

**UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**AN EVALUATION OF THE EFFECTIVENESS OF THE APPLICATION OF  
SECTION 42 OF THE EMPLOYMENT EQUITY ACT 55 OF 1998**

**By**

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for the degree of

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## DECLARATION

I, LENNIT HENDRY MAX, declare that *an evaluation of the effectiveness of the application of section 42 of the Employment Equity Act 55 of 1998* is my own work. It has never been submitted before for any degree or examination in any other university. All the sources that I have used or quoted have been indicated and acknowledged as complete references.

Signed .....

Date: 12 November 2012

Student Number: 3110656



## **KEYWORDS**

Affirmative action

Apartheid

Constitution

Designated

Differentiation

Dignity

Disadvantaged

Discrimination

Equality

Formal

Substantive



## **DEDICATION**

This work is dedicated to my late parents, Jan Max (father), Lettie Max (mother), my wife, Farouz Max and my son, Lennit Hendry Max (Jnr).

## **ACKNOWLEDGEMENTS**

I acknowledge with great thanks and gratitude the assistance of the following persons:  
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## ABBREVIATIONS

ANC	-	African National Congress
BBBEE	-	Broad Based Black Economical Empowerment
CC	-	Constitutional Court
CEE	-	Commission for Employment Equity
EEA	-	Employment Equity Act
EEC	-	Employment Equity Commission
EO	-	Executive Order
GN	-	Government Notice
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ILO	-	International Labour Organization
LAC	-	Labour Appeal Court
LRA	-	Labour Relations Act
OFCCP	-	Office of Contract Compliance Programs
PAJA	-	Promotion of Administrative Justice Act
PEPUDA	-	Promotion of Equality and Prevention of Unfair Discrimination Act
UN	-	United Nations
US	-	United States



## **ABSTRACT**

This paper evaluates s 42 of the South African Employment Equity Act (EEA) with specific focus on the application of the demographic profile of the national and regional economically active population by designated employers. The comparative analysis considers how the law of affirmative action in the United States of America and in Namibia, international conventions and the International Labour Organization (ILO) in relation to South Africa's Constitution and the EEA promote affirmative action. While international law holds that affirmative action measures should be of a temporary nature with an individualistic focus on formal equity, the EEA granted affirmative action measures which are permanent, group based and substantive in nature.

Given South Africa's discriminatory past, it became an accepted principle that affirmative action needs to be implemented to redress the imbalances caused by apartheid. In broad terms, the EEA provides for the advantage of persons or certain categories of persons who were disadvantaged by unfair discrimination. As a result the EEA focuses on race, sex and people with disabilities to determine those who are to be the beneficiaries of affirmative action.

International Law also embraces the notion of affirmative action and place a duty on all member states to act pro-actively to correct the effects of unfair discrimination. The mini-thesis also evaluates the powers of the Director-General of Labour with specific focus on the enforcement of measures and how it relates to the Promotion of Administrative Justice Act (PAJA) in compliance with the provisions of the EEA.

It is concluded that s 42 of the EEA (with the exception of s 42(a)(i)) provides sufficient measures to redress the inequalities of the past by providing equal opportunities for suitably qualified people of the designated groups. That the Constitution and the EEA does not provide for differentiation amongst "Black people" (African, Coloureds and Indians). That the application of both the national and regional demographics are compulsory in formulating an equity plan, that the one cannot be ignored in favour of the other, and that the Director-General of Labour is sufficiently empowered to ensure compliance with the provisions of the EEA.

# CHAPTER 1

## INTRODUCTION

### 1.1 Background to the study

The Preamble to the South African Constitution recognises the injustices of South Africa's past.<sup>1</sup> The differentiation made between race groups was central to the divisions which existed and to a large extent still exist in South Africa, and is furthermore a source of grave assaults on the dignity of its people, in particular black people.<sup>2</sup>

Mahomed J commented as follows: *'The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone.'*<sup>3</sup> This discrimination has, among other things, resulted in the fact that those who were not white were traditionally employed in inferior positions.<sup>4</sup> In South Africa this differentiation was prevalent in all spheres of society, *'it determined people's voting rights, where they could reside, where they could own property, their social status, the jobs for which they could apply, the amount of their pension and the quality of their children's education'*.<sup>5</sup> The aforementioned discrimination had the effect that non-whites were disadvantaged at all levels of society. Hence affirmative action measures were designed to eradicate these iniquitous practices.

The concept of affirmative action has its origin in the United States of America where it resulted from various forms of mass action by the Civil Rights Movement against racial inequalities during the 1950's and 1960's.<sup>6</sup> Namibia also perceived affirmative action as a necessary tool to bring about change in a previous discriminatory society created by the former South African Government.<sup>7</sup> During the transition period from apartheid to South Africa's new democracy, political leaders negotiated the interim Constitution<sup>8</sup> followed by the final Constitution. The interim as well as the final Constitutions were written with equality at the centre.<sup>9</sup> The Constitution is the supreme law of South Africa and any law inconsistent with it is invalid.

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>2</sup> Ngcukaitobi T 'Adjudicating Transformation in the Labour Courts – An edifice on the rise?' (2007) 28 *ILJ* 1.

<sup>3</sup> *S v Makwanyane & Another* (1995) 3 SA 262 (CC).

<sup>4</sup> Valentine S 'An Appalling 'science'' *Sunday Times* 23 September 2007 6 *'...They said the regulations laid down that only Europeans could be on the artisan pay schedule. They said I could resign or to be reduced to a Non – European grade.'* See also Wing A 'The South African Constitution as a Role Model for the United States' 24 ed (2008) 74. *'The system of apartheid systemically discriminated against black people in all aspects of social life. Senior jobs and access to established schools and Universities were denied to them.'*

<sup>5</sup> Valentine S 'An Appalling 'science'' *Sunday Times* 23 September 2007 6.

<sup>6</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 9.

<sup>7</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 16.

<sup>8</sup> Act 127 of 1993 (hereafter the interim Constitution).

<sup>9</sup> Gaibie S 'Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 years on' (2011) 1 *ILJ* 19. See also Ngcukaitobi T 'Adjudicating Transformation in the Labour Courts – An edifice on the rise?' (2007) 28 *ILJ* 3.

Section 9 of the Bill of Rights<sup>10</sup> deals with the prohibition of unfair discrimination. It follows that at the heart of this prohibition lies the recognition that the Constitution's sole objective is to ensure that all people are equal regardless of conscience, religion, thought, belief and political opinion.<sup>11</sup> It implies that the aim is to empower the disadvantaged groups to compete equally in the workplace with those who were advantaged during apartheid. In terms of s 9(4), national legislation must be enacted to prevent or prohibit unfair discrimination. Hence the constitutional jurisprudence emphasizes the fact that equality is only possible if equality is given a substantive rather than a formal meaning.<sup>12</sup> A **formal** approach to equality will only ensure that people are being treated the same but imbalances will still exist.<sup>13</sup>

Therefore, **substantive** equality will ensure that the systemic inequality which exists on the basis of race, gender and other grounds is addressed and eradicated.<sup>14</sup> In its attempt to address these inequalities in the workplace, government promulgated the Employment Equity Act 55 of 1998 (EEA). Section 2 defines the purpose of the EEA and state:

*'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 experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.'*

Section 9(2) of the Constitution sanctions measures, such as affirmative action, as a form of 'fair discrimination' to ensure that processes are developed to address the imbalances of the past. Accordingly, the EEA recognizes that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income in the national labour market, and that these disparities caused severe disadvantages to certain groups and need to be corrected.<sup>15</sup> Ngobo J concluded in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* as follows:

*'Our constitution recognises that decades of systemic racial discrimination entrenched by apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.'*<sup>16</sup>

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<sup>10</sup> Chapter 2 of the Constitution.

<sup>11</sup> Section 15(1) of the Constitution.

<sup>12</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 ILJ 8131.

<sup>13</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 ILJ 8131.

<sup>14</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 ILJ 8131.

<sup>15</sup> Preamble to the Employment Equity Act 55 of 1998 (EEA).

<sup>16</sup> 2004 (4) SA 490 (CC) 74.

Dupper also has the following view: '*Substantive equality takes the circumstances of people into account and requires the law to ensure equality of outcome.*'<sup>17</sup>

## 1.2 Rationale and Significance of the study

The EEA places an obligation on designated employers to ensure compliance with the provisions of the Act. In terms of s 43, the Director-General of Labour has the power to conduct a review in order to assess an employer's compliance with s 42 of the Act, and may refer the employer's non-compliance to the Labour Court. Section 42 of the EEA laid down the test for assessment of compliance which the Director-General should use.

The current provision states:

'In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in s 15, take into account all of the following:

- (a) *The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-*
  - (i) *demographic profile of the **national and regional** economically active population;*
  - (ii) ***pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;***
  - (iii) *economic and financial factors relevant to the sector in which the employer operates;*
  - (iv) *present and anticipated economic and financial circumstances of the employer; and*
  - (v) *the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;*
- (b) *progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;*
- (c) *reasonable efforts made by a designated employer to implement its employment equity plan;*
- (d) *the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and*
- (e) *any other prescribed factor'. (own emphasis)*

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<sup>17</sup>Dupper O '*Affirmative Action and Substantive Equality: The South African Experience*' 14 ed (2002) SA Merc LJ 275.

Section 42 of the EEA as indicated above deals with compliance with the provisions of the Act to ensure that the inequalities of the past are being eliminated. Section 43 of the EEA, as indicated before, empowers the Director-General to conduct a review to ensure compliance with the Act by designated employers and it states:

- ‘(1) *The Director-General may conduct a review to determine whether an employer is complying with this Act.*
- (2) *In order to conduct the review the Director-General may –*
- (a) *request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;*
  - (b) *request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer’s compliance with this Act;*
  - (c) *request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act; or*
  - (d) *request a meeting with any –*
    - (i) *employee or trade union consulted in terms of section 16;*
    - (ii) *workplace forum; or*
    - (iii) *other person who may have information relevant to the review.’*

It can be presumed that the Director-General, as a public figure and before applying s 45 of the EEA, has to comply with s 2(b) of The Promotion of Administrative Justice Act (PAJA).<sup>18</sup> Recently, amendments to, *inter alia*, s 42 of the EEA have been proposed.<sup>19</sup> These proposed amendments to s 42, it is submitted, imply (directly or indirectly) that the current s 42 does not give sufficient effect to the objectives of affirmative action.

These intended amendments seek to remove the reference to “national and regional” demographics in s 42(a)(i), while completely removing ss 42(a)(ii) to 42(a)(v). However, these proposed amendments have met with some controversy in light of the reactions to comments made by the former Director-General, Jimmy Manyi.<sup>20</sup> As a result of public outcry it is highly likely that the government will not pursue implementing these proposals. The International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention) provides for ‘proactive measures’ against racism.<sup>21</sup>

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<sup>18</sup> Act No. 3 of 2000 Subsection 2(b) states: ‘*In order to give effect to the right to procedurally fair administrative action, an administrator, subjected to subsection (4), must give a person referred to in subsection (1)- (a) adequate notice of the nature and purpose of the proposed administrative action; (b) a action; (d) adequate notice of any right of review or internal appeal, where applicable; and (e) adequate notice of the right to request reasons in terms of section 5.*’

<sup>19</sup> Employment Equity Bill (B -2010).

<sup>20</sup> Hlongwane S (Analysis): ‘Jimmy Manyi finds out just how tough it is to be between Manuel and a hard place’ *The Daily Maverick* 2 March 2011 5 as well as Graham S ‘Manyi Coloured remarks cast doubt on job suitability’ *The Citizen* 2 March 2011 6.

<sup>21</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organisation, 1958.*

This positive notion implies that the State must not wait until somebody complains about discrimination.<sup>22</sup> According to the South African Human Rights Commission (SAHRC), the South African government report on compliance with the Convention indicates that a framework is in place to eliminate discrimination, and addresses the South African concept of unfair discrimination, the approach of the courts, and protection of non-citizens from racial discrimination, and special measures to advance certain categories of persons.<sup>23</sup>

In this regard, s 9 of the Constitution and Chapter II of the EEA are in place to ensure compliance therewith. In addition to the aforesaid, the Constitutional Court (CC) (as the final arbitrator) was created to enforce the relevant provisions of the Constitution.<sup>24</sup> It should also be borne in mind that any decision made in terms of the relevant EEA sections should also be in line with the principles and provisions of the PAJA.

The court in *Dudley v City of Cape Town & Another*,<sup>25</sup> concluded that Chapter V of the EEA deals with the enforcement of the provisions stipulated in Chapter III (affirmative action) and that Chapter V is the most suitable remedy to ensure compliance therewith. The effect of the court decision, it is submitted, is that the first step to ensure compliance with Chapter III is to invoke the remedies contained in Chapter V.

Ngcukaitobi<sup>26</sup> argues that s 15 of the EEA demands affirmative action measures to be designed to ensure that 'suitably qualified' people from designated groups (Africans, coloureds, Indians, women and people with disabilities) have 'equal employment' opportunities and are 'equitably represented' in 'all' occupational categories and levels in the workplace of a designated employer. Cooper<sup>27</sup> is of the view that an employee would suffer indirect discrimination when criteria, conditions or policies are applied which appear to be neutral but which adversely affect a disproportionate number of a certain group.

The assessment of s 42 against these arguments is critical to ensure compliance with the Constitution and the EEA, and whether the latter addresses equitable representation of disadvantaged people in the workplace. It is submitted that an evaluation of the current s 42 and the powers of the Director-General of Labour is essential to answer the question as to whether the EEA addresses the objectives of affirmative action adequately or not. Application and enforcement of s 42 should accordingly be measured in light of South Africa's obligations in terms of the Constitution, the goals of the EEA, as well as against the definitions of discrimination in terms of the ILO (International Labour Organization) Convention 111 of 1958.

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<sup>22</sup> Wing A 'The South African Constitution as a Role Model for the United States' 24 ed (2008) 74.

<sup>23</sup> South African Human Rights Commission 'Shadow Report on the South Africa's compliance with the Provisions of the International Convention Against All Forms of Racial Discrimination' (2006) 15.

<sup>24</sup> Wing A 'The South African Constitution as a Role Model for the United States' 24 ed (2008) 74.

<sup>25</sup> (2008) 12 *BLLR* 1155 (LAC).

<sup>26</sup> Ngcukaitobi T 'Adjudicating Transformation in the Labour Courts - An Edifice on the Rice?' (2007) 28 *ILJ* 1436.

<sup>27</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813.

For the purpose of legal comparison, international and foreign law on affirmative action and policy will also be analysed in order to gain a global perspective. In this instance similarities as well as differences exist between South Africa, the United States and Namibia given their historical backgrounds.<sup>28</sup> As Wing states: “the equity clause of the South African Constitution is very detailed in comparison to the US Fourteenth Amendment, encompassing equal protection, anti-discrimination, affirmative action, and private action notions.”<sup>29</sup>

The South African Constitution also goes beyond the individualistic approach of the United States (US).<sup>30</sup> Strong parallels exist between the South African EEA and the Namibian Affirmative Action (Employment) Act 29 of 1998. The Constitution requires that, when interpreting the Bill of Rights, a court must consider international law and may consider foreign law.<sup>31</sup> Therefore, it is imperative to evaluate and compare foreign law and the enforcement mechanisms which the US and Namibia use to ensure compliance with their affirmative action and anti-discrimination laws as well as their compliance with the United Nations (UN) and ILO Conventions.

### 1.3 Aims of the research

The principal objective of this research will be to evaluate if the application of s 42 of the EEA, the Constitution, and the powers vested in the Director-General of Labour are sufficient to ensure adequate representation in the workplace. The objective of affirmative action is to ensure equitable representation of disadvantaged groups in the workplace. Section 42 determines that the demographic profile of the national and regional economically active population should be taken into account in addressing representation.

This research will evaluate the operation of s 42, and the powers of the Director-General of Labour against the provisions of the Constitution, relevant statutes, South Africa’s international legal obligations as well as case law to determine whether these laws contributed sufficiently to the representation of the different designated groupings in the workplace.

### 1.4 Research question

Whether the application of s 42 of the EEA, the Constitution, and the powers vested in the Director-General of Labour is sufficient to ensure adequate representation in the workplace.

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<sup>28</sup> Van Rooyen J *Implementing Affirmative Action in Namibia* 3 ed (2000) 10.

<sup>29</sup> Wing A *The South African Constitution as a Role Model for the United States* 24 ed (2008) 74.

<sup>30</sup> Wing A *The South African Constitution as a Role Model for the United States* 24 ed (2008) 74.

<sup>31</sup> Sections 39(1)(b) and (c) of the Constitution.

## **1.5 Research methodology**

The literature study will include both primary and secondary sources. The primary sources will essentially consist of the Constitution of South Africa, foreign law, international conventions, a comparative study of the United States and Namibian legislation, as well as South African case law and legislation. The secondary sources include, *inter alia*, textbooks, journal articles, internet sources, media reports and statistics.

## **1.6 Chapter structure**

Chapter 1 consists of the background to the study, the rationale for and significance of the study, the research question, and, research methodology.

Chapter 2 deals with two concepts e.g. affirmative action in South Africa and a brief discussion of inherent requirements which justify fair discrimination. This chapter will commence with an overview of the relevant principles of these two concepts as contained in legislation and case law.

Chapter 3 provides a comparative analysis of foreign law and international conventions regarding the relationship between affirmative action and non-discrimination, evaluates the Constitution and the EEA against the former, and considers how these legal principles relate to the South African context.

Chapter 4 addresses the issues surrounding the elimination of unfair discrimination, enforcement mechanisms, and the obligation of employers to ensure that systems are in place to deal effectively with equity in the workplace. This chapter will also evaluate the powers of the Director-General of Labour and the principles of PAJA in ensuring compliance with the Act.

Chapter 5 which is the concluding chapter evaluates whether s 42 of the EEA and the powers of the Director-General of Labour are sufficient to ensure equal representation of disadvantage groups in the workplace.



## CHAPTER 2

### OVERVIEW OF AFFIRMATIVE ACTION IN A SOUTH AFRICAN CONTEXT

#### 2.1 Introduction

Given South Africa's history during apartheid, discrimination in the workplace was legally enforced on the basis of race and gender.<sup>32</sup> As a result employers had a free hand to discriminate on the basis of religion, disability and political opinion.<sup>33</sup> This led to racist and sexist practices which resulted in systemic and institutional discrimination and inequality.<sup>34</sup>

The Constitution and the EEA were enacted. They acknowledge the injustices of the past, provide measures to eliminate unfair labour practices in the workplace, and contain an express prohibition of direct and indirect unfair discrimination.<sup>35</sup> Thus s 6(2) of the EEA states:

*'It is not unfair discrimination to-*  
*(a) take affirmative action measures 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.'*

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#### 2.2 Affirmative Action

The Constitution recognizes the injustices of the past and identifies the need to ensure a society based on equality, dignity and freedom.<sup>36</sup> Further, the Constitution created the basis for affirmative action and states as follows:

*'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.'*<sup>37</sup>

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<sup>32</sup> Valentine S 'An Appalling 'science'' *Sunday Times* 23 September 2007 6.

<sup>33</sup> Du Toit D 'Labour Law from a working class perspective: Protection against Unfair Discrimination in the Workplace: Are the Courts getting it Right?' (2007) 1.

<sup>34</sup> McGregor M 'Affirmative action and non-discrimination: South African law evaluated against international law (2006) 390.

<sup>35</sup> Apon L 'et al' 'Does a right to be appointed exist for designated groups? The boundaries of employment equity' (2010) 346.

<sup>36</sup> Preamble of Constitution.

<sup>37</sup> Section.9(2) of the Constitution.

It is evident that s 9(2) creates a broad category of beneficiaries of affirmative action. Although the Constitution did not define ‘disadvantaged persons’ *per se*, that function is delegated to be addressed in the legislation which it envisaged, namely the EEA.

Subsequently the EEA was enacted to ensure compliance with s 9(2) of the Constitution in addressing the imbalances in the workplace. Chapter II of the Act provides for the elimination of unfair discrimination<sup>38</sup> with a specific prohibition of direct and indirect unfair discrimination on specific grounds.<sup>39</sup> Chapter III deals with affirmative action, and places an obligation on all designated employers<sup>40</sup> to implement affirmative action measures to ensure representation in all categories and at all levels in the workplace.<sup>41</sup>

The EEA, similarly to the Constitution, also recognizes the fact that apartheid disadvantaged certain categories of people. Hence the Preamble of the EEA states:

*‘Recognising – that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the 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 workplace; and give effect to the obligations of the Republic as a member of the International Labour Organisation.’*

It can be concluded that s 2 of the EEA narrowed the scope of beneficiaries or categories of people by ring fencing the beneficiaries as ‘designated groups’.

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<sup>38</sup> EEA s 6(2) ‘It is not unfair discrimination to- (a) take affirmative action measures 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.’

<sup>39</sup> EEA s 6(1) ‘No person 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.’

<sup>40</sup> EEA s 1 ‘Designated employer means – (a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual of a small business in terms of Schedule 4 to this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Services; and (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.’

<sup>41</sup> EEA s 15(1).

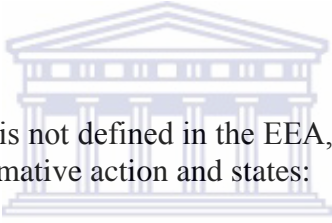
Section 1 of the EEA defined ‘designated groups’ to mean Black people, women and people with disabilities. In terms of the EEA Black people are inclusive of Africans, Coloureds and Indians.

Considering the restorative measure as contained in the EEA, it can thus be concluded that the apartheid system unfairly discriminated against Africans, Coloureds, Indians, women and people with disabilities. It is accordingly submitted that the EEA’s objective is to promote the constitutional right of equality and the achievement of a diverse and broadly representative workforce in South Africa.

According to the Preamble of the EEA it is obvious that its purpose is twofold: first, to promote equal opportunities and fair treatment through the elimination of past unfair discrimination; secondly, to redress the past disadvantages to ensure equal representivity of ‘designated groups’ in the workplace by enforcing affirmative action measures.<sup>42</sup> In this regard s 13 read alongside s 15 of the EEA places a legal obligation on designated employers to give effect to s 9(2) of the Constitution in implementing affirmative action measures for people in the designated groups in order to achieve employment equity.

### 2.2.1 Employment Equity

Although ‘employment equity’ is not defined in the EEA, s 15, directs employers on how to ensure the realization of affirmative action and states:

- 
- (1) 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,*
  - (2) Affirmative action measures implemented by a designated employer must include: (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people; (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; (d) ... measures to: (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.*

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<sup>42</sup> McGregor M ‘Affirmative action and non-discrimination: South African law evaluated against international law’ (2006) 39.

(3) *The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.*

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

Therefore, the inference to be drawn is that equality is a value and affirmative action a measure.<sup>43</sup> It follows that the two are not the same. Equity as a value is clearly illustrated in s 9(1) of the Constitution which states: '*Everyone is equal before the law and has the right to equal protection and benefit of the law.*'

On the other hand, affirmative action enforced by the EEA is a remedial measure, which is a long-term goal aimed to achieve substantive equality.<sup>44</sup> This implies that 'affirmative action is a means to an end and not an end in itself'.<sup>45</sup> In other words it can be concluded that affirmative action is an ongoing process until equality is achieved. Hence it is suggested that it is correct to conclude that the Constitution does not implement affirmative action but provides for a duty for implementation thereof.<sup>46</sup> The principles contained in s 15 above were applied in *Stoman v Minister of Safety & Security & Others*.<sup>47</sup> In this matter a black police officer was appointed to a post in the SA Police Service (SAPS) instead of his white colleague who received the highest percentage mark during the interviews. The applicant accordingly claimed unfair discrimination in terms of s 9(3) of the Constitution.<sup>48</sup>

The dispute was about an allegation of discrimination based on race, and the presumption is, that it is, indeed unfair unless the respondent can prove it was fair. The Court in *Stoman* held that discrimination on the grounds listed in s 9(3) of the Constitution was regarded as unfair unless it was established that the discrimination was fair. The Court in *Stoman* held further that the appointment of a black officer over a white one was not unjustifiable in view of the constitutional recognition of affirmative action measures.

In other words, the Court in *Stoman* accepted actions to be taken to ensure the advancement of persons or categories of persons previously disadvantaged by unfair discrimination. It is safe to deduce from the aforefoing that the court sanctioned affirmative action measures to address South Africa's deep-rooted history of racial and systemic discrimination.

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<sup>43</sup> Thompson D 'et al' '*Affirmative Action; Only A Shield? Or Also A Shield?*' (2007) 644.

<sup>44</sup> McGregor M '*Affirmative action and non-discrimination: South African law evaluated against international law* (2006) 397.

<sup>45</sup> Thompson D 'et al' '*Affirmative Action; Only A Shield? Or Also A Shield?*' (2007) 644.

<sup>46</sup> Thompson D 'et al' '*Affirmative Action; Only A Shield? Or Also A Shield?*' (2007) 645.

<sup>47</sup> (2002) 23 ILJ 1020 (T).

<sup>48</sup> '*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.*'

These measures undoubtedly contained an element of reverse discrimination sanctioned by the Constitution as fair.<sup>49</sup> Van Rensburg is of the view that s 9(2) of the Constitution is directed at the previously disadvantaged and not whether the individual belongs to a specific race group.<sup>50</sup> In other words in Van Rensburg's view race is not a prerequisite to benefit from affirmative action.

As previously stated, 'Black people' is inclusive of Africans, Coloureds and Indians. It follows that in terms of the EEA these are the black people who need to be advanced in terms of s 9(2) of the Constitution (the enabling Act) as they were discriminated against under the apartheid system. It is, therefore, submitted that although the Constitution does not refer to race directly, it is suggested that race is indirectly a determining factor in terms of the EEA to redress the disadvantages of the past.

It is also equally true that not all white people benefited by the apartheid system and some find them in similar social conditions as the disadvantaged groups. But differentiation in terms of the EEA is defined in terms of race (with the exception of women and people with disabilities) and not on a person's social status.

It is suggested that in the absence of such differentiation (social status) white people who did not benefit from apartheid would in all likelihood not be entitled to enjoy the benefits of affirmative action. The inference to be drawn is that the differentiation in terms of the EEA is based on the group (disadvantaged) to which people belong and not on their social status. It is therefore, submitted, that Van Rensburg bases his argument above on the following *obiter* of the CC in *Pretoria City Council v Walker*:<sup>51</sup>

*'No member of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups'*

At the same time Van Rensburg concedes that the Constitution granted affirmative action to those groups who were previously discriminated against, and who in all fairness refer to Black people (Africans, Coloureds and Indians).<sup>52</sup> Furthermore, Venter also argues that s 9(2) of the Constitution seeks to benefit certain people and that discrimination against or disadvantage of people were not the objective.<sup>53</sup> Venter is further of the opinion that if affirmative action is to be achieved by means of a process of unfair discrimination, then such actions are unconstitutional.

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<sup>49</sup> Section 9(2) and (5).

<sup>50</sup> Van Rensburg LJ *Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid* (unpublished LLD thesis, North-West University, 2004) 243.

<sup>51</sup> (1998) 2 SA 363 (CC); (1998) 3 BCLR 257 (CC) 81.

<sup>52</sup> Van Rensburg LJ *Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid* (unpublished LLD thesis, North-West University 2004) 264.

<sup>53</sup> Venter J *'Die Beperkings van Regstellende Gelykheid'* (2004) 28.

Steward supports Venter's view in stating that 'the achievement of equality for some cannot be realized by negating the right to equality of others'.<sup>54</sup> In relation to the aforementioned views, the fairness of the application of affirmative action measures were tested in *Coetzer & Others v Minister of Safety & Security*.<sup>55</sup> The applicants, all white, argued that the South African Police Service discriminated unfairly against them in filling only eight of the 28 vacancies with people from the designated group without having a proper equity plan.

The Court concluded that in the absence of such a plan and given the responsibility of the police to render effective services, such discrimination was unfair. Section 6(2) of the EEA read with s 9(2) of the Constitution addresses Venter's and Steward's concerns' and s 9(5) of the Constitution justifies discrimination under certain circumstances as fair discrimination.<sup>56</sup> Thus it is safe to conclude that the discrimination applied by SAPS in the *Coetzer* case (in the absence of a legitimate affirmative action plan) did not pass muster in terms of s 9(5) of the Constitution.

However, in having regard to the views of Van Rensburg and Venter, the Court in *Stoman* held further that s 9(2) of the Constitution recognizes **substantive** equality rather than **formal** equality. The effect is that equality is more than mere non-discrimination and that s 9(2) of the Constitution and the EEA were measures designed to protect or advance persons or categories of persons previously disadvantaged by unfair discrimination.<sup>57</sup>

### 2.2.2 Formal and Substantive Equality

The above suggests that the notion of **formal** equality is that everyone is treated according to a neutral standard (equal), unlike **substantive** equality which relates to measures to correct past disadvantages.<sup>58</sup>

Section 9(1) of the Constitution forms the basis of formal equality and states:

*'Everyone is equal before the law and has the right to equal protection and benefit of the law.'*

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<sup>54</sup> Steward D 2011 'Tutu, Moseneke and the 'White Tax'

<http://www.politicsweb.co.za/politicsweb/view/politicsweb> (accessed 22 August 2011).

<sup>55</sup> (2003) 24 ILJ 163 (LC).

<sup>56</sup> The Constitution s 9(5) 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is unfair.'

<sup>57</sup> Dupper O 'Affirmative Action and Substantive Equality: The South African Experience' 14 ed (2002) SA Merc LJ 275. 'Substantive equality takes the circumstances of people into account and requires the law to ensure equality of outcome.'

<sup>58</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004)25 LJ 822.

However, s 9(2), as opposed to s 9(1), justifies interference to achieve substantive equality and states:

*'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.'*

Dupper<sup>59</sup> explain the difference as follows:

*'In short, formal equality means sameness of treatment – the law must treat persons in the same manner regardless of their circumstances. Substantive equality takes the circumstances of people into account and requires the law to ensure equality of outcome. The Constitution, it is then stressed, requires us to look at substance. It requires us to focus on the purpose or effects of rules and conduct and not merely on their form.'*

In normal circumstances formal equality would ensure that everybody be treated equally. However, given South Africa's history, formal equality would not ensure that those discriminated against under apartheid would be able to enjoy equal opportunities similar to those who benefitted from apartheid.<sup>60</sup> Hence substantive equality is the only vehicle to ensure the elimination of past disadvantages.<sup>61</sup> Therefore, it would make no sense to treat people who were discriminated against equal with those who were not.<sup>62</sup> This principle was clearly illustrated in *Stoman* in which the Court concluded that the appointment of a black candidate over a white one is justifiable in order to give effect to s 9(2) of the Constitution and s 6(2) of the EEA to ensure the advancement of people in the designated group. Goldstone J also expounded on the concepts in *President of the Republic of SA v Hugo*.<sup>63</sup>

*'We need, therefore, to develop a concept of unfair discrimination which recognizes 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 the 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.'*

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<sup>59</sup> Dupper O 'Affirmative Action and Substantive Equality: The South African Experience' 14 ed (2002) SA Merc LJ 275.

<sup>60</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 LJ 822.

<sup>61</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 LJ 822.

<sup>62</sup> McGregor M 'Affirmative action and non-discrimination: South African law evaluated against international law' (2006) 390.

<sup>63</sup> (1997) 1 SACR 567 (CC) 586.

In view of the above, the CC in *Harksen*<sup>64</sup> found that the following factors are relevant to determine discrimination:

- *'The position of the complainant in society, e.g. whether the complainant is part of a group that suffered disadvantages or is vulnerable;*
- *The nature of the provision or power; and*
- *The effect of the discrimination.'*

Moreover, 'discrimination' is also defined in ILO Convention 111 of 1958<sup>65</sup> as follows:

*'(1) (a) Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers organizations, where such exist, and with other appropriate bodies.*

*(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'*

The Convention<sup>66</sup> obliges countries, including South Africa, to act pro-actively against all forms of racism.<sup>67</sup> The objective is to ensure that measures will be taken to educate and advance certain racial as well as ethnic groups in ensuring equal enjoyment of rights. These measures will not necessarily be regarded as racial discrimination, which under normal circumstances are listed grounds of discrimination.<sup>68</sup> The ILO Convention places an obligation on states to comply with its Article 2(2) which states:

*'...when the circumstances so warrant, (to) take, in the social, economical, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedom.*

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<sup>64</sup> *Harksen v Lane NO & Others* (1998) 1 SA 300 (CC) 63 - 65.

<sup>65</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organization, 1958.*

<sup>66</sup> *International Convention on the Elimination of All Forms of Racial Discrimination, 1965, United Nations, Treaty Series, vol. 660.*

<sup>67</sup> Articles 1(4), 2(2) of the Race Convention 'It provides for the basis for future tests as to the acceptability of such measures. It provides for time limits for the implementation of affirmative action'. See also *Dupper O 'Affirmative Action and Substantive Equality: The South African experience'* (2002) (14) SA Merc LJ 280. '...So the State has a duty to act positively to correct the results of such discrimination'.

<sup>68</sup> *McGregor M 'Affirmative action and non-discrimination: South African law evaluated against international law'* (2006) 389. See also the Constitution s 9(3).



Thus, affirmative action measures as implemented in South Africa in terms of the EEA are therefore not regarded as racial discrimination.<sup>69</sup> In this regard s 9(2) of the Constitution granted approval of affirmative action measures to be in line with the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention).

Having regard to the above, the question arises: can it be concluded that the word ‘unfair’ limits the prohibition of discrimination and that employers could discriminate unless a court found it to be unfair?<sup>70</sup> It is suggested that the Constitution, International Law and the EEA place an obligation on the state to act proactively to remedy a situation, and not to wait until a plaintiff sues for discrimination.<sup>71</sup>

The Labour Appeal Court (LAC) in *Mias v Minister of Justice & Others*<sup>72</sup> (as discussed in par.2.8 hereafter) dealt with the question whether or not an action constitutes discrimination and states as follows:

*‘In short: Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly?’*

Section 3 of the EEA also states:

*‘This Act must be interpreted –*

- (a) In compliance with the Constitution;*
- (b) So as to give effect to its purpose;*
- (c) Taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and*
- (d) In compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination of Employment and Occupation.’*

Thus, it is submitted that a correlation exists between ILO Convention 111, the International Convention on the Elimination of All Forms of Racial Discrimination, the EEA (the Preamble) and the Constitution s 9(2)), and that they must be read together to determine whether discrimination exists, and if so, whether it is fair or not.<sup>73</sup> The EEA, which is the implementation document provided for by s 9(2) of the Constitution complies with relevant International Conventions.

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<sup>69</sup> The Constitution s 9(5).

<sup>70</sup> Du Toit D *‘Labour Law from a working class perspective: Protection against Unfair Discrimination in the Workplace: Are the Courts getting it Right?’*(2007) 3.

<sup>71</sup> Wing A *‘The South African Constitution as a Role Model for the United States’* 24 ed (2008) 74.

<sup>72</sup> (2002) 1 BLLR 1 (LAC) 21.

<sup>73</sup> Du Toit D *‘Labour Law from a working class perspective: Protection against Unfair Discrimination in the Workplace: Are the Courts getting it Right?’* (2007) 1.

### 2.2.3 Suitably Qualified

The EEA s 20(3) defines ‘suitably qualified’ people as follows;

*‘For the purpose of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person`s:-*

- (a) Formal qualifications;*
- (b) Prior learning;*
- (c) Relevant experience; or*
- (d) Capacity to acquire, within a reasonable time, the ability to do the job.’*

As indicated in chapter 1, s 42 of the EEA currently states ‘that in determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General of Labour must take into account factors which include but are not limited to’:

*‘...the extent to which suitably qualified people from and amongst the different designated groups are equitably be represented within each occupational category and level in that employer`s workforce in relation to the (i) demographic profile of the national and regional economically active population; (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees.’ (own emphasis)*

On the face of it, it can be inferred that the Director-General of Labour has no discretion in applying his or her mind with regard to ‘suitably qualified’ people, as well as ‘national’ and ‘regional’ demographics. However, it appears that in terms of s 42 an employer has discretion as it may appoint or promote suitably qualified people as the term may seems not to be compelling.

It is also suggested that the Director-General must consider both the national and regional demographics and cannot ignore the one in favour of the other. The phrase ‘may appoint’ suggests that the employer is not compelled to make such appointments. However, it appears that if the employer lacks acceptable levels of redress in its workplace, that it should justify such failure to the Director-General of Labour. The powers of the Director-General in this regard will be discussed in Chapter 4.

In the *Stoman*<sup>74</sup> case the suitability of a person for appointment was also under consideration. The Court rejected the view of the Court in *Public Servants Association of SA & Others v Minister of Justice*<sup>75</sup> that the appointment of a candidate from one race group above a candidate from another race group was only acceptable where the candidates all had broadly the same qualifications and merits.

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<sup>74</sup> *Stoman v Minister of Safety & Security & Others* (2002) 23 ILJ 1020 (T).

<sup>75</sup> (1997) 3 SA 925 (T).

The Court in *Stoman* also noted that the principle is too restrictive to give meaningful effect to the objective of the Constitution and the measures to ensure equality. However, the Court stated that the appointment of a ‘wholly unqualified’ or less than ‘suitably qualified’ or incapable person in a responsible position could never be justified.<sup>76</sup>

Given the aforesaid, it is evident that an employer should strike a balance between s 20 (3) and all other relevant factors in determining an appointment of somebody from the designated groups. It thus suffices to state that substantive equality can never be used as a defence to the appointment of a ‘wholly unqualified’ person in a position of responsibility.

#### **2.2.4 Right of Designated Employee to be Appointed or Promoted**

The salient question now arises: whether a designated employee has a right to be appointed or promoted because he or she belongs to the designated groups? This question was first addressed in *Harmse v City of Cape Town*.<sup>77</sup> The Court held that a failure by the employer to remove discriminatory barriers may in certain instances found a claim of indirect discrimination. The Court was also of the view that in so doing, an employer violates a designated employee’s right not to be discriminated against. It is suggested that such failure by the employer is contrary to s 5<sup>78</sup> read with s 15(2)(a) of the EEA.<sup>79</sup>

The Labour Court in *Harmse* also held that the Constitution and the EEA provide a justiciable right to affirmative action. On the face of it, the *Harmse* judgment appears to recognize the individual right of an employee to affirmative action. In contrast to the *Harmse* case, the LAC in *Dudley v City of Cape Town & another*<sup>80</sup> and the Labour Court in *Thekiso v IBM South Africa (Pty) Ltd*<sup>81</sup> concluded that affirmative action does not provide an enforceable right to individual employees for preferential treatment.

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<sup>76</sup> (2002) 23 ILJ 1020 (T).

<sup>77</sup> (2003) 6 BLLR 557 (LC).

<sup>78</sup> ‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.’

<sup>79</sup> ‘Affirmative action measures implemented by a designated employer must include: (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people; (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; (d) ... measures to: (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.’

<sup>80</sup> (2008) 12 BLLR 1155 (LAC).

<sup>81</sup> (2007) 3 BLLR 253 (LC).

Van Rensburg<sup>82</sup> has a concern with the *Dudley* judgment in this regard as he is of the view that the word ‘persons’ (individuals) in s 9(2) of the Constitution should be analysed in its context which states:

*‘...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.’ (own emphasis)*

Dupper<sup>83</sup> on the other hand is of the view that substantive equality compels the government to prevent the continuation of discrimination and essentially counter the individual right to affirmative action. Dupper’s argument is also supported by the judgment in *Stoman* in which the Court emphasized the collective nature of affirmative action:

*‘The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of the South African society.’<sup>84</sup>*

Once again given the view of Van Rensburg, the Court declined to define the word ‘persons’ and thereby failed to provide direction as to the intention of the legislature with regard to the use of the word ‘persons’ in the context of s 9(2) of the Constitution.

The only conclusion validly to be drawn from the use of the word ‘persons’ is that it should be interpreted in the context of a category of persons and does not imply an individual right to affirmative action. Apon<sup>85</sup> is of the view that the *Dudley* case is too narrow to give effect to the constitutional objectives as it does not promote the spirit of substantive equality. It is further submitted that the Court in *Dudley* case treated two candidates, one designated and the other non-designated, on an equal footing with no regard to preferential treatment as provided for in s 9(2) of the Constitution and s 2 of the EEA.

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<sup>82</sup> Van Rensburg LJ ‘*Regstellende Aksie en die Grondwetlike Waardes ’n Regsvergelykende Studie na Grondwetlikheid* (unpublished LLD thesis, North-West University, 2004) 264.

<sup>83</sup> Dupper O ‘*Affirmative Action and Substantive Equality: The South African Experience*’ 14 ed (2002) SA Merc LJ 280.

<sup>84</sup> (2002) 23 ILJ 1020 (T) 1035.

<sup>85</sup> Apon L ‘et al’ ‘*Does a right to be appointed exist for designated groups? The boundaries of employment equity*’ (2010) 346.

It must be borne in mind that the Court in *Dudley* did not decide the question whether the failure of the employer to appoint the applicant, who was a designated employee, constituted unfair discrimination or not. The Court concluded that the applicant did not have *locus standi* to approach the Labour Court directly, as she had not exhausted the remedies set out in Chapter V of the EEA. The latter will be discussed in chapter 4 hereafter.

### 2.2.5 Citizenship

The Preamble of the Constitution states ‘...that South Africa belongs to all who live in it, united in our diversity...’ With the Preamble as background there is a presumption that neither s 9(2) of the Constitution nor the EEA excludes non-South Africans. This issue was argued in the case of *Auf der Heyde v University of Cape Town*.<sup>86</sup>

The applicant successfully argued that the concept of affirmative action as envisaged by the Constitution and regulated by the labour laws is one which is developed to address designated groups in the context and history of South Africa. The applicant, who happened to be a white person, was not appointed to a post at the University, and argued that one of the successful candidates appointed, although black, was not a citizen of South Africa. The applicant submitted that a non-citizen did not qualify to be a beneficiary of the University’s affirmative policy.

Although the LAC concluded that Chibale, a non-citizen, was appointed on merit, it stated that the University’s affirmative action policy was indeed designed to address the imbalances in the Republic of South Africa; and that the LRA and affirmative action as envisaged by the Constitution were developed against the background of South Africa’s history of discrimination. In essence the Court found that only South African citizens qualify to benefit from affirmative action.<sup>87</sup>

In the event that citizenship is used in the context of affirmative action, it is imperative to establish whether the use of citizenship is discriminatory, and, if so, whether it constitutes unfair discrimination. This test to determine whether an act constitutes unfair discrimination or not was equally expounded by the LAC in *Mias v Minister of Justice & Others*.<sup>88</sup> In this case the appellant an attorney who practised for his own account, applied for a position as State Attorney. Whilst residing in Port Elizabeth he happened to be successful to be appointed in Cape Town.

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<sup>86</sup> (2000) 21 *ILJ* 1758 (LC).

<sup>87</sup> (2000) 21 *ILJ* 1758 (LC) 2656.

<sup>88</sup> (2002) 1 *BLLR* 1 (LAC).

The appellant was only entitled to the limited re-location benefits granted a new appointee to the public service. These benefits were substantially less than benefits which were only applicable to existing public servant transfers. It follows that the appellant alleged that the differentiation between the different benefits for employees constituted a 'residual unfair labour practice'<sup>89</sup> in terms of the LRA. The LAC noted as follows: 'It was not in dispute that the settled constitutional jurisprudence on unfair discrimination is applicable to the item. In short: Is there a differentiation? If so, is it discriminatory? If so, is it unfair either directly, on one or more of the specified grounds, or indirectly (which affects the burden of proof).'<sup>90</sup>

Neither the Constitution nor the LRA<sup>91</sup> saw non-citizenship as a listed ground of discrimination. The CC in *Harksen v Lane NO & Others*<sup>92</sup> found citizenship and HIV status to be unlisted grounds. The effect is that in the event of an unlisted ground the onus to prove discrimination rests on the applicant.<sup>93</sup> This is an objective enquiry; motive or intent is not relevant.<sup>94</sup>

The inference to be drawn from the fact that citizenship is not a listed ground to constitute discrimination is that the purpose of affirmative action is to achieve equality for South African citizens only.<sup>95</sup> This view is not without criticism as it seems to be in contrast with the Preamble of the Constitution as indicated before. It is, therefore, submitted that the South African community is made up of citizens and non-citizens and that non-citizens also were either directly or indirectly affected by unfair discrimination.<sup>96</sup>

Although the preamble of the EEA also acknowledges the discriminatory laws and disparities in employment which were caused by apartheid, it is a fact that foreigners are a vulnerable minority group in South Africa, and that they could suffer unfair discrimination irrespective of whether it is a listed or unlisted ground.<sup>97</sup> Given the current application of affirmative action and that citizenship is an unlisted ground, the question whether the exclusion of non-citizens constitutes discrimination or not, needs still to be clarified by the CC.

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<sup>89</sup> Labour Relations Act 66 of 1995 (LRA). Part B, items 2(1)(a) or (b), of schedule 7. '*Residual unfair labour practice. For the purpose of this item, an unfair labour practice means any unfair act of omission that arises between an employer and employee.*'

<sup>90</sup> (2002) 1 BLLR 1 (LAC) 21.

<sup>91</sup> The LRA s 187(1)(f).

<sup>92</sup> (1998) 1 SA 300 (CC).

<sup>93</sup> (1998) 1 SA 300 (CC) 63.

<sup>94</sup> (1998) 1 SA 300 (CC) 62.

<sup>95</sup> McGregor M '*Affirmative action and non-discrimination: South African law evaluated against international law*' (2006) 400.

<sup>96</sup> McGregor M '*Affirmative action and non-discrimination: South African law evaluated against international law*' (2006) 400.

<sup>97</sup> McGregor M '*Affirmative action and non-discrimination: South African law evaluated against international law*' (2006) 402 - 403.

## 2.2.6 Differentiation

The term ‘differentiation’ points to different treatment of people which is justifiable under certain circumstances.<sup>98</sup> It follows that discrimination is prohibited in terms of s 9(3) of the Constitution,<sup>99</sup> unless it is justified in terms of s 36 of the Constitution<sup>100</sup> to enjoy constitutional approval in terms of s 9(5)<sup>101</sup>.

As stated before, the effect of s 9(1) of the Constitution is that all people should be treated equally. However, as previously stated, this approach would not assist the government to address the imbalances caused by apartheid. As a result of the need to address past imbalances, s 9(2) of the Constitution was enacted to ensure that equality in the workplace is implemented. It is at this instance that s 36 of the Constitution comes into play in order to legitimize legislation and other measures to address and to eliminate the inequalities created by past discrimination by implementing affirmative action for the disadvantaged.<sup>102</sup>

Given the definition of ‘designated groups’ it appears to include women of all races. The question whether the EEA presumed further differentiation amongst women on the basis of colour was mooted by the Labour Court in *PSA obo Karriem v SAPS & Another*.<sup>103</sup> In this case two women, the one white, the other coloured, contended for a position. The coloured female employee claimed she was discriminated against because the white female was ultimately appointed.

Although the Labour Court found that the white female was appointed on merit, it was confirmed that she was also part of the designated groups. In essence, then, the Court concluded that all women enjoy equal status in terms of affirmative action regardless of race. The Constitution as well as the LRA is not clear as to whether further differentiation between males, unlike women, within the meaning of ‘designated groups’ is presumed. The Constitution s 9(2) provides for measures to advance people who were previously disadvantaged by apartheid. The EEA, in turn, categorizes those previously disadvantaged people as a ‘designated groups’.

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<sup>98</sup> McGregor M ‘Affirmative action and non-discrimination: South African law evaluated against international law’ (2006) 390.

<sup>99</sup> ‘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.’

<sup>100</sup> ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) except as provided in subsection (1) or in any other provision of the Constitution no law may limit any right entrenched in the Bill of Rights.’

<sup>101</sup> ‘Discrimination on or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

<sup>102</sup> McGregor M ‘Affirmative action and non-discrimination: South African law evaluated against international law’ (2006) 390.

<sup>103</sup> (2007) 4 BLLR 308 (LC).

It follows that s 9(2) of the Constitution should be utilized to promote the designated group which includes Blacks, Coloureds, Indians, women and people with disabilities. Hence, the presumption is that differentiation within the designated group with specific reference to 'Black' people was not presumed.

A related question was dealt with in *Baxter v National Commissioner of Correctional Services & Another*.<sup>104</sup> In this case a coloured male was recommended to be appointed as a Director. The recommendation was denied on the basis that his appointment does not promote the Department's equity plan, despite the fact that the Department's plan indicated that a coloured appointment is justified, and that he was also in all circumstances 'suitably qualified' to be appointed as well as being part of the designated groups.

The Court found in favour of the applicant and concluded that, despite the shortcomings of the Department of Correctional Services' equity plan (which favoured a coloured appointment), the employee was unfairly discriminated against, since he was also part of the designated groups and thus a beneficiary of affirmative action. One can also argue that the *Baxter* case corresponds with the view of the CC in *Pretoria City Council v Walker*<sup>105</sup> (as quoted before), in which the court warns that laws should not be used more harshly against a certain race group to treat them in an undeserving manner.

The same question was dealt with in *IMAWU v Greater Louis Trichardt Transitional Local Council*.<sup>106</sup> In this case two white and three black candidates were subjected to an internal test for the position of town treasurer. The Court found that the black appointee received the lowest marks of all, including of the three black candidates. The Court in dealing with a claim of alleged unfair discrimination noted *obiter* that, in the event that members of the same designated groups compete with each other, the best possible candidate from the designated group should be appointed.<sup>107</sup>

In other words, merit and experience alone should be the yardstick when it involves only the members of a designated group.<sup>108</sup> The inference validly to be drawn from this decision is that any further differentiation amongst the members of designated groups might constitute unfair discrimination.

Although the Court in *Baxter* found in favour of the applicant, it is doubtful whether the judgment would have been the same if the Department of Correctional Services' equity plan had not supported a coloured appointment. Therefore, the *Baxter* as well as the *Louis Trichardt* judgments cannot be perceived as benchmark decisions in ensuring equal treatment among the members of the designated groups.

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<sup>104</sup> (2006) ZALC 23 (LC).

<sup>105</sup> (1998) 2 SA 363 (CC); (1998) 3 BCLR 257 (CC) 81.

<sup>106</sup> (2000) 21 ILJ 1119 (LC).

<sup>107</sup> (2000) 21 ILJ 1119 (LC) 1129 B-D.

<sup>108</sup> Dupper O 'Affirmative Action and Substantive Equality: The South African Experience' 14 ed (2002) SA Merc LJ 290.



It follows, that in terms of the rules of precedent other courts are not compelled to adhere to the said judgments and they can also be replaced by a judgment of the CC. They do, however, establish a valuable legal guideline on how to deal with members of the designated groups competing amongst themselves.

Before the coming into effect of the Constitution, affirmative action was also enshrined under s 8(3) of the interim Constitution which stated:

*‘This section shall not preclude measures designed to achieve the adequate protection and advancement of persons and groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms...’*<sup>109</sup>

Whether differentiation within the designated groups in terms of s 8(3) of the Interim Constitution was acceptable, was dealt with in *Motala v University of Natal*.<sup>110</sup> In this case an Indian student who had obtained five distinctions in matric was refused admission into the medical school. The medical school had decided to limit 40 to the number of Indian students admitted to its programme, because of the poor standard of education available to African students meant that a merit based entrance programme would result in very few African applicants being accepted into medical school.

The question was whether the University’s affirmative action programme was justified to discriminate against an Indian student with five distinctions in favour of a black student. The Court in *Motala* held within the context of s 8(3) of the Interim Constitution, although both applicants belonged to the designated groups, the admission policy was indeed a measure designed to achieve adequate protection and to advance people previously disadvantaged by unfair discrimination.

The *Motala* case should be seen in the context of the four-tier educational system which was in existence at the time which seriously disadvantaged African students by providing them with a sub-standard qualification. Subsequently the educational system has changed drastically and very limited differences exist.

The importance of the impact of the *Motala* judgment is that it disadvantages people who were already disadvantaged in the past.<sup>111</sup> It is, therefore, submitted that this will further disadvantage Indians and Coloureds in relation to whites and leave Indians and Coloureds behind with regard to Africans.

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<sup>109</sup> The Constitution of South Africa, Act 2000 of 1993.

<sup>110</sup> (1995) *BCLR* 374 (D).

<sup>111</sup> Van Rensburg LJ ‘*Regstellende Aksie en die Grondwetlike Waardes n Regsvergelykende Studie na Grondwetlikheid*’ (unpublished LLD thesis North-West University, 2004) 259.

The proposal by government to amend s 42 of the EEA (discussed hereafter) would in all probability prejudice the other members of designated groups if the *Motala* principle is going to apply. In the event, the *Motala* principle is going to be followed, the EEA should be interpreted to consider the extent to which the effects of apartheid are still felt in society and how they have prejudiced the different race categories within the disadvantaged groups. In other words this approach will recognize the existence of degrees of disadvantage.<sup>112</sup>

Subsequently, the Constitution came into effect and the EEA was enacted which subscribed to s 9(2) of the Constitution to ensure that affirmative action measures are designed and enforced. It is, therefore, doubtful whether the courts and specifically the CC will follow the line as set in the *Motala* case.

In this regard the proposed amendments to s 42 of the EEA (as referred to in chapter 1) seek to remove the reference to 'national and regional' demographics in s 42(a)(i), while completely removing s 42(a) (ii) to 42(a)(v). These proposed amendments resulted in some controversy in light of the comments made by the former Director-General of Labour, Jimmy Manyi, in that coloureds are over-represented in the Western Cape and should spread out to the rest of the country.<sup>113</sup>

Although it appears to be an accepted principle to advance formerly disadvantaged groups in order to rectify the imbalances of the past, the proposed amendments to s 42 might be construed or interpreted as discriminating amongst the disadvantaged groups themselves. The reality is that, while most employees from the disadvantaged groups claim an equal right or have reasonable expectations to benefit from affirmative action, the proposed amendments to s 42 seems to limit those prospects for certain disadvantaged groups. It is, therefore, submitted that there is a risk that a principle of 'first among equals' might become a practice in the South African context.

The proposed amendments should accordingly be measured in light of South Africa's obligations in terms of the Constitution, the goals of the EEA, as well as against the definitions of 'discrimination' in terms of ILO Convention C111, 1958.<sup>114</sup> It should also be borne in mind that any decision made in terms of the relevant sections of the EEA, should also be in accordance with the principles and provisions of the Promotion of Administrative Justice Act.<sup>115</sup>

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<sup>112</sup> Parinton J 'et al' *The Development of Defences in Unfair Discrimination Cases (Part 2)* (2005) 600.

<sup>113</sup> Hlongwane S (Analysis): 'Jimmy Manyi finds out just how tough it is to be between Manuel and a hard place' *The Daily Maverick* 2 March 2011 5 as well as Graham S 'Manyi Coloured remarks cast doubt on job suitability' *The Citizen* 2 March 2011 6.

<sup>114</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organisation*, 1958.

<sup>115</sup> Promotion Administration of Justice Act, 3 of 2000 (hereafter the PAJA).

Thus it is suggested that the government's intention with regard to the proposed amendments to s 42 of the EEA was to give effect to the principle of 'differentiation' within the context of the *Motala* judgment. Government departments, e.g. the department of Correctional Services, already implement their equity policies in terms of the proposed amendments to s 42 of the EEA.

The above proposals have caused serious concern amongst coloured members of the Department of Correctional Services<sup>116</sup> who claim they are also from the designated groups (Black people) and are equally entitled to the benefits of affirmative action. As a result a labour dispute between employees and the Department of Correctional Services (The Department) in terms of the application of s 42 (a)(i) has been filed in the Labour Court.<sup>117</sup> The facts are in short the following: The Department's Employment Equity Plan for the period 2010 to 2014 was adopted after consultation with employee organisations.

The national targets that were agreed upon were 79.3% for Africans, 9.3% for Whites, 3.5% for Indians and 8.8% for Coloureds. The workforce representivity status (national) for the period 2010 to 2014 is 67.8% for Africans, 15.7% for Whites, 3.5% for Indians and 13% for Coloureds. As a result of these targets the Department received a written memorandum from 7 Coloured Senior Management System (SMS) members, objecting to the use of the national demographics, as it creates employment barriers for coloureds which are prohibited in terms of s 15(4) of the EEA.

The department argues that it is defined as a national Department under schedule 1 issued in terms of s 7(2)(a) of the Public Service Act 103 of 1994 and is therefore entitled to apply the national demographics. The current application of the demographics (s 42 (a)(i)) by the Department of Correctional Services results in the differentiation within designated groups which is detrimental to certain members of that group.<sup>118</sup>

Therefore, it is suggested that the implementation of the EEA should be in line with the spirit as set out in the *Van Heerden*<sup>119</sup> case, in which Moseneke J stated:

*'In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.'*<sup>120</sup>

Cooper,<sup>121</sup> as stated before, is also of the view that an employee would suffer indirect discrimination when criteria, conditions or policies apply which appear to be neutral but which adversely affect a disproportionate number of members of a certain group. It is submitted that this is the case with regard to the Department of Correctional Services.

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<sup>116</sup> Dawie – Rubriek 'DKD is nou op dun ys oor ras' *Die Burger* 25 February 2012 8.

<sup>117</sup> *Solidarity & Others v Department of Correctional Service & Others* (Case No.C368/2012).

<sup>118</sup> Hlongwane S (Analysis): 'Jimmy Manyi finds out just how tough it is to be between Manuel and a hard place' *The Daily Maverick* 2 March 2011 5, as well as Graham S 'Manyi Coloured remarks cast doubt on job suitability' *The Citizen* 2 March 2011 6.

<sup>119</sup> *Minister of Finance v Van Heerden* (2004) 6 SA 121.

<sup>120</sup> (2004) 6 SA 44.

<sup>121</sup> Cooper C 'The boundaries of Equality in Labour Law' (2004) 25 *ILJ* 826.

Thus, as explained above, the proposed amendments to s 42 which government intends to implement would in all probability be in contradiction of the spirit of *Van Heerden*, and in Cooper's view would constitute unfair discrimination. Following the above, the LAC in *Dudley* concluded that an employee has a cause of action (for unfair discrimination) only after the employee challenges the failure of an employer to give effect to affirmative action measures in terms of Chapter V of the EEA.

It follows that an employee should first report such failure to the Director-General of Labour who will in turn approach the Labour Court for a compliance order after alternative remedies are exhausted.<sup>122</sup> However, it is submitted that (as discussed in chapter 5, hereafter) that the Director-General of Labour cannot, currently, legally compel designated employers to apply national and regional demographics. Although the *Baxter* case was interpretive of the term 'designated groups,' regard must be given to the equity plan of the Department of Correctional Services which favoured the applicant.

The LC in *Harmse v City of Cape Town*<sup>123</sup> concluded that when a designated employer developed an affirmative action plan, its employees acquire a legitimate expectation that it will be implemented accordingly.<sup>124</sup> Similar to the *Harmse* case, the LAC in *Dudley* cautioned against *ad hoc* appointments and promotions. It stated that the employer would run the risk of being at odds with a collectively determined equity plan.<sup>125</sup> This was confirmed in the *Louis Trichardt* case (as stated above) in which the LC concluded that the affirmative action appointment did not pass muster as the employer failed to implement an affirmative action program as required in terms of a collective agreement.<sup>126</sup>

The conclusion to be drawn is that the Court in *Baxter* followed the principle as applied in *Harmse*,<sup>127</sup> given the fact that the affirmative action plan favoured the applicant. The views of both *Harmse* and *Dudley* were supported by the LC in *Coetzer & Others v Minister of Safety & Security*.<sup>128</sup> The LC in *Coetzer* concluded that, among other factors, it is unfair in the absence of an equity plan for the SA Police Service not to appoint white candidates to positions in the explosive unit which were reserved for previously disadvantaged people only. The court in the *Louis Trichardt* case followed the same line in stating that an employer cannot justify an affirmative action appointment if it failed to comply with a collective agreement.

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<sup>122</sup> (2008) 12 *BLLR* 1155 (LAC) 12.

<sup>123</sup> (2003) 6 *BLLR* 557 (LC).

<sup>124</sup> (2003) 6 *BLLR* 557 (LC) 49.

<sup>125</sup> (2008) 12 *BLLR* 1155 (LAC) 52.

<sup>126</sup> (2000) 21 *ILJ* 1119 (LC).

<sup>127</sup> (2003) 6 *BLLR* 557 (LC) 47: 'If an employer fails to promote equality through affirmative action measures, that employer violates the rights of designated employees not to be discriminated against.'

<sup>128</sup> (2003) 24 *ILJ* 163 (LC) 31.

## 2.3 Operational Requirements

Operational requirements is another measure (other than affirmative action) which justifies fair discrimination in exceptional circumstances (inherent requirement) which are determined in terms of s 2 of ILO Convention 111<sup>129</sup> and in terms of s 6(2)(b) of the EEA.<sup>130</sup> The foregoing was applied in *PSA obo Karriem v SAPS & Another*<sup>131</sup> in which the Court found that ‘operational requirements’ outweighed employment equity considerations, and that this complies with the provisions of the ILO and EEA as discussed hereafter.

The application of ‘operational requirements’ as applied in *Kariem*, as a justifiable ground against a claim of unfair discrimination was also demonstrated in the case of *Woolworths (Pty) Ltd v Whitehead*.<sup>132</sup> In the *Whitehead* case, the respondent, a pregnant women claimed unfair discrimination by the appellant as she was not appointed because of her pregnancy. The appellant argued that it was a requirement that the successful applicant should at least work continuously for at least 12 months.

The appellant conceded that the pregnancy was a determining factor as the respondent would not be able to comply with that requirement. In this case the Court concluded that ‘inherent’ requirement meant an ‘indispensable attribute’ which relates to an inescapable way to perform a job.<sup>133</sup> A matter of urgency or a commercial rationale would not suffice.<sup>134</sup> In terms of the ILO any ‘limitation’ in this regard must be required by the characteristics of the job and should be in proportion to its requirements.<sup>135</sup>

It follows that such an ‘inherent’ requirement should be a permanent characteristic of the job.<sup>136</sup> It follows further that a complainant, having regard to the above, will bear the onus to prove the elements of discrimination as decided in *Harksen*.<sup>137</sup>

## 2.4 Conclusion

Given the above it can be concluded that constitutional jurisprudence has accepted affirmative action measures and inherent requirements as justifiable grounds for fair discrimination in an attempt to redress past imbalances in the workplace.

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<sup>129</sup> Article 1(2) ‘Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.’

<sup>130</sup> ‘It is not unfair discrimination to- distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.’

<sup>131</sup> (2007) 4 BLLR 308 (LC).

<sup>132</sup> (2000) 21 ILJ 571 (LAC).

<sup>133</sup> Cooper C ‘The boundaries of Equality in Labour Law’ (2004) 25 LJ 835.

<sup>134</sup> Cooper C ‘The boundaries of Equality in Labour Law’ (2004) 25 LJ 835.

<sup>135</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organization*, 1958.

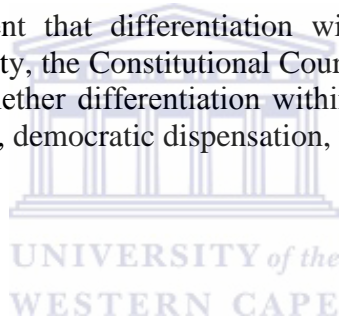
<sup>136</sup> Cooper C ‘The boundaries of Equality in Labour Law’ (2004) 25 LJ 835.

<sup>137</sup> (1998) 1 SA 300 (CC) 63.

Therefore, affirmative action granted differentiation in the context of substantive equality; and that the grounds provided to advance persons within the context of the 'designated groups' are not arbitrary, therefore not discriminatory. Given South Africa's history, inequalities cannot be addressed in terms of formal equality. It has to be done in a restitutionary manner which is consonant with the concept of substantive equality.

Substantive equality, unlike formal equality, therefore, focuses on the group and rejects the emphasis on individualism. In terms of the cases as discussed above, an employer can only use affirmative action appointments as a shield if it has programs in place to give effect to the objectives of the EEA. It is obvious that the primary objective of the EEA is to ensure equal representation in the workplace. Whether the EEA intended differentiation within the designated groups themselves to achieve its goals is at this stage not clear.

However, both differentiation within the context of the *Motala*<sup>138</sup> judgment and citizenship in terms of *Auf der Heyde v University of Cape Town*<sup>139</sup> are still unclear and remain very contentious issues. It is, however, suggested that the decision in *IMAWU v Greater Louis Trichardt Transitional Local Government*<sup>140</sup> establishes an acceptable criterion to apply in the event that differentiation within the designated groups is applicable. Given the uncertainty, the Constitutional Court would in all probability be the final arbiter with regard to whether differentiation within the 'designated groups' itself would constitute, in the current, democratic dispensation, unfair discrimination or not.



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<sup>138</sup> (1995) *BCLR* 374 (D).

<sup>139</sup> (2000) 21 *ILJ* 1758 (LC).

<sup>140</sup> (2000) 21 *ILJ* 1119 (LC).

## CHAPTER 3

### **A COMPARATIVE ANALYSIS OF THE LAW OF AFFIRMATIVE ACTION IN THE UNITED STATES OF AMERICA, NAMIBIA AND INTERNATIONAL LAW IN RELATION TO SOUTH AFRICA'S CONSTITUTION AND EMPLOYMENT EQUITY ACT**

#### **3. The United States of America**

##### **3.1 Introduction**

Affirmative action has its origin in the United States of America.<sup>141</sup> The disadvantages suffered by minorities in America dates from the time of slavery, whereas in South Africa the disadvantages suffered by the majority of blacks originated from apartheid and colonialism.<sup>142</sup> Affirmative action was the result of activity by the Civil Rights Movement, similar to the African National Congress (ANC) and other groups in South Africa that embarked on various forms of mass action to ensure the elimination of racial inequalities which existed at the time.<sup>143</sup>

As a result the American government embarked on processes to ensure equal treatment to minority groups in terms of jobs and education.<sup>144</sup> The Fourteenth Amendment, of the US Constitution which included the equal protection<sup>145</sup> and equal opportunity<sup>146</sup> clauses were enacted.

The SA Constitution also encompasses notions of equal protection, anti-discrimination and affirmative action.<sup>147</sup> Although there are similarities between the South African and the US equal employment measures, they are not the same. The South African Constitution, for instance, acknowledges the notion of formal equality,<sup>148</sup> as is the case in the US, but to rectify the imbalances of the past it also embraces the substantive approach to equality.<sup>149</sup> The enforcement measures and assessment of the relevant laws will be discussed in chapter 4 and 5 hereafter.

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<sup>141</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 9. See also Duppert O 'Affirmative Action and Substantive Equality. *The South African Experience*' 14 ed (2002) SA Merc LI 275.

<sup>142</sup> Van Rensburg LJ 'Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid' (unpublished LLD thesis, North-West University, 2004) 73.

<sup>143</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 9.

<sup>144</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 9.

<sup>145</sup> Ratified in 1868 and was applicable to the states only.

<sup>146</sup> Sections 703(a)(1); 703(a)(2).

<sup>147</sup> Wing A 'The South African Constitution as a Role Model for the United States' 24 ed (2008) 75.

<sup>148</sup> The Constitution s 9(1).

<sup>149</sup> The Constitution s 9(2).

### 3.2 Affirmative Action in the US

In terms of the US Constitution the American Federal government is not the primary government and governance was left to the states.<sup>150</sup> Although the American Constitution was amended with the Fourteenth Amendment to provide for equal protection, it did not provide for the right to equality similar to s 9(2) of the South African Constitution. Subsequent to the decision in *Dred Scott v Sandford*,<sup>151</sup> in which it was decided that no person of African descent, whether freedman or slave, even if they were born in the USA, could qualify as an American citizen, amendments were made to the Constitution.<sup>152</sup> Hence the Fourteenth Amendment was enacted and the so-called 'equal protection clause' of the Amendment states as follows:

*'All persons born or naturalized in the United States...are citizens of the United States and of the states wherein they reside... and (no state) shall... deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws.'*<sup>153</sup> (own emphasis)

It is submitted that the use of the word 'person' indicates that the equal protection clause embraces individualism. Individualism was clearly demonstrated in the *Stotts*<sup>154</sup> case in which a union that consisted of non-minorities challenged lay-offs and demanded that blacks with less service than their white colleagues should be laid off as well. The court emphasized victim specificity by making it clear that each individual had to prove that they indeed suffered from past discrimination.

Although a victim of past discrimination might be successful in proving individual prejudice he or she will not automatically succeed in being awarded the position he or she was deprived of in the past. Adopting this formal approach to equality, the court concluded that the seniority system supersedes affirmative action plans and that it had limited powers to award those who could prove individual prejudice.<sup>155</sup> The inference to be drawn from the above is that unlike the South African Constitution, the protection granted in terms of equal protection clause of the Fourteenth Amendment, did not embrace substantive equality with regard to the minority groups.<sup>156</sup>

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<sup>150</sup> The Constitution of the United States of America (1787) and ratified in September 1787. Art. IV s 4 'The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.'

<sup>151</sup> 60 US 393 (1857).

<sup>152</sup> McGregor M 'The Application of Affirmative Action in Employment law with specific reference to the Beneficiaries: A Comparative Study' (unpublished LLD thesis, Unisa, 2005) 214.

<sup>153</sup> The Fourteenth Amendment: S 1 of the 'Equal Protection Clause'.

<sup>154</sup> *Firefighters Local Union No. 1784 v Stotts* 104 S Ct 2576 (1984).

<sup>155</sup> McGregor M 'The Application of Affirmative Action in Employment law with specific reference to the Beneficiaries: A Comparative Study' (unpublished LLD thesis, Unisa, 2005) 250.

<sup>156</sup> 104 S Ct 2576 (1984).



Similarly to the equal protection clause, the word ‘persons’ as previously stated is also used in s 9(2) of the South African Constitution which states:

*‘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.’*  
(own emphasis)

Although the word ‘persons’ is used, the Constitution does not entertain individualism, but concentrates on the group as decided in the *Stoman* case.<sup>157</sup> This is a very clear distinction from the American affirmative action focus.

A dissenting judgment of Judge Blackmun in the *Stotts* case is in line with how South African courts interpret and apply the provisions of the Constitution and the EEA. His view is that an affirmative action plan was more group-based than individual based. This approach embraces the notion that the purpose of affirmative action was to provide a remedy for the discriminated-against ‘group as a whole’, rather than for any of the individual members of the group.<sup>158</sup> With regard to the equal protection clause it can be concluded that it does not explicitly prohibit discrimination, but that due process should be followed if such rights are infringed. The South African Constitution, s 9(3), unlike the Fourteenth Amendment, is very explicit and states:

*‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’*

‘Fair’ discrimination in a South African context is very controversial. This is only possible in terms of the EEA, Broad Based Black Economic Empowerment (BBBEE) and the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>159</sup> (PEPUDA), and either s 9(5) or s 36 of the Constitution. However, the significance of the Fourteenth Amendment is that it paved the way for affirmative action in the US.

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<sup>157</sup> (2002) 23 ILJ 1010 (T) 1035, in which the court emphasized the collective nature of affirmative action: ‘The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of the South African society.’

<sup>158</sup> 104 S Ct 2576 (1984) 2606.

<sup>159</sup> Act 4 of 2000.

In essence the amendment forbade states in the US to create laws which violates the rights as enshrined by the equal protection clause.<sup>160</sup> Subsequent to the constitutional amendments, the Civil Rights Act of 1866 was enacted and s 1 states:

*‘That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race or color... .’*

Similarly to the Civil Rights Act, s 20 of the South African Constitution declares that ‘no person may be deprived of citizenship’. Contrary to the American Constitution, which did not make any provision for the protection of human dignity, the South African Constitution in terms of s 10 recognizes human dignity as a core value under the Bill of Rights.<sup>161</sup> As a result the equal protection clause was not without controversy as it was challenged in various court cases. *Plessy v Ferguson*<sup>162</sup> considered the validity of legislation applied by the state of Louisiana which provided for separate, but equal, railway carriages for Negroes and whites. The majority of the Supreme Court found the legislation to be reasonable given the doctrine of ‘separate but equal’. As stated above the equal protection clause did not explicitly prohibit discrimination and states could implement laws of this nature. However, this decision was not without criticism and Judge Harlan in his dissenting judgment in the *Plessey* case noted the following:

*‘The white race deems itself to be the dominant race in this country ... But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved ... In my opinion, the judgement this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.’<sup>163</sup>*

The *Plessy* decision was overridden by the *Brown v Board of Education*<sup>164</sup> case. In *Brown* the Supreme Court concluded that segregation of children in public schools on the basis of race deprived Negro children of equal educational opportunities. In essence the Supreme Court in *Brown* found that the ‘separate but equal’ policy is in conflict with the Fourteenth Amendment ‘equal protection clause’. It is submitted that this judgment embraces the Fourteenth Amendment and set the stage for affirmative action in the workplace as well.

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<sup>160</sup> *Brown v Board of Education* 347 US 483 (1954). *The Supreme Court overrode the ‘separate but equal’ decision in the Plessy case in concluding that segregation of children in public schools on the basis of race deprived Negro children of equal education opportunities.*

<sup>161</sup> ‘Everybody has inherent dignity and the right to have their dignity respected and protected.’

<sup>162</sup> 163 US 537 (1896).

<sup>163</sup> 163 US 537 (1896) 559.

<sup>164</sup> 347 US 483 (1954).

Following the *Brown* judgment, Title VII of the Civil Rights Act<sup>165</sup> was enacted to implement affirmative action programs. Title VII has an ‘equal opportunity clause’ which states:

*It shall be an unlawful employment practice for an employer –*

*(1) to fail or to refuse hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual’s race, color, religion, sex, or national origin;*

*or*

*(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affected his status as an employee, because of such individual’s race, color, religion, sex, or national origin.’*

In a South African context, the EEA, similarly to the Constitution, as discussed before, also recognizes the fact that apartheid disadvantaged certain categories of people. Hence the Preamble of the EEA states:

*‘Recognising – that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the 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 workplace; and give effect to the obligations of the Republic as a member of the International Labour Organisation,... .’*

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<sup>165</sup> Civil Rights Act of 1964 s 703(a)(1); 703(a)(2).

Although the courts in America directed that the implementation of affirmative action should be reasonable, the Court in *Detroit Police Officers' Association v Young*<sup>166</sup> encouraged authorities to apply affirmative action measures by stating: 'Moreover, the Constitution imposes on states a duty to take affirmative action steps to eliminate the continuing effects of past discrimination.'

It follows that although Title VII prohibits discrimination, it does not impose a statutory duty on employers to implement affirmative action as opposed to the EEA. Section 706(g)(1) of Title VII empowers the courts to ensure the application of affirmative action as a remedy for non-compliance.

Therefore, it is submitted that the state and private employers in America are not obliged to take positive action with regard to affirmative action. It follows that attention is only drawn towards affirmative action when a person who feels wronged by affirmative action programs approaches the court.

Given the above it is evident that both Title VII of the Civil Rights Act and the EEA have envisaged equality in the workplace. However, the inference which can be drawn from Title VII is that it envisaged formal equality whilst the EEA and the Constitution of South Africa envisage equality of outcome (substantive equality).

### 3.3 Beneficiaries of Affirmative Action

It is obvious that affirmative measures in America as well as in South Africa were aimed to advance blacks e.g. the minority in America and the majority in South Africa. The inference drawn is that affirmative action was not based on the social status of a person but rather on a particular race group, but also women and people with disabilities (irrespective of race).

Although Title VII does not name any particular race group but refers to minorities, inclusive of women, it is safe to conclude that it strived to advance blacks as they represents the minority in the US.<sup>167</sup>

'Minorities' in the US are define as:

*'Blacks, Hispanics, American Indian or Alaskan Native and Asian or Pacific Islander,' and 'Black' is defined as '(not of Hispanic origin) all persons having origins in any of the Black racial groups of Africa.'*<sup>168</sup>

The definition of 'minorities' in terms of Title VII is not inclusive of coloureds, as is the situation in South Africa, where the EEA in s 1 defines 'designated groups' with specific reference to Black people as inclusive of Africans, Coloureds and Indians.

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<sup>166</sup> 608 F 2d 671 694 (1979).

<sup>167</sup> Executive Order 11246. Issued in 1965.

<sup>168</sup> Title VII – Form EEO – 1. See EEOC Standard Form 100 s 4 of the Appendix.

It follows that in terms of the equal protection clause people of foreign origin also qualify to benefit from affirmative measures designed for minority groups, unlike in South Africa where only citizens are deemed to be the beneficiaries.<sup>169</sup>

The effect is that white people as well as all males of any origin qualify for protection under Title VII.<sup>170</sup> Hence, ss 2(a) and (b) of the EEA are more explicit with regard to who is entitled to equal opportunity and state:

*‘The purpose of the 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 the employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce’ (own emphasis).*

The definition of ‘minorities’ in terms of Title VII does not include people with disabilities, whilst the term ‘designated groups’ in terms of the EEA is inclusive of people with disabilities. Equality for disabled people in the US is covered under a separate law.<sup>171</sup>

The difference in the affirmative action policies of America and South Africa is clearly demonstrated by the case of *Regents of the University of California v Bakke*.<sup>172</sup> In this case the University set aside 16 out of 100 places exclusively for racial minority applicants. The plaintiff scored the highest number of points of any of the students admitted under the programme.

The plaintiff argued that the University’s refusal to admit him to the Medical School was based on race and subsequently discriminated against him and that this constituted a violation of Title VII and the Fourteenth Amendment equal protection clause. The Court in *Bakke* was of the view that the equal protection clause required that the same protection be given to every person regardless of race. The Court further held that racial and ethnic distinctions are inherently suspect and need the strict scrutiny test.

The Court noted as follows:

*‘Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group’s general interest ... Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise permissible burdens in order to enhance the societal standing of their ethnic groups ...*

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<sup>169</sup> *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC) 69 ‘The only persons to whom it should legitimately and fairly be directed therefore, are persons previously and directly disadvantaged by unfair discrimination in the South African context.’

<sup>170</sup> Title VII – Form EEO – 1.

<sup>171</sup> Disabilities Act of 1990.

<sup>172</sup> 98 S Ct 2733 (1978).

*[p]referential programs may only be reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.*<sup>173</sup>

The Supreme Court noted further with regard to the individualistic notion of equal protection:

*'...[i]t is the individual who is entitled to judicial protections against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group ...'*<sup>174</sup>

It follows that in terms of the equal protection clause an affirmative action plan has to pass the strict scrutiny test to be constitutional. In other words a compelling interest has to be proved of past discrimination against a specific group as well as of individual discrimination.<sup>175</sup>

In terms of the EEA, however, an affirmative action plan will only pass constitutional muster if it complies with s 9(2) of the Constitution. The view in *Bakke* was supported in the *Adarand*<sup>176</sup> case in which Judge O'Connor, for the majority, noted that the Fifth and Fourteenth Amendments support individuals and not groups. Therefore, it follows that any government action which has an element of race should be subjected to strict scrutiny to ensure that the individual's right is not violated.

In contrast to the *Bakke* case, the same principles in a South African context were also expounded in *Stoman v Minister of Safety & Security & Others*.<sup>177</sup> In this case as previously stated, a black police officer was appointed over his white colleague who received the highest percentage mark during the interview. The applicant accordingly claimed unfair discrimination in terms of s 9(3) of the Constitution.<sup>178</sup> This is similar to what *Bakke* claimed in terms of the equal protection clause.

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<sup>173</sup> 98 S Ct 2733 (1978) 2748.

<sup>174</sup> 98 S Ct 2733 (1978) 2753.

<sup>175</sup> McGregor M 'The Application of Affirmative Action in Employment law with specific reference to the Beneficiaries: A Comparative Study' (unpublished LLD thesis, Unisa, 2005) 242.

<sup>176</sup> *Adarand Constructors v Pena* 115 S Ct 2097 (1995).

<sup>177</sup> (2002) 23 ILJ 1020 (T).

<sup>178</sup> '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.'

Unlike the *Bakke* judgment, the Court in *Stoman* held that discrimination on the grounds listed in s 9(3) of the Constitution was regarded as unfair unless it was established that the discrimination was fair.<sup>179</sup> The dispute was about an allegation of discrimination based on race and there was the presumption that it was indeed unfair unless the respondent can prove it was fair. The court noted further that the Constitution recognizes the principle of substantive equality along with that of formal quality.

In other words the Court in *Stoman* accepted that actions needed to be taken to ensure the advancement of persons or categories of persons previously disadvantaged by unfair discrimination. It is accordingly submitted that the court sanctioned affirmative action measures to address South Africa's deep-rooted history of racial and systemic discrimination.

It is obvious, as previously stated, that the equal protection clause has formal equality in mind as opposed to the South African Constitution's s 9(2) and the EEA's s 6(2) which embrace substantive equality. It is furthermore important to note that whilst the equal protection clause caters for individual rights, affirmative action in South Africa provides protection to the group. The principle the Supreme Court applied in the *Bakke* case is that no person should be prejudiced during processes adopted in an attempt to advance another. The South African Constitution as well as the EEA is in direct conflict with that approach as it provides for direct (fair) discrimination to ensure that the imbalances of the past are corrected.<sup>180</sup>

The Court in *Stoman v Minister of Safety and Security* emphasized the collective nature of affirmative action:

*'The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of the South African society.'*<sup>181</sup>

Whilst the ideals of the Constitution and the EEA are to redress past imbalances, Judge Powell in the *Bakke* case was unwilling to deal with the question of past prejudice and noted as follows:

*'The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgements. ...the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals.'*

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<sup>179</sup> The Constitution s 9(5) 'Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

<sup>180</sup> Constitution s 9(2) and the EEA s 6(2).

<sup>181</sup> (2002) 23 ILJ 1020 (T) 1035.

*Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants.*<sup>182</sup>

Given the above, it is evident that the American philosophy of affirmative action is based on the promotion of equality between the different race groups, as opposed to the enforcement of the constitutional values of human beings as enshrined in the South African Constitution.<sup>183</sup> It is also important to note the remarks of Judge Blackmun in his dissenting judgment in the *Stotts* case in which he explains the difficulty of having a racially neutral affirmative action plan. He noted that '*in order to get beyond racism, we must first take account of race. There is no other way*'.<sup>184</sup>

Judge Blackmun also warned that the Court cannot allow the equal protection clause to perpetuate racial supremacy and noted that to '*treat some persons equally, we must treat them differently*'.<sup>185</sup>

Hence it is submitted that Judge Blackmun's remarks are consistent with the principles as set out in the EEA to ensure equality of outcome. In terms of the EEA employers are obligated to comply with s 15 in ensuring that sufficient steps are taken to level the playing fields. A failure to comply with the provisions of the EEA is punishable with a sanction imposed by the Director-General of Labour as will be discussed below.

In having regard to the above, affirmative action plans came under scrutiny in the *Weber*<sup>186</sup> case. The majority was of the opinion that Title VII granted 'equality of opportunity', and the advancement of one person should not be to the detriment of another. The Court in *Weber* came to three conclusions. First, the legitimate expectations of white people should not be trammelled, no white person should be retrenched and replaced by a black person, and whites should not be prevented from advancement. Secondly, there should be a cut-off date for the advancement of those catered for in the affirmative action plan and it should only continue until the problem is addressed. Thirdly, the plan should be flexible, must not contain fixed percentages (quotas) of minorities as beneficiaries to rectify the problem, but just utilize sufficient minorities to address the racial imbalances.<sup>187</sup>

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<sup>182</sup> 98 S Ct 2733 (1978) 2751-2.

<sup>183</sup> Van Rensburg LJ '*Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid*' (unpublished LLD thesis, North-West University 2004) 67.

<sup>184</sup> 104 S Ct 2576 (1984) 2807.

<sup>185</sup> 104 S Ct 2576 (1984) 2807.

<sup>186</sup> *United States Steelworkers v Weber* 99 S Ct 2721 (1979).

<sup>187</sup> 99 S Ct 2731 (1979).



In contrast to the ruling in *Weber*, the South African Constitution as well as the EEA do not make provision for a cut-off date and have strong indicators as to how redress should be achieved.<sup>188</sup> As opposed to *Weber*, in terms of the EEA, white males as a group, regardless of the fact whether an individual benefitted from the apartheid system or not, are excluded from any express benefit of affirmative action programmes.<sup>189</sup> On the other hand, s 15(4) of the EEA prohibits any employer from implementing employment practices which could establish an absolute barrier to the advancement of people who are excluded from the designated groups.

It should be noted that in terms of Title VII, court interference is only possible if an employer intentionally engaged in an unlawful employment practice.<sup>190</sup> In terms of the South African Constitution the determination of the existence of discrimination is an objective enquiry and motive or intent is not relevant.<sup>191</sup>

Title VII also provides that employers could determine their own merit standards in developing an ability test and act upon the results thereof, as long as the actions are not meant to discriminate. However, the Court in *Local 28*<sup>192</sup> noted that it cannot interfere if the individual is denied an opportunity on the ground that he is unqualified. The latter is in line with South African jurisprudence that the appointment of a 'wholly unqualified' or less than suitably qualified or incapable person in a responsible position could never be justified.<sup>193</sup> Given the fact that affirmative action is controversial, the opponents thereof would argue that such programs will allow for 'unqualified' or 'less qualified' people to be appointed and for qualified or better qualified people to be ignored. The tests which were applied to determine competency of minority groups were found culturally biased and might be regarded as an employment barrier.<sup>194</sup>

The effect, if the above is true, is that the practice will leave the door open for abuse by employers as an excuse not to implement affirmative action. To ensure the effective implementation of affirmative action, it is suggested that a merit test should at least determine the best candidate among members of the minority groups. The latter was also the view of the Court in *IMAWU*<sup>195</sup> in which the Labour Court noted 'that in the event members of the 'designated group' compete with another that the best possible candidate from that group should be appointed'. The EEA, contrary to Title VII, is very explicit as to who is eligible for preferential treatment in terms of designated groups. Thus as indicated before, the EEA in s 20(3) defined 'suitably qualified' people who needs to be considered by the employer to redress the imbalances.

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<sup>188</sup> Section 15 read with s 20 of the EEA.

<sup>189</sup> EEA s 1.

<sup>190</sup> Section 706(g).

<sup>191</sup> (1998) 1 SA 300 (CC) 322; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) 278.

<sup>192</sup> *Local 28 of Sheet Metal Workers v EEOC* 106 S Ct 3019 (1986).

<sup>193</sup> (2002) 23 ILJ 1020 (T).

<sup>194</sup> Du Toit D 'et el' *'Labour Relations Law'* 5 ed (2006) Lexis Nexis 645.

<sup>195</sup> (2000) 21 ILJ 1119 (LC).

To ensure that the above is complied with, s 42(a) of the EEA makes provision that the Director-General of Labour should supervise the affirmative programs of employers and must take into account factors which include but are not limited to,

*'The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer`s workforce in the relation to the - ... .' (own emphasis)*

As stated before, the EEA, unlike Title VII, does not leave any escape route for employers not to advance people of the 'designated groups'. Given the above it is submitted that affirmative action programmes are based on a needs principle and that the beneficiaries thereof deserve compensation as they were prejudiced in the past.<sup>196</sup>

### 3.4 Conclusion

In essence then, in assessing the use of affirmative action processes by both America and South Africa, it is evident that affirmative action in the US is subjected to a sunset clause as opposed to the EEA which presumes affirmative action as a value (permanent). There is no doubt that the processes in both the US, which focus on the minority and South Africa, which focus on the majority (designated groups), are directed to ensure equitable representation in the workplace.

However, the distinct difference is that affirmative action in the US follows an individualistic approach as opposed to the EEA which embraces a group approach.<sup>197</sup> The processes in both countries will only be regarded as legitimate if they are included in an affirmative action plan.<sup>198</sup>

### 3.5 Affirmative Action in Namibia

#### 3.5.1 Introduction

Before independence in 1990 Namibia was governed by the then South African apartheid regime. As a result the resemblance of Namibia`s labour laws to those of South Africa is notable.<sup>199</sup> New labour laws were enacted after the adoption of Namibia`s Constitution.<sup>200</sup> It goes without saying that, similar to what the situation was in South Africa, blacks were employed on fixed term contracts and their movements and choice of jobs were legally restricted.<sup>201</sup>

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<sup>196</sup> Smith N 'Affirmative Action: Its Origin and Point' (1992) 243.

<sup>197</sup> 98 S Ct 2733 (1978) 2753. See also *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T) 1035.

<sup>198</sup> 99 S Ct 2721 (1979). See also *Coetzer & Others v Minister of Safety and Security* (2003) 24 ILJ 163 (LC).

<sup>199</sup> Fenwick C 'Labour Law in Namibia: Towards an 'Indigenous Solution'? (2005) 4.

<sup>200</sup> Fenwick C (2005) 10.

<sup>201</sup> Fenwick C (2005) 4.

Following the transition in 1990, the new Namibian government reconstructed its labour legislation to comply with international practices as envisaged by the ILO.<sup>202</sup> To have an understanding of how affirmative action in Namibia compares with that of South Africa, the relevant legislation in this regard needs to be discussed.

Affirmative action law in both South Africa<sup>203</sup> and Namibia<sup>204</sup> is still in a process of development and limited information is available. It is clear from the legislation that much similarity exists between the two country's affirmative action laws but there are also various dissimilarities.<sup>205</sup> Dissimilarities are that South Africa's Act refers to 'Employment Equity' whilst Namibia's Act refer directly to 'Affirmative Action'. The difference in focus of affirmative action in South Africa and Namibia to that in the United States of America is that in the US, affirmative action is directed to the minority whilst in South Africa and Namibia the focus is on the majority. Both South Africa and Namibia were previously governed by the minority, with the majority initially oppressed, later being elected into power after the respective transitions. For the purpose of this thesis the focus will be on the relevant legislation and legal principles.

### 3.5.2 Comparison of Legislation

It is noteworthy to mention that the Namibian Affirmative Action Act (and the EEA<sup>206</sup> in a South African context), makes provision for the establishment of an Employment Equity Commission (EEC).<sup>207</sup> Section 4 of the Namibian Act states: The objectives of the Commission are -

- (a) *'To enquire into whether a relevant employer has adopted and is implementing an affirmative action plan and whether any particular affirmative action plan or affirmative action measure meets the objects of this Act, and to take the actions prescribed by or under this Act in regard thereto;*
- (b) *To collect and compile information for the purposes of the administration of the provisions of this Act;*
- (c) *To advise any person, body, institution, organisation, or interest group on matters pertaining to the objects of this Act, including whether an existing or proposed affirmative action measure or employment practice is consistent with the objects of this Act;*

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<sup>202</sup> Musukubili F 'A Comparison of the South African and Namibian Labour Dispute Resolution System' (unpublished LLM thesis, Nelson Mandela Metropolitan University, 2009) 1.

<sup>203</sup> The EEA.

<sup>204</sup> Namibian Affirmative Action (Employment) Act, 29 of 1998.

<sup>205</sup> Van Rensburg LJ 'Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid' (unpublished LLD thesis, North-West University, 2004) 164.

<sup>206</sup> Section 28, Commission for Employment Equity.

<sup>207</sup> Section 4 of Act 29 of 1998.

- (d) *To advise the Minister on making regulations in order to achieve the objects of this Act and on any other matter the Minister may refer to the Commission;*
- (e) *To undertake or sponsor research and publications relating to the objects of this Act and the Commission`s functions; and*
- (f) *To exercise such other powers or perform such other duties and functions as many or is required to be performed or exercised by the Commission under this Act.'*

The EEA, although providing for a Commission for Employment Equity (CEE),<sup>208</sup> the Director-General of Labour<sup>209</sup> (as will be discussed in chapter 4) is empowered to fulfil the functions similar to those of the EEC. From the Preamble of the Namibian Affirmative Action Act, it is clear that it is focus on developing rules and regulations to ensure equal opportunities for designated groups and a justifiable representivity in the workforce.

Hence the Preamble states:

*'To achieve equal opportunity in employment in accordance with Article 10 and Article 23 of the Namibian Constitution; to provide for the establishment of the Employment Equity Commission; to redress through appropriate affirmative action plans the conditions of disadvantage in employment experienced by persons in designated groups arising from past discriminatory laws and practices; to institute procedure to contribute towards the elimination of discrimination in employment; and to provide for matters incidental thereto.'*

The Preamble of the EEA as discussed before (para 3.2 above) has similar objectives. It is, therefore, submitted that both Preambles are directed to achieve equal representation and eliminate discrimination in the workplace. The Namibian Act defines affirmative action in s 17 as:

*'measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment and are equitably represented in the workforce of a relevant employer.'* (own emphasis)

It goes on to include, among other things, the following very important obligations under s 17(2):

- (a) *'identification and elimination of employment barriers against persons in designated groups;*
- (b) *making reasonable efforts in the workplace to accommodate, physically or otherwise, persons with disabilities; and*

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<sup>208</sup> Chapter IV s 28 of the EEA.

<sup>209</sup> Section 42 of the EEA.

(c) instituting positive measures to further the employment opportunities for persons in designated groups, which may include measures such as:-

- (i) ensuring that existing training programmes contribute to furthering the objects of this Act;
- (ii) establishing new training programmes aimed at furthering the objects of this Act; and
- (iii) giving preferential treatment in employment decisions to suitably qualified persons from designated groups to ensure that such persons are equitably represented in the workforce of the relevant employer.'

Although the EEA does not, strictly speaking, define 'affirmative action', ss 15(1) and (2) of the EEA relate to s 17 of the Namibian Affirmative Action Act, in stating:

- '(1) 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,
- (2) Affirmative action measures implemented by a designated employer must include: (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people; (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) ... measures to: (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.'

From the above, very few differences between the Namibian Act and the EEA are evident, such as the EEC<sup>210</sup> serving as an enforcing tool, similar to the function of the Director-General of Labour in terms of the EEA.<sup>211</sup>

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<sup>210</sup> Section 5 of the Namibian Act.

<sup>211</sup> See Chapter 4.

### 3.5.3 Definitions

In determining the similarities and dissimilarities between Namibia's and South Africa's labour laws, the following definitions of the Namibian legislation will be discussed: Relevant employer, Designated groups, Employment barriers, Suitably qualified person, Employee and Disabilities.

#### (a) The relevant employer

The term 'relevant employer' used in the Namibian Act is similar to that used in the EEA, i.e. the 'designated employer'. However, s 20 of the Namibian Act stipulates that the Minister of Labour will identify the employers who have to comply with the Act. These employers must be named individually or be identified by category.

The criteria used to identify a 'relevant employer' include numerical levels, industrial or economic sectors, and any other principles or standards deemed appropriate by the Minister. The 'designated employer' in terms of the EEA is determined by means of objective criteria, unlike the 'relevant employer' that is determined in a subjective manner.<sup>212</sup> A 'designated employer' in terms of s 1 of the EEA means:

- *'an employer who employs 50 or more employees; an employer, who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act,*
- *a municipality as referred to in Chapter 7 of the Constitution; an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government,*
- *the National Defence Force, the National Intelligence Agency and the South African Secret Service;*
- *and an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.'*

In the event that the status of the relevant employer should change, the employer is responsible to report such change to the Namibian EEC. In terms of Government Notice (GN) No. 159 of 1999, no relevant employer shall cease to exist to be a relevant employer as a result of the reduction in the number of employees in the employ of the relevant employer to less than 50.<sup>213</sup>

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<sup>212</sup> Van Rensburg LJ 'Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid' (unpublished LLD thesis, North-West University, 2004) 192.

<sup>213</sup> Article 3(3) of the regulations of the Namibian Affirmative Action Act as published in the Namibian Government Gazette 158 of 199 and Government Notice 159 of 06 August 1999.

The effect of the GN is it compels private sector (relevant) employers to ensure that their affirmative action reports should be submitted no later than 18 months after the date it is published.<sup>214</sup> The EEA of South Africa has no similar provision and it is not clear what the situation is going to be if the employer's status has changed. The Namibian Act, s 22 also provides for any employer who is not a relevant employer to adopt and implement a voluntary affirmative action plan which is consistent with the Act. Unlike the Namibian Act, the EEA makes no provision for voluntary affirmative action plans.

(b) Designated groups

Section 18 of the Namibian Act, refers to three groups whose members are to benefit from affirmative action measure, viz (1) racially disadvantaged persons; (2) women (irrespective of race); and (3) persons with disabilities (physical or mental limitations irrespective of race or gender). 'Designated groups' in terms of the EEA means black people, women and people with disabilities. Black people are further defined by the EEA to be inclusive of Africans, Coloureds and Indians. The similarity between the two definitions is that both make provision for women and people with disabilities. It is submitted that both instances include women of all races.

However, the term 'racially disadvantaged groups' in the Namibian Act, includes all races, having regard to their social, economic, or educational imbalances which arose from the racially discriminatory laws which existed before Namibia became independent.<sup>215</sup>

It follows that 'white' males in terms of the Namibian Act, unlike in South Africa, are also entitled to benefit from affirmative action measures if they can prove that they fell victim to the discriminatory laws of the past. In South Africa all white males, irrespective of whether they were born before or after 1994 and regardless of their social status, are excluded from affirmative action measures.<sup>216</sup> Section 19 of the Namibian Act excludes only non-Namibians from the benefits of affirmative action measures.

In terms of s 19(3) a relevant employer must train a Namibian citizen as the understudy for every non-Namibian citizen in its employment. An employer who wants to retain a non-Namibian citizen as a permanent employee must apply for exemption to the Minister of Labour. Non-Namibians with permanent residence rights are included in the affirmative action provisions applicable to Namibian citizens. Although the EEA does not discriminate against non-South Africans directly in terms of its definition, it was determined that affirmative action measures cater only for South African citizens.<sup>217</sup> It is clear that both the Namibian Act as well as the EEA give employment preference to their own citizens. It is submitted, that this principle is an acceptable one as any government is first and foremost responsible to address the needs of its own citizens.

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<sup>214</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 36.

<sup>215</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 24.

<sup>216</sup> Article 1 of the EEA.

<sup>217</sup> (2001) 22 *ILJ* 2647 (LAC) 2656 (E).

In a South African context, as stated earlier, not all white males benefitted from apartheid. This is evident in the growing unemployment of white males and the increase in the occupation of informal housing by white families.<sup>218</sup> Therefore, it is hoped that South Africa, with its growing unemployment and the fact that the current provisions of the EEA (designated groups) excludes all white males (which could result in another minority disadvantaged group) should consider the Namibian approach. Although s 15(4) of the EEA prohibits any designated employer from establishing employment practices which creates an absolute barrier to the prospective or continued employment or advancement of people who are not from disadvantaged groups, the fact remains that white males are effectively, and will never be, beneficiaries of affirmative action.<sup>219</sup>

It is, therefore, submitted that if South Africa does not amend the EEA it would create another minority disadvantaged group instead of levelling the playing fields. The Namibian Act is plausible in that the benefits of affirmative action are based on whether or not a person has suffered from past discriminatory laws, and that race is not the determining factor.

(c) Employment barrier

An employment barrier in terms of s 1 of the Namibian Act ‘means any rule, practice or condition, other than a legitimate job requirement, which adversely affects persons who are members of a designated group more than it affects persons who are not members of such designated group’. ‘Employment barrier’ is not defined in the EEA. It relates to the definition of ‘employment policy or practice’ in terms of s 1 read with s 2 of the EEA, which includes the achievement of 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 experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace’.

It follows then, that any employment practice or policy which prevents the advancement of black people, women and people with disabilities would be perceived as a barrier. The imposition of inappropriate language or educational requirements may also be regarded as a barrier.<sup>220</sup> It is submitted that the intention of both definitions is to remove all obstacles that could prevent the empowerment of employees.<sup>221</sup>

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<sup>218</sup> I Luv South South Africa ‘Zuma visits white squatter camps’ available at <http://iluvsa.blogspot.com/2008/07/zuma-visits-white-squatter-camps.html> (accessed 21 May 2012). ‘Not only do we have more black poor, we have new white poor. Instead, through terrible policies we chased away our talented people, creating more unemployment then shutting out an entire race group from job opportunities. Fourteen years later, the place is a mess.’

<sup>219</sup> Gibson E ‘SAL se kadetprogram aanvaar nie wit mans vir opleiding’ *Die Burger* 17 Augustus 2012 4.

<sup>220</sup> Du Toit D ‘et al’ *Labour Relations Law* 5 ed (2006) Lexis Nexis 645.

<sup>221</sup> Section 15(4) of the EEA.



#### (d) Suitably qualified person

Section 1 of the Namibian Act defines a suitably qualified person as a ‘person who has the abilities, formal qualifications or relevant experience for a position of employment’. Similarly s 20(3) of the EEA also defines ‘suitably qualified person’ as ‘a person who may be suitably qualified for a job as a result of anyone of, or any combination of that person`s- (a) formal qualifications; (b) prior learning; (c) relevant experience; or (c) capacity to acquire, within a reasonable time, the ability to do the job’.

It follows that in determining whether a person is suitable to be employed and/or promoted the employer must consider the aforementioned. It follows further that the employer is obligated to comply with the above and, failing such, he should substantiate such decision.

The difference between the two definitions is that the Namibian definition makes no provision for a person to acquire the necessary capacity within a reasonable time. In regard to the EEA definition an employer cannot discriminate against a person only on the ground that the employee lacks experience.<sup>222</sup> It is submitted that the only exception to the rule is in terms of Art.1(2) of the ILO Convention No. 111 of 1958<sup>223</sup> which states that ‘*any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination*’.

#### (e) Employee

An employee who is entitled to benefit from affirmative action measures is defined in s 1 of the Namibian Labour Act to be ‘any natural person: (a) who is employed by, or working for, any employer and who is receiving, or entitled to receive, any remuneration; or (b) who in any manner assists in the carrying on or the conducting of the business of an employer’.

In terms of the EEA ‘employee’ ‘means any person other than an independent contractor who- (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer, and ‘employed’ and ‘employment’ have corresponding meanings’. The only difference between the two definitions is that the EEA refers to any person ‘other than an independent contractor’.

#### (f) Disabilities

Section 18(b) of the Namibian Act defines ‘disabilities’ ‘in relation to a person, includes any persistent physical or mental limitation which restricts such person’s preparation for, entry into or participation or advancement in, employment or occupation’.

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<sup>222</sup> Section 20(5) of the EEA.

<sup>223</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organization*, 1958. See also s 6(2)(b) of the EEA.

In terms of s 1 of the EEA ‘people with disabilities’ are defined as those who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment. In essence the two definitions are the same to ensure equal opportunity to that particular group.

### **3.5.4 Conclusion**

In the light of the above, it is evident that the similarities between the EEA and the Namibian Act are overwhelming compared to the differences. The fundamental difference is that the Namibian Act in its attempt to rectify imbalances has a strong focus on the social status of individuals, as opposed to the EEA which is directed to particular race groups (designated groups) regardless of whether or not a particular individual was the victim of past prejudice. The monitoring and enforcement of affirmative action measures will be discussed in chapter 4 hereafter.

## **3.6 International Law**

### **3.6.1 Introduction**

The principles of equality and non-discrimination are found in international law instruments such as treaties, international conventions, and declarations.<sup>224</sup> From many of these instruments, it follows that every citizen has fundamental rights which obliges (member) states to take proactive steps to protect it.<sup>225</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention) and the Convention on the Elimination of All Forms of Discrimination Against Women (Women’s Convention) emanated from the United Nations Charter and the Universal Declaration of Human Rights respectively.<sup>226</sup> In essence, then, these international instruments provide the foundation of affirmative action to remedy the effects of discrimination.

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<sup>224</sup> Interim Report on Group and Human Rights 5.

<sup>225</sup> McGregor M ‘Affirmative action and non-discrimination: South African law evaluated against international law’ (2006) 386.

<sup>226</sup> Cohn M ‘Affirmative Action and the Equality Principle in Human Rights Treaties: United States Violation of Its International Obligations’ (2002) 250.

### 3.6.2 The UN Charter

During South Africa's transition, the interim<sup>227</sup> and current Constitutions<sup>228</sup> were enacted in a manner to comply with international law on human rights. The UN Charter (the Charter) is inclusive of all the major principles of international relations. The Charter subscribes to the following:<sup>229</sup>

‘WE THE PEOPLE OF THE UNITED NATIONS DETERMINED

*to save succeeding generations from the scourge of war,*

*which twice in our lifetime has brought untold sorrow to mankind,*

*and to reaffirm faith in fundamental human rights,*

*in the dignity and worth of the human person,*

*in the equal rights of men and women and of the nations large and small, and*

*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,*

*and to promote social progress and better standards of life in larger freedom...*

AND FOR THESE ENDS

*....to employ international machinery for the promotion of the economic and social advancement of all peoples....*

The Charter also seeks:<sup>230</sup>

*‘[t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...’*

It follows that the various states, inclusive of South Africa have to pledge adherence to these principles, to promote respect for them, and in the event of their transgression, to take action jointly and severely in conjunction with the UN to ensure world peace.<sup>231</sup>

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<sup>227</sup> Interim Constitution of South Africa, Act, 2000 of 1993 s 8(3).

<sup>228</sup> Section 9(2).

<sup>229</sup> Preamble; Chapter 1, Article 1(1).

<sup>230</sup> Chapter 1, Article 1(3).

<sup>231</sup> McGregor M ‘*The Application of Affirmative Action and non-discrimination: South African law evaluated against international law*’ (2006) 386.

It is suggested that the Charter should be read with the equal protection clause of the Fourteenth Amendment to the Constitution of the USA, which prohibits discrimination. The Charter presumed equal treatment of all irrespective of race, sex, gender, and that all peoples were entitled to the benefits of affirmative action.

The International Covenant on Economic, Social and Cultural Rights<sup>232</sup> is in this respect equally relevant as it empowers people to develop their own economy and to be self-sustainable,<sup>233</sup> followed by the International Covenant on Civil and Political Rights which compels states to allow citizens to exercise their individual rights.

Having regard to the above Covenants and the Charter in respect of individual rights, the International Covenant on the Elimination of All Forms of Racial Discrimination<sup>234</sup> in pursuance of equal rights requires states to implement affirmative action measures to address all forms of racial discrimination.<sup>235</sup>

It does not imply that all people, at all relevant times, will be treated equally. To ensure the elimination of racial discrimination and equal treatment, certain people need to be treated differently, which is the view of Judge Blackmun in his dissenting judgment in the *Bakke* case as discussed earlier. Judge Blackmun is also of the view that race is a determining factor when dealing with racial discrimination.<sup>236</sup>

### 3.6.3 The Race Convention

The above principles of affirmative action are also embodied in Art.1 of the Race Convention which states:

*'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnical groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'*<sup>237</sup> (own emphasis)

<sup>232</sup> Adopted in 1966. *The objective is to force governments provide societal rights to all people in a society.*

<sup>233</sup> Van Rensburg LJ 'Regstellende Aksie en die Grondwetlike Waardes 'n Regsvergelykende Studie na Grondwetlikheid' (unpublished LLD thesis, North-West University, 2004) 268.

<sup>234</sup> Proclaimed by the General Assembly of the UN on 20 November 1963 and adopted in 1965.

<sup>235</sup> Cohn M 'Affirmative Action and the Equality Principle in Human Rights Treaties: United States Violation of Its International Obligations' (2002) 251.

<sup>236</sup> 104 S Ct 2576 (1984) 2807.

<sup>237</sup> Articles 1(4) 'This Convention provides the basis for future tests as to the acceptability of such measures. It includes notions of necessity and proportionality to the aims to be achieved as well as the time limits.'

Although the EEA embraces the principles as set out in chapter 2 above, it appears to be in conflict with two issues: first, the EEA is specifically directed in respect of ‘black’ with regard to race and limits the rights of ‘white males’ to equally participating for employment; and secondly, Art. 1 of the Race Convention presumed the demolition of affirmative action when it achieved its objective, whilst affirmative action in South Africa is currently of a permanent nature.

The Race Convention also states that ‘reservations’ incompatible with its purpose and objective will be void.<sup>238</sup> It follows then that the EEA’s definition in s 1<sup>239</sup> with regard to ‘designated groups’ could be in conflict with the Convention’s objective and purpose. However, in defence of South Africa’s ‘reservation’ for the ‘designated groups’, it can be argued that it is the only manner in which equality would be achieved as members of that group were the victims of past discrimination. Therefore, the Constitution expressly states that a measure designed to eliminate past discrimination is not in itself unfair.<sup>240</sup>

It is evident from the above that the Race Convention presumed pro-active measures to be taken by states against racism, which is compatible with the provisions as contained in the Constitution.<sup>241</sup> In essence the Race Convention is based on three notions: a state should prove that its actions were necessary; that the actions are proportional to the objective; and should make provision for a time limit.<sup>242</sup>

It is submitted that the reason why the Race Convention is directed to the individual and not the group, is to avoid individuals from enjoying the benefits of affirmative action because of their membership of a specific group whilst it may be that they as individuals, never suffered personal discrimination.<sup>243</sup> Given the fact that the EEA is of a permanent nature, it is submitted that it is therefore in conflict with the notion of temporary measures. Unlike the Race Convention, affirmative action in terms of South Africa’s Constitution and EEA embraces protection of the group. It is submitted that people who did not suffer discrimination during apartheid may also benefit from affirmative action.

It follows, that given the fact, the protection in terms of the EEA is group orientated, children (within the designated group) born during 1994 and thereafter who were not victims of past discrimination benefit from affirmative action measures even if they are from affluent families. In contrast, as indicated before, white males born during 1994 and thereafter would be the victims of affirmative action measures, even though they did not benefit from the apartheid practices which may lead to a new category of disadvantaged minority.

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<sup>238</sup> Cohn M ‘Affirmative Action and the Equality Principle in Human Rights Treaties: United States ‘Violation of Its International Obligations’” (2002) 252.

<sup>239</sup> EEA s 1 ‘designated group’ means black people, women and people with disabilities; ‘black people’ is a generic term which means African, Coloureds and Indians.’

<sup>240</sup> Section 9(5).

<sup>241</sup> Articles 1(4): 2(2) of the Race Convention.

<sup>242</sup> Article 1(4) of the Race Convention.

<sup>243</sup> Van Rensburg LJ ‘Regstellende Aksie en die Grondwetlike Waardes n Regsvergelykende Studie na Grondwetlikheid’ (unpublished LLD thesis, North-West University, 2004) 281.

### 3.6.4 The Women Convention

In addition to the Race Convention, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) also require states to take steps to eliminate discrimination. Article 2(1) of the ICESCR provides:

*'Each State Party to the present Covenant undertakes to take steps, individually through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'*<sup>244</sup>

Similar requirements are set by Art. 4(1) of the Women Convention:

*'Adoption by State Parties of temporary social measures aimed at accelerating de facto inequality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.'*

Following the above, the Women's Convention is explicit and focuses on various provisions to achieve affirmative action which require States Parties to take appropriate measures which, among others but not limited to, include: - measures to prevent discrimination between the status of women and men; that employment opportunities are equal and women are not discriminated against because of pregnancies and family responsibilities; that women enjoy full emancipation and choice of marriage.

However, the Women's Convention similar to the Race Convention, presumed the need for temporary measures to achieve its goals. It is submitted that States initiates various measures to meet their obligations as set out in the Convention as long as they are compatible with its provisions.<sup>245</sup> Hence, South Africa as a signature to the Convention enacted the EEA which addresses the inequalities in respect of women.

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<sup>244</sup> Adopted in 1997.

<sup>245</sup> McGregor M 'The Application of Affirmative Action and non-discrimination: South African law evaluated against international law' (2006) 389.

### 3.6.5 The International Labour Organization

Having regard to Art's 1 and 5 of the Discrimination (Employment and Occupation) Convention<sup>246</sup> which was adopted by the ILO, it is clear that the ILO favours affirmative action.<sup>247</sup>

Article 1 of the Convention states:

- (1) For the purpose of this Convention the term discrimination includes:-
- (a) *Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;*
  - (b) *such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers organizations, where such exist, and with other appropriate bodies.*
- (2) *Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.*
- (3) *For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.'*

Article 5 embraces Art. 1 in so far as it pursues the implementation of measures to achieve equality and states:

- (1) *'Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.*
- (2) *Any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.'*

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<sup>246</sup> *Discrimination (Employment and Occupation) Convention* No 111, 1958.

<sup>247</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' (2000) 11.

Having regard to the above Convention, the EEA, which is the implementation document and is provided for by s 9(2) of the Constitution and it complies with the ILO in terms of s 1 (definition of designated groups), s 2(a) and (b) as well as s 3 as stated hereinbefore.

Article 1(2) of the Convention, and s 6(2)(b) of the EEA make provision for fair discrimination in exceptional circumstances, namely that of inherent requirements of a job. The principles as prescribed by the ILO and other Conventions were (as discussed above) expounded in *PSA obo Karriem v SAPS & Another*<sup>248</sup> in which the Court found that ‘operational requirements’ outweighed employment equity considerations, and is in compliance with the provisions of the ILO Convention and the EEA.

The justifiable defence to a claim of unfair discrimination as expounded in *Karriem*, was also discussed in *Woolworths (Pty) Ltd v Whitehead*.<sup>249</sup> In this case the Court concluded that ‘inherent’ meant an ‘indispensable attribute’ which relates to an inescapable way to perform the job.<sup>250</sup> A matter of urgency or a commercial rationale would not pass constitutional muster.<sup>251</sup> In terms of the ILO Convention any ‘limitation’ in this regard must be required by the characteristics of the job and should be in proportion to its requirements.<sup>252</sup> It follows that such an ‘inherent’ requirement should be a permanent characteristic of the job.<sup>253</sup>

The effect is that the ILO’s objective is to promote social justice for workers globally, which includes the formulation of international policies and programmes, creation of international labour standards and provision of technical assistance, education and training.<sup>254</sup> Given the representativeness of the ILO, it is submitted, that it provides an equal voice to citizens of member states at ILO conferences.

The provisions of the International Conventions are binding on states, which ratified them and comply with it accordingly. However, recommendations thereto are not binding, but might be morally enforceable to be used to draft guidelines for policy and compliance.<sup>255</sup> The intention of these conventions and recommendations if properly implemented is to ensure improvement in the working conditions of workers.<sup>256</sup> In ensuring compliance therewith member states are compelled to report on progress in respect of the conventions they ratified.<sup>257</sup>

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<sup>248</sup> (2007) 4 *BLLR* 308 (LC).

<sup>249</sup> (2000) 21 *ILJ* 571 (LAC).

<sup>250</sup> Cooper C ‘*The boundaries of Equality in Labour Law*’ (2004) 25 *LJ* 835.

<sup>251</sup> Cooper C ‘*The boundaries of Equality in Labour Law*’ (2004) 25 *LJ* 835.

<sup>252</sup> *Discrimination (Employment and Occupation) Convention and Recommendation No.111 of the International Labour Organization*, 1958.

<sup>253</sup> Cooper C ‘*The boundaries of Equality in Labour Law*’ (2004) 25 *LJ* 835.

<sup>254</sup> *Preamble of the ILO Constitution*.

<sup>255</sup> *The ILO* 14.

<sup>256</sup> *The ILO* 14.

<sup>257</sup> *The ILO* 14.



The Declaration on Fundamental Principles and Rights at Work<sup>258</sup> was adopted by the ILO and states:

*'... in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share in the wealth which they have to generate, and to achieve fully their human potential.'*

Given the above, it is submitted that no employment or occupation whether performed by nationals or foreigners, is excluded from the content and scope of the ILO Conventions. The phrase 'special measures' as contained in ILO Convention No.111 (Discrimination Convention) serve as bases for affirmative action; hence affirmative action measures in terms of the EEA are regarded as not discriminatory.<sup>259</sup>

### 3.7. Conclusion

It is evident from the preceding discussion that South Africa, in preparing its affirmative action measures, considered international conventions. Given the differences in affirmative action measures between the US, Namibia and South Africa, it is clear that there exists no 'one size fits all' measure given the complex nature of the countries.<sup>260</sup>

In terms of the history of South Africa it appears that affirmative action is a compelling measure to ensure equality to all in the workplace.<sup>261</sup> In essence, then, affirmative action is based on a need to address an imbalance.<sup>262</sup> Therefore, the monitoring, enforcement and assessment is essential and will be discussed in chapters 4 hereafter. Although Maduro argues that 'past discriminations do not justify current discriminations between individuals that have not themselves benefited or been the object of such discrimination',<sup>263</sup> the EEA is aimed to compensate the group regardless whether or not the individual was discriminated against in the past.

From the fact that affirmative action is designed to benefit those who were discriminated against in the past, it can be postulated that the beneficiaries are receiving compensation for past injuries done to them.<sup>264</sup> Among others, International Conventions serve in assisting to justify fair discrimination which is contained in the EEA and enabled by the South African Constitution.

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<sup>258</sup> Adopted in 1998.

<sup>259</sup> Art. 5 of the Discrimination Convention.

<sup>260</sup> Groeneveldt D *'The Truth about Employment Equity'*  
<http://www.ifaisa.org/TheTruthaboutEmploymentEquity.html> (accessed 18 May 2012).

<sup>261</sup> Faundez J *'Promoting Affirmative Action'* (1994) 1187.

<sup>262</sup> Smith N *'Affirmative Action: Its Origin and point'* (1992) 234.

<sup>263</sup> Madoru M *'Comparative Perspectives on Equality Law-A view from the United States and the European Union'* (2010) 103.

<sup>264</sup> Smith N *'Affirmative Action: Its Origin and point'* (1992) 234.

In essence the International Conventions acknowledge different treatment as acceptable to ensure equity.<sup>265</sup> It is thus submitted that affirmative action policies are admissible in so far as they do not discriminate. However, to expect that affirmative action would instantly solve the severe disadvantages created by apartheid is a myth.<sup>266</sup>

Having regard to the fact that the International Conventions provide that affirmative action measures should be of a temporary nature, it therefore appears that the EEA is in direct conflict with that objective of these Conventions. Suffice it to say at this stage that the success of affirmative action or the failure thereof will depend on the recognition thereof as a suitable response, as well as effective communication in all spheres of government and the private sector.<sup>267</sup> It follows that the success of affirmative action can also depend on the outcome of measures taken to redress past inequalities, and the result is a workforce reflective of the population in which the enterprise operates.



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<sup>265</sup> Article 1(4) and 2(2) of the Race Convention and Article 4 of the Women's Convention.

<sup>266</sup> Faundez J 'Promoting Affirmative Action' (1994) 1194.

<sup>267</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' (2000) 14.

## **CHAPTER 4**

### **THE OBLIGATION OF EMPLOYERS TO ENSURE SYSTEMS ARE IN PLACE TO ELIMINATE UNFAIR DISCRIMINATION IN THE WORKPLACE, AND AN EVALUATION OF THE POWERS OF THE DIRECTOR-GENERAL OF LABOUR IN TERMS OF COMPLIANCE WITH THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT**

#### **4.1 Introduction**

Having regard to the principles of affirmative action as discussed in the preceding chapters, it is imperative to determine whether the legislation and / or regulations, which were enacted to ensure equality in the workforce, are sufficient to eliminate unfair discrimination. In ensuring the effective compliance with, and implementation of, the legislation and regulations, compliance systems will inevitably determine whether the goals of affirmative action will be achieved.

Therefore, States which are determined to ensure equality in the workplace have to ensure that monitoring systems are in place and that a failure to adhere to legislative provisions will have consequences. Given the fact that the Department of Labour is an organ of State which is empowered to ensure compliance with the legal provisions as enshrined in the Constitution and the EEA, the actions of the Director-General of Labour need to be evaluated against, among others, the provisions of the PAJA. In evaluating the above, the enforcement systems of the US, Namibia and South Africa will be discussed.

#### **4.2 Monitoring and Enforcement Legislation**

The South African EEA, The Namibian Affirmative Action Act, and the US Title VII (equality opportunity clause) obliged governments and certain employers to ensure compliance with national and international affirmative action legislation, as discussed hereafter. The EEA, for instance, provides direction and guidelines to designated employers and government departments,<sup>268</sup> enabling them to ensure employment equity in the workplace.<sup>269</sup> To ensure proper ministerial oversight the Commission for Employment Equity (CEE)<sup>270</sup> was established to act in an advisory capacity to the Minister of Labour, but does not have any executive powers as such.<sup>271</sup>

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<sup>268</sup> Section 53.

<sup>269</sup> Section 13 read with s15.

<sup>270</sup> Section 28 of the EEA.

<sup>271</sup> Section 30. *'The Commission advises the Minister among on - (a) Codes of good practice issued by the Minister in terms of section 54; (b) regulations made by the Minister in terms of section 55; and (c) Policy and any other matter concerning this Act.'*

The Namibian Employment Equity Commission (EEC), unlike the CEE, has executive powers similar to the powers vested in the Director-General of Labour in terms of the EEA.<sup>272</sup> On the other hand the provisions of the International Conventions (ILO) are binding on members states, which have to ratified them, comply with it and have to report on progress made.<sup>273</sup>

In terms of s 5 of the Namibian Act the main powers of the Commission are to –

- *‘issue guidelines to employers;*
- *facilitate training programmes and other technical assistance;*
- *appoint review officers;*
- *approve, disapprove or conditionally approve affirmative action reports;*
- *appoint review panels;*
- *issue affirmative action compliance certificates;*
- *refer disputes to the Labour Commissioner, and*
- *to establish awards recognizing affirmative action achievements.’*

The Director-General of Labour in terms of s 43(1) of the EEA may conduct a review to determine whether an employer is complying with the provisions of this Act. In so doing, the Director-General may embark on steps in terms of s 43(2) of the Act which states:

*‘In order to conduct the review the Director-General may –*

- (a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;*
- (b) request an employer to submit to the Director-General any book, record, correspondence, document or information that could reasonably be relevant to the review of the employer’s compliance with this Act;*
- (c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with this Act;*  
*or*
- (d) request a meeting with any-*
  - (i) employee or trade union consulted in terms of s16;*
  - (ii) workplace forum; or*
  - (iii) other person who may have information relevant to the review.’*  
*(own emphasis)*

It is suggested that in terms of s 43(2), the Director-General of Labour has a discretion as he or she may embark on the steps set out therein to ensure that employers comply with the provisions of the EEA, by interrogating their employment equity plans and how they implement it in the workplace. The term may creates the impression that the Director-General could be selective in its approach, which may have unintended consequences as it may be perceived as an abuse of power when these steps are only applicable when dealing with selected relevant employers.

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<sup>272</sup> Chapter V ss 34 - 45.

<sup>273</sup> The ILO 14.

In view of the powers and functions of the EEC (Namibia) as well as those of the Director-General of Labour (EEA), it is evident that the respective legislation, despite the discretion which the Director-General of Labour may exercise, envisaged compliance with affirmative action laws to address inequalities in the workplace. Both institutions are responsible to monitor, guides, assist, direct and as last resort sue an employer for non-compliance.<sup>274</sup>

Although Title VII (US) laid the basis for equality in the workplace, in terms of s 703(j), it does not compel employers to implement affirmative action measures. It, furthermore, granted employers the right to differentiate between employees with regard to benefits, conditions of employment as long as the decision was not based on discrimination in terms of race, sex, colour, religion or national origin. Such differentiation could be implemented on the basis of the merit system, and could also be justified on the principle that the employer had no intention to discriminate. In terms of the South African law, intent or motive is irrelevant in the determination of the existence of direct or indirect (institutionalised) discrimination as it is an objective inquiry.<sup>275</sup> In furthering the objectives of Title VII's equal opportunity clause, Executive Order (EO) No 11246 was introduced.

The Order aimed to promote equal opportunities for minorities in ensuring that those contractors who intend contracting with the State take positive action in eliminating employment discrimination.<sup>276</sup> First, it prohibits discrimination in hiring and employment decisions of government contractors as well as subcontractors in terms of the equal opportunity clause. In terms of the EO the powers to impose affirmative action programmes were vested in the federal Department of Labour which could also issue relevant regulations.<sup>277</sup> Secondly, it encouraged contractors and subcontractors to implement affirmative action with regard to 'qualified' minorities and women to enhance equality in the workplace.

The US established the Office of Contract Compliance Programs (OFCCP) to ensure the application of the equal opportunity clause. It was the duty of the OFCCP to ensure that each contractor's contract with government contain an equal opportunity clause in terms of EO 11246. In essence, the compliance with the equal employment opportunity clause in an employer's contract with the State makes affirmative action indirectly compulsory, similarly to the provisions contained in the EEA. It can be inferred that compliance with affirmative action legislation, as discussed above, would result in awards given to the relevant employers to encourage the promotion of equal opportunities.

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<sup>274</sup> Section 45 of the EEA and s 5 of the Namibian Act.

<sup>275</sup> (1998) 1 SA 300 (CC) 54.

<sup>276</sup> Sections 703(a)(1) and 703(a)(2): *'It shall be an unlawful employment practice for an employer – to fail or to refuse hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affected his status as an employee, because of such individual's race, color, religion, sex, or national origin.'*

<sup>277</sup> Executive Order 11246.

It also follows that if employers take effective steps to ensure compliance with the legislation, it would undoubtedly result in the awarding of government tenders (State contracts).<sup>278</sup>

### 4.3 Duties of Employers

If under-utilisation of women and minorities is experienced, employers (contractors), in terms of the OFCCP, are obliged to conduct a self-evaluation to enable them to identify and to remove any equal opportunity barriers.<sup>279</sup> This obligation emanated from the Title VII 'equal opportunity clause' which envisaged the empowerment of minorities and women in the US. It follows that although affirmative action measures are not compelled, non-compliance will negatively affect an employer's application for a State contract.

A relevant employer, in terms of the Namibian Affirmative Action Act, in developing and implementing an affirmative action plan,<sup>280</sup> is required to conduct a statistical analysis of its workforce, similarly to the EEA, with regard to the representation of the three designated group categories viz, racially disadvantaged persons, women, and persons with disabilities.<sup>281</sup>

Every designated employer, in terms of the EEA, must draw up and implement an affirmative action plan in order to achieve employment equity for the designated groups as set out in chapter III. Section 13(1) states that, 'every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act'. In order to achieve that, the employer should consult with the relevant workplace structures which are in existence in the workplace at the time.<sup>282</sup>

Hence, the objective is to create an integrated process, inclusive of the relevant role-players,<sup>283</sup> for identifying and removing employment barriers in pursuit of addressing equitable representation of suitably qualified persons from the designated groups within the workplace.<sup>284</sup> Notwithstanding the aforementioned, a designated employer is also required to ensure, subject to s 42, that no barrier exists which could prevent the employment and advancement of people who are not from the designated group.<sup>285</sup>

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<sup>278</sup> Section 53 of the EEA.

<sup>279</sup> 41 CFR 60-2.10(a). *As part of its affirmative action programme, a contractor must monitor and examine its employment decisions and compensation systems in order to evaluate the impact of such systems on women and minorities.*

<sup>280</sup> Section 29.

<sup>281</sup> Namibian Act, s 18.

<sup>282</sup> Section 13(2) of the EEA.

<sup>283</sup> Section 16 of the EEA.

<sup>284</sup> Du Toit D 'et al' *'Labour Relations Law' 5 ed (2006) Lexis Nexis 631.*

<sup>285</sup> Section 15(4) of the EEA.

To ensure compliance with the plan, the designated employer must also assign one or two managers to take responsibility for monitoring and implementing the affirmative action measures.<sup>286</sup> This, however, does not relieve the employer of its responsibility in terms of this Act or any other law, as discussed hereafter.<sup>287</sup>

#### 4.3.1 Consultation with Employees

The affirmative action plans, as discussed above and further, is subject to proper consultation with relevant role-players. Sections 24 of the Namibian Act as well as s 16 of the EEA make such consultation compulsory. Both provisions are in essence the same and require consultation by the employers with employee representatives (unions) with regard to the preparation, implementation, revision and monitoring of affirmative action plans. In the absence of employee representatives, workplace forums or the employees themselves may be directly consulted.

The object of consultation is to reach consensus, similarly to a collective bargaining exercise which can serve as a joint problem solving mechanism in the event a dispute arises.<sup>288</sup> It follows that an employer cannot unilaterally prepare and implement an affirmative action plan. Neither, can an employer deviate from a properly consulted affirmative action plan which was accepted by all relevant parties.<sup>289</sup> The LC in *Dudley* cautioned against *ad hoc* appointments and promotions as an employer runs the risk of being at odds with a collectively determined equity plan. However, it is submitted that if consensus cannot be reached between the parties, the employer retains the right (after consultation) to implement the affirmative action plan notwithstanding.<sup>290</sup>

It is further submitted that this is not overly problematic due to the fact that, if any other party is aggrieved by the decision of the employer to unilaterally implement the plan, they can in terms of s 34 of the EEA report any contravention of the provisions of the Act to the Director-General of Labour. In the USA, although the same requirement was not explicitly expressed in the *Weber*<sup>291</sup> case, the Court interpreted the composition of a voluntary affirmative action plan of a private employer.

The plaintiff (*Weber*) challenged the decision of a private employer who developed in-house training for crafting, and implemented an affirmative action plan in an attempt to address the lack of crafting skills among blacks. The training of these crafting skills was provided by unions which excluded blacks. *Weber* sued when several slots were subsequently awarded to blacks with less seniority as him. The majority of the Court concluded that Title VII provides for equality of opportunity, while the minority were of the view that it permitted equality of treatment.

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<sup>286</sup> Section. 24(1) of the EEA.

<sup>287</sup> Section. 24(2) of the EEA.

<sup>288</sup> *Atlantis Diesel Engines (Pty) Ltd v NUMSA* (1994) 14 ILJ 1247 (A).

<sup>289</sup> (2008) 12 BLLR 115 (LAC).

<sup>290</sup> Du Toit D 'et al' *'Labour Relations Law'* 5 ed (2006) Lexis Nexis 639.

<sup>291</sup> 99 S Ct 2721 (1979); See chapter 3.

Although the Court upheld the affirmative action plan, it laid down very clear criteria to which future affirmative action plans would be judged, as discussed hereafter. In the circumstances it can be assumed that consultation with interested parties would be applicable in the preparation, implementation and monitoring of employment equity plans in terms of the US equal opportunity clause. The inference to be drawn is that an employer, in order to address inequalities in the workplace has the right, after consultation to take steps which are necessary and just.

### 4.3.2 Affirmative Action Plans

Employers could comply with the respective legislation and orders, only if they have developed a proper affirmative action plan, that it was properly consulted about as required by law, as stated above. This approach was confirmed in the US in *United States Steelworkers v Weber*<sup>292</sup> in which the Court concluded as follows:

*'First, the legitimate expectations of whites should not be trammelled unnecessarily. No white person could be dismissed in order to be replaced by a black person, and there should not be an absolute bar to the advancement of white employees. Secondly, the plan must be temporary, with either a specified date or goal which would terminate the plan. The plan must only continue for as long as necessary to correct the problem. Thirdly, the plan must be flexible and could not be used to maintain a fixed percentage of minority employees, but only to eliminate 'manifest racial imbalances' in a traditionally segregated workforce or job category.'*

In terms of the EEA, the same line was followed in *Coetzer & Others v Minister of Safety & Security*<sup>293</sup> in which the Court states, among other factors, that it was unfair of the SA Police Service (SAPS), in the absence of an equity plan, not to appoint white candidates to positions reserved for the designated groups. Section 20(1) of the EEA states:

*'A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.'*

Employers have to ensure that an affirmative action plan must contain 'numerical goals' to ensure the achievement of equitable representation of people from the designated groups.<sup>294</sup> This plan must also be in accordance with the provisions as contained in s 20(2)(a)-(i) of the EEA. In terms of s 20, *inter alia*, the designated employer must take into consideration the objectives for each year and in terms of s 15(2), the employer have to ensure the elimination of employment barriers which will adversely affect the progress of designated groups.

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<sup>292</sup> 99 S Ct 2721 (1979).

<sup>293</sup> (2003) 24 ILJ 163 (LC).

<sup>294</sup> Section 15(2)(d) and s 20(2)(c) of the EEA.



In terms of the Namibian legislation, s 23, states that every relevant employer<sup>295</sup> must prepare and implement a three-year affirmative action plan. This plan must contain specific affirmative action measures to be implemented to ensure, the elimination of employment barriers against persons in the designated groups. Section 18 defines designated groups as ‘(a) racially disadvantaged persons; (b) women (inclusive of all races); and (c) persons with disabilities (physical or mental limitations, inclusive of all races)’.

The term ‘racially disadvantaged persons’ means all persons belonging to a racial or ethnical group which formerly had been, or still is, directly or indirectly disadvantaged in the sphere of employment as a consequence of social, economic, or educational imbalances arising out of racially discriminating laws or practices before the independence of Namibia. In giving effect to this, s 19 of the Act stipulates that a relevant employer should give preferential treatment to suitably qualified<sup>296</sup> persons from designated groups. The Act also compels a relevant employer to train a Namibian citizen as an understudy for every appointment of a non-Namibian citizen. Given the above, it appears that the development and implementation of affirmative action plans are the only valid process to ensure the elimination of inequalities in the workplace.

Although affirmative action plans in terms of US legislation, should be of a temporary and flexible nature, it is a proven fact that an employer’s action in implementing affirmative action measures could only be justified in terms of a proper employment equity plan. The inference to be drawn from the discussion above, is, that the objective of equity plans are to achieve reasonable progress in the accommodation of people from the designated groups, as envisaged by ss 42(b) and 15(c) of the EEA.

#### **4.3.3 The Monitoring of the Implementation of Affirmative Action**

The EEA provides for employees and trade union representatives to report any deviations and / or contraventions of the Act to any person who is party to the agreed affirmative action plan.<sup>297</sup> Labour inspectors, in terms of ss 35 and 36, are also empowered to monitor the effective implementation of the provisions of this Act along with the Basic Conditions of Employment Act. In terms of item 7.1.2 of the Code of Good Practice, that managerial accountability for employment equity outcomes should be incorporated in the manager’s performance contract.<sup>298</sup>

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<sup>295</sup> See chapter 3 par 3.2.2.1.

<sup>296</sup> See chapter 3 par 3.2.2.1.

<sup>297</sup> Section 34 ‘Any employee or trade union representative may bring an alleged contravention of this Act to the attention of- (a) another employee; (b) an employer; (c) a trade union; (d) a workplace forum; (e) a labour inspector; (f) the Director-General; or (g) the Commission.’

<sup>298</sup> GN R1394 GG 20626 of 23 November 1999.

It follows that a designated employer must also assign one or two managers to take responsibility for monitoring and implementing the affirmative action measures.<sup>299</sup> As indicated before, this does not relieve the employer of its responsibility in terms of this Act or any other law.<sup>300</sup> These managers are in terms of s 34 of the Act responsible to report any contravention to the relevant people mentioned therein. However, it ultimately remains the responsibility of the employer to address any shortcomings. In other words as soon as the employer become aware of a breach or deviation of the equity plan he or she should take remedial steps which are necessary to rectify the situation.

According to the Namibian Act, the review officer has responsibilities similar to those of labour inspectors, to evaluate affirmative action plans, including 'analysing and reviewing the affirmative action plan and to ensure that the relevant employers implement the plan and comply with the provisions of the Act; and thereafter submit their findings and recommendations to the Commission to approve or reject the report. The employer will receive a copy of same'. The inference drawn is that an affirmative action plan should first be approved by the Commission, before implementation, to ensure compliance with the provisions of the Act.

In the US, the Department of Labour is empowered to issue regulations which in turn allow federal agencies to impose sanctions and penalties for non-compliance with EO's.<sup>301</sup> As stated before, Title VII does not impose a statutory duty on employers to implement affirmative action. However, in the event that a person is wronged by an unfair labour practice of the employer, the courts have the responsibility to remedy the situation.



#### **4.4 Conclusion**

In the light of the above, it can be concluded that legislation directs employers how to ensure employment equity in the workplace. It follows then that, employers have a duty to ensure compliance of the relevant legislation, to consult with the relevant parties in the workplace, developing, implementing and monitoring the effectiveness of affirmative action plans. Employers are equally obliged to follow the guidelines as directed by the Director-General of Labour in terms of the EEA, the EEC (Namibian) and the OFCCP (US). Non-compliance thereof may lead to punitive actions e.g. employers may pay penalties or losing government contracts.

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<sup>299</sup> Section 24(1) of the EEA.

<sup>300</sup> Section 24(2) of the EEA.

<sup>301</sup> *The role of the Department of Labor with regard to equal employment opportunity is limited. The department liaises the EEOC, OFCCP and other agencies when drafting regulations. They also may prosecute employers who provide false or misleading information to agencies.*

#### 4.5 Powers of the Director-General of Labour

As stated hereinbefore, in terms of s 42 of the EEA, the Director-General, in determining whether a designated employer is implementing employment equity in compliance with this Act, must take into account factors which includes but are not limited to,

- (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the;*
- (i) demographic profile of the national and regional economically active population;*
  - (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;*
  - (iii) economic and financial factors relevant to the sector in which the employer operates;*
  - (iv) present and anticipated economic and financial circumstances of the employer; and*
  - (v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;*
- (b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;*
- (c) reasonable efforts made by a designated employer to implement its employment equity plan;*
- (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from the designated groups; and*
- (e) any other prescribed factor.'*

It is suggested that not all the criteria stated above might be applicable to every designated employer. In other words the Director-General of Labour or his or her delegated person should determine which of the provisions are most relevant as key indicators of compliance.<sup>302</sup> It is evident from the above that the Director-General of Labour must also determine, among other provisions contained in chapter V of the Act, whether an employer has a data-base of 'suitably qualified' people (employees) in accordance with s 20(3) of the Act. Furthermore, to what extent designated groups are accommodated in the workplace, and whether the employer utilized them equitably in the different occupational categories in terms of a proper human resource and development plan.

It follows that in doing so the Director-General of Labour has to consider whether the suitably qualified people deployed in the workplace, are in proportion with the demographic profile of the national and regional economically active population. It is submitted that in determining the demographic profile, the location of the employer's business would be a determining factor.

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<sup>302</sup> Du Toit D 'et al' *'Labour Relations Law'* 5 ed (2006) Lexis Nexis 656.

That said, s 42(a)(i) is currently the subject of a labour dispute in the Labour Court<sup>303</sup> as employers differ with regard to the interpretation of that provision of the Act. The Director-General may also conduct a review *meru motu* to determine whether an employer complies with the provisions of the EEA.<sup>304</sup> In terms of s 43(2), the Director-General may embark on several actions to determine the status of compliance by the employer.

The Director-General, subsequent to s 43(2), may also in terms of s 44 approve the employment equity plan or, decide on steps to be taken to rectify the shortcomings within a specific time frame, and or take any other steps deemed necessary. In the event where an employer fails to comply with the instructions subsequent to the Director-General's directives issued in terms of ss 43 and 44, the Director-General may refer the employer's failure to the Labour Court.<sup>305</sup>

In other words, the Director-General is not compelled to take court action but can also revert to alternative dispute resolution actions. Following a referral to the Labour Court, it may, among other orders, issue a compliance order, refer the dispute to the CCMA, order compensation in the event an employee was unfairly treated, and / or impose a fine with regard to a failure to comply with a specific provision of the Act.<sup>306</sup>

#### **4.6 The Promotion of Administrative Justice Act (PAJA)**

The objective of the PAJA is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair. Hence the Preamble states:

*'WHEREAS section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;*

*AND WHEREAS section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-*

- *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
- *impose a duty on the state to give effect to those rights; and*
- *promote an efficient administration;*

*AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33 (3) must be enacted within three years of the date on which the Constitution took effect;*

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<sup>303</sup> *Solidarity & Others v Department of Correctional Service & Others (Case No. C368/2012).*

<sup>304</sup> Section 43(1) of the EEA.

<sup>305</sup> Section 45 of the EEA.

<sup>306</sup> Section 50 of the EEA.

*AND IN ORDER TO-*

- *promote an efficient administration and good governance; and*
- *create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,..'*

In view of the Preamble, it is safe to deduce that the Constitution serves as the framework within which government administrations should execute their authority. This includes, among others, the day to day activities of government e.g. actions of ministers, Directors-General, municipal managers, and other public officials.<sup>307</sup>

It is furthermore envisaged to be an open and transparent process of government to which the public has access for recourse should they feeling wronged by an administrative decision. In other words, the exercise of public power by officials must comply with the provisions of the Constitution which is the supreme law.<sup>308</sup>

Section 33 of the Constitution provides as follows:

- (1) *'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
- (3) *National legislation must be enacted to give effect to these rights, and must-*
  - (a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
  - (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
  - (c) *promote an efficient administration.'*

In accordance with s 33, the PAJA was enacted with the objective to promote an efficient administration to ensure a democratic, accountable, open and transparent government for all.

Hence, 'administrative action' means any decision taken or any failure to take a decision, by –

- (a) *an organ of state, when-*
  - (i) *exercising a power in terms of the Constitution or a provincial constitution;*
  - or*
  - (ii) *exercising a public power or performing a public function in terms of any legislation.; or*

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<sup>307</sup> Van Heerden M 'Promotion of Administrative Justice Act, 2000: Three Types of Administrative Actions' (2009) 184.

<sup>308</sup> The Constitution s 33.

(b) *a natural or juristic person, other than a organ of state, when exercising a public power or performing a public function in terms of an empowering provision..*<sup>309</sup>

As alluded to before, the term 'organ of state' should be understood to mean an organ of state that forms part of the executive sphere of government. It follows that the term not only refers to an institution, such as a department, but also to an official who is empowered by the Constitution, a provincial constitution or any other legislation to perform a function.<sup>310</sup>

Accordingly, administrative action refers to actions taken by an organ of state while exercising a public power of performing a public function. In instances where an official is empowered by legislation to exercise a power or to perform a certain function and such official refuses or fails to exercise the power or to perform the function, such refusal or failure in itself qualifies as an administrative act.<sup>311</sup> In essence, the rule of natural justice has to be complied with when taking administrative actions. Accordingly, a person, who will be affected by the decision, must be afforded the opportunity to state his or her case and the authority must consider the merits thereof before taking the decision'.<sup>312</sup> It also implies that the authority that takes the decision must be free from bias and must be unprejudiced.<sup>313</sup>

Having considered the above, it can be concluded that the Director-General of Labour is a functionary in terms of the Act. It is also submitted that the functions of the Director-General of Labour as prescribed in chapter V of the EEA constitute administrative actions as defined in s 1 of the Act, and that they are actions on behalf of a state organ. Subject to s 56(4) of the EEA, any official of the Department of Labour who performs a delegated responsibility is equally subject to the provisions of the PAJA. Any such decision taken, which materially and adversely affects the rights or legitimate expectations of a person, should be fair. It follows that a person who feels that their right is adversely affected by a decision of the Director-General is entitled to be provided with written reasons.

The Constitutional Court in *President of the RSA v SARFU*<sup>314</sup> clearly distinguishes between government and administration. The Court found that administration is the part of government that is responsible for the implementation of legislation. In this case the Court makes it plain that to determine whether an action constitutes an administrative function in terms of the PAJA, the focus is on the function rather the functionary. Therefore, when the Director-General and / or their delegate perform a function in terms of the relevant provisions of chapter V, this would undoubtedly constitute an administrative action.<sup>315</sup>

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<sup>309</sup> Section 1 of the PAJA.

<sup>310</sup> The Constitution s 239.

<sup>311</sup> Section 1 of the PAJA.

<sup>312</sup> Section 3(2)(b) of the PAJA.

<sup>313</sup> Section 3(3) of the PAJA.

<sup>314</sup> (1999) 10 (BLCR) 1059 (CC).

<sup>315</sup> Section 1 of the PAJA.

#### 4.6.1 Judicial Review of Administrative Action

Any person, whose rights were adversely affected by an administrative action from an organ of state, as defined above, may institute proceedings in a court or a tribunal designed for the judicial review of an administrative action.<sup>316</sup> A court or tribunal has the power to review, among others, an administrative action taken by an administrator who was not authorized to do so in terms of the law, if the action was procedurally unfair, for ulterior purpose or motive, in bad faith, or arbitrarily or capriciously.

A person who feels wronged can also in terms of the Act take a failure of an administrator to act on judicial review.<sup>317</sup> This can be illustrated at the hand of the pending labour court case in which the union, Solidarity obo members of the Department of Correctional Services (The Department) sues the Department for an alleged unfair labour practice for not applying regional demographics as well.<sup>318</sup> The Department, in developing its equity plan considers only national demographics. In terms of s 42(a)(i), an employer have to consider both national and regional demographics as prescribed by the EEA. The Department claims that it is in terms of s 7(2)(a) of the Public Service Act 103 of 1994, a National Department and is entitled to considers only the national demographics in developing its equity plan.

As a result coloured employees of the Department in the Western Cape, who are members of the (dominant) economical active population felt prejudiced by the decision as they are restrained in terms of employment opportunities and promotions. The Department's equity plan supports the views of the former Director-General of Labour, Mr Jimmy Manyi who at the time said that coloured people is over populated in the Western Cape and should spread out to other provinces for job opportunities.<sup>319</sup> Hence, the coloured members approached the labour court to review the Department's equity plan as it did not take regional demographics into account.

#### 4.7 Conclusion

Given the above, it is submitted, that the successful implementation of affirmative action measures are the responsibility of not only the employer but of all role-players concerned. However, the employer remains the person ultimately responsible for the non-compliance with the provisions of the Act. The effective implementation and monitoring of affirmative action plans require a team effort and the major responsibility rests with the relevant employer. In essence, all parties whether consulted or not, who are relevant to the workplace have a responsibility to ensure the effective execution of the affirmative action plan.

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<sup>316</sup> Section 6 of the PAJA.

<sup>317</sup> Section 6(3) of the PAJA.

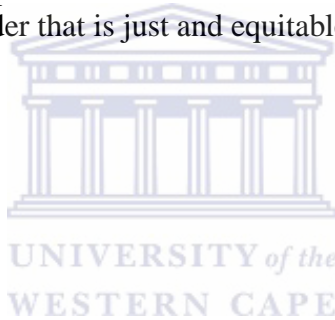
<sup>318</sup> *Solidarity & Others v Department of Correctional Service & Others* (Case No. C368/2012).

<sup>319</sup> Hlongwane S (Analysis): 'Jimmy Manyi finds out just how tough it is to be between Manuel and a hard place' *The Daily Maverick* 2 March 2011 5

They are equally responsible to report any contravention to the Director-General of Labour or any other party as stated in s 34. Although managers may be held accountable to reach the affirmative action objectives, the employer remains ultimately responsible. Therefore, it goes without saying that the success of an affirmative action plan requires its collective ownership by those ultimately affected by it.<sup>320</sup>

The Director-General, at the same time, has the responsibility to ensure that employers comply effectively with the provisions of the Act, and may institute the necessary proceedings to remedy any non-compliance. The Director-General of Labour and / or their delegate who performs a function in terms of chapter V of the EEA is bound by the provisions of the PAJA. It requires the Director-General of Labour to be transparent, accountable, and to ensure the application of a democratic procedure. In other words the Director-General of Labour has to comply with the rules of natural justice.

Any person, who feels wronged by an action, or a failure to act by an administrator of an organ of state, has the right to seek relief in terms of a judicial review in a court or tribunal designated for that purpose. The court or tribunal, after considered the arguments of the parties may grant any order that is just and equitable in terms of s 8 of the PAJA.



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<sup>320</sup> Van Rooyen J 'Implementing Affirmative Action in Namibia' 3 ed (2000) 13.



## CHAPTER 5

### **AN EVALUATION OF WHETHER SECTION 42 OF THE EMPLOYMENT EQUITY ACT AND THE POWERS OF THE DIRECTOR-GENERAL OF LABOUR ARE SUFFICIENT TO ENSURE EQUAL REPRESENTATION OF DISADVANTAGED GROUPS IN THE WORKPLACE**

#### **5.1 Introduction**

It has shown that, due to South Africa's history of apartheid, certain people were unfairly discriminated against on the basis of race, gender and other grounds.<sup>321</sup> Hence, to eradicate unfair discrimination the interim Constitution followed by the final Constitution and the EEA were enacted, and had among others, equality as their objective.<sup>322</sup> The objective of the EEA is to ensure that sufficient measures are to be taken to eradicate discrimination and ensure equitable representation of members of the designated groups in the workplace.

As discussed in the preceding Chapters, the US and Namibia experienced the same inequalities and it was therefore important to evaluate and to compare the measures implemented by them with those adopted by South Africa. Seeing that South Africa is a member of the UN and ILO, it was equally important to determine how its labour laws relate to international treaties and conventions.

It follows then, that the purpose of s 42 of the EEA was to ensure that employers comply with the aforementioned principles and that the Director-General of Labour has the responsibility to assess and enforce compliance therewith.

#### **5.2 Discussion**

The Constitution of the RSA prohibits discrimination on the grounds of, *inter alia*, race and gender,<sup>323</sup> and the EEA in outlawing discrimination echoes this principle. Although the Constitution and the EEA legitimizes affirmative action measures to redress the inequities of the past, it decline to sanction social engineering mechanically designed to produce representation which is solely based on race and gender. This can never be justifiable as s 9(2) and (4) of the Constitution and s 2(b) of the EEA, clearly envisage representivity that is broad and equitable. Although affirmative action measures are directed at the designated groups, s 15(4) prohibits a designated employer from embarking on processes which prevent the employment and advancement of non-designated employees. In other words, opportunities have to be made available to employees of all races and gender subject to the provisions of s 42.

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<sup>321</sup> See chapter 1 par 1.

<sup>322</sup> See chapter 1 par 1.

<sup>323</sup> Section 9(3) of the Constitution.

Section 15(3) of the EEA is relevant in this regard and provides that affirmative action plans may include preferential treatment (of designated groups) and numerical goals, but exclude quotas.<sup>324</sup> This principle supports the objective of s 195(1) of the Constitution and s 15(2)(b) of the EEA, which clearly envisage representivity that is broad, equitable and based on reasonable accommodations being made.<sup>325</sup>

The application of s 42 as it currently stands gave rise to different interpretations e.g. national departments of government (Department of Correctional Service and the Department of the SA Police Service) claim that they are entitled to implement national demographics and in so doing ignore regional demographics despite the preponderance of a certain race group in that region.<sup>326</sup> If this notion is correct, no account is then taken of the economically active people in that region which is a requirement in terms of s 42(a)(i).<sup>327</sup>

Du Toit is of the view that if recruiting is done locally, the regional demographics, and if it is done nationally, the national demographics are applicable respectively.<sup>328</sup> It follows then that, in terms of Black individuals (Africans, Coloureds and Indians), the employer must take into account the regional and national composition of the black population in racial and gender terms.<sup>329</sup>

Section 15(4), read alongside with s 42, as previously stated, prohibits any designated employer from establishing employment practices which create an absolute barrier to the prospective or continued employment or advancement of people who are not from disadvantaged groups. That said, the inference validly to be drawn is that s 15(4) read with s 42 did not provide for any existent, or presumed future, barriers (differentiation) amongst the designated groups themselves.

In other words, if the enactments prevent employers from creating employment barriers for non-designated employees, it would also not tolerate employment barriers created to prevent the prospective employment or advancement of members or a certain category of members of the designated groups itself, as reflected in the Department of Correctional Services EE Plan.<sup>330</sup> Furthermore, s 42 of the EEA provides for the consideration of factors to determine compliance with employment equity concerns. All of these factors, including, but not limited to, the demographic profile (national and regional) of the economically active population and the pool of suitably qualified people from the designated groups, must be taken into account during employment considerations.

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<sup>324</sup> Section 15(3) states: “*The measures referred to in sub-section (2) (d) include preferential treatment and numerical goals, but exclude quotas.*”

<sup>325</sup> See chapter 2 par 2.2.

<sup>326</sup> Dawie-Rubriek ‘DKD is nou op dun ys oor ras.’ *Die Burger* 25 February 2012 4.

<sup>327</sup> See chapter 2 par 2.9.

<sup>328</sup> Du Toit D ‘et al’ ‘*Labour Relations Law*’ 5 ed (2006) *Lexis Nexis* 637.

<sup>329</sup> Du Toit D ‘et al’ ‘*Labour Relations Law*’ 5 ed (2006) *Lexis Nexis* 637.

<sup>330</sup> See Chapter 2 par 2.9.

It is evident from the above that no basis is provided by the EEA for employment equity practices which only consider national demographics to determine an appropriate composition of the workplace. However, during a recent urgent court application in the Labour Court, the Department of Correctional Services argued that it is compelled to apply national equity targets and not the regional equity targets of the Western Cape demographics, and that the applicant (a coloured male) who happened to be a member of the (dominant) economical active population in the region, should move to another province where demographics might favour him.<sup>331</sup> It is submitted that such application of s 42(a)(i) is against the spirit of both the Constitution and the EEA as it presumably constitutes a process of social engineering reminiscent of our past (forced removals).

Given the foregoing, it follows that the Director-General of Labour in terms of s 42 has no discretion other to consider both national and regional demographics in determining compliance with the EEA. Although the Director-General of Labour is bound to consider both, it is suggested that s 42 does not impose a direct legal duty on employers to do the same. Thus, it is safe to conclude that, currently, the employer has discretion in applying the demographics.<sup>332</sup>

Section 15(2)(d) provides for equitable representation in the various occupational levels in the workplace, and it is submitted that the EEA does not provide for ‘degrees of disadvantage’ and that no hierarchy for affirmative action exists within the designated groups.<sup>333</sup> It is submitted that such an approach would complicate the objective of the EEA as it may be difficult to determine the extent of disadvantage that each person individually (African, Coloured and Indian) has suffered, and that the nature of discrimination may vary in respect of disability, race and gender.<sup>334</sup>

Chapter V of the EEA gives extensive powers to the Director-General to ensure compliance with the EEA. In the event of non-compliance with the Director-General’s directives, the Director-General can sue a designated employer in the labour court, forcing the employer to comply with the EEA. Additional to the Director-General’s powers, the EEA provides that CCMA commissioners in arbitration proceedings can make an appropriate award that gives effect to a provision of the EEA.<sup>335</sup>

However, given the uncertainty with regard to the interpretation of s 42(a)(i), it is submitted that the Director-General of Labour, in terms of his or her powers, would be unable to direct an employer as to which demographics should be applicable in drafting and implementing their affirmative action plan.

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<sup>331</sup> Jones M ‘Equity Targets – Prisons officer fights for promotion’ *Cape Times* 22 Augustus 2012 2.

<sup>332</sup> See chapter 2 par 2.2.

<sup>333</sup> See chapter 2 par 2.2.

<sup>334</sup> McGregor M ‘*The Application of Affirmative Action in Employment law with specific reference to the Beneficiaries: A Comparative Study*’ (unpublished LLD thesis, Unisa, 2005) 443.

<sup>335</sup> Section 48.

On consideration of the aforesaid, it appears that s 42 (with the exception of s 42(a)(i)) contains sufficient measures to ensure the eradication of past discrimination and to ensure equitable representation in the workplace through the selection of suitably qualified people from amongst members of the designated groups.

Given the labour dispute with regard to the Department of Correctional Services EE Plan, clarity in respect of s 42(a)(i) is critical in ensuring that the drafting of equity plans and their implementation pass constitutional muster. Therefore, this highly contentious issue should urgently be put to rest in terms of a Constitutional Court judgment to ensure guidance and legal certainty.

### 5.3 Conclusion

In the light of the above and with the exception of s 42(a)(i) as discussed herein, it can be concluded that the EEA did contribute significantly to transformation in the workplace in terms of equitable representation. However, more needs to be done, and an expectation that the workplace will become absolutely discrimination free is misplaced.

Neither would it be possible for equal opportunities to become available overnight for everyone. Systemic discrimination in the workplace will continue to persist and will obviously be eradicated over a reasonable time. However, given the reported cases which were referred to in the preceding chapters, it is evident that affirmative action has become an acceptable and legitimate vehicle to ensure equality in the workplace.<sup>336</sup>

It is submitted, that to give legitimate effect to s 42 of the EEA, employers should ensure that their equity plans reflect under-representivity in the different categories and levels in the workplace. It follows that it would be unnecessary and unfair to have pre-determined and arbitrary hierarchies and ranking of the designated groups.<sup>337</sup> Therefore, it is submitted that employers should treat members of the designated groups equally with specific reference to ‘Black people’ (Africans, Coloureds and Indians), and that merit and experience should be the only determining factor amongst them.

Such approach will embrace the objectives of international instruments in that human beings are ‘born free and equal in dignity and rights’.<sup>338</sup> It is further submitted that differentiation amongst the designated groups (Black people) would be counter-productive to the objectives of the EEA. The fact that a certain category of the designated groups had to approach the Labour Court to ensure equal treatment, has the potential to create a culture of racial inferiority which may evolve into racial hostility amongst them.<sup>339</sup>

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<sup>336</sup> See chapter 2 par 2.2 and par 2.4.

<sup>337</sup> *Solidarity & Others v Department of Correctional Service & Others* (Case No.C368/2012).

<sup>338</sup> Universal Declaration of Human Rights. Adopted on 16 December 1948.

<sup>339</sup> Rubinfeld J ‘*Affirmative Action*’ (1997) 427.

It is also submitted that the powers vested in the Director-General in terms of chapter V, with the exception of s 42(a)(i), is sufficient to ensure compliance with the EEA. The Director-General of Labour in its oversight capacity, can apply measures to assist, direct, and can as a last resort, in the case of non-compliance with its directives sue, the employer in the Labour Court.<sup>340</sup>

Finally, it goes without saying that affirmative action has the potential to evoke unrealistic expectations and emotions as it restrict opportunities for some. As a result, negativism will be detrimental to the long-term success of affirmative action. Therefore, as prerequisite, affirmative action policies, requires the recognition by all role-players, and should be perceived to be fair and reasonable by both employers and employees.

#### 5.4 Recommendation

It is recommended that South Africa consider the Namibian Affirmative Action Act as it is plausible in the sense that the benefits of the affirmative action are based on whether or not an individual has suffered from past discrimination, and that race is not the determining factor.<sup>341</sup> However, proof of direct or indirect disadvantage in the labour field as a result of the social, educational and economical status arising from past discrimination is required.<sup>342</sup>

It is submitted that this approach would in all likelihood contribute to the following, e.g.

- First, prevent a further differentiation amongst the designated groups, a situation created by the Department of Correctional Services as discussed above.
- Secondly, prevent that the same people in the designated groups benefit more than once (including BEE contracts), ensuring that the benefit of affirmative action reaches more disadvantaged persons. (The EEA provides no guidelines as to when a designated person is sufficiently advanced. The implication is that a designated person enjoys affirmative action benefits, and a non-designated person, will be excluded of equal job opportunities for the duration of his or her lifetime), and
- Thirdly, prevent that the workplace loses essential / scarce skills by appointing a non-designated person (skilled) together with a designated person (trainee) with specific performance outcomes (mentorship).

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<sup>340</sup> Section 45 of the EEA.

<sup>341</sup> See chapter 3 par 3.5.3(b).

<sup>342</sup> Namibian Act s 18 states: '(1) For the purpose of this Act there are three designated groups whose members are to be benefit by the implementation of affirmative action measures: (a) racially disadvantaged persons; (b) women; and persons with disabilities. (2) (a) "racially disadvantaged persons" means all persons who belong to a racial or ethnic group which was or is, directly or indirectly, disadvantaged in the labour field as a consequence of social, economic, or educational imbalances arising out of racially discriminatory laws or practices before the Independence of Namibia;..'

The aforesaid would in all probability prevent a situation of labour practices which can result in un-intended consequences of affirmative action measures (the one race group feel threatened by another). It has also the potential of promoting a spirit of unity and racial harmony amongst racial groups, in that everybody will be afforded a fair opportunity in the workplace.



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