of proving fairness on employers,²⁶¹ that merely to label affirmative action measures as such does not guarantee constitutional protection²⁶² and that there is no bar to review of affirmative action measures.²⁶³ Affirmative action measures must be designed to achieve something and must provide adequate protection in the sense that the measures adopted are not permitted to go beyond what is adequate.²⁶⁴ An efficient administration must be promoted and cannot be compromised by the aim of a broadly representative administration.²⁶⁵ Subsequent decisions followed this approach to affirmative action.²⁶⁶

The Constitutional Court, in *Minister of Finance v van Heerden*²⁶⁷ disagreed with *Public Servants of Association of South Africa & Others v Minister of Justice & Others*' approach and changed the paradigm of how to approach affirmative action. Moseneke J (as he was then referred to) held that, legislative and other measures that properly fall within the requirements of section 9(2) of the Constitution are not presumptively unfair. Remedial measures are not derogation from but a substantive and composite part of the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary objects are to promote the achievement of equality.²⁶⁸

²⁶⁰ *Public Servants Association of South Africa and Others v Minister of Justice and Others* 1997 (3) SA 925 (T).

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Rycroft "Appointments and Promotions" 6.

²⁶⁷ *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC).

²⁶⁸ *Ibid.* At paragraph 36, Moseneke J held that if a measure falls within the ambit of section 9(2) of the Constitution, it does not constitute unfair discrimination. The Constitutional Court then set a threefold test to determine whether a measure falls within section 9(2); the first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination,

It is submitted that the court in *Public Servants of Association of South Africa & Others v Minister of Justice & Others*, failed to understand the underlying purpose of affirmative action measures. By viewing these measures as outright discriminatory placed unnecessary burden on the employer. This would have had unpleasant repercussions. It would have led to a situation whereby every time employers implement affirmative action measures would have to prove the fairness thereof. This would have led to multiplicity of actions been instituted against various employers. The decision of the Constitutional Court is indeed welcomed. This decision clarifies the fact that affirmative action measures which fall properly within the ambit of section 9(2) of the Constitution are not to be presumed to be unfair. This essentially means that, he or she who believes that affirmative action measures that are adopted by the employer are unfair, has to prove that those measures are unfair. The employer will then be called upon to prove the fairness of those measures.

Affirmative action in South Africa has been recognized and accepted as a fair form of discrimination. It may also be used as a complete defence to a claim of unfair discrimination by employers. The employer seeking to uphold the affirmative action policy must prove to the court that the discrimination alleged is a fair discrimination.²⁶⁹ Deane states that 'it is settled law that any action that discriminates but is claimed that it is fair on the basis of it being affirmative action, must not be irrational, excessive or overboard'.²⁷⁰ The beneficiaries of such action must be persons who were previously disadvantaged by unfair discrimination and who continue to suffer substantive equality in relation to those who were privileged and benefited under apartheid'.²⁷¹ The courts are entitled to investigate and evaluate the constitutionality of any measure that purports to be an affirmative action measure.²⁷²

the second is whether the measure is designed to protect or advance such persons or categories of persons and the third requirement is whether the measure promotes the achievement of equality.

²⁶⁹ Deane *Comparative Study* 205.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

The labour court in *Dudley v City of Cape Town and another*²⁷³ held that affirmative action does not confer a right on employees to be employed. The labour court quoted with approval the American case of *Local 28, Sheetmetal Workers' Industrial Association v EEOC*²⁷⁴ which held that 'the purpose of affirmative action is not to make identified victims [of past discrimination] whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members, no individual is entitled to relief and the beneficiaries need not show that they were victims of discrimination'.

In order to be able to benefit from affirmative action measures, the applicant must in the first place fall within a group that was disadvantaged by unfair discrimination in the past. These measures are accordingly not meant to benefit him or her as an individual, but are directed at improving the overall wellbeing of his or her group. This illustrates that affirmative action in South Africa is viewed as benefitting a particular group through its members not merely that member in his or her individual capacity. Affirmative action measures therefore recognise the particular hardships that a particular group had faced in the past thereby ensure that, that particular group never again shall experience such hardships, by preferring its members in the labour market.

South Africa has rejected the idea of strict numerical quotas in order to make sure that affirmative action is constitutional. According to Deane, these reservations or quotas seem to be baseless and are there purely for political gains.²⁷⁵ It is indeed desirable that when an employer is choosing a suitably qualified candidate, he or she must take account of various relevant criteria. The employers should not be obligated to fill in a

²⁷³ *Dudley v City of Cape Town & another* [2004] 5 BLLR 413 (LC). The EEA clearly does not provide an individual entitlement to affirmative action. Instead, a failure to implement affirmative action measures by the employer can only give rise to an enforcement issue. Non compliance can result in a fine which is determined by a court. However, it has become clear that in practice, fines at least on their own are not an effective means of enforcement or deterrent since big businesses are able to pay these fines, which in the end may simply be considered as a calculated risk. See also *Thekiso v IBM South Africa (Pty) Ltd* (2007) 28 ILJ 177 (CC) and *Cupido v GlaxoSmithKline South Africa (Pty) Ltd* [2005] 6 BLLR 55 (LC)

²⁷⁴ *Local 28, Sheetmetal Workers' Industrial Association v EEOC* 478 US 421 (1986) at 424.

²⁷⁵ Deane 2009 PER 2. Deane argues that numerical quotas or reservations are impermissible as they impose unfair burdens on those excluded and they involve suspension of standards.

quota. The adoption of a more flexible 'numerical goals' in South Africa will ensure that a suitably qualified candidate will be appointed as opposed to an unqualified candidate to fill in a fixed quota.²⁷⁶ Affirmative action is not intended to promote cosmetic changes resulting from the hiring of persons from designated groups into important jobs. It is also not designed to promote black and women employees into positions for which they not qualified.²⁷⁷ It is true that when people who are not qualified for a particular job are hired into that job, the quality and efficiency in that particular employment field will be compromised hence such practice should be avoided.

5.2.5. ACTUAL PAST DISCRIMINATION OR GROUP MEMBERSHIP AS A REQUIREMENT TO BENEFIT FROM AFFIRMATIVE ACTION

The criteria for the selection of beneficiaries vary from country to country. They are related to the objective of achieving equality in one form or another.²⁷⁸ There are differing views as to which criteria to be used in order to benefit from affirmative action. On the one hand, there is a view that actual past discrimination has to be shown in order for an applicant to benefit from affirmative action. On the other hand, there is a view that in order to benefit from affirmative action, the applicant must be a member of a group that has been disadvantaged in the past.

The justification for the actual past discrimination view is that, not all members of the previously disadvantaged groups have actually suffered unfair discrimination in their personal capacity in the past. According to this view, affirmative action is not intended

²⁷⁶ Deane *Comparative Study* 417. See also an Indian case *Indra Sawhney v Union of India & Others* (1992) Supp. (3) SCC 217; 1993 (1) SCT 488 (SC). The court held that 'the very idea of reservation implies the selection of a less meritorious person. At the same time, we recognize that this much cost has to be paid if the constitutional promise of social justice is to be redeemed. We also formally believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with, and may in some cases excel, members on open completion'.

²⁷⁷ Anon 1996 <http://www.polity.org.za/polity/govdocs/commissions/fintoc.html> 25 October 2009 (1996). Affirmative action involves a systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training in accordance with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority.

²⁷⁸ Motumi *Implementation of Affirmative Action* 2.3.

for such individuals.²⁷⁹ Proponents of this view generally believe that some members of the previously disadvantaged groups are to a certain extent advantaged as they were able to acquire better education during apartheid. Further, other members of these groups were able to acquire wealth during apartheid days. As a result, these members are better placed to compete on the equal footing with the white South Africans.

Brassey does not support affirmative action policies. However, due to the fact that they have been implemented by the South African government, he argues that, for a person to benefit from affirmative action, it is desirable that he must have suffered disadvantage personally in the past.²⁸⁰ The criterion of past disadvantage envisages a comparison between the individual as he is or she is and as he or she would have been but for the discriminatory conduct. Brassey further contends that, in the sphere of employment, the degrees of disadvantage can be assessed in the course of appointing or promoting a person. He argues that such an individual assessment is broadly speaking, what the United States Constitution expects of a legitimate affirmative action programme and the same is arguably true of the South African Constitution.²⁸¹

Proponents of group and race based affirmative action generally believe that, disadvantages experienced in the past were directed towards the group at large and not

²⁷⁹ Adam *The Journal of Modern African Studies* 247. According to Adam, the race based rationale that since all black people suffered discrimination, all require redress, obscures the reality that those least in need of affirmative action policies, yet best able to claim benefits, would seem most likely to secure them. Affirmative action focused on race facilitates the acquisition of wealth by an already privileged enclave because it does not seek to eliminate or even reduce class distinctions. While all blacks were oppressed and disadvantaged by apartheid, not all were equally affected. It would seem absurd therefore to extend benefits to high achievers within the black community simply because they are black. To insist that they need preferential treatment simply because they are part of a disadvantaged group is to devalue their talents.

²⁸⁰ Brassey 1998 *ILJ* 1361.

²⁸¹ *Ibid.* An assessment of an individualised nature is kinder to the applicant for appointment or promotion and better able to address his or her needs. Enquiries into past discrimination make applicants squirm when race is the criterion for affirmative action, they want preferment on ability, not skin colour, and are quick to say that race based judgments are appropriate only for others and not themselves. Individualising the assessment of disadvantage enables us to escape the odious comparison and helps to keep the baleful influence of race to a minimum. Where the decision is specifically geared to an assessment of the individual's attributes and entitlements, the anxiety is easily dispelled. A proper judgment can be made and the parties can then openly plan a set of special measures to bring the individual up to standard. Brassey believes that 'the EEA will be exploited by disgruntled incompetents who have been overlooked for appointments or promotion, it will be policed by trade unions and it will be used by the authorities to select and victimize opponents of the government or employees who fail to pay the requisite bribes'.

its individual members. Therefore, members of the previously disadvantaged groups were discriminated against merely because they were members of those groups. South Africa's past policy of apartheid has been branded 'as a crime against humanity' and its devastating effects on black communities has been documented as amply as to require no additional prove.²⁸² Du Toit submits that 'even relatively educated or prosperous black South Africans should be entitled to the benefit from affirmative action'. The advantages that they enjoy were achieved despite the disadvantage imposed on them by apartheid'.²⁸³ The presumption should remain, unless rebutted, that but for racial discrimination they are likely to have achieved greater advantages.²⁸⁴

After a long standing debate on whether the EEA require past personal disadvantage to benefit under affirmative action measures or whether membership of a designated group would suffice, the issue was put to rest by the Constitutional Court in *Minister of Finance v Van Heerden*²⁸⁵ where Mokgoro J held that:²⁸⁶

Another aspect of section 9 (2) is that it allows a person or categories of people to be advanced. This is important because of the nature of the unfair discrimination that was perpetrated by apartheid. The approach of apartheid was to categorise people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered out according to one's membership of a group. Recognising this, section 9 (2) allows for measures to be enacted which target whole categories of persons. Therefore a person or group of persons are advanced on the basis of membership of a group. The importance of this is that it is unnecessary for the state to show that each individual member of a group that was targeted by past unfair discrimination was in fact individually unfairly discriminated against when enacting a measure under section 9 (2). It is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination in order to benefit from a provision in terms of section 9 (2).

²⁸² Du Toit 2000 *Labour Law News & CCMA Reports* 12.

²⁸³ Toit 2000 *Labour Law News & CCMA Reports* 12.

²⁸⁴ Ibid.

²⁸⁵ Van Niekerk *Law at Work* 148.

²⁸⁶ *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC).

It is submitted that this is the right approach and it is in line with the 1996 Constitution. It is therefore, the group itself that has been wronged hence it is desirable for its members to benefit from affirmative action by virtue of being members of such a group.

5.2.6. ARGUMENTS AGAINST AFFIRMATIVE ACTION

The opponents of affirmative action argue that it is a programme which is designed to reward and compensate people on the basis of their genetically determined characteristics such as race, ethnicity and sex. Further, those programmes also undermine the democratic concept of equality of opportunity.²⁸⁷ They believe that individuals should be given the opportunity to compete justly for jobs on the basis of their own abilities.²⁸⁸ Dworking argues that 'there are three violations of rights that can result from affirmative action: it can violate a person's right to be judged on merit, to be judged as an individual instead of as a member of a group and it can violate a person's right not to be excluded from an opportunity simply because of race'.²⁸⁹

Affirmative action critics also argue that innocent white males, who were not directly involved in the discrimination leveled against the previously disadvantaged, are victimized and penalized through no fault of their own.²⁹⁰ Another common perception of the opponents of affirmative action is that it leads to a lowering of standards in the workplace.²⁹¹ There is also a believe that, individuals should be worthy of compensation

²⁸⁷ Bell *Meritocracy and Equality* 41. According to Bell, the principle of equality of opportunity denies the precedence of birth, of nepotism, of patronage or any other criterion which allocates places, other than fair competition open equally to talent and ambition. It asserts universalism over particularism, and achievement over ascription.

²⁸⁸ *Ibid.* Bells is also of the view that "merit" according to the principle of affirmative action is held as a new source of inequality and of social, if not psychological injustice.

²⁸⁹ Dworkin *Taking Rights Seriously* 298.

²⁹⁰ Rosenfelt *Affirmative Action and Justice* 304.

²⁹¹ Padayachee *Employment Equity* 78. These opponents claim that 'the people who are not qualified to do the job replace those who are qualified to do that job from previously advantaged group resulting in the service of the latter being terminated'.

only if they have been personally wronged and have been unable to overcome the debilitating effects of the injury such as unjust discrimination.²⁹²

Furthermore, opponents of affirmative action also contend that affirmative action devalues the accomplishments of all those who belong to groups it is intended to help, thereby making affirmative action counterproductive.²⁹³ They are also of the view that affirmative action hinders reconciliation, replaces old wrongs with new wrongs and undermines the achievements of those discriminated against in the past. It also encourages individuals to identify themselves as disadvantaged even when they are not.²⁹⁴

They further argue that 'it increases racial tensions and benefit more privileged within the targeted groups at the expense of the least fortunate within the non-targeted groups'.²⁹⁵ Furthermore, opponents argue that, if blacks were mistreated in the past for a morally irrelevant characteristic (being black), then to give them preferential treatment for the same morally irrelevant characteristic is equally indefensible.²⁹⁶ They see affirmative action as reverse discrimination which contributes to discrimination in group status. It is felt that awarding jobs and benefits according to group statistics rather than on individual merit, is unjust and lowers standards and organisational effectiveness.²⁹⁷

The former South African President, F W De Klerk, criticized the implementation of affirmative action policy in South Africa. De Klerk contends that 'the reality is that the wholesale appointment of people who are not suitably qualified has been a major factor in dysfunctional service delivery by the state, particularly at the municipal level'.²⁹⁸

²⁹² Padayachee *Employment Equity* 77. Opponents of affirmative action argue that a preferential treatment is not deserved simply by membership of a group which has been traditionally discriminated against. They maintain that personal injury must be demonstrated.

²⁹³ Anon 2008 http://en.wikipedia.org/wiki/Affirmative_action 25 October 2009.

²⁹⁴ Ibid.

²⁹⁵ Ibid. They contend that affirmative action policies only benefit a small segment within the target group, generally those who are better educated and hence do not need affirmative action to secure a job or a position.

²⁹⁶ Wolf *Fire with Fire* 26.

²⁹⁷ Zwane 1995 *African Security Review* 44.

²⁹⁸ De Klerk 2009 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page> 26 October 2009. De Klerk believes that affirmative action is unconstitutional and racist. He argues that 'it is being used to

Unbalanced affirmative action has undermined the right of millions of ordinary South Africans to equal enjoyment of many of the basic rights in the Constitution, including most notably the right to health care, food, water and social security and the right to education.²⁹⁹

Affirmative action has received much criticism especially from the white people and some black people who have been doing well in business. Some skilled people in South Africa have also demonstrated their displeasure at affirmative action by threatening to leave the country should government go ahead with the policy of affirmative action.

5.2.7. ARGUMENTS FOR AFFIRMATIVE ACTION

Defenders of affirmative action have rejected the claim that affirmative action amounts to reverse discrimination as unsound.³⁰⁰ They argue that the present affirmative action policies, unlike past invidious discrimination, do not express disregard towards members of a certain group based on the idea that they are inherently inferior or have less moral standing than others because of their race and sex.³⁰¹ Because of this, affirmative action lacks the crucial element of prejudice of disdain towards a group that characterized the discriminatory practices of apartheid and is thus morally in a different category.³⁰²

make it sound as if it lays a foundation for the interpretation that affirmative action based on race is acceptable. Affirmative action should be used for previously disadvantaged people regardless of their race or skin colour. Further, unbalanced affirmative action has actually undermined the right to equality. Another problem is that the guiding principle behind the implementation of affirmative action has too often been the ideology of demographic representivity. In practice, the application of representivity in the public administration has often ignored countervailing requirements for ability, objectivity, fairness and good human resource management'.

²⁹⁹ De Klerk 2009 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page> 26 October 2009.

³⁰⁰ Dupper 2005 *The International Journal of Comparative Labour Law and Industrial Relations* Spring 93.

³⁰¹ Ibid.

³⁰² Ibid. There is in other words, a morally significant difference between offensive forms of discrimination and the remedial intent of affirmative action policies. Also see Nagel *A Defence of Affirmative Action* 346. According to Nagel, racial and sexual discrimination are based on contempt or even loathing for the excluded group, a feeling that certain contracts with them are degrading to members of the dominant group, that they are fit only for subordinate positions or menial work. Affirmative action involves none of this; it is simply a means of increasing the social and economic strength of formerly victimized groups and does not stigmatize others.

Proponents of affirmative action view it as one of the most effective ways to address the long-standing problems of racism and sexism experienced by groups which are previously disadvantaged, thus serving as a vehicle for reaching the goal of equality.³⁰³ They believe that in order to achieve equality of opportunities, those whom opportunities were denied to in the past should now be preferred as against those whom opportunities were opened to in the past. This view is in line with the substantive understanding of equality, which is embraced by the 1996 Constitution. They argue that to eliminate maldistribution of resources, it is necessary to consider one's race, sex or ethnicity because these characteristics are the reason for the discrimination that brought about such maldistribution in the first place.³⁰⁴

Proponents of affirmative action argue that the disproportionate representations, results from covert, institutionalised and involuntary forms of discriminations that permeates the fabric of society, particularly in societies that have had a long history of racial, ethnic, or sex based discrimination.³⁰⁵ Proponents see affirmative action measures as better placed to deal with these challenges. They argue that, the continuation of affirmative action is a litmus test of our nation's commitment to racial justice.³⁰⁶ Furthermore, they view opponents as at best, insensitive to the enduring effects of generations of racism or at worst, racists seeking to preserve their own privilege.³⁰⁷

An obvious justification for affirmative action it is said to involve the compensation of victims of past discrimination. Such compensation is not only in accordance with the norms of compensatory justice but also uphold the integrity of a just distributive system based on the principle of equal opportunity.³⁰⁸ Proponents of affirmative action generally argue that equal treatment may result in the perpetuation of existing inequalities. They are also of the view that, whilst the preferential treatment of white males intensifies such inequalities, favouring the previously disadvantaged would promote the elimination of

³⁰³ Anon 2009 www.apa.org/pubinfo/affirmaction.htm 26 October 2009.

³⁰⁴ Padayachee *Employment Equity* 87.

³⁰⁵ Anon http://en.wikipedia.org/wiki/Affirmative_action 26 October 2009.

³⁰⁶ Anon 2003 www.scu.edu/ethics/publications/iie/v7n3/affirmative.html 26 October 2009.

³⁰⁷ Benatar 2007 www.ever-fasternews.com/index.php%3Fphp 26 October 2009.

³⁰⁸ Goldman *Justice and Reverse Discrimination* 87.

race and gender-based inequalities in the workplace.³⁰⁹ Affirmative action is intended to make up for socially caused deprivations that have placed black and women in the disadvantage. Affirmative action programmes are perceived as appropriate means for society to discharge its obligations to those groups which were wronged in the past.³¹⁰

5.3 THE POLICY OF BLACK ECONOMIC EMPOWERMENT

For decades, before South Africa achieved democracy in 1994, the apartheid government systematically excluded African, Indian and Coloured people from meaningful participation in the country's economy. The economy was and to some extent still is in the hands of white South Africans. The democratic government saw a need to encourage participation of previously excluded groups in the economy, particularly black people.

The government then introduced the Black Economic Empowerment (BEE) strategy. Government has argued that BEE is not affirmative action, although employment equity forms part of it. Nor does it aim to take wealth from white people and give it to blacks. It is essentially a growth strategy, targeting the South African economy's weakest point, inequality.³¹¹ Such a measure came after a realization that no economy in the world can effectively grow by excluding any part of its people, more so when the people excluded are the majority in the country.

South Africa's policy of BEE is not simply a moral initiative to redress the wrongs of the past. It is a pragmatic growth strategy that aims to realize the country's full economic potential.³¹² BEE is driven by BBBEEA, which measures companies' empowerment progress in four areas: direct empowerment through ownership and control of enterprises and assets, management at senior level, human resource development and employment equity. Indirect empowerment through: preferential procurement, enterprise

³⁰⁹ Padayachee *Employment Equity* 75.

³¹⁰ *Ibid.*

³¹¹ Anon 2009 <http://www.southafrica.info/business/trends/empowerment/bee.htm> 26 October 2009.

³¹² *Ibid.*

development and corporate social investment.³¹³ However, since its conception, the authenticity and relevance of BEE has come under scrutiny. It has been seen on the one hand, as an ethically just initiative to compensate previously disadvantaged individuals and on the other hand, as a pragmatic strategy which undercuts the notion of merit.³¹⁴

This initiative by government has produced unsatisfactory results. It has resulted in a small portion of the South African society becoming very rich overnight and also not benefiting the whole society at large. As a result, the gap between the rich and the poor is not decreasing. There is an emergence of a further disparity between the rich black and the poor black. BEE initiatives have been criticized as having benefited a few, while small and micro business development initiatives have not had the impact required in reducing unemployment and in strengthening entrepreneurship in South Africa.³¹⁵ It has been argued that BEE has been hijacked by a few powerful individuals and has become irrelevant to the majority section of the previously disadvantaged communities.³¹⁶ It is encouraging however, that President Zuma has admitted that 'in its current implementation BBEE has benefited the few and has not been broad based enough, that they believe this must be addressed going forward'.³¹⁷

5.4 CONCLUSION

At the heart of the ANC led government agenda is the total transformation of South Africa into a truly non-racial and non-sexist society.³¹⁸ The South African democratic government aims to create a society that has equal opportunities for its entire people, be it at political, social, cultural or economic spheres. The ANC believes that affirmative action is one of the key tools of achieving this objective, thereby arguing that 'it is

³¹³ Ibid.

³¹⁴ Anon 2009 http://www.wbs.ac.za/about_wbs/directors_blog/ 26 October 2009.

³¹⁵ Anon 2009 www.caresa-lesotho.org.za/econem.htm+criticising+Black+Economic+Empowerment 26 October 2009.

³¹⁶ Radebe *Financial Mail* 12.

³¹⁷ Zuma 2009 <http://www.moneyweb.co.za/mw/view/mw/en/page86?oid=279812&sn=Detail> 26 October 2009.

³¹⁸ Ibid.

therefore unthinkable that we can abandon affirmative action as a policy while we have not achieved the objective of transforming our society completely'.³¹⁹

It was demonstrated in this chapter that affirmative action is a term that originated in the USA. Affirmative action refers to a range of programmes directed towards targeting previously disadvantaged groups to redress their inequality.³²⁰ By adopting affirmative action as a policy, the government aims to address past discrimination and to ensure future equality for previously disadvantaged groups. It was also demonstrated how South African courts adjudicate affirmative action disputes.

It was further demonstrated in this chapter that affirmative action provisions do not apply to all employers, but only apply to designated employers. Designated employers are obliged to ensure that suitably qualified members from designated groups benefit from affirmative action. Once affirmative action measures are shown to be consistent with the goals of the EEA and section 9(2) of the 1996 Constitution, they will be regarded as valid and legitimate and need not be further justified.

Furthermore, it was demonstrated in this chapter that there are different views regarding beneficiaries of affirmative action. There are those who believe that actual past discrimination must be a requirement in order to benefit from affirmative action. On the other hand, there are those who believe that, by virtue of belonging to a designated group, one ought to benefit from affirmative action. Black people appear to be following the latter view. This chapter also analysed arguments that have been put forward, those that support affirmative action as well as those that are opposing it. Finally, this chapter looked at the policy of BEE and showed that this policy has brought about unsatisfactory results. The BBE policy has failed to close down the gap between the rich and the poor in South Africa.

³¹⁹ Ibid. The government contends that affirmative action is also critical in dealing with the historical past of inequality, injustice and racial based discrimination.

³²⁰ Dupper 2002 *SA Mercantile Law Journal* 275.

CHAPTER 6: CHALLENGES AND SUCCESSES OF THE EMPLOYMENT EQUITY ACT

6.1 INTRODUCTION

The South African democratic government has visibly demonstrated its intention to deal with the problem of inequality and discrimination in the workplace, bringing about a diverse workforce representative of South Africa's demographics.³²¹ The EEA is but one of the regulations put in place by the government to achieve this objective. The EEA requires a fundamental change in the way people think about and perceives other people. If this does not take place, the implementation of employment equity strategy will be problematic.³²² It is true that laws can require organisations to hire and promote historically disadvantaged individuals. The law however, cannot remove societal barriers arising from people's attitudes.³²³

This chapter seeks to outline some of the challenges and successes of the EEA ever since its inception in 1998. The effectiveness of the EEA in eliminating systematic discrimination and inequality in order to ensure active promotion of equality of opportunities in the workplace will also be evaluated. Furthermore, challenges that are faced by the South African government relating to the eradication of the legacy of the labour market injustices under apartheid will also be demonstrated.

6.2 CHALLENGES

6.2.1 TRANSFORMATION AND DEMOCRACY IN THE WORKPLACE

It is an uncontested fact that there has been and still are many inequalities in the South African labour market. These inequalities are found along, among others, racial and

³²¹Smith and Roodt 2003 *SAJHRM* 32. It is the intention of the ANC led government to transform all organisations. The government has done this by enacting several transformational laws. These transformational laws are often viewed as controversial since they legally enforce the preferential employment and advancement of non-whites and other previously disadvantaged groups.

³²² Human "Equity and Efficacy" 106.

³²³ Swanepoel *et al Theory and Practice* 157.

gender lines. In many instances they amount to direct and indirect discrimination. Such inequalities relate for instance, to the development of human capital (education and training), high unemployment among black people and women, sharp differences in wage earnings and income as well as occupational inequalities.³²⁴ These inequalities are as a result of the laws and actions of the South African oppressive governments of the past.³²⁵

The history of the South African labour system is a history of workplace struggle for the black people. It is a history of a struggle against inequalities, workplace discrimination, salary disparities, recognition of employee rights etc. There has also been a differential unemployment rate between black and white South Africans. Frans Barker has observed that:³²⁶

Although discrimination is an important reason for differential unemployment rates between black and white people, it should be remembered that inequalities in employment relate very closely to other factors such as inequalities in education, differential population growth rates and the levels of urbanisation. Because African workers on average have lower educational qualifications than whites and at the same time their numbers have increased sharply, it is to be expected that unemployment among them will be higher than among whites, who have higher educational qualifications and experience low or declining growth rates. In addition if African workers are the least urbanised group, it is to be expected that employment among them will also be lower because of fewer employment opportunities in rural areas. If discrimination in employment is to be eliminated, those causes of much of the discrimination have to be addressed.

In order to foster transformation in the labour market during the transitional period from oppressive rule to democratic rule, there was a need to address the concerns

³²⁴ Barker *South African Labour Market* 9.

³²⁵ Ibid. Both the colonial and apartheid regimes systematically and purposefully restricted the majority of South Africans from meaningful participation in the economy. The accumulation process under apartheid confined the creation of wealth to a racial minority and imposed underdevelopment on black communities. The result is an economic structure that today, in essence, still excludes the vast majority of South Africans. It is imperative to understand the magnitude of what took place in our past in order to understand why we need to act together as a nation to bring about an economic transformation in the interest of all, not only the minority within South Africa.

³²⁶ Barker *South African Labour Market* 234.

highlighted by Barker. These inequalities could no longer be allowed to characterise the South African labour market, if the successful transition to democracy was to be achieved. Transformation was a process that needed all South Africans who believed in democratic values to join hands in the implementation of measures aimed at abolishing all inequalities in the labour market. It was therefore, not only the responsibility of black people together with their political leaders but rather a collective effort from all races and sectors of our society.

The effective abolition of all forms of inequalities in the labour market has been instrumental in the attainment of workplace democracy in South Africa. Many black people have lost their jobs and even their lives in pursuit of workplace democracy. Some have been restricted from totally entering the South African labour market.³²⁷ As a concept, workplace democracy is used increasingly with reference to workplace transformation in the new South Africa.³²⁸ Black workers' resistance to racism and apartheid led to the ultimate change of the labour relations in South Africa, resulting in the collapse of apartheid.³²⁹ The breakdown of apartheid did not immediately translate into improved material conditions for the majority of South Africans.³³⁰ There was a need to transform the labour market in order to reflect the constitutional changes that occurred in the 1990s.

It is submitted therefore that, the need for all the constitutional changes came after the realization by the state that even though transformation is a continuous process, it must be catalyzed by progressive measures. Measures aimed at bettering the lives of those that were neglected by both the colonial and apartheid regimes. Even though apartheid tendencies in various workplaces are very much still prevalent, there are signs of improvement after the advent of democracy in South Africa. The 1996 Constitution is a

³²⁷ More 2006 <http://home.imagnet.co.za/liasa/papers/more.html> 03 November 2009.

³²⁸ Ibid.

³²⁹ Aliber and Maharajh 2005 <http://www.hsrc.ac.za/research/output/pdf> 03 November 2009.

³³⁰ Ibid. When one questions exactly what workplace democracy entails, a great variety of concepts like employee-participation, industrial democracy, self-managed teams, employee-empowerment, employee-representation participative management and non-racial categorization of employees come into play. Although all these concepts may have different meanings, they all emphasize the need for a healthy tension-free relationship between employers and employees. But this may not be always possible because of conflict of interest.

welcomed relieve in the South African labour market which has been characterized by great inequalities in the past.

The democratic government was faced with further fundamental challenges. The South African labour market was characterized by an oversupply of unskilled workers and a shortage of skilled ones.³³¹ Factors such as low levels of education and lack of skills created barriers for most black people to access better jobs. In some instances, some citizens were not only unemployed but they were unemployable as well. Those already in the labour market had limited skills making it difficult for them to gain promotions. The government was also faced with the structural reality, were suitably qualified black people were overlooked when better jobs became available.

6.2.2 THE EFFECTIVENESS OF THE EMPLOYMENT EQUITY ACT

It is desirable that the South African labour market reflect the demographics of the entire South African society in various workplaces. Employment opportunities should be opened to all equitably. However, this has not been the case even after the advent of democracy in South Africa. Some of the challenges experienced in South Africa's labour market were outlined by the minister of labour Membathisi Mdladlana.³³²

On the 19th of October 1998, we promulgated the Employment Equity Act. Guided by the Constitution of the Republic, in this Act our purpose is to promote "equal opportunity and fair treatment in employment" and to implement "affirmative action measures to redress the disadvantages in employment experienced by designated groups". Ten years on, research conducted by the Sociology of Work Programme at Wits University tells us that, "the hierarchy of the national labour market is still very much racialised; occupations at the lower-end and lowest end are almost exclusively filled by black people and African women respectively, whilst the very top-end occupation has the smallest proportion of black people and especially African people. Coloured people are clustered from middle of the range to lower end occupations while Indian people and white people are predominantly located in the middle to high end occupations". Black people remain at the lowest end of the labour market

³³¹ Anon 2008 <http://www.southafrica.info/business/economy/policies/labour.htm> 03 November 2009.

³³² Mdladlana 2008 <http://www.anc.org.za/caucus/docs/sp/2008/sp0515c.html> 03 November 2009.

hierarchy. Fourteen years into our democracy, why is this still the case? The common answer to this question is that there are not enough well qualified black people to employ.

It is encouraging however, that South Africa currently is producing black graduates who will be eligible to be employed at various corporations. However, upon completion of their studies, these graduates may fall victim of workplace inequalities and unfair discrimination. At top management of various corporations, white people are still very much well represented and dominant. The question is 'are these white people willing to train and tool these black graduates to enable them to occupy top positions? This is very much doubtful! Because they do not adequately trained and develop these black graduates. Mzamo Masito correctly argues that 'some of the white managers are given responsibilities to mentor black graduates so that one day they can take over their jobs and the mentor will sabotage the mentee. The mentee will be told to take it easy, and a task that should have taken a week to learn will be dragged to 3 months'.³³³

The observation above by the minister shows that, whites continue to dominate the labour market especially top jobs followed by Indians, while Coloureds and Africans continue to settle for inferior jobs. It is submitted that the EEA is also failing the legal profession in South Africa. Many law firms in South Africa are seeking to comply with the EEA regulations by providing articles of clerkship to a high number of black candidate attorneys. On the one hand, one might be persuaded to commend these law firms in this regard. On the other hand, however, upon a critical inspection, one finds that the majority of these candidate attorneys do not get to be employed at those law firms upon completion of their articles.

On an annual basis these law firms are on a circle of huge intake of black candidate attorneys. By this, they ensure that when the Employment Equity Commission (EEC) makes its inspections, they are found to be in compliance with the EEA regulations.³³⁴

³³³ Mzamo Masito 2009 <http://www.bantupages.co.za/assets/downloads/politics.pdf>.

³³⁴ Anon 2009 <http://www.werksmans.co.za/8/transformation/> 03 November 2009. Werksmans is one of the leading law firms in South Africa, and in its website it has stated that 'at least 70 percent of the candidate attorneys we recruit every year are from previously disadvantaged groups'. It is not clear from their website when exactly they stated with this initiative. Assuming that, they started after the inception of the

When one looks at the people who end up being retained by most law firms in South Africa, are whites, both male and females, Indians and to a lesser extent coloureds. Africans are over-looked in these law firms.³³⁵

As a result, the question that comes to mind is 'after completion of their articles, where do all Africans who were taken in as candidate attorneys go'? The failure to retain them shows that they were not properly trained during the time of their articles and now they have become redundant to the law firm. Due to the large intake of African candidate attorneys such a law firm will be taken as having had complied with their statutory employment equity obligations.

Most of the big law firms in South Africa are under the management of white people.³³⁶ These law firms comply with the statutory obligation of employing "blacks", by employing either Indians or Coloureds in management positions. They further comply with the need to employ members of the "designated groups" by employing white women. It is submitted that the inclusion of Indians, coloureds and white women in the definition of "designated groups" further disadvantages members of the African groups

EEA, one can confidently conclude that they failed drastically to effectively comply with the EEA regulations. This law firm has about 91 directors, majority of which are white males, about 17 white females, 4 male Indians, three coloureds, of which one is female and only five Africans of which three are females. This firm has about 22 senior associates, 11 are white females, four are white males, three are female Indians, two are coloureds and two are female blacks. Werksman further has about ten associates, five of which are white females, three are white males and one is an African female and one black male. When one looks at these figures, a conclusion can be drawn (wrongly so, it is submitted) that this law firm is in compliance with the EEA. Out of 70 percent previously disadvantaged candidate attorneys, it is not clear from the website how much Africans make out of this 70 percent. Also looking at the above figures, it is disturbing that black people (Africans) are totally excluded from the top ranks of this law firm. This shows that after completion of the articles of clerkship, whites, particularly white females are retained by this law firm.

³³⁵ The websites of all the big law firms in South Africa indicate clearly that whites are dominant in the legal profession. See www.webberwentzel.com, www.werksmans.co.za, www.bowman.co.za, www.adamsadams.com, www.ens.co.za just to name but a few.

³³⁶ Anon 2009 <http://www.webberwentzel.com/wwb/view/wwb/en/page174> 03 November 2009. Webber Wentzel states in their website that 'the management of Webber Wentzel is under the control of a management board comprising the senior partner and six elected members, all of whom are equity partners. One of the elected members must be a black partner, one must be a woman partner and one must be from our Cape Town offices'. It is not surprising that their 'one black partner is an Indian' out of the six elected members. A women partner is a white woman. Even though the partner from Cape Town does not appear from their website, one can conclude that he is white. Out of their up to 130 or more partners, associates, senior associates and directed, less than 15 are African. Webber Wentzel state that 'it is our policy to advance black professionals as quickly as possible commensurate with their qualifications and abilities.... It is our policy to ensure that at least 60 % of the annual intake of our candidate attorneys comprises black people'.

who are suitably qualified. They end up being disregarded by various employers. As a result, this further entrenches their disadvantaged position.

Other challenge remains convincing those opposed to the employment equity policies that these policies are not only relevant but also necessary. There are those who base their dissatisfaction on these policies on the argument that 'we no longer ask whether an employee can do the job, but focus instead on whether the appointment advances the company's racial dynamic'.³³⁷ This is clearly a misplaced view of these policies as they do not seek to enhance racial dynamics at the expense of productivity and ability to do the work. There are those who are eager to prove that these policies are not suitable and cannot be justified. They do this by employing "unsuitably qualified" black people in influential positions, paving the way for them to fail. This is against the rationale of the EEA, which is to advance "suitably qualified" individuals from designated groups.

Through the implementation of the EEA, there has been an emergence of few black people who are becoming very wealthy generally known as "black elites".³³⁸ The majority of black South Africans particularly those in rural areas have not yet benefited from EEA measures. The majority of people from the designated groups remain largely uneducated and not adequately trained to be able to compete in the labour market and consequently to benefit from employment equity policies. In this respect, the EEA has not been effective. The current implementation of affirmative action is ineffective because it is based on emotional outset (racial numbers) and not in inputs (training and development). Training and development will lead to growth, which is the best method of correction.³³⁹

³³⁷ Stokes 2009 <http://www.fanews.co.za/article.asp?> 03 October 2009.

³³⁸ Anon 2007 http://www.hsrc.ac.za/HSRC_Review_Article-69.phtml 03 November 2009.

³³⁹ Dirk Hermann 2008 www.solidaritysa.co.za/download.php 03 November 2009. Because of the insufficient focus on training and development South Africa is experiencing a huge skills problem and this leads to poor growth and service delivery.

The latest employment equity report by the EEC has revealed that white males are still entrenched in management positions with little progress being made to remedy this.³⁴⁰ The report shows that representation of white males has dropped slightly over the years but has been in the range of 60 percent to 70 percent over this period. This means that there is still dominance by white males in the workplace hence government should intervene in this regard.³⁴¹

Nonetheless, one should not lose sight of the fact that generally, in higher level jobs the available pool of previously disadvantaged persons who are able to fill and fulfill the required requirements is relatively small. It is submitted that the success of the equity programmes and affirmative action depends heavily on the willingness of white people who are by and large in management positions in various workplaces. Most of them are indeed gatekeepers hence it is up to them to open up their domain so that black people can be appointed.³⁴²

6.3 SUCCESSES

Given South Africa's history, there was a need to transform South Africa as a whole and the labour market in particular. In the early 1990s, a major political transformation occurred in South Africa which was paving a way for an effective political, social and economic transformation in the country. The starting point for such transformation was the enactment of the national Constitution together with transformative laws which were to follow. Transformative laws aim to create a more egalitarian society where economic disparities between different races are eradicated or at least somewhat leveled.³⁴³

Constitutional transformation in the South African labour market included the dismantling of the formal structures of colonial rule and apartheid. It also included the

³⁴⁰ Williams *Mail & Guardian* 12.

³⁴¹ Jack 2009 <http://www.busrep.co.za/index.php?fSectionId=2512&fArticleId=5152235> 03 November 2009.

³⁴² Kgopola *Affirmative Action* 107.

³⁴³ Albertyn and Goldblatt 1998 *SAJHR* 249. Such laws in a shorter term would aim at the proportional representation across income, wealth and resource categories of the various social groupings and in the longer term they would aim at the realization of a society where all residents will lead dignified lives, free from hunger and want.

explicit targeting and ultimate eradication of the social structures that cause and reinforce inequality in the workplace.³⁴⁴ It further included the empowerment of the poor and otherwise the historically marginalized sectors of society.³⁴⁵ Transformation is and should not be a temporary phenomenon that ends when we all have access to resources and basic services.³⁴⁶ Transformation is the preferred and overarching word that South Africans use for what is needed to make their country the vibrant and non-racial democracy they yearn for.³⁴⁷

In the labour context, there was a need to transform the labour market by putting in place measures that would ensure equitable representation of all races in various workplaces. These measures included the formulation of policies and enactment of legislation that would ensure effective eradication of colonial and apartheid discriminatory practices. As well as the advancement of those who were marginalized during the oppressive rule in South Africa. Such measures would also go a long way in ensuring equal access to opportunities that arise in various workplaces for all who are employed in those workplaces.

To deal with challenges experienced in the labour market, the South African government empowered by the Constitution enacted several laws including the EEA.³⁴⁸

³⁴⁴Pieterse 2005 *SAPL* 159. There is no universally accepted definition of Transformative Constitutionalism. See also Klare 1998 *SAJHR* 146. Klare argues that Transformative Constitutionalism is 'a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political development) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative Constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law'. See also Albertyn and Goldblatt 1998 *SAJHR* 249. Albertyn and Goldblatt argue that 'the challenge of achieving equality within this transformation project involves the eradication of systematic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realize their full human potential within positive social relationships'. Transformation then is a social and economic revolution.

³⁴⁵ Pieterse 2005 *SAPL* 159.

³⁴⁶ Langa 2006 <http://www.judicialeducation.org.za/files/doc.pdf> 03 November 2009. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted or rejected and in which change is unpredictable but the idea of change is constant.

³⁴⁷ Gordon *Transformation* 2.

³⁴⁸ The introduction of new the labour legislation has had a profound impact on the South African labour market, notably the Labour Relation Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Skills Development Act 97 of 1998. However the most important piece of legislation for the purposes of this study is the Employment Equity Act 55 of 1998.

The EEA among others introduced the concept that has become very controversial in South Africa, the concept of affirmative action in order to foster equity in various workplaces. Affirmative action measures need to be implemented effectively and efficiently to enable all South Africans who did not have opportunities in the past to be able to claim those opportunities now.³⁴⁹

The EEA was brought in to help businesses 'create a more equitable workplace by promoting equal opportunity and fair treatment through the elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages experienced by designated groups'.³⁵⁰ The aim of the democratic government was to remove discrimination that has prevented the vast majority of the population from attaining adequate levels of education and jobs.³⁵¹ At least since its inception in 1998, the EEA has opened the labour market doors to "suitably qualified" members from designated groups. As a result, some members from the "designated groups" have been able to gain employment in various influential positions both within government and the private sector. Kgopola argues that:³⁵²

The main thrust of affirmative action should be directed towards the advancement of Black people and women who were by far the most oppressed by apartheid. Yet this does not mean that the principles of diversity and capacity building should not be used to promote as well as advancement of others (for example White men) in every sphere of life in a quest to achieve a genuine egalitarian society. If well handled, affirmative action will help heal the wounds of the past injustices, bind the nation together and produce benefits for everyone. If badly managed, it will simply redistribute resentment, damage the economy, national cohesion and destroy social peace. If not undertaken at all, the country will remain backward and divided at its heart.

³⁴⁹ However it must be borne in mind that any action to address the inequalities of the past and those experienced presently in South Africa will confront obstacles. There will be some sectors of the population who will be against such measures. The government also might be faced with the reality of the fact that those they are targeting are actually the majority of the population hence the government might find itself lacking resources to meet their desires. It is important however, that programmes aimed that are designed to address inequalities should be aimed at the broader population and not only at the urban or unionized and employed elites. Care should also be taken to reduce and not to increase racial tensions. Generally see Barker *South African Labour Market* 241.

³⁵⁰ Jongens 2006 *Postable* 30.

³⁵¹ *Ibid.*

³⁵² Kgopola *Affirmative Action* 108.

The ANC led government also sought to advance the economic standing of black people through its BBBEE policy, which has also not escaped criticism.³⁵³ By the introduction of such measures, the democratic government sought to emancipate black people so that they too can enjoy the fruits of South Africa.³⁵⁴ The implementation of these policies has been severely criticized as they have generally been viewed as benefiting only the few within our broader society.

It is pleasing and encouraging to see that at least the democratic government is committed to improving the skills of employees in South Africa. The enactment of the Skills Development Act³⁵⁵ (SDA) has been instrumental in the development of employees' skills in various workplaces, even though the progress in this regard has been very slow. The SDA provides for an institutional framework to device and implement national, sector and workplace strategies to develop and improve skills of the South African workforce.³⁵⁶ The EEA in South Africa also clearly emphasizes the acquisition of skills as the prerequisite for employment of affirmative action candidates.

Two important institutional structures are provided by the SDA for various sectors in the economy: the National Skills Authority (NSA) and the Sector Education and Training Authorities (SETAs).³⁵⁷ Among others, the function of the NSA is to advise the minister on the national skills policy, strategy and guidelines on the implementation of the strategy and liaises with the SETAs to oversee the implementation of the national skills strategy.³⁵⁸ With the help of the NSA, the minister of labour launched the National Skills Development Strategy (NSDS) so as to radically transform education and training in

³⁵³ Anon 2005 <http://www.info.gov.za/view/DownloadFileAction?id=70187> 05 November 2009. The Broad Black Economic Empowerment strategy is a necessary government intervention to address the systematic exclusion of the majority of South Africans from full participation in the economy.

³⁵⁴ The BBBEE seeks to accelerate the deracialisation of the South African economy and fast track the re-entry of historically marginalised communities into the mainstream of the economy. However, despite a broad range of state policy, strategy and programme interventions aimed at overcoming economic disparities, entrenched inequalities continue to characterise the economy and act as a deterrent to growth, economic development, employment creation and poverty eradication. Vast racial and gender inequalities in the distribution of and access to wealth, income, skills and employment still persist in South Africa.

³⁵⁵ Skills Development Act 97 of 1998. Herein referred to as the SDA.

³⁵⁶ Preamble to the SDA.

³⁵⁷ Sections 2 and 3 of the SDA.

³⁵⁸ Section 2 (1) of the SDA.

South Africa by improving both the quality and quantity of training to support increased competitiveness of industry and improved quality of life for all South Africans.³⁵⁹ More importantly, the NSDS seeks to address the problem of systematic labour market discrimination by imparting high skills and a commitment to lifelong learning to previously disadvantaged people.³⁶⁰

6.4 CONCLUSION

In general the successes of the EEA have been very limited. There have not been significant changes to the racial composition of employees at most companies. There are of course exceptions, but the latest report from the CEE showed very little progress and in the professional category the percentage of African employees had actually gone down. This chapter demonstrated both challenges and successes of the EEA. Transformation and democracy in various workplaces were highlighted as some of the challenges facing the effective implementation of EEA.

It was demonstrated in this chapter, that the legal profession remains largely white dominated as Africans find it difficult to effectively break through this profession. The position is the same in various private sector organisations. Furthermore, it was demonstrated that the EEA, despite its shortcomings has provided a platform for members of designated groups to gain employment and to be able to attain top jobs in both the private and the public sector. The results from the report of the EEC were also demonstrated in this chapter as well as the South African government commitment towards the development of skills in the country.

³⁵⁹ Modisha 2007 wits.ac.za:8080/dspace/bitstream/Chapter6.pdf 06 November 2009.

³⁶⁰ Modisha *Cosmopolitan Citizenship Africa*.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

It is desirable that various programmes promoting employment equity and affirmative action in various workplaces be in harmony with the main goal of ensuring effective socio-economic and political participation of all members of society in the affairs of the country.³⁶¹ It is essential that these initiatives be implemented in such a way as to transform the economic system of society so that every racial group of the population is represented at all levels of the economic activities of the country.³⁶² This is in line with the objectives of South Africa's democratic government, which 'necessitated concomitant economic transformation to allow those previously disenfranchised, who constitute majority of the population, to have an equitable share in the economy as a way forward from the apartheid social structure'.³⁶³

The EEA emphasizes the acquisition of skills as a prerequisite for employment of affirmative action candidates. It is imperative that programmes relating to the acquisition of skills and training in employment be revisited and revised to effectively cater for members of those groups who were previously disadvantaged. A robust approach by government must be adopted to counter the arrogance that is displayed by various organisations, which do not adhere to the principles and obligations of the EEA. In order to ensure that companies effectively comply with the regulations of the EEA, effective monitoring and enforcement mechanisms should be put in place. These structures should be given statutory power to deal with non complying organisations.

7.1 EFFECTIVE IMPLEMENTATION OF THE EMPLOYMENT EQUITY ACT MEASURES

7.1.1 EDUCATION

³⁶¹ Kgopola *Affirmative Action* 108.

³⁶² Modisha *Cosmopolitan Citizenship Africa* 153.

³⁶³ *Ibid.*

The government must put measures in place in order to educate employees, prospective employees and employers about the importance of the measures advocated by the EEA. Such education should not however be the sole responsibility of government. Trade unions and other stakeholders should also assist in ensuring that various sectors of society understand the aims and objectives as well as need for the EEA policies. Modisha states that:³⁶⁴

In addition, Van Vuuren identifies two possible challenges to the policy: limited knowledge about the policy and about the broad-based BEE in general and lack of leadership in taking transformation issues seriously. He recommends that all available resources be committed to educating both employers and employees about the importance and implementation of the policy. Further, he argues that there is a need for leadership, white business leaders in particular, to 'preach the gospel' of transformation to their constituencies. It would be difficult, he maintains, for white employees to understand the argument for employment equity coming from a black person. Black leaders, for instance, should ensure that black people understand that the implementation of this policy depends on one's abilities to perform in the workplace rather than solely on skin colour. The role of leadership is also echoed by Rudy Dicks, who argues that it is important for trade unions to accelerate the empowerment of leadership at all levels to engage with the implementation of the policy. For instance, shop stewards, who are the first reference for workers' grievances in the workplace, would play a critical role in monitoring and enforcing the implementation of this policy at the workplace.

For discrimination which is unfair and unwarranted to be totally eradicated in various workplaces, it is important that we understand what unfair discrimination is and its related undesirable consequences. There is a need therefore for extensive educational programmes aimed at explaining the impact of unfair discrimination. This should involve targeting the attitudes that various groups have as against each other. This will help them move forward to understand each other in order for them not to have negative perception and myths against each other. Indeed, employers have a pivotal role to play in this regard, to harmonise relations within various workplaces. Employers should also be committed not to perpetuate unfair discrimination in their workplaces. They should

³⁶⁴ Ibid.

strive to foster the culture of excellence by affording competent people equitable opportunities based on their abilities. Employees from designated groups should be given a fair chance to grow and develop within various workplaces.

Education relating to affirmative action as a policy must also be intensified. Its relevance, especially in the context of South Africa, has to be well articulated and explained. It should not be used to discriminate against white people. Affirmative action should not be used to employ incompetent candidates and those incapable of acquiring necessary skills thereby compromising the quality of work that should be done. However, it is imperative to effectively eradicate the assumption that generally white people are more capable than blacks when it comes to strategic and influential jobs and that they are the most suitable for such positions.

There seems to be the thinking amongst white people, that should affirmative action be scrapped, black people would not stand a chance of competing with them for such positions, as majority of them are incompetent. This is a false assumption and there is no apparent merit in this argument. Most black people are starting to take advantage of the educational resources that are at their disposal and affirmative action measures are meant to ensure that such black people upon completion of their studies or their attainment of relevant qualifications and skills are not met with unnecessary barriers when looking for employment.

It is submitted, that affirmative action measures should benefit a person by virtue of belonging to a designated group and not as an individual who himself experienced actual discrimination. Affirmative action measures are not meant to advance individuals and should never be understood as such. They are meant to advance a group that its progress as a group has been delayed and set back due to political reasons in South Africa. White people in South Africa, were never advantaged as individuals but as belonging to a group that has been viewed as superior to others. As a result, in order to ensure that there is equality in South Africa, it is desirable to advance a designated group by preferring its individuals. This view is consistent with the 1996 Constitution.

7.1.2 SKILLS DEVELOPMENT AND TRAINING

To achieve employment equity especially in managerial positions in various workplaces in order to eradicate inequalities of the past, there must be well coordinated, effective and formulated skills development and training programmes. Skills development and training are indeed critical in achieving equity in the workplace. Advancement of skills, training and development helps disadvantaged employees to catch up with those employees that have had a better education and exposure to acquire necessary experience and skills.³⁶⁵

Not all blacks need training and development and also not all whites are trained and developed. But is it true that, due to historical reasons most black people need to be trained in order to compete effectively in the country's economy hence employers should be obliged to provide such training when they are required to do so. Not only should they be trained, after acquiring the necessary skills they should be eligible to compete for high and skilled jobs equitably with their white counterparts.

The EEC remarked that 'proportionally in terms of the Economically Active Population (EAP), more white and Indian employees (i.e. both male and female) received training in the skilled, professionally qualified, senior management and top management levels when compared to any other population group'.³⁶⁶ It is undesirable to have only the members of minority groups attaining necessary training and skills in order to have top jobs in various corporations. This really runs against the objectives and aims of the EEA.

The upgrading of people skills is simply a matter of practical business sense, quite apart from the implicit political threats of quotas and moral correctness. Consequently, people development demands a commitment of time, money and skills to level the economic playing fields by increasing opportunities for people to become competent. The development and advancement of employees should be made in accordance with the

³⁶⁵ Jongens 2006 *Postamble* 38.

³⁶⁶ Manyi 2009 <http://www.pmg.org.za/files/docs/090825employmentequityreport.pdf> 07 November 2009.

SDA.³⁶⁷ It is desirable that the EEA programmes and policies visibly demonstrates the employer's intention to redress the disadvantages in employment and ensure equitable representation in all occupational categories and levels in the workplace. In order for suitably qualified individuals from designated groups to be able to compete effectively in the labour market their training and skills development should be given necessary attention.

7.1.3 EMPLOYMENT EQUITY COMMISSION *RECOMMENDATIONS*

A broad objective of the EEA is to achieve an equitable representation of the designated groups that mirrors their EAP. This includes their recruitment, training, development and promotion. This has either not been the case in various workplaces in South Africa or the progress has been very slow in some workplaces. As a result, the CEE chair Jimmy Manyi said that 'it would be recommended that laws governing the EEA be revised as they did not deal harshly enough with offenders'.³⁶⁸ Fines for non-compliance also needed to be reconsidered as they currently amounted to "petty cash". Manyi said the amounts needed to be escalated to 10% of a company's turnover, which was similar to penalties handed down by the Competition Commission.³⁶⁹ This recommendation will indeed encourage employers to effectively comply with the EEA.

7.1.4 *AFFIRMATIVE ACTION AND HUMAN RESOURCE DEVELOPMENT*

Any affirmative action programme has to be accompanied by a process of human resource development to offset the problem of quality.³⁷⁰ Affirmative action as part of a revised attitude to human resources management, demands that we look consistently at outputs of people undertaking similar work and provide constructive performance

³⁶⁷ Modisha *Cosmopolitan Citizenship Africa* 170.

³⁶⁸ Williams 2009 <http://www.mg.co.za/article/2009-08-24-commission-slams-progress-of-employment-equity> 07 November 2009.

³⁶⁹ Ibid.

³⁷⁰ Kgopola *Affirmative Action* 106.

feedback.³⁷¹ Human resource strategies within the framework of affirmative action should include among others formal training and recruitment mechanisms.³⁷²

7.1.5 REDIFINING THE TERMS “BLACK PEOPLE” AND “DESIGNATED GROUPS”

In order for the EEA to achieve employment equity in various South African workplaces, there will be a need to redefine the terms “black people” and “designated groups”. “Black People” is a generic term which includes Africans, Coloureds and Indians.³⁷³ The term “designated groups” means black people, women and people with disabilities.³⁷⁴ The term “black people” should be defined to mean African people only. Coloureds and Indians should be accorded their own respective definitions.

Such a step is necessary because most corporations employ Indians or Coloureds under the banner of black people and as such they would be found to have complied with the obligations of the EEA. This further disadvantage African people in various workplaces as they remain highly under represented. The position is the same in relation to promotion to top positions. These groups’ respective degrees of past disadvantage must to a certain extent be outlined. As a result, members from these groups who are suitably qualified should benefit from affirmative action measures with due regard to their groups degree of past disadvantage.

It was a mistake to include white women in the definition of “designated groups”. White women in various corporations are being favoured for employment and promotion over other members from designated groups. White women should be removed from this definition, because they have not suffered grave inequalities and injustices in the past. It cannot be denied that they have been subjected to discrimination in the past, but such discrimination did not prevent them from acquiring better education. They have also benefited from the policies of apartheid by virtue of being members of the advantaged white minority.

³⁷¹ Kgopola *Affirmative Action* 106.

³⁷² Anon 2009 www.hst.org.za/pphc/Phila/summary/vol3_21.htm 07 November 2009.

³⁷³ Section 1 of the EEA.

³⁷⁴ Ibid.

which is relevant and should be promoted and supported to redress the inequalities of the past.

It has been demonstrated in this study that, implementation of affirmative action policies in the post-apartheid South Africa has been criticized for not being able to achieve the purported goals of redressing the historical injustices done towards the previously disadvantaged groups.³⁷⁸ These policies, it is argued, are instead creating a small group of black elite and black middle class, while white people and the majority of black people are increasingly being marginalized.³⁷⁹ Critics of these policies further argue that such policies have the potential to increase tension between designated and undesignated groups, while simultaneously widening the gap between the rich and the poor.³⁸⁰ It is without a doubt that with every policy there will be challenges and problems that will arise as well as those who are opposed to it. However, such challenges should not be a barrier to the effective implementation of such policies, more so when such policies are meant to benefit the greater majority of society.

The EEA recognizes the importance of accelerating skills and advanced professional skills development so as to address the legacy of systematic labour market discrimination and inferior education. The EEA not only attempts to facilitate representation of all racial, gender, ethnicity and disability groups in the workforce, but also seeks to promote the functioning of skills and qualification as a criterion for employment.³⁸¹ It has been argued that these policies should be based on class differences, as opposed to racial, gender or disability criteria to address inequalities left by the previous regime. This promotes the transformation of historical injustices without creating new and unnecessary inequalities, as the majority of those who are disadvantaged by the previous regime will be found within the designated groups.³⁸²

³⁷⁸ Modisha *Cosmopolitan Citizenship Africa* 153-178.

³⁷⁹ Terreblanch *History of Inequality* 34.

³⁸⁰ Modisha *Cosmopolitan Citizenship Africa* 153-178.

³⁸¹ *Ibid.*

³⁸² Tierney 1997 *Review of Educational Research* 142.

The post-1994 government enacted the EEA as a measure that attempted to redress the inequalities that resulted from the colonial and apartheid regimes. The purpose of this study was to investigate the effectiveness of the EEA in addressing these past inequalities in various workplaces. This was done by first discussing the laws that were promulgated under the colonial and apartheid regimes. It was demonstrated how these laws disadvantaged and discriminated against black people in South Africa, particularly Africans. This study further demonstrated events that led to the demise of apartheid as well as the advent of democracy in South Africa. Constitutional enactments were also discussed which paved a way for the promulgation of the EEA.

The legislative framework of the EEA was demonstrated thereby discussing the effects of discrimination as well as affirmative action and black economic empowerment as policies. Some of the major challenges and successes were demonstrated in this study thereby also providing progressive suggestions and recommendations on the effective implementation of EEA regulations in South Africa. It is submitted that affirmative action is better suited to address and redress past inequalities. It must however be implemented with greatest caution not to discriminate unfairly towards those who are not intended to benefit from it.

7.3 AN AFTERTHOUGHT

It is pivotal to understand affirmative action measures as a means to attain the end of equitable representivity in the workplace. The EEA aims to correct the demographic imbalances in the South African workforce by compelling employers to remove barriers to the advancement of blacks, coloureds, Indians and women as well as the disabled, to advance them in all categories of employment by affirmative action.³⁸³ It is desirable that affirmative action measures should not be isolated rather they should form part of a rational policy or plan of action capable of achieving the objective of advancing persons from previously disadvantaged groups and be adequate for this purpose.³⁸⁴

³⁸³ Grogan *Workplace Law* 279.

³⁸⁴ Du Toit 2000 *Labour Law News & CCMA Reports* 12.

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