AFFIRMATIVE ACTION AND THE EMPLOYMENT EQUITY ACT OF SOUTH AFRICA

BY

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Mini-dissertation

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Declaration

I, Tseke Mokgomane Tladi (student number: 9802664), hereby declare that the thesis submitted for the Master of Arts degree to the Rand Afrikaans University, apart from the help recognised, is my own work and has not formerly been submitted to another university for a degree.
Abstract

The study is about the concept of Affirmative Action in the Employment Equity Act of South Africa, however it traces the history of Affirmative Action from the United States of America and Malaysia. These two countries are found to be leading the world in Affirmative Action. The term ‘Affirmative Action’ originated from the United States of America to prohibit unfair discrimination against certain groups of people because of non-job-related characteristics in terms of Civil Rights Act of 1960. Malaysia introduced Affirmative Action to develop education and employment opportunities of the Bumiputra. Bumiputra is one of the ethnic groups in Malaysia that have suffered unfair discrimination.

Affirmative Action is a concept that became topical with attempts in South Africa to increase the participation of previously disadvantaged groups in the workplace. This concept, which is accepted constitutionally, is still controversial in its meaning and practice. It is for this reason that the study attempts to dispel misunderstandings about the concept. The study distinguishes Affirmative Action from related concepts such as equal employment opportunity and reverse discrimination.

In order to develop the idea of Affirmative Action, the study also makes a distinction between descriptive definitions and normative definitions. This study opted for normative definitions in order to develop an ideal of what Affirmative Action is supposed to be.

The study looks at how Affirmative Action is conceptualised in the Employment Equity Act of South Africa. Through the evaluation of the concept of Affirmative Action in the Employment Equity Act in terms of my normative definition of Affirmative Action, it was found that Affirmative Action in the Employment Equity Act complies with the normative definition of Affirmative Action.

The following are my conclusion:

- Affirmative Action is not similar to reverse discrimination or equal employment opportunities.
- Affirmative Action in the Employment Equity Act is another form of discrimination though not unfair
- It redresses injustices experienced by groups who have been disadvantaged in the past.
- It eliminates unfair discrimination and develops the skills of those who did not have opportunities
- It promotes equal opportunities in employment and thus it is a temporary intervention in the workplace.

The findings of the study concluded that Affirmative Action is essential to the economic and skills development of the disadvantaged groups in particular and the South African society in general.
CHAPTER ONE: AFFIRMATIVE ACTION

1.1. Historical background

The term ‘Affirmative Action’ first appeared in the 1935 Wagner Act, 29 USC section 160 (c) in the United States of America. In terms of this Act, says Bacchi (1996: 32), “Affirmative Action denoted an employer’s duty to take positive measures to undo the effects of past unfair labour practices against unions and to prevent them from recurring in the future”. But in the civil rights context, contemporary Affirmative Action originated in the United States of America in the 1960s to prohibit unfair discrimination according to the newly adopted Civil Rights legislation. In the United States of America, Affirmative Action Programmes have had some success in forcing employers to open up jobs and promote Blacks, Spanish-speakers and women (as disadvantaged groups). The unfair discrimination and spheres of blacks and Spanish-speakers’ and women’s impact on education have been uneven and in general one can say Affirmative Action is highly controversial in the United States of America. Conservatives tend to be opposed to it (Sachs, 1993: 170).
Although it is a controversial issue for conservatives, the elections of 1960 in the United States of America led to an era of change in approaches to discrimination. These elections resulted in the fair treatment of people and in equal opportunities, which began with the adoption of Civil Rights Act of 1964, in sectors such as education and employment where certain groups of people such as women and black people were not visible. Between 1964 and 1980 federal officials argued about the moral legitimacy of the particular benefits of particular strategies for helping disadvantaged groups catch up with the advantaged groups economically. (Jencks, 1992:24).

Jencks (1992:24) maintains that the American government pressurised private employers to hire disadvantaged people for jobs that had traditionally been reserved for advantaged groups. The American government spent a lot of money on education and training so that disadvantaged groups received a substantial part of the benefits.

How did the government pressurise the private employers into employing disadvantaged groups? The Civil Rights Act of 1964 was passed in the United
States of America. The Act prohibits discrimination by employers or unions whether private or public. Accordingly, it is unlawful for any employer to fail, or refuse to hire, or discharge any individual because of such an individual’s race, religion, sex or national origin (Capaldi, 1985: 28; Bacchi, 1996: 32).

The above paragraph shows that the American experience of Affirmative Action is important. Against this background, where there are inequalities in the world, every country treats inequality differently. In the book, *The Malaysian Experience of Affirmative Action: Lessons for South Africa*, Emsley (1996), maintains that the United States of America has Affirmative Action in order to redress its inequalities and Malaysia also has Affirmative Action to redress its inequalities.

There are many similarities and differences between the United States of America after the adoption of Civil Rights legislation and Malaysia after its independence in 1957 and the South African political, economic and social situation today. The majority of the population in Malaysia had a political majority in government, yet controlled only two percent (2%)
of the listed equity on the Kuala Lumpur Stock Exchange and therefore lacked significant control of the economy (Emsley, 1996: 26).

But following independence in 1957, the Malaysian government introduced strong Affirmative Action policies aimed at improving education and employment opportunities for the Bumiputra. The Bumiputra is one of the ethnic groups in Malaysia. The Malaysian government did not concentrate particularly on channelling the economic wealth to Bumiputra. By 1969 the economic imbalances in the country had led to great tension, culminating in riots.

The National Consultative Council was established in Malaysia. This council aimed at brokering a deal to ensure that genuine economic change to facilitate ultimate long-term stability would take place within Malaysia (Emsley, 1996: 8).

During the establishment of the council all major parties were invited to nominate representatives to participate. The council provided a forum for continuing interracial discussion and it was at this forum that a deal was brokered. The deal was that a return to parliamentary democracy would be offered in
return for Affirmative Action processes. Affirmative Action transformed the position of the Bumiputra both socially and economically. The Chinese and Indians maintained “that economic backwardness and deprivation of the Malays were the root to cause the 1969 riots” (Emsley, 1996: 21). This statement implied that in Malaysia, the Chinese and Indians would never be comfortable and secure if the Bumiputra were first to be considered for transformation.

The council formulated an ambitious policy: the New Economic Policy (NEP). This policy was a programme designed to redress the racial imbalances within Malaysia at large and also to achieve a radical transformation of the socio-economic structure of Malaysia.

In terms of the NEP, Emsley (1996: 71) argues, Bumiputra resources needed to be created through growth in the economy, not from the redistribution of existing resources. Accordingly, the NEP reduced and eradicated poverty by raising the income level and increasing the employment opportunities for all Malaysians. According to Emsley (1996: 26), the NEP also restructured the Malaysian polity to correct the
injustices in the economy and to reduce and eliminate the identification of race with economic functions.

When looking at how Malaysia introduced NEC and NEP to develop the Bumiputra, it is evident that South Africa also needs a strategy to redress the unfair disadvantages created in the past by apartheid against certain groups. The difference between South Africa and Malaysia is the average growth of the economies. The real growth rate in Malaysia over the past twenty years was phenomenal: seven to eight percent (7% to 8%), while South Africa’s growth rate has been one to two percent (1% to 2%). South Africa cannot reasonably expect a growth rate similar to Malaysia’s over the next few years and accordingly Bumiputra Affirmative Action policies in Malaysia should be introduced in South Africa as they will not certainly be prejudicial to white businesses. Yet the government may argue that the Malaysian growth rate has come about as a result of the processes of Affirmative Action in Malaysia. Malaysia was able to create new wealth for the Bumiputra and did not have to remove wealth from the Chinese (Emsley, 1996: 90).

In South Africa the elections of 27th April 1994 marked the end of inequalities in the country. A
democratic constitution was drafted and passed in 1996. Section 9 of the Constitution guarantees that everyone is equal before the law and has the right to equal protection and the benefit of the law, and the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

South Africa is a new democracy. A democratic government, in its capacity for representing all people, is obliged to rectify discriminatory legislation and enforce the law. That is, a democratic government is obliged to abolish discrimination, which is treating certain groups of people unfairly (Cahn, 1995: 24). The Parliament of South Africa passed the Employment Equity Act (No. 55 of 1998). The Employment Equity Act (EEA) marked an end to unfair discrimination in the workplace on the basis of the above-mentioned grounds (found in the Constitution) and added the following to the list:

- Family responsibility
- HIV status
- Political opinion
The Employment Equity Act provides for Affirmative Action programmes. These programmes aim at redressing unfair discrimination in the workplace. In relation to the Employment Equity Act, the former President of South Africa, Nelson Mandela has said: "The primary aim of affirmative action must be to redress the imbalances created by apartheid. We are not asking for hand-outs for anyone, nor are we saying that just as a white skin has been a passport to privilege in the past, so black skin should be the basis of privilege in the future. The first point to be made is that affirmative action must be rooted in principle of justice and equality" (Human, 1993: 3).

In South Africa, Affirmative Action has become a practice that has political connotations. Whether one is for or against Affirmative Action is heavily loaded with assumptions about personal and political values. Nevertheless, there is no doubt that well-constructed Affirmative Action programmes are needed as strategies to create diversity at all levels in South African organisations for competitive purposes. At all levels of an organisation, diversity ensures a range of responses and ideas critical for addressing
differences, which were known during apartheid in South Africa.

1.2. Research

1.2.1. Research Problem

The research will make a moral evaluation of the conception of Affirmative Action as embodied in the Employment Equity Act of South Africa.

To deal with this problem, the following questions form my secondary problem:

- What is a normative definition of Affirmative Action?
- How does the Employment Equity Act conceptualise Affirmative Action?
- Does Affirmative Action in the Employment Equity Act comply with the normative definition of Affirmative Action?

To answer these questions, one needs to make a thorough study of literature on Affirmative Action and the Employment Equity Act of South Africa.
1.2.2. Research Aim

The aim of this mini-dissertation is to develop a normative definition of the concept of Affirmative Action, to show how Affirmative Action is conceptualised in the Employment Equity Act, and, then evaluate Affirmative action in the Employment Equity Act in terms of the normative definition of Affirmative Action.

1.2.3. Research Strategy

1.2.3.1. Literature Study

A literature study on the subject of Affirmative Action and the Employment Equity Act will be conducted to determine what has already been achieved. This will avoid duplication. My review of the literature is based on the assumption that knowledge accumulates. That is, we learn and build on what others have done.

1.3. Overview

This mini-dissertation consists of five chapters.
The **first chapter** introduces the reader to Affirmative Action by focussing on its historical background. This chapter also states the research problem and provides research objectives together with the research strategy.

The **second chapter** of this mini-dissertation introduces the reader to the moral understanding of Affirmative Action. The main objective of this chapter is to develop an ideal of what Affirmative Action ought to be. It distinguishes Affirmative Action from related concepts such as reverse discrimination and equal employment opportunities. It also provides a distinction between descriptive and normative definitions and opts for a normative definition in order to develop what Affirmative Action ought to be.

The **third chapter** investigates how Affirmative Action is conceptualised in the Employment Equity Act of South Africa. It begins by providing the background to the concept before exploring the concept itself. The focus is only on Affirmative Action in the Employment Equity Act.
The main aim **Chapter Four** is to evaluate the concept of Affirmative Action in the Employment Equity Act in terms of my normative definition of Affirmative Action.

In the **fifth** and final chapter, I will sum up the mini-dissertation. This will include a general conclusion and summary of the whole study.
CHAPTER TWO: A NORMATIVE DEFINITION OF AFFIRMATIVE ACTION

2.1. Introduction

Affirmative Action is an intervention designed to redress and develop a country like South Africa, which is characterised by injustices and unfair discrimination of the past. It is brought into public and private debates as political parties, philosophers and business people try to define it.

The main aim of this chapter is to develop a normative definition of Affirmative Action. The chapter will attempt to supply and justify a coherent moral view of Affirmative Action. It should be pointed out that I am neither an Affirmative Action Officer nor a member of a specific workforce. I am approaching Affirmative Action as a philosophy student. I am, therefore, introducing this topic in the spirit of impartiality: ‘A Normative definition of Affirmative Action’.

I will start by distinguishing Affirmative Action from concepts such as reverse discrimination and from equal employment opportunity. After distinguishing
Affirmative Action from these concepts, a distinction will also be made between descriptive definitions and normative definitions. Based on this distinction I opted for a normative definition in order to develop an ideal of what Affirmative Action ought to be.

2.2. Distinguishing Affirmative Action from related concepts

Affirmative Action is a strategy to overcome the legacy of inequality in the workplace where discrimination has unfairly disadvantaged certain groups of people. As the aim of this chapter is to develop an idea of what Affirmative Action is supposed to be, a clear distinction has to be made between Affirmative Action and two related concepts. They are equal employment opportunity and reverse discrimination. Albie Sachs (in Adams, 1993: 126) argues “the terms equal opportunities and Affirmative Action are sometimes used interchangeably, sometimes in an opposite sense”. Often Affirmative Action is mistaken for reverse discrimination.

2.2.1. Equal employment opportunity

Paul et al (1987: vii) claims that equal opportunity is at the centre of many contemporary public and
private debates worldwide. There is widespread agreement that equality of opportunity is a requirement for a just society. There is also widespread disagreement about just what this requirement amounts to and how it should be balanced against other requirements of justice. Are practices such as Affirmative Action and reverse discrimination legitimate ways of ensuring equal employment opportunity and rectifying the consequences of historical inequality of opportunity in the workplace? This is the question to which the concept of equal employment opportunity gives rise and it is a very difficult question.

What is equal employment opportunity? By equal employment opportunity I mean where all individuals in the workplace are given equal opportunities to help them to realise their full potential in employment. Equal employment opportunity further means granting opportunities to all people to exercise their full potential in the workplace. It assumes that all people are equal though they have different talents.

Equal employment opportunity also refers further to treating people equally and giving everyone the
opportunity to compete for the best available positions according to merit. Sometimes the merit principle is overridden by not considering ability to perform the task. For example, a white male could be hired or promoted for a position in authority because the person in charge discriminates against women. Some argue that the standards will fall if appointments are not made according to merit.

People who make selections make decisions that are not necessarily consistent with merit. People prefer their friends or people like themselves. Consequently, there is bias in favour of people similar to the selectors. This is not easily detected as outright discrimination, but results in appointment, which do not conform to the merit.

IDASA (1995: 7) supports the “revision of standards and practices and selection criteria to ensure that they do not exclude qualified people from consideration for position and employment benefits. This involves not only removing arbitrary, artificial and unnecessary barriers to employment opportunities, but a reassessment of current standards so that a more realistic interpretation of what merit actually involves for particular jobs or benefits is applied”.
While Affirmative Action redresses injustices by preferring the victims of discrimination and develops them, equal opportunities in employment promote merit. A policy of equal opportunities in employment does not address the deficits that are associated with unfair discrimination through training and development.

Unlike a policy of equal opportunities in employment, Affirmative Action intends to bridge the gap between the inequality caused by discrimination and merit principle. Affirmative Action helps to narrow the gap for preference recipients (Himma, 2001: 285).

To sum up, Affirmative Action is the most topical issue in the public and private sectors worldwide. Unlike equal employment opportunities based on the merit principle, Affirmative Action focuses on groups that have been discriminated against in the workplace. It focuses on these groups because they were disadvantaged before. Therefore, Affirmative Action would like to level the playing field. The goal of Affirmative Action is to achieve equal employment opportunities.
Affirmative Action is a temporary intervention to facilitate change from an unfair situation to a situation where inequalities are redressed so that all people can compete on an equal footing for the available opportunities (Rossouw, 1994: 74 – 75). Affirmative Action is temporary because if it becomes a permanent policy of preferring the previously disadvantaged groups, it will be seen as reverse discrimination.

2.2.2. Reverse discrimination

Affirmative Action can also be distinguished from reverse discrimination. Reverse discrimination has been used synonymously with Affirmative Action. But reverse discrimination is where one form of discrimination has been replaced by another. Reverse discrimination can be defined as that type of discrimination and prejudice that works against people who were not discriminated against in the past in areas such as education and business. Opponents of Affirmative Action argue that selection, hiring or employment policies that favour groups that have been discriminated against are in themselves discriminatory because these policies treat some
groups unfairly, for instance young white males, who are not responsible for the injustices of the past.

Unlike reverse discrimination, Rossouw argues (1994: 73) “the aim of Affirmative Action is not to substitute one form of discrimination for another. On the contrary, the aim is to get rid of discrimination altogether”. This means that Affirmative Action is not the same as reverse discrimination. Nevertheless, reverse discrimination is another term associated with Affirmative Action. Reverse discrimination means treatment that reverses the patterns of earlier discrimination. This notion means that while Affirmative Action redresses injustices and develops the groups discriminated against; reverse discrimination reinforces unfair discrimination.

In the Collins Oxford Dictionary, reverse means turn back in position, direction and order; to move in the opposite direction and to retaliate. This definition of reverse implies that reverse discrimination is a form of retaliation in discrimination. Retaliation means to return like for like, especially evil for evil and to repay someone in kind. Therefore, I regard retaliation to be a characteristic of reverse discrimination.
What is reverse discrimination? Reverse discrimination, as Livingstone (1979: 49) argues, further means that advantaged groups are denied opportunities that they are qualified for and/or which they would have achieved if there were no preferences given to previously disadvantaged groups.

Reverse discrimination can be avoided if less qualified people belonging to groups that have been discriminated against in the past are not hired or promoted over more qualified people from other groups that have not been discriminated against in the past. Reverse discrimination can be avoided if training programmes and skills development for victims of unfair discrimination, including all people in the society who lack qualifications and who are also looking for employment, are set up. All trainees should be informed that training must be accomplished satisfactorily, after which they will be considered for employment.

Unlike Affirmative Action, which redresses injustices, develops the victims of discrimination and promotes equal opportunities in employment, reverse discrimination merely reverses the
discrimination. This means the groups who benefited from previous discrimination, now become the victims of new discrimination and the previous victims become the beneficiaries of new discrimination.

Therefore, Affirmative Action is morally preferable to reverse discrimination and a necessary strategy to be used in a society that is characterised by past injustices.

Affirmative Action has many definitions. I will draw attention to the normative definition, which will be developed in this chapter. First, a distinction between descriptive definitions and normative definitions will be made. This distinction will provide the ground for opting for a normative definition.

2.3. Descriptive definitions versus Normative definitions

To construct and evaluate philosophical argument about alternatives, I will present a definition of, and distinguish between, descriptive definitions and normative definitions. This section on descriptive definitions versus normative definitions distinguishes between ‘is’ and ‘ought’.
Descriptive definitions concern what an issue or situation has been or is. Lawrence (1999: 13) argues that a descriptive definition is “concerned with describing values and rules according to which people have conducted and do conduct” their situation.

In support of the above paragraph, Caws argues (1996: 12), an understanding of a situation or concept which is based on a kind of natural history, for instance views of ultimate object of moral endeavours as a highest good, pleasure, the intellectual love of God, the greatest happiness of greatest number of people, performance of duty and the like, is descriptive.

Unlike descriptive definitions, normative definitions don’t focus on what people do or believe but on what people ought to do or ought to believe. It prescribes what should happen rather than describing what happened (Caws, 1996: 13). Lawrence (1999: 13) claims that normative definitions go beyond descriptive definitions in prescribing what ought to be the case.
2.4. A Normative definition of Affirmative Action

This discussion on the definition of Affirmative Action revolves around the question “what should Affirmative Action be?” The answer to this question will have implications for the practice of Affirmative Action. Based on the distinction between descriptive definitions and normative definitions, this chapter opts for a normative definition and tries to define what Affirmative Action ought to be. Affirmative Action ought to be a strategy to redress injustices though the elimination of unfair discrimination created in the past and through the development of victims of discrimination for the promotion of equal employment opportunity (cf. Hoffman & Frederick, 1995: 341; Human, 1993: 1 – 3; IDASA, 1995: 7; Innes et al, 1993: 4 – 5; Qunta, 1995: 2).

When one looks at the above definition of Affirmative Action, it is evident that it is not a descriptive definition but a normative definition. It is normative because it sets certain criteria that should be met for Affirmative Action. This definition also distinguishes between forms of Affirmative Action. I believe without this definition one would
be compelled to accept anything as Affirmative Action, irrespective of its quality and aims.

Before going any further, it is important to note that I regard the following four aspects of a normative definition of Affirmative Action as important: (a) redressing injustices (b) eliminating unfair discrimination (c) developing victims of discrimination and (d) promoting equal employment opportunity. Each of these aspects will be discussed fully below.

2.4.1. Redressing injustices

The aim of Affirmative Action is to redress the injustices of the past. By redressing injustices, I mean overcoming the discriminatory practices or the consequences of discrimination, which prevent or prevented certain groups of people from enjoying equality or equal opportunity in the workplace. Affirmative Action is, therefore, a means of overcoming barriers to equal employment opportunity rather than a means of advancing the interest of some groups at the expense of others (Innes et al, 1995: 5). However, Affirmative Action believes that preferential treatment is a form of promoting
redress. It also recommends preferential treatment for certain groups based on discrimination against them in the past (De George, 1986: 253).

According to Rosenfeld (1991: 43), preferential treatment means granting special treatment and opportunity to people among groups of competitors on the basis that they were discriminated against in the past.

Affirmative Action would have to grant preference to those disadvantaged by discrimination. This implies that the victims of unfair discrimination were hampered at the beginning because of opportunities denied in the past. Preference is, therefore, given to appointing people in the workplace from discriminated against groups.

Given the urgent need to increase the number of members of discriminated against groups in key positions, Affirmative Action strongly recommends, that in recruiting for junior and middle management positions, preference should be given to the members of the discriminated against groups of the past. However, employers must, of course, set minimum requirements for each position and preference should
be given to members of discriminated against groups who meet the minimum requirements (Nkuhlu, 1993: 18–19).

This paragraph brings the question of a quota system into focus. Quotas refer to a disputed term that advocates of Affirmative Action see as benign goals and time-tables to advance the prospects of discriminated against groups. Opponents of Affirmative Action believe that quotas limit the opportunities of some individuals and divide the population into hostile and competing factions. Affirmative Action should be about more than mere quotas, argues Rossouw (1994: 74), as the purpose of Affirmative Action is to eradicate unfair discrimination by redressing injustices.

2.4.2. Eliminating unfair discrimination

Unfair discrimination is an immoral practice that systematically produces classes of people who are treated unjustly if not unequally (De George, 1986: 240).

Unfairly discriminated against people are not respected and they are treated as members of a
certain class with certain characteristics. Consequently, these people are not given equal treatment, and they are not treated with respect. This inequality and lack of respect imply that unfair discrimination directly violates the principle of justice because it does not allow either freedom to all or equality of opportunity (cf. De George, 1986: 240).

Unfair discrimination results in uneducated groups of people. For instance, as a result of unfair discrimination black people were uneducated, or poorly educated and lived in extremely poor conditions. These people were forced to live in segregated areas and were discriminated against in schooling, opportunities to gain advancement, in employment and in every aspect of social life. (cf. De George, 1986: 241). These are the results of unfair discrimination.

Moreover, the consequences of unfair discrimination, for instance in South Africa, are clear. White males are heavily over-represented in the key decision-making positions. Blacks and other discriminated against groups are underrepresented because they have suffered from a lack of primary, secondary and
tertiary education as well as adequate vocational training (Thompson, 1993: 23).

Affirmative Action targets unfair discrimination because it is an immoral practice and people are treated unfairly and unequally. Another reason why Affirmative Action targets unfair discrimination is that unfair discrimination does not develop disadvantaged groups nor does it come up with development measures for people who are disadvantaged and lack skills.

2.4.3. Developing victims of discrimination

As stated in the normative definition, Affirmative Action is redressing injustices through eliminating unfair discrimination, and it redresses injustices through the development of victims of discrimination. The process of development needs to be accelerated by providing training opportunities. Development should be increased because some members of certain groups were discriminated against in the past. These members lack skills and development.

What does development in the workplace mean? For this mini-dissertation, development is a process whereby
disadvantaged groups are trained and retained through a series of programmes that focus on organisational culture, and policies and procedures in the workplace.

Human (1993: 12) states that development is a process of setting goals and moderate risk-taking in line with individual strengths and weaknesses. This definition implies that, in the context of Affirmative Action, development should acknowledge the capacity of the person doing the work. That is, the individual strengths and weaknesses of a person are considered.

Qunta (1995: 22) argues that if Affirmative Action is implemented properly people may have to be appointed who will need further training to perform certain duties. That is, upgrading a person’s basic skills potential for development is needed.

Training is part of development. Training institutions or developmental institutions have an important part to play in Affirmative Action. Nkuhlu (1993: 17) argues that development institutions have a very important role to play in extending basic infrastructure in areas traditionally reserved for
Blacks and in extending access to resources to disadvantaged groups. We need to keep in mind that the majority of disadvantaged people are poor and unemployed. Affirmative Action must include these people as well. They must be empowered through the creation of structures that will enable them to be involved in decisions affecting their lives and through increased access to economic resources and income-generating activities.

Development programmes make Affirmative Action initiatives successful. This notion implies that many Affirmative Action initiatives fail because of the poor skills of managers and the poor support systems for trainees in the workplace. The emphasis, therefore, must be on facilitating access and providing adequate, appropriate individualised support in order to also create opportunities.

2.4.4. Promoting equal employment opportunity

Affirmative Action aims at equal employment opportunity (IDASA, 1995: 7). As I have indicated when distinguishing Affirmative Action from equal employment opportunity, these two concepts are not the same. Affirmative Action has equal employment
opportunity as its goal. By equal employment opportunity I mean an environment in the workplace, which offers all individuals the opportunity to realise their full potential. The underlying principle is that all individuals are equal and they also have different talents or gifts. These individuals should be allowed to apply themselves to bring out their best (Ramphele, 1995: 34).

Given the assumption that talent is randomly distributed in the society, those societies that give equal opportunities to all members, would benefit from the diversity of the talent that would be unleashed.

Equal employment opportunity also means offering everyone in the workplace an opportunity to gain a position in workplace based on a neutral understanding of merit as opposed to a negative understanding of merit. A negative understanding of merit is used by opponents of Affirmative Action to contrast their ideal selection based on individual achievement with selection based on preference. In contrast, Innes et al, (1993: 42) states that the aim of Affirmative Action is to “ensure that people who were discriminated against in the workplace are
empowered to enable them to compete for all posts, including those at a high level” without prejudice. This statements means that people should compete for whatever position they think they have qualifications.

The relationship between Affirmative Action and equal employment opportunity is central to the Affirmative Action controversy. Some people argue for equal employment opportunity as opposed to Affirmative Action. More often than not, a comparison is drawn between equal employment opportunity and equality with the implication that Affirmative Action has the latter as its goal.

Equal employment opportunity and equal treatment in the above paragraph seem to be divided on Affirmative Action. This dichotomy is used to legitimise Affirmative Action, including targeted hiring and promotion. This mini-dissertation believes that equal employment opportunity and equal treatment are goals of Affirmative Action. Affirmative Action is a temporary intervention that aims at equal employment opportunities.
Equal employment opportunity does not have any adverse effects on groups in the society. In contrast to Affirmative Action there may be effects on some members of advantaged groups. Firstly, any adverse impact on advantaged groups is considered to be the unfortunate by-product of finally dealing with the discrimination of the past. Secondly, if people from advantaged groups suffer setbacks to their careers when members of disadvantaged groups are hired or promoted ahead of them, these setbacks should be viewed as merely temporary and incidental. Hence, Affirmative Action is a temporary intervention to deal with injustices to achieve equal employment opportunity. Affirmative Action is a temporary intervention that aims at getting rid of unfair discrimination that was (and still is) experienced by certain groups in order to enable members of those groups to compete on equal footing with those who did not suffer from unfair discrimination (Rossouw, 1994: 73).

Still on temporality of Affirmative Action to achieve its goal, Qunta (1995: 22) regards Affirmative Action as a strategy that “will temporarily give preference to qualified Black persons, to correct past
imbalances, until a normal situation has been established”.

Of course, the ultimate goal of Affirmative Action is equal employment. Affirmative Action is, therefore, seen as a temporary measure designed to facilitate the process of creating equal employment opportunity by eradicating unfair discrimination at various levels of the organisation. Consequently, Affirmative Action is a temporary intervention to achieve equal employment opportunity without lowering standards and without hindering the career aspirations or expectations of current organisational members who are competent in their jobs.

2.5. Conclusion

We have seen how Affirmative Action can be successfully distinguished from reverse discrimination and equal employment opportunity. This distinction aims at dispelling the misunderstandings and confusion about Affirmative Action. Affirmative Action is not reverse discrimination because it does not reverse the unfair discrimination to those who did not suffer disadvantages in the past. Equally important, Affirmative Action is not equal employment
opportunity because it does not promote the merit principle, which is the main character of equal employment opportunity. Affirmative Action prefers hiring discriminated against groups because they were disadvantaged in the past. That is, they suffer from unfair discrimination of the past.

This chapter revealed a distinction between descriptive definitions and normative definitions. I am using a normative definition in order to develop an ideal of what Affirmative Action ought to be.

Affirmative Action redresses injustices, eliminates unfair discrimination, develops the discriminated against groups and promotes equal employment opportunity.

The next chapter will look at Affirmative Action in the Employment Equity Act of South Africa. Affirmative Action will be defined in relation to what the Employment Equity Act says and how it conceptualises and defines Affirmative Action
CHAPTER THREE

AFFIRMATIVE ACTION IN THE EMPLOYMENT EQUITY ACT (of South Africa)

3.1. Introduction

The subject of Affirmative Action can be approached from many angles and viewpoints. While one approaches it from the point of view of education, one can approach it from the point of view of employment. This chapter approaches the subject from the point of view of the Employment Equity Act (Number 55 of 1998) of South Africa. The Employment Equity Act seeks to eliminate unfair discrimination in employment and to provide for Affirmative Action to redress the disadvantages of the past created by apartheid and to provide equal treatment and equity in employment. The objective of this chapter is to offer an analysis of the concept of Affirmative Action in the Employment Equity Act of South Africa. But first the rationale for introducing the Employment Equity Act will be discussed.
3.2. Rationale for the Employment Equity Act

The reasons behind the necessity for employment equity legislation are many. They include, among others, the need to eradicate the past legacy of discrimination that has led to major inequalities in our society and labour market; the need for economic growth; the satisfaction of constitutional requirements and the inadequacies of removing certain discriminatory laws.

Policies and procedures enacted by government to promote employment equity arise from the necessity to eradicate the deep inequalities still inherent in South African society and the South African labour market today. Legislation aims to help redress the disadvantages emanating from past racial policies and to ensure the accommodation of differences between people in the workplace.

The system of apartheid has left behind the legacy of inequality and unfair discrimination that is reflected in the disparities in the distribution of jobs within the national labour market. These disparities reveal the effect of discrimination against designated groups. In terms of section 1 of
the Employment Equity Act, entitled: Definition, ‘designated groups’ refer to black people, women and people with disabilities. ‘Black people’ refers to Africans, Coloureds and Indians irrespective of gender, and disabilities and ‘women’ include Black and Whites irrespective of disabilities. And ‘people with disabilities’ include males and females irrespective of race. The Employment Equity Act proceeds to define the meaning of people with disabilities as, in terms of section 1, “people who have long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment”.

The disparities in the distribution of jobs within the labour market are reinforced by social practices, which perpetuate discrimination in employment against these designated groups. These disparities therefore cannot be relieved or cured by merely eliminating discrimination or repealing discriminatory laws. Policies, programmes and positive measures to redress the injustices of the past are needed. These are Affirmative Action measures.
The history of South Africa provides examples of groups disadvantaged by discriminatory policies in the workplace. The disadvantages, as implied in section 6 of the Employment Equity Act, are the inequalities that resulted from apartheid and other discriminatory laws in employment. That is, ‘inequalities’ refer to what were experienced by people who were disadvantaged and the unequal treatment they received.

The Employment Equity Act, in terms of section 15 subsection 2(a), sees Affirmative Action measures as “measures to identify and eliminate barriers, including unfair discrimination, which adversely affect people from discriminated groups”. It aims at eliminating selection procedures that are unfairly discriminating against groups in the workplace.

The above paragraph means that all kinds of unfair discrimination should be identified and comparison should be undertaken between those who benefit (or benefited) from unfair discrimination against other groups and those who suffer (or suffered) from unfair discrimination.
Within the labour market, discrimination has taken the form of occupational segregation, discrimination in policies and procedures and lack of access to training and development opportunities. The question of inequality and unfair discrimination raises the point of the requirements for a job. The requirements for a particular job could be evaluated to determine whether or not they are relevant to the job in question. But the evaluation should be done without unfair discrimination and without excluding people on the basis of colour, gender and/ or disabilities.

What are the requirements for a job in terms of Affirmative Action and Employment Equity Act? In terms of section 20 subsection 3, the requirements of a job are those that show that “a person may be suitably qualified for a job as result of any one of, or any combination of that person’s -

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

Then section 20 subsection 3 agrees with section 20 subsection 5, which shows that a designated employer
may not unfairly discriminate against a person solely on the basis of that person’s lack of experience when determining a suitably qualified person for a job.

What is a designated employer? As define in section 1 entitled ‘Definition’ designated employer refers to "an employer who employs 50 or more employees; an employer who employs fewer than 50 employees, but has an annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this Act”.

In terms of section 2(b), Affirmative Action ensures equality to designated groups in all occupations and levels in the workplace. By assurance of equality, the Employment Equity Act means equal treatment of all groups of people in the workplace. Consequently, section 42 (a) (i) explains that Affirmative Action is concerned with the “demographic profiles of the national and regional economically active people” in society in general and the workplace in particular. This means that the demographic profiles of South Africa should be reflected in the workplace of the designated employer to ensure equality and equity for the provision of the Employment Equity Act.
Affirmative Action also ensures that people who did not suffer from unfair discrimination in the past will not begin to suffer from it now. The reason behind this notion is that this type of discrimination is not unfair. In terms of section 6 subsection 2, it is not unfair to discriminate, using Affirmative Action, when selecting a candidate in the workplace for the provision of Employment Equity Act.

Talking about redress proved useful in portraying targeted hiring and quotas as unfair manipulation of already fair processes. Consequently, the potential flow-on effects in the workplace culture that might have followed from a large increase of personnel from designated groups never occurred.

The above paragraph implies that Affirmative Action is not similar to quotas and also does not promote quotas. In terms of section 15 subsection 3, Affirmative Action measures “... exclude quotas”. Accordingly, Affirmative Action does not impose any quota for representing members of designated groups so that demographic profiles of South Africa are reflected in the workplace.
Rather, Affirmative Action includes numerical goals. That is, it creates a basis for consultation between employers, employees and trade unions so that parties will set numerical goals. These parties will put in place measures to achieve equality, which are appropriate to their own workplaces and experiences, without undermining the goals of a more representative and diverse workforce.

In terms of section 20 subsection 2 (c) of the Employment Equity Act consultation, communication, conduct analysis and an employment equity plan will help to determine the profile of the designated employer’s workforce within each occupational category and also determine the degree of underrepresentation of people from designated groups.

In terms of section 19 subsection 1, the designated employer should collect and analyse data of the employment policies and practices, procedures and working conditions. The employer should also conduct an analysis of information about the employees. Effectively, the designated employer will identify employment barriers. The designated employer will have to develop profiles of their workforce in each
occupational category and level in order to determine degrees of underrepresentation.

As I indicated previously, in the labour market apartheid has left behind a legacy of disparities in the distribution of jobs, which reveal the effects of discrimination against designated groups. These disparities are reinforced by social practices. Section 7 of the Employment Equity Act explains that employers cannot test employees psychologically any longer unless the test has been scientifically shown to be valid, reliable and unbiased. In terms of section 8, employers are debarred from testing employees medically except in specified and limited circumstances. Human Immune Virus (HIV) testing is specifically prohibited.

The above paragraph implies that psychological, medical and HIV testing were done in the past with the intention of unfairly discriminating against certain groups. That is, this testing discriminated against certain groups.

Black people, women and people with disabilities faced significant disadvantