

**ELIMINATING THE INEQUITIES FACED BY  
WOMEN IN THE WORKPLACE**

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# CHAPTER ONE

## 1.1 Introduction

Women have for decades experienced inequalities. They never held any key decision and policy making positions, have been victims of discrimination both at home and in the workplace on the basis of their sex, gender, sexual orientation and have experienced unfair labour practices in respect of maternity and pregnancy.

Change was inevitable. They were faced with the challenge to eliminate the barriers that prohibits their upward mobility and to close all the gaps that incapacitate them from gaining equal opportunity in the workplace. This has been evidenced in the corporate sector, were few women chief executives makes it in the global business and in the public sector at the political level women parliamentarians makes it in the legislature.

In order to address the plight of women, there was a need for judicial regulation of employer power, which normally manifest in the common law power to terminate employment.<sup>1</sup> Other incidents of employer power, namely, the power to select for training, promotion and recruitment, which are now subject to judicial scrutiny.<sup>2</sup>

In addition, a need for policies to address employment inequity stems from the recognition of the existing inequalities associated with race and gender.<sup>3</sup> To achieve the elimination of inequities faced by women in the workplace, we need to examine whether the legislative framework, enforcement mechanisms and measures put in place will really promote equality. This depends on the courts interpretation of legislation; whether formal or substantive equality is achieved in order to eliminate discrimination directly or indirectly.

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1 Cheadle Thompson & Haysom: Education and labour law module at 87.

2 *ibid.*

3 Meintjies – van der Walt L 'Levelling the paying fields' (1998) 19 ILJ 22.

South Africa has one of the most progressive constitutions in the world. The interim constitution<sup>4</sup> and the final constitution<sup>5</sup> in recognition of the imbalances of the past demonstrated the ability to take effective action in providing freedom from gender and sex discrimination, protection of the bill of rights, and the elimination of unfair labour practices.

The Constitution founds values for the achievement of equality, promotion and enhancement of human dignity, the advancement of human rights and freedoms,<sup>6</sup> outlawing any form of discrimination (especially unfair discrimination) whether it is direct or indirect. The purpose of adopting the constitution being to heal the divisions of the past, and to establish a society based on democratic values, social justice and fundamental human rights<sup>7</sup>, emphasis placed on the rights of the designated groups.<sup>8</sup>

The government of national unity's commitment to empowering women is evidenced by the signing of a number of conventions on women. Among these are the convention on political rights for women, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>9</sup> and the introduction of the *Employment Equity Act*<sup>10</sup> which sought to eliminate unfair discrimination in employment and provide for affirmative action to correct the imbalances of the past.

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4 Act 200 of 1993 (herein referred to as the 1993 constitution).

5 Act 106 of 1996 (referred to hereinafter as the 1996 Constitution).

6 S 1(a) of Act 108 of 1996.

7 Preamble.

8 Designated groups as defined in the *Employment Equity Act* 55 of 1998 means black people, women and people with disabilities.

9 Article 11 stated that the state must remove discrimination against women in work so that women enjoy equal rights in the workplace. Those include the right to the same employment opportunities, including the right to be judged by the same criteria as men, the right to promotion, job security and all benefits and conditions of services.

10 Act 55 of 1998.

To promote economic and equal participation and wealth redistribution to the majority of the population who were previously disadvantaged, a *Broad Based Black Economic Empowerment Act*<sup>11</sup> and *Skill Development Act*<sup>12</sup> with the aim to train and encourage entrepreneurship through small medium and micro enterprises (SMME's) and to improve the skills of the South African workforce were established.

It is clear that the government has made progress in its commitment to advancing economic development, social justice, labour peace and democratising the workplace, a number of NGO's managed by women have been given recognition and financial support.

The Constitution guarantees the equal status of women and men and have provided that *'Everyone is equal before the law and has the right to equal protection and benefits of the law.'*<sup>13</sup>

In the light of the above information there is evidence that women rights are recognised, hence the establishment of the *Commission for Gender Equality*,<sup>14</sup> *Office of the Status of Women*,<sup>15</sup> *Codes of Good Practice on HIV/AIDS*,<sup>16</sup> *Code of Conduct on Handling Sexual Harassment Cases*,<sup>17</sup> *Basic Conditions of*

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11 The BEE which stipulates that the economic empowerment of all black people, include women, workers, youth, people with disabilities and people in rural arrears *SA's Premier Black Business leadership magazine* 2nd Quarter 2004 68.

12 The Act which provides leaderships that lead to recognised occupational qualifications and improve the skills of South African workforce and to intergrades those strategies within the National Qualifications Framework contemplated in South African Qualifications authority (SAQA).

13 S 9(1) of Act 108 of 1996.

14 The Chapter 9 Institution in terms of s 181(1)(d) to strengthen Constitutional democracy and in terms of s 187(1) to promote gender equality and the protection, development and attainment of gender equality.

15 Office of Status of Women is an office created in the office of the Premier in every province to monitor and ensure that women are represented in government.

16 Code of Practice on HIV/AIDS, as provided for in s 28 of EEA where the Employment Equity Commission which is responsible for advising the Minister of Labour on Codes of Good Practice will allow the Minister in terms of s 54 to issue such a code.

17 Government Gazette GN 1367 of 1998.

*Employment Act,*<sup>18</sup> *Labour Relations Act,*<sup>19</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act,*<sup>20</sup> *Unemployment Insurance Act.*<sup>21</sup>

Against this background, could it be said inequities faced by women have been eliminated based on the established legislative framework? What are remaining are the steps taken by women to ensure effective improvisation and elimination of inequities in the workplace.

In order to provide redress to those who were previously disadvantaged by apartheid and male dominated workplaces, the legislative trends, give effect to the conception of equality by setting goals of substantive equality, by also placing a positive duty on employers (designated employers) to achieve this goal, and by introducing policies and programmes to address identified inequalities.

Therefore, it is necessary to draw a distinction between formal equality (called equality in treatment) and substantive equality (called equality in outcome).<sup>22</sup>

**Formal equality** means sameness of treatment; the law must treat individuals in the same manner regardless of their circumstances. It also assumes that all people are equal bearers of rights. On this view, inequality is an aberration that can be eliminated by extending the same rights and entitlements to all in accordance with the same '*neutral*' norm or standard of measurement.<sup>23</sup>

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18 Act 75 of 1997.

19 Act 66 of 1995 in ss 1(a) and 3(b) explicitly states that it is one of its objectives to give any person interpreting the *Labour Relations Act* to do so in compliance with the Constitution in s 23.

20 Act 4 of 2000 which in the Preamble shows that it aims at nothing less than the eradication of social and economic inequalities, especially those that are systemic in nature which were generated in our history by colonialism apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.

21 Act 30 of 1966 as amended.

22 Basson et al: *Essential Labour Law*, Vol 1 *Individual Labour Law* 3rd ed (2002) 304. It has been stated that the Constitutional provision on elimination of discrimination relies on the two bases provision of unfair discrimination and affirmative action which can help to approach genuine equality, which include the full and equal enjoyment of all rights and freedoms.

23 De Waal, Currie & Erasmus: *The Bill of Rights Handbook*, 4th ed Juta & CO Ltd 2001, at 200.

**Formal equality** does not take actual social and economic disparities between groups and individuals into account. This is the concept of equality, which requires like to be treated alike.<sup>24</sup>

**Substantive equality** on the other hand is sensitive to entrenched, structural equality, focusing on the results or effects of a particular rule rather than its form. It requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the constitution's commitment to equality is upheld.<sup>25</sup> It has been referred to as equality in live, social and economic circumstances and opportunities needed to experience human self-realisation.<sup>26</sup>

Kentridge J<sup>27</sup> describes the difference between formal and substantive equality as follows:

*A formal approach to equality assumes that inequality is aberrant and that it can be eradicated by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the pattern of the past, for that inequality needs to be redressed and not simply removed. This means that those who were deprived of resources in the past are entitled to an 'unequal' share of the resources at present.*<sup>28</sup>

In assessing the formal and substantive equality and the purpose of the Constitution (the purposive approach interpretation) there is clear indication that section 9 of the Constitution follows the substantive conception of equality.

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24 Ibid.

25 Cathrine O'Reagan: Equality at work and the limits of the law: 68. Quoted from Dupper & Garbers: SA Labour Law by Thompson and Benjamin para 4. Discrimination Law.

26 Dupper & Garbers: Employment Discrimination: SA Labour Law by Thompson and Benjamin.

27 Ibid.

28 Janet Kentridge "Equality" in Chaskalson et al eds Constitutional law of South Africa (1998) at para 14.2.

Hence in *President of the Republic of South Africa and Another v Hugo*,<sup>29</sup> the Constitutional Court recognised that treating people (especially black people, women and people with disabilities)<sup>30</sup> identically (formal equality) can often result in inequality.

In this case, Goldstone J explained substantive fairness as follows:

*We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of 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. A classification, which is unfair in one context, may not necessarily be unfair in a different context.*<sup>31</sup>

The Constitution's purpose is to eradicate discrimination especially unfair discrimination as stated by *Dworkin* that:

*..... the right to equality means the right to be treated as equals which does not always mean the right to receive equal treatment.*<sup>32</sup>

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,<sup>33</sup> the Constitutional Court referred to equality as having restitution or remedial equality and stated that:

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29 1997 (4) SA 1 CC; 1997 (6) BCLR 708 CC.

30 Designated groups as explained in fn 7.

31 *Supra* fn 21 at para 39 - treating unlike alike may be as unequal as treating like unlike.

32 Current Labour Law 1997 at 77.

33 1999 (1) SA 6 CC at Para 60-61 Quoted from Dupper and Garbers "*Employment Discrimination*".



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

## **1.2 Cultural barriers experienced by women in the workplace**

Despite all legislature efforts and mechanisms put in place to eradicate inequities, inequality still exists. Some feminists argue that a separate chapter on women's rights in the bill of rights aimed at actual equality between men and women might have helped to clarify the content and extent of the rights and values pertaining to women in South Africa.<sup>34</sup>

Hence some feminist academics have indicated cultural barriers that find existence and application in the workplace.

Maddock (1999) gives a more materialist analysis of gender and culture in public organisations. In her book "*challenging women*". She refers to gender cultures, saying:

*Male cultures vary from organisation to organisation, but there are common themes of which is that:- men continue to underrate and undervalue women in general.*<sup>35</sup>

Considering positions held by women, and the fact that they are not in decision-making positions, contributes to inequality. The manner in which recruitment and promotions are conducted, male attitudes exhibited as well as the differences of sexual harassment experienced by women as compared to that

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34 Women and the Law in South Africa: Empowerment through Enlightenment 144.  
35 Rutherford 2001 [http://www.emerald.library.com/ft\\_sep](http://www.emerald.library.com/ft_sep) quoting from Maddock article (Challenging Women: Gender, Culture and Organization. Sage London).

of men, fear and threats to lose employment or victimisation, indicates ignorance to rules and regulations. Statistics South Africa<sup>36</sup> shows in the Labour Force Survey that a high number of black African Women are unemployed, and that only 1.04% of African women are in senior positions.

There are people who still believe that women have not gained economic, political and social equality with men,

*Throughout much of the history of Western civilisation, deep seated cultural beliefs allowed women only limited roles in society, many people believe that women's natural roles were as mothers and wives. These people considered women to be better suited for childbearing and home making rather than for involvement in the public life of business or politics. Widespread belief that women are intellectually (challenged) inferior to men, led most societies to limit women's education to learning domestic skills. Well educated, upper-class men controlled most positions of employment and power in society.<sup>37</sup>*

This was the challenge women had of educating men that women are entering the labour market as equal partners and deserve the same treatment and opportunities. Women are to compete as women in the market and should not try to be "manlike" to be equal but different and be respected for who and what they are. This was supported by Wollstonecraft when she wrote:

*'A vindication of the Rights of women' (1792) that co-education on the grounds that by extending men's education to women, women would have the same opportunity as men to demonstrate their rational capacities. That once the rationality of women was demonstrated, there could no longer be any justification for refusing to extend the rights of men to women.<sup>38</sup>*

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36 Census 2001 September: Statistics South Africa: Labour Force Survey.

37 Women's rights <http://encarta.msn.com/fund/concise.asp> 20 Jul.

38 Martin 1997 Gender L & Pol'y 3 [http://www.law.duke.edu/journal/djglp/articles/gen\\_4p\\_3.htm](http://www.law.duke.edu/journal/djglp/articles/gen_4p_3.htm).

Women have been segregated to an extent that the male attitude and patriarchal belief are still evident. Weber used the term "closure" to refer to the process of subordination, whereby one group monopolises advantages by closing off opportunities to another group outside beneath it, which it defines as inferior and ineligible. The culture approach, with its peculiar masculine concept, myths, rites, rituals, artefacts, and their "*ambiguous*" meaning, is traditionally seen as likely to induce tension and a disinterest where women are concerned.<sup>39</sup>

The organisational cultural fit indicates that there are barriers to women's upward mobility, resulting in women receiving jobs that pay lower salaries. In such organisations, women are seen as supporters of men. Women managers are often required to exhibit what is almost a male gender identity, and are habitually viewed as exceptions to women in general.

Gender imbalance creates an organisational culture that is hostile or resistant to women<sup>40</sup>, as women are not included in formal networking. Those who are recognised and included result in being "*tokens*" at the top of the organisation. Those who are placed at the top though they do not qualify are placed to satisfy the interest of the appointee.

The situation not only bothered women, the chairperson of the Gender Commission stated, "*The truth is, while we are talking the talk of gender equality, we are still not walking the walk*".<sup>41</sup>

In support to the hurdles by women, Hearn's assertion that there are too many men in management, and carries with it the suggestion that an improvement in the numbers of women may well be the way forward and that male behaviour can be modified if more women enter managerial positions. Women may acquire their own dynamic which in turn can lead to cultural change, which will be more hospitable to women.<sup>42</sup>

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39 Goates "Women" *Management Review* Vol 16 No.8 Sept 2001 371-382.

40 Simpson <http://www.emaral-library.com> 5.

41 Acta Academia Supplement 2002 (1).

42 Simpson <http://www.emaral-library.com> 6.

Gender Equality has now been written into the Constitution, but it is not enough to ensure gender equality. It is up to people who believe in equality to ensure that this equality becomes a practical reality and does not remain the law in the books.<sup>43</sup> Against this background, reference is made to President Mbeki's present government, where the number of women has increased to senior positions, in order to assist the cause of gender equality.

President Nelson Mandela in his opening statement at the opening of South Africa's first democratically elected Parliament on May 1994 stated that:

*It is vitally important that all structures of government and non governmental organisations to note that freedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take on board, that the objectives of the Reconstruction and Development Programme will not have been realised unless we see, in visible and practical terms that the conditions of women of our country have radically changed for better, and that they have been empowered to intervene in all aspects of life, as equals with any member of the society.*<sup>44</sup>

Those who belong to the "old boys club" who still hold the traditional (patriarchal) view on equal wages for woman to be seen as an insult and hold the view that women are not "breadwinners" will not pass constitutional muster.<sup>45</sup> The "breadwinner concept"<sup>46</sup> is found to be absurd, as women enter the labour market to develop the economy and continue with their family responsibility,<sup>47</sup> which makes them breadwinners and head of families too.

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43 Unit for Gender Research in law Unisa: Women and law in South Africa: Empowerment through enlightenment 6.

44 Quoted from article of *Women Beyond* (2000) 28.

45 Lessing: South African Women Today 194.

46 Unisa Centre for Women's Studies (1991:1) Breadwinner was defined as a male member of staff, or a female member of staff who is single, widowed or divorced or a married female member of staff whose husband is unable to find employment owing to permanent disability. This belief ignored not only the financial contribution made by women to the household, but also the fact that women increasingly fulfilling the role of single parents and sole breadwinner.

47 Family Responsibility means the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate

Breadwinner as defined in men's terms should be abandoned as an outmoded concept, which has no legal basis.

Professor Suzan Scot of UNISA stated that all employees should be treated alike, irrespective of gender or other subjective personal circumstances.<sup>48</sup> The definition of breadwinner clearly indicated unfair discrimination.<sup>49</sup> Women enter the labour market for the sole purpose of developing the economy and eliminating inequities they are faced with in the workplace also to enjoy equal opportunities as entrenched in the Constitution.

## CHAPTER TWO

### What is Equality or Equity

There is lack of clarity and absence of consensus about what the differences are between equality and equity, both terms mean different things to different people.<sup>50</sup> The words are often used interchangeably.

*Equality has been a central normative concept for the modern women's movement all over Europe and in many other parts of the world, (SA Included). Experience in devising Policies, evaluating them and using litigation to secure their implementation has led to extensive debates about concepts like equal rights and equal opportunities.*<sup>51</sup>

Equality is the fundamental right in the constitution, which is aimed at achieving freedom. As stated by Kentridge that:

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family who need their care or support as explained in the *Employment Equity Act 55 of 1998*.

48 Supra fn 35: Unit for Gender Research in law Unisa: Women and the law in South Africa: Empowerment through enlightenment.

49 Dupper & Garbers: Provision of benefits to and Discrimination against same sex couples: where the meaning of "unfairly" was said to do more than distinguish between different kinds of differentiation. It distinguishes between permissible and impermissible discrimination, where discrimination itself has a pejorative meaning (see Kentridge J "Equality" in Chaskalson et al (eds) at 14 - 18).

50 Wolpe A et al: Gender Equity in Education (1997) 38.

51 Elizabeth Meehan and Selina Seven Huijsen: Equality Politics and gender. Sage Publication 1991 London 13.

*The commitment to equality lies at the heart of the South African Interim Constitution, and also that equality influence the interpretation and application of every right protected in the Bill of Rights.*<sup>52</sup>

Society can achieve equality by providing equal opportunities for all. Equality should not be seen in gender blind terms; it inevitably refers to males and not take account of gender differences<sup>53</sup> whereas the Constitution provides the protection of the rights of every person (i.e every man, woman, child) and the promotion of gender equality.

The office of the Status of Women,<sup>54</sup> whose main role is to influence policy and deliver government programmes in a way which promotes gender mainstreaming and the transformation of previous gender roles, has its mission:

*To establish mechanisms and procedures that will advance government towards Gender Equality, and its vision: To develop an enabling environment that will guarantee Gender Equality, facilitate the process of equality as envisaged in the 1996 Constitution.*

The Gender Equity Task Team<sup>55</sup> defined gender equality as follows:

*Gender equality is concerned with the promotion of equal opportunities and fair treatment for men and women in the personnel, social, cultural, political and economic arenas.*

Gender Equality entails meeting women's and men's, girl's and boy's needs in order for them to:

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52       Supra fn 28 see Tobias P Van Reenen Equality, Discrimination and Affirmative Action: an analysis of s 9 of the Constitution of the Republic of South Africa 1997 SA Public law 151 at 152. Freeman 1998 SALJ 243 describes Equality as "a core value underlying democratic society envisioned by both the interim and final constitution".

53       Gender Equity in Education (1997) at 38.

54       Supra n15.

55       The GETT was a task team appointed and led by a Gender Equity Commissioner, which was the brainchild of the (then) Ministry and Department of Education to eliminate gender inequality throughout the whole education system.

- compete in the formal and informal labour market;
- participate fully in civil society; and
- fulfil their familial roles adequately without being discriminated against because of their gender.<sup>56</sup>

Ann-Marie Wolpe *et al*<sup>57</sup> support the issue of equality of opportunities for women and men that it entails a series of steps to create the conditions necessary for such opportunities. She referred to Dr Ramphela's distinction in relation to practices in the work situation:

*Equality is non-negotiable with respect to the rights of citizens before the law. All citizens – men and women have to be treated equally. But equal treatment in all cases, in a society scarred by discrimination also has the potential of reinforcing inequality.*

*Equality on the other hand, is more contextually defined and can mean both equal treatment and preferential treatment. For example, women as bearers of children have certain demands made on their time and bodies. They need preferential treatment to allow them to cope with biological demands. Maternity leave, Flexi-time at work, flexible career advancement and so forth are essential. Failure to effect these preferential treatments would perpetuate the under representation of women in the workplace, particularly in the skilled professions.*

*Equity also concerns the need to set standards and reorganise the nature of environments, which were previously the exclusive preserve of man, ensuring that they support the development of both men and women. One may not simply want an equal slice of the mad race in which men are currently involved: one may want to transform values underlying the notion of work, leadership and*

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56 GETT at 40.

57 *The Report of the Gender Equality Task Team on Gender Equity in Education 200.*

*human relations. Policies against sexual harassment and other forms of harassment, which poison the social milieu, are crucial in this regard (1995:60).*

*The Constitution recognises the difference between sex and gender in the equality clause. Thus the Commission on Gender Equality was established in terms of the Constitution to protect and promote gender equality and to advise and make recommendations to parliament or any other legislature with regard to laws, practices or proposed legislation, which affects gender equality and the status of women.<sup>58</sup>*

## **CHAPTER THREE**

### **3.1 Women and Employment**

#### **3.1.1 *The Effects of Equality as Envisaged in the Constitution and the Labour Relations Act, 1995***

It is evident that women still face discrimination in employment, as they are still not receiving fair salaries and that they are placed in lower positions at the lower end of the remuneration spectrum, and still discriminated based on their sex, though sex discrimination is outlawed in the Labour Relations Act, 1995, the Employment Equity Act, 1998, and the Constitution, 1996. To achieve equality the provisions of section 9 of the Constitution has to be complied with.

Inequality in the workplace cannot be eradicated by removal of discriminatory laws alone. There must be change of attitudes and conditions in employment in order to achieve the level of growth for sustainable development.

Women have continued to struggle to fight for equal opportunities. In "*Bound for the Promised Land*", women indicated their keenness to increase their



knowledge by joining the professionate. In USA 50% or more of graduates are female though few have reached senior grades.

In 1996 South African women slightly outnumbered men among University students. The research conducted at Free State University indicated that from the perspective of gender and race, the glass ceiling phenomenon manifest itself throughout South Africa.

For women to achieve equality section 9 of the Constitution is of importance to them. It reads as follows:

1. *Everyone is equal before the law and has the right to equal protection and benefit of the law;*
2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.*
3. *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
4. *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3) National legislation must be enacted to prevent or prohibit unfair discrimination.*
5. *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. This indicates that the substantive vision of equality is envisaged.*

From the section(s) flows the following important points that:

- a) Section 9(1) places a duty on the state to grant protection to those groups who in the past found themselves disadvantaged i.e. black people, women and people with disabilities.
- b) Provision for legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. In this section preferential treatment may be given to those previously disadvantaged “*an Affirmative Action Concept*”, where discrimination based on sex may be permissible.
- c) Discrimination on the basis of one of the grounds listed in section 9(3) will be unfair and unconstitutional, as it will violate provision of sections 9(3) and (4). However if preferential treatment is used as a redress of past discriminatory practices against those who were previously disadvantaged by unfair discrimination then it is permissible. This will be to benefit such persons with the aim of securing their full and equal enjoyment of all rights and freedoms.
- d) Section 9 provides that discrimination on one or more of the grounds listed in section 9(3) is unfair unless it is established that discrimination is fair.

In order to determine whether the equality clause in terms of section 8 of the Interim Constitution or section 9 of Final Constitution is violated or whether unfair discrimination exists, the questions in Harksen's case<sup>59</sup> are asked:

- a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if

it does bear a rational connection, it might nevertheless amount to discrimination.

b) Does the differentiation amount to unfair discrimination?

This requires a two-stage analysis:

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

ii) If the differentiation amounts to '*discrimination*', does it amount to '*unfair discrimination*'? If it has been found to have been on a specified ground, then unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of sections 9(3) and (4).

e) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

In *Prinsloo v Van der Linde & Another*,<sup>60</sup> there was consideration of violation of equality clause, it concerned the presumption of negligence in respect of a veld,

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60 1997 (3) SA 1012 CC vide Current Labour Law 1997 at 76.

forest or mountain fire in section 84 of the *Forest Act 122 of 1984*, where it was alleged that the section violated the right to equality. The Constitutional Court in this case considered both the nature of equality as it finds expression in section 8 of the Interim Constitution and the meaning of unfair discrimination contained in the same section. The Court noted that not each and every differentiation made in law amounted to unequal treatment and concluded that:

*The idea of differentiation seems to lie at the heart of equality jurisprudence in general and of section 8 right or rights in particular. Taking as comprehensive a view as possible of the way equality is treated in section 8 of the Interim Constitution and 9 of final Constitution, we would suggest that it deals with differentiation in basically two ways: differentiation which does not involve unfair discrimination and that which does involve unfair discrimination.*

*The proscribed activity is not stated to be 'unfair differentiation' but is stated to be 'unfair discrimination'. 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.*

*We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.*

*Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender.*

*Unfair discrimination, in the context of section 8 as a whole, actually means treating persons differently in a way which impairs*

*their fundamental dignity as human beings, who are as a matter of fact equal in dignity,*

*It is noted in Prinsloo's case that differential treatment becomes discrimination, only if it is pejorative - that is it treating persons differently in a way which impairs their fundamental dignity as human beings.*

A distinction is drawn between cases where differential treatment carries no negative impact, for example where there is provision of separate toilet facilities for men and women. But discrimination will be found where toilet facilities are provided for men which are substantially inferior to those provided for women.<sup>61</sup> A similar approach was held by the Labour Court in Leonard Dingler's<sup>62</sup> case where Seady A J held that prohibition of unfair discrimination contained in item 2(1)(a) of Schedule 7 of *Labour Relations Act* (now repealed) explained different kinds of differentiation (permissible and impermissible) as follows:

*The provision sorts permissible from impermissible discrimination. By this mechanism, the legislation recognises that discriminatory measures are not always unfair... The notion of permissible discrimination is in keeping with a substantive, rather than formal approach to equality that permeates the Constitution and from which item 2(1)(a) of Schedule 7 draws its inspiration.*

In *Kadiaka v Amalgamated Beverages Industries*,<sup>63</sup> the Labour Court illustrated differentiation on the basis of previous employment. The applicant in this case

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61 Du Toit et al 435. In *Jooste v Score Supermarket Trading (Pty) Ltd* (1999) 20 ILJ CC, (the issue of differentiation was discussed) s 35 of *Compensation for Occupational Injuries and Disease Act* 130 of 1993 was argued that, it unfairly differentiated on the one hand between persons who were employees, who could not institute common law proceedings against their employer, and persons who were not employees on the other hand, whose rights to institute proceedings against someone who negligently injured them was limited. The Court stated that to succeed in a claim of equality it must first be established that there is no rational relationship between differentiation and a legitimate government purpose. Secondly, if there is such a rational relationship, the differentiation must be shown to constitute unfair discrimination and thirdly if it is unfair discrimination it must be shown that the differentiation is not a justifiable limitation in terms of the limitation clause.

62 (1998) 19 ILJ 285 LC at 294 I-J, quoted from Du Toit et al 435.

63 (1999) 20 ILJ 373 LC.

was employed by New Age, he applied for employment in a similar capacity with ABI. ABI refused to employ him. He complained that ABI had committed a residual unfair labour practice as envisaged by item 2(1)(a) (now repealed) read with item 2(2)(a) of Schedule 7 of the *Labour Relations Act* 1995, and that it constituted unfair discrimination.

The court found that ABI's policy amounted to differential treatment of ex NAB employees but that it did not constitute discrimination in a pejorative sense because it made commercial sense and for operational reasons, it was not vindictive and unfair or inimical to the values of the society as expressed in the Constitution.

In determining whether there was unfair discrimination on arbitrary ground, the dispute has to be referred to CCMA for conciliation on failure to conciliate to the Labour Court. The court stated that unfair discrimination on arbitrary ground takes place when the discrimination is for no reason or is purposeless. Even if there is a reason, discrimination may be arbitrary if the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job seeker and is morally offensive.

The above cases indicate that certain aspects of equality have to be considered before it can be conclusively stated that a person has been differentiated unfairly. To address the question whether there has been any improvement recently in the position of women and to see if changes have been effected, it has to be gauged whether women are aware of the labour legislation pertaining to equity. In addition, to consider what action is taken when they are discriminated.

### **3.1.2 *Discrimination experienced by women in employment***

The Labour Relations Act, 1995 that deals with Residual Unfair Labour Practice definition item 2(1) of Schedule 7, from which paragraph (a) of the definition was repealed and replaced with a similar provision in the *Employment Equity Act* 55 of 1998, placed emphasis on the remedies available to women when unfairly discriminated against in the workplace, in the definition of unfair labour practice in section 186(2) which read:

- (1) *For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving*
  - (a) *the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;*
  - (b) *the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee.*
- (2) *For the purpose of subitem (1)(a)*
  - (a) *'employee' includes an applicant for employment;*
  - (b) *an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms; and*
  - (c) *any discrimination based on the inherent requirement of the particular job does not constitute unfair discrimination.*

This means that an employer is not allowed to discriminate against any women when applying for a job simply because she is a woman or black or practice a certain religion. To ensure enforcement of section 9 of the Constitution, and to eradicate unfair discrimination of women in the workplace, the *Employment Equity Act* has to be complied with. In this Act the prohibited grounds of discrimination in section 6(1) of EEA are

identical to those contained in section 9(3) of the Constitution, with the addition of family responsibility, HIV status and political opinion.

Women are victims of discrimination, mainly due to the consequences of apartheid, which left black people<sup>64</sup> with lack of skills, education and vocational training,<sup>65</sup> and the fact that collective agreements were concluded which in principle indicated arbitrary discrimination against female employees<sup>66</sup> resulted in the EEA in section 2, 5, 6 and PEPUDA<sup>67</sup> distinctly enacted to promote and achieve constitutional right to equality and the exercise of true democracy to prohibit unfair discrimination.

Section 2 reads:

*The purpose of this Act is to achieve equity in the workplace by:-*

- a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and*
- b) Implementing affirmative action measures to redress the disadvantages in employment experience by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.*

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64 The definition of black people in the EEA is said to be a generic term which means Africans, Coloureds and Indians.

65 Barker F. *The Labour Relations: in South African Labour Market* 53.

66 *Ntsangani v Golden Lay Farms Limited* (1992)13 ILJ 1199 LC where the Industrial Court upheld a collective agreement where the Union had authorised retrenchment of women employees. Also in *Collins v Volkskas Bank Westonia Division of ABSA* (1994)1 ILJ 4.2.2 the Industrial Court had been prepared to sanction a limitation on the right to maternity leave contained in a collective agreement on grounds that it was not so manifestly unfair as to justify the courts intervention. The ruling has been superceded by s 25 of BCEA 75 of 1997 establishing a right to maternity leave, which cannot be reduced by collective agreement. This is a bonus considering that collective agreements are binding, but once they become discriminatory, the courts can intervene.

67 Act 4 of 2000: Promotion of Equality and Prevention of unfair discrimination in s 6.



This section indicates the employment relationship between designated employer and designated employees as it compels the designated employer to:

- eliminate and identify employment barriers;
- grant equal development opportunities to all employees;
- ensuring that all employees are treated with respect;
- ensuring equal representation of all people at the various levels; and
- serve the positions held by people belonging to designated groups.

*In addition section 5 of the same Act, prohibits unfair discrimination whereby every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment Policy or Practise.*

The Act defines the phrase any employment Policy or Practice as including, but not limited to:

- Recruitment procedures, advertising and selection criteria;
- appointments and the appointment process;
- job classification and grading;
- remuneration, employment benefits and terms and conditions of employment;
- job assignments;
- the working environment and facilities;
- training and development;
- performance evaluation systems;
- promotions;
- transfer and demotions; and
- dismissal (though the *Employment Equity Act* 1998 includes dismissals), discriminatory dismissals still fall under section 187 of the *Labour Relations Act* 1995 (LRA) and have to be processed in terms of the dispute resolution procedures applicable to unfair dismissals.

While section 6(2) states that it is not unfair discrimination to

- (a) *take affirmative action measure consistent with the purpose of this Act; or*
- (b) *distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*

Discrimination in Employment is prohibited and when it is alleged, it must be established whether it took place. The onus rests with the employee. In *Transport and General Worker Union & Another v Bayete Security Holdings*<sup>68</sup>, it was said the applicant must in the first instance prove that he has been the victim of discrimination. Only once this is proven, does the onus shift to the respondent to prove that the discrimination did not amount to unfair discrimination.<sup>69</sup> 'A bald averment' that there has been discrimination is not sufficient to shift the onus. The Labour Relations Act, 1995 and EEA provide specific remedies for discrimination in employment.

- a dismissal is automatically unfair if the reason is based on unfair discrimination,<sup>70</sup>
- Affirmative Action does not constitute unfair discrimination and to distinguish, exclude or prefer any person based on the inherent requirement of a job.

Since South Africa is not the only country experiencing discriminatory policies, discrimination against women has been a global affair. In UK two Directives, which prohibit discrimination on the ground of race and ethnic origin were established i.e. Race Directive<sup>71</sup> and Employment Directive<sup>72</sup>, which sets out an anti-discrimination principle of equal treatment. In addition, the Sex Discrimination Act<sup>73</sup> which came into operation in the UK. The Equal

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68 (1999) 20 ILJ 1117 (LC).

69 S 11 of EEA in respect of Burden of Proof.

70 S 187(1)(4) of Labour Relations Act, 1995.

71 Council Directive 2000/43.

72 Council Directive 2000/78: vide Harvey Division L "Equal opportunities" 2002.

73 Sex Discrimination is defined as an unlawful treatment of anyone less favourably than a person of the opposite sex is or would be treated in the same circumstances. It came into force on 29th December 1975: Grogan op cit 185, that sex and *Race Discrimination Act* defines sex discrimination as less favourable treatment of a women

Opportunities Commission was established to oversee the operation of the *Sex Discrimination Act* and the *Equal Pay Act*.

The Constitution and *Employment Equity Act* outlaws direct or indirect discrimination, when a person receives less favourable treatment than another because of one of the listed grounds in section 9(3) of Constitution and section 6 of EEA that will be regarded as direct discrimination e.g where an employer treats a woman less favourably than a man in the same position would have been treated, simply because the employee is a woman.

In *Association of Professional Teachers & Another v Minister of Education & Others*<sup>74</sup> and *George v Western Cape Education Department and Another*.<sup>75</sup> In both cases the clear finding was that the housing subsidy policy directly discriminated against a class of women on the basis of their sex, coupled with marital status. In both cases the Public Service Staff Code stipulated that a housing subsidy could be granted to legally married woman only if her husband was permanently medically unfit. The court held that the requirement was discriminatory and constituted unfair labour practice.

Indirect discrimination occurs where the employer applies a rule that looks on the face of it '*neutral*', to all employees, but the application of that rule has a disproportionate effect on a certain group of employees who are disadvantaged, for example in the US case of *Griggs v Duke Power CO*<sup>76</sup>, where the US Supreme Court held that a requirement relating to a high school certificate and passing scores on general aptitude tests constituted indirect discrimination.

In this case black employees challenged the company's hiring and promotion requirements, which required a high school diploma. The requirement indirectly had the effect of keeping black people out of the job since disproportionately few were able to meet this requirement.

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by a person than he or she would accord a man, and race discrimination as less favourable treatment by a person on the grounds of race than he or she accord other persons. Andre van Niekerk '*Equality Rights and new Act*' in Cheadle et al current Labour Law (1995)77.

74 (1995) 16 ILJ 1048 IC, also 1995(9) BCLR 29 IC.

75 (1995) 16 ILJ 1529 IC.

76 401 US 429 (1971).

When establishing whether indirect discrimination has taken place the employers motive is irrelevant and the employee need not prove that he has been prejudiced or suffered loss.<sup>77</sup>

In *Dothard v Rawlinson*<sup>78</sup> indirect discrimination was proven against women, where a requirement was made that prison guards be at least 5'2 which excluded approximately 33% of US women only a percentage of men and was not relevant (sufficiently) to the needs of the employer.

CCMA in South Africa held that an employer who required a standard 8 qualification for appointment indirectly discriminated against the applicant, because the requirement was not necessary<sup>79</sup> like in *Collins v Volkscas*<sup>80</sup> where the court rejected the argument by employer that her dismissal was for reasons of incapacity and did not amount to discrimination. In fact the court found that the dismissal was a form of indirect discrimination, since it constituted a labour practice, which was fair, inform but discriminatory in effect.

Employers in certain cases may indirectly discriminate by using language proficiency as well as other tests as selection criteria in order to select job applicants in accordance with the character of the workforce rather than test them for the needs of the job.<sup>81</sup> This results in a disproportionate impact on women. In *Bulka-Kaufhaus v Weber van Hans*,<sup>82</sup> the court held that an employer couldn't rely on merely convenience to discriminate, but on a real need.

The employer will have to show the objective grounds for discriminating between men and women and that such differentiation is accepted only if these grounds correspond to a real need on the part of the undertaking, and are

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77 Grogan J: Workplace law 7th ed quoting from Leonard Dingler's case that the court found the criterion of monthly paid status amounted to indirect discrimination on the grounds of race in that it had a disparate impact on black employees in the company.

78 433 US 321 (1977).

79 *Adriaanse v Swartklip Products* (1999) 6 BALR 649 CCMA.

80 (1994) 12 BLLR 73 IC.

81 The prohibitions stated in ss 7 & 8 of EEA, unless determined to be justifiable by the Labour Court in terms of s 50(4) of EEA or unless the test used has been scientifically shown to be valid and reliable, applied fairly to employees and not biased against any employee or group.

82 1986 IRLR 317.

appropriate with a view to achieving the objectives pursued and are necessary to that end.

Clearly, the above cases indicate how easily women can be discriminated against on unreasonable grounds. However, the Courts have played a pivotal role by interpreting the legislations and making an impact on the conduct of employers. An illustration was made when the courts interpreted and applied the concept of unfair discrimination under the unfair labour practice definition.

## **CHAPTER FOUR**

### **4.1 Elimination of Inequities in the workplace**

The implementation of affirmative action measures to advance designated groups will result in the eradication of unfair discrimination, unfair labour practices and achievement of Employment Equity.

It is important to begin by explaining the difference between employment equity and affirmative action. '*Employment Equity*' refers to the concept of fairness and '*equal opportunity*' for all employees and '*affirmative action*' on the other hand is a process that is aimed at advancing specific groups or designated groups of employees.

The employment equity does not only have an impact on organisations, it also has significance for economic development and growth. In addition, it has the potential to make a difference to individuals and to provide an opportunity for people to reach their potential.<sup>83</sup>

Employers should undertake procedures to ensure equal pay and benefits for equal work as proposed in the Green Paper on Employment and Occupational Equity.<sup>84</sup> The problem of pay inequity is further compounded by the fact that women and especially Africans are concentrated in occupations at the lower

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83 Contemporary Labour Relations: "Implementing the *Employment Equity Act* in South Africa".

84 Green Paper on Employment and Occupational Equity: Gazette 17303 of 1 July 1996.

end of the remuneration spectrum despite the fact that women constitute over a third of all employees, women's pay is lower than that of men.<sup>85</sup>

There is a need to ensure that EEA is enforced, which persuades employers and other stakeholders that it is in their own business interest to implement employment equity plans and to treat employees fairly irrespective of race, gender or disability,<sup>86</sup>

Clear regulatory standards, vigorous enforcement mechanisms must be objectively measurable for the purpose of narrowing wage differentials between jobs of equal value.<sup>87</sup> The principle of equal pay for work of equal value should apply.

The Code of Good Practice established in terms of section 54 of EEA must set out guidelines on how to deal with equal pay disputes. The employer to do an analysis in terms of section 19 of EEA of its practices, policies and procedures, and working environment to identify employment barriers, which adversely affect people from designated groups.

In South Africa, it has been recognised that benefit allocations based on distinctions between different categories of employees, though seemingly neutral, may in fact translate into distinctions based on race. This was illustrated in *Leonard Dingler Employee Representative Council v Leonard Dingler (PTY) Ltd*<sup>88</sup> where the employer differentiated between monthly paid and weekly paid employees to determine eligibility for membership of a staff benefit fund.

The court found the criterion used amounted to indirect discrimination on the grounds of race and that it had a disparate impact on the company's black employees.

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85 L Meintjies van der walt: Levelling the buying fields (1998) 19 ILJ 22 indicating the study done by O'Regan in 1994.

86 Bob Hepple: Equality laws and economic efficiency 1997 18 ILJ 598.

87 *Ibid.*

88 (1998) 19 ILJ 858 LC.

In *SACWU v Sentrachem Ltd and others*<sup>89</sup> the Industrial Court decision was taken on review and the Supreme Court affirmed prohibition of direct wage discrimination. It was held that wage discrimination based on race or any other differences between employees other than skills and experience is an unfair labour practice. "*Any practice in which a black person is paid a different wage from that of a white person doing the same jobs having the same length of service, qualifications and skills is a labour practice wage discrimination based on race and constitute an unfair labour practice*".

Arguments and debates about 'equal pay for equal work' have been held whereby issues like comparator, the basis of comparison, the meaning of 'equal pay' and justifiable grounds for pay disparity are to be examined.<sup>90</sup> This is for the purpose of ensuring that wage differentiation is eliminated and women receive equal pay for work of equal value.

In *Transport and General Workers Union & Another v Bayete Security Holdings*,<sup>91</sup> the Labour Court stated that a claim of unfair discrimination arises only when two or more similarly situated employees are treated differently. This different pay levels for different employees are not in themselves sufficient to prove discrimination. The court held that the applicant was obliged to establish that his claim was one of unfair discrimination and that he had been a victim of discrimination. Once that was proven the onus would then shift to the respondent to prove that discrimination was not unfair.

In *Louw v Golden Arrow Bus Service*<sup>92</sup> a different view was held. The court rejected the claim on facts, finding that Louw had failed to prove that the work currently being performed by him and his white colleagues was comparable. The judgement on item 2(1)(a) of Schedule 7 though repealed indicates that it is not enough for an employee who alleges wage discrimination to say I am white and I am paid less than X who is black.

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89 (1988) 9 ILJ 410 (IC).

90 Women & the Law in South Africa 163.

91 (1999) 4 BLLR 401 LC.

92 (2000) 71 ILJ 188 LC.

In *Ntai v SA Breweries*,<sup>93</sup> the court warned against the practice of simply alleging discrimination on “arbitrary” conduct by the employer, without specifying the grounds for that allegation. Pay differentiation must be based on proportionality. Women will benefit and that will eliminate women’s inequity.

When a women is dismissed because she is pregnant, the dismissal is automatically unfair in terms of section 187(1)(e) of the Labour Relations Act, 1995. The dismissal constitutes direct unfair discrimination on the ground of pregnancy, sex or gender and family responsibility, while in terms of section 187(1)(f) the dismissal is automatically unfair and an unfair labour practice in terms of item 2(1)(a) of Schedule 7 of *Labour Relations Act* (now repealed).

If the court finds that a dismissal is unfair, it may order reinstatement of employee, unless the employee does not wish to be reinstated or reemployed or that continued employment relationship would be intolerable. This will also assist women where they are unfairly dismissed or based on pregnancy.

In *Botha v SA Import Export International CC*<sup>94</sup> it was stated by Marcus AJ that “the social and legal recognition of the equal status of women in the workplace” clearly requires that women are not disadvantaged in their employment or employment prospects by virtue of their unique capacity to become pregnant.

From the protection afforded by item 2 of Schedule 7 of Labour Relations Act, an applicant for employment who could show that she was not appointed due to her pregnancy or intended pregnancy can claim a remedy for direct discrimination on the ground of sex or gender and family responsibility. This was illustrated in *Whitehead v Woolworth (PTY) Ltd*,<sup>95</sup> though it was appealed Mrs Whitehead alleged that her dismissal amounted to an automatically unfair dismissal or unfair labour practice. The employer unsuccessfully argued in the Labour Court that dismissal was justified and discrimination on the basis of an Inherent requirement of the job that the person be continually available at work for a period at least of twelve months.

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93 (2001) 22 ILJ 214 LC.

94 (1999) 20 ILJ 2580 LC at 21.

95 (1999)20 ILJ 2133 LC.



The court said:

*Getting a job done within a prescribed period could well be an Inherent requirement, but, to succeed on this ground, a party relying thereon must satisfy the court that time was of essence... what is crucial when one speaks of the Inherent job requirement, is that the requirement must be so inherent that if not met an applicant will simply not qualify for the post... the concept implies that the indispensable attribute must be job related.*

Zondo AJP and Willis JA, upheld the appeal.<sup>96</sup> Willis JA found that there was nothing arbitrary in the employers conduct, as he accepted that the employer needed continuity in the position for an uninterrupted period of 12 months. The employer took into account perfectly rational and commercially understandable considerations, and there was no bigotry or prejudice which item 2(1)(a) of Schedule 7 is designed to prevent.

Zondo AJP noted that employer discriminated against Mrs Whitehead but that there was no causal connection between her not being appointed and her pregnancy. According to Zondo there was no evidence that, if her pregnancy had not been taken into account, she and not the other candidate would have been appointed.

Conradie JA dissented: I support him on the basis that why did Mr Inskip appoint her in the first place even when there were other candidates but for the information of pregnancy. I am also of view that there was discrimination based on sex and pregnancy, section 6 of EEA was applied. Mrs Whitehead has been discriminated based on her pregnancy though the appeal was upheld.

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96 *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 57 LAC. Vide *Sheridan v The Original Mary-Anne's at the Colony (Pty) Ltd* (1999) 20 ILJ 2952 LC - where protection was given in terms of the Basic Conditions of Employment Act, 1997 in ss 25 & 26. *Mashava v Cuzen & Woods attorneys* (2000) 21 ILJ 402 LC; *Collins v Volkskas Bank (Westonaria Branch)* (1994) 12 BLLR 73 (IC). The court in this case noting that article 5(c) of ILO convention 158 states that an absence from work during maternity leave shall not constitute a valid reason for termination of employment.

The protection against dismissal based on pregnancy is supported by the fact that women play a unique social role, whereupon Sandra Fredman<sup>97</sup> says:

*The capacity to bear children is in many senses the most creative of all human potentialities. It is also a social necessity. Yet, far from being valued, women's unique reproductive function has generally been seen as a pretext for stigma and exclusion from public life. The reasons for this lie deep in the history of women's subordination to men.*

Another form of job security is provided for in the *Basic Conditions of Employment Act* where maternity leave is compulsory. The employer takes measures to guarantee women employees job on return from maternity leave. In the English case of *Brown v Stockton-on-Tees Borough Council*.<sup>98</sup> The House of Lords adopted the broader approach. The law is seen as a part of social legislation passed for specific protection of women and to put them on equal footing with men. *Although it is often at considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, that is the price that has to be paid as part of the social and legal recognition of the equal status of women in the work place.*

In the light of the above information, the established legislation indicates that women's hurdles will be overcome once the Acts are complied with.

#### **4.2 Justification for discrimination or distinction**

The two justification grounds for discrimination by employers are provided for in section 6(2) of the *Employment Equity Act* that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act or to distinguish, exclude or prefer any person based on an inherent requirement of

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97 S Fredman: *Women and the law* 1997 at 179, Quoted by Marcus AJ in *Botha v Import Export International CC*. vide *Carol Louis Webb v EMO Air Cargo UK Ltd* (1993) 1 WLR 49.

98 1989 AC 20, (1998) 2 ALL ER 129 HC.

the job. However, the two measures may not be the only reasons advanced to justify discrimination.

There is a need now to consider the purpose and goal of affirmative action and the application of section 9(2) of the constitution, which allows for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

### **4.3 The goals of affirmative action**

The goal of affirmative action in terms of section 2(b) is

- to ensure the equitable representation of certain groups in all occupational categories and levels in the workplace. This is in support of the ratified article 2 of conversion 111 of 1958, which obliges member states to pursue policies that eliminate discrimination and encourage equal opportunities in the workplace. Also Article 1(2) which allows for discrimination on the basis of the inherent requirement of the job;
- to achieve equality which includes the full and equal enjoyment of all rights and freedoms;
- a temporary measure to achieve equality;
- beneficiaries of affirmative measures are as envisaged in section 15 of the Employment Equity Act, 1998;
- that the affirmative measure must be proportionate and rational.

Similarly in section 2(2)(b) of Schedule 7 of Labour Relations Act, 1995 which states that::

*... an employer is not prevented from adopting or implementing employment policies and practices that are 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.*<sup>99</sup>

According to Rycroft, the provisions add to the extent and complexity of the juridification of industrial relations in South Africa. Juridification refers to the use of the law by the state to 'steer' social and economic life in a particular direction by limiting the autonomy of individuals or groups to determine their own affairs.<sup>100</sup> This is unavoidable as women through the law are striving to achieve equality and eliminate inequities they are faced with.

However, affirmative action policy will ordinarily to other people constitute discrimination, it is saved from being unfair discrimination because of the constitutional and legislative mandate.

Various people had a fear that affirmative action will be seen as discrimination in reverse where certain people will be preferred over others especially (white) males as affirmative action was designed to advance designated groups meaning black people, women and people with disabilities.

Affirmative action is justified by its consequences, because a measure used to favour those who were previously disadvantaged at the expense of those who were relatively well off will not be discriminatory as the consequence of such measure are at the end to have a more equal society. Meaning that the measure chosen must be intended to achieve these desirable consequences.<sup>101</sup>

In *Public Servants' Association of South Africa v Minister of Justice*.<sup>102</sup> The PSA instituted an action against the Minister of Justice for failing to consider Mr Swanepoel and his colleagues for a position of Deputy State Attorney. The only persons considered were three women who were less qualified than Mr

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99 Rycroft A: Obstacles to Employment Equity? The Role of judges and Arbitrators in the interpretation and Implementation of Affirmative Action Policies (1999) 20 ILJ 1411.

100 Ibid.

101 De Waal et al: Bill of Rights handbook.

102 1997(5) BLLR 577 T: vide *Public Service Association v Minister of Correctional Services* where affirmative action and the 21% appointment of women target to recruit and employ women although the 21% sounded discriminatory the fact was that prison population was male dominated and the agreement had not been derived from a haphazard or arbitrary manner.

Swanepoel and had less experience. The respondent raised a defence that Public Service was permitted to be restructured in such a way that it was broadly representative of the South African Community and that affirmative action was a desirable objective.

Discrimination was established in terms of race and gender, and it would be sufficient to justify a claim of unfair discrimination in terms of the interim constitution unless proven otherwise. The court held, that, under the interim constitution a rational connection was lacking when affirmative action resulted in the appointment of applicants whose manifest unsuitability would compromise another Constitutional imperative that rested on the Public Service to promote efficiency.<sup>103</sup>

In *Stoman v Minister of Safety & Security & others*,<sup>104</sup> the High Court held that the Constitution promotes, not merely formal equality, but substantive equality. This includes affirmative action measures sanctioned by legislation such as EEA and PEPUDA. The only issue is whether the particular affirmative action was indeed to protect and advance persons or categories of persons who were previously disadvantaged, there must be a rational connection between affirmative measures and the aims which they are designed to achieve.<sup>105</sup>

Debates about the rational connection continues in relation to the question of efficiency, which will be compromised should an unsuitable person be appointed.

The question of how far the skills, experience or qualification gap must be extended before the appointment of a less qualified or experienced black candidate becomes irrational. Blacks are appointed for their "suitability". In *Stoman's* case, it was said the gap might be considerable, on the argument that affirmative action can only be fairly applied when candidates have broadly the same qualifications.

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103 Grogan J: Workplace law 7th ed Juta 252.  
104 (2002) 23 ILJ 1020 T.  
105 Supra n102.

The court however did not go so far as to hold that differences in qualifications are never relevant when determining a racially determined choice of candidate is fair. The court merely recognised that an affirmative action appointment is not unfair merely because the candidate is formally less qualified than candidates from the previously advantaged group are.<sup>106</sup>

The argument about employability will diminish once section 15 of EEA is applied. Only those who are suitably qualified from designated groups and who are equitably represented make the grade.

In *Public Service Association v Minister of Correctional Services*,<sup>107</sup> the court noted that affirmative action programmes involved an area where courts should be reluctant to interfere and that, provided that the policy was lawful, it was not for the courts to second guess the judgements of those who formulated the policy, the application was dismissed.

In *George v Liberty Life Association of Africa Ltd*,<sup>108</sup> the Court stated that it is not sufficient for an employer to show that the beneficiary of an affirmative action programme merely happens to be a member of a group that has been discriminated against in the past, or the employer to prove that the successful applicant was personally disadvantaged. The industrial court insisted that the applicant must have been disadvantaged because he belongs to a group who had been educated in a deprived education system. Though in terms of the EEA it is not necessary as indicated in Stoman's case that the aim is not to reward an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAP as an important component of South African Society.

In a case of promotions in *MWU obo van Coller v Eskom*<sup>109</sup> a white woman was overlooked for promotion in favour of a coloured woman' although she had been recommended as the top candidate, the arbitrator held that it is not enough for

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106      Ibid.

107      Labour Court decision in fn 87.

108      (1996) 17 ILJ 571 IC.

109      (1999) 9 BLLR 1089 (IMSSA).

an employer to rely upon a generalised intention to advance or protect persons or groups or categories of persons. The employer must rely on standards that have been developed for that purpose.<sup>110</sup> Efficiency must not be compromised.

For affirmative action to be effective and the employer using it as a defence, there must have been a policy in place, as indicated in *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*<sup>111</sup> and *Mc Inners v Technikon*.<sup>112</sup>

In recognition of affirmative action measures and who are the beneficiaries of affirmative action. Sections 4(2) and 15(1) of the EEA places a duty on the designated employer (employers with 50 or more employees) to implement affirmative action measures for people from designated groups to achieve employment equity.

Affirmative action measures are defined as measures designed to ensure that "suitably qualified" people from designated groups have equal opportunities and are equitably represented in all occupational categories and levels in employment.

Section 20(3) of EEA states that a person may be suitably qualified for a job as a result of "any one of or any combination of the following criteria":

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

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110 S 20(3) & (4) of EEA, 1998.

111 (2000) 21 ILJ 1119 LC.

112 (2000) 21 ILJ 1138 CC - In this case the court went further to indicate that the Technikon had not only ignored the requirements of its own policy by disregarding the respective merits of the candidate but that it had decided to pay the successful candidate a higher salary than his Head of Department: *Department of Correctional Services v van Vuuren* (1999)20 ILJ 2297 LAC, the Industrial Court found that the Commissioner had committed an unfair labour practice. The decision was appealed and the Labour Appeal Court found that the Commission was empowered by statute to make appointments. The appeal was upheld.

In terms of section 20(3) this indicates that a designated person(s) is selected as being the "right person for the job" and the employer may in terms of section 20(4) review all factors listed in subsection 20(3), however the employer may not discriminate a person on the basis that she lacks experience. *Harmse v City of Cape Town* the applicant alleged that he had not been shortlisted because he was black, more shortlisted were white. Consideration should be to the fact that the person can do the job. Reasonable accommodation must be provided as in terms of section 15(2)(b) & (c).

Affirmative action measures are said to be adopted in terms of an employment equity plan and that they should in terms of section 6(2) of EEA be consistent with the purpose of the Act. This was illustrated in *Durban Metropolitan Council and SAMCRU obo Lootzy* where the arbitrator approved the preference of an African candidate over Indian and Coloured candidates who had been rated more highly in the selection procedure in the interest of redressing the under representation of African employees in the department concerned.

In *Abbott v Bargaining Council for Motor Industry (Western Cape)*<sup>113</sup> that affirmative action in this sense is a 'shield' for the employer implementing it rather than a 'sword' for job applicants. The measures are designed to achieve, adequate protection and advancement disadvantage by unfair discrimination. All this are to be based on proportionate and rational manner.

In *Coetzer & others v Minister of Safety and Security & another*<sup>114</sup> a claim of unfair discrimination was raised that by not being promoted to vacancies and reserving 10% of SAPS' posts for members of a designated groups was unfair and amounts to a quota.

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113 (1999)8 LC vide *Harmse v City of Cape Town* (2003) 6 BLLR 557 LC - the Court held that affirmative action is not only a defence to a claim of unfair discrimination failure by an employer to take active steps to remove discriminatory barriers may also in certain circumstances provide a basis for an action based on unfair discrimination. This is a case where a person was not shortlisted for any of the 3 posts he applied for, and that he was suitably qualified and that the respondent had failed to comply with the obligations to review all factors relating to his qualifications and that the respondent had unfairly discriminated against him on the basis of his lack of experience.

114 (2003) 2 BLLR 173 LC.



The goals of affirmative action are to measure the demographics, nationally and regionally of the economically active population, the number of those who are suitably qualified. Consideration of present and planned vacancies, removal of all barriers, which affect persons from the designated groups. Once this is achieved, there will not be any need for affirmative action.

The court noted in Coetzer's case the SAPS employment equity plan and dismissed the applicants' contention that the numerical target constituted a 'quota'. No applications were received for designated posts and to deny the non-designated group promotion was irrational and unfair as the court found that there was no specific affirmative action plan and the decision not to fill in post was based on the Commissioner's desire to promote representatively in the SAP. Thus, the affirmative action measures were insufficient to ensure that posts were filled. The Court ordered respondent to promote the applicants.

By implementing affirmative action measures, women will be protected and their interest in employment promoted.

#### **4.4 Inherent requirement of the job**

The defence of inherent requirement of a job by the employer where a claim of unfair discrimination was made shifts the onus of proof to the employer, as he has to prove that certain characteristics are indeed inherent requirements of a job.

In *MST Wilmot v Foschini Ltd*,<sup>115</sup> the applicant was a casual employee and promised a permanent post in the Donna Claire Division Group, but had been refused the position because of her size. The employer admitted that it discriminated against applicants who did not fit the profile of a 'fuller figure' as the staff were meant to promote the garments they sold by wearing them. The job requirement included the need to wear and promote garments and on that basis, the discrimination was fair.

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115 André van Niekerk: Employment Equity: current Labour Law 1999.

In USA law race can never be a *bona fide* requirement of the job. The *bona fide* occupational qualification or BFOQ apply to qualifications that affect an employees' ability to do a job and only essential job duties.<sup>116</sup> In *Diaz v Pan American World Airways Inc.*<sup>117</sup> An employer employed only female flight attendants and attempted to justify this on the basis that men lacked the compassion necessary to calm nervous or timid passengers; this was found to be discriminatory, not an inherent requirement of a job.

The court held that discrimination based on sex would only be valid when the essence of the business operation would be undermined by not hiring members of one sex exclusively.

The defence raised in *Whitehead v Woolworths (PTY) Ltd* that it was an inherent requirement of the job that the applicant should be able to perform it for a minimum of twelve months was rejected, *inter alia* because the applicant was subsequently offered a five month contract. Also a requirement of three years experience was found not to be essential to the post of Dean and that the advertisement containing the requirement was therefore unfair.<sup>118</sup>

The defence has to be construed restrictively as certain situations may be a matter of preference and not discrimination to request a Chinese to work as a chef in a Chinese Restaurant. The English criteria of authenticity applies where possession by the employee of some inherent attribute is an essential characteristic of the role she or he is to perform, as '*authenticity*' is defined in *Sex Discrimination Act* when judging the validity of discrimination.

Where an employer refuses to employ a blind employee as an airline pilot, the action may be justified but may require accommodating employee in another job. Principle of reasonable accommodation as contemplated in section 15(2)(b).

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116 Basson et al: Essential Labour Law: Individual Labour Law at 310.

117 442 F2D 1273 (9th CIR)(1981).

118 (1998) 7 CCMA 6.14.1 (Du Toit et al) comprehensive guide 462.

## CHAPTER FIVE

### Conclusion

The Constitution created a framework within which institutions are to operate and the national machinery to promote the advancement of women and the removal of the barriers to women's upward mobility, and the facilitation of gender equality. South Africa ratified certain international conventions e.g. the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW) and the Beijing Platform for Action, Beijing +5.

The Constitution provides that no state may unfairly discriminate directly or indirectly against anyone on the grounds including sex and gender, there is also provision for redress and future equality in the *Employment Equity Act*, the *Promotion of Equality and Prevention of Unfair Discrimination Act*, *Basic Conditions of Employment Act*, the *Labour Relations Act* and *Protected Disclosure Act*, *Maintenance and Domestic Violence Act*. Despite all these, there are still barriers to women's upward mobility. Women are still in lower positions and low-income bracket.

The national machinery established the Office of Status of Women, Commission on Gender Equality, Human Rights Commission and Public Protector to ensure that women's rights are protected and that they enjoy equal benefits of the law and freedoms.

Gender inequality can only be removed if the "glass ceiling" is removed and women are equally represented in the occupational category and they educate and train themselves to have effective performance in the work environment in order to have equal participation in decision-making and to become more conscious of their rights.

There must also be action plans to ensure removal of structural and behavioural patterns that are exhibited in the workplace and to have enforcement and monitoring mechanisms and time frames within which compliance is expected. As regards, managerial positions women in South Africa has reached a milestone. Their percentage in senior positions is increasing.

The office of status of women in the Presidents Office to hold workshops, road shows and create investigative measures e.g. Inspectors to visit offices to enquire if gender desks are established and how they operate.

As stated previously that the monitoring mechanisms are to question the recruitment policies and practices. The support given to NGO's which empower women and deals with their daily issues must be visible – media to play a pivotal role in acknowledging women who are bringing transformation.

Women paid according to the principle of equal work for work of equal value and the department of labour to continue its awareness campaign about the importance of Employment Equity plans. The performance management systems put in place to ensure that gender issues are addressed. The office of Commission on Gender to make their reports public.

The legislative framework endeavours to assist the cause of women and eliminate inequalities in the workplace.

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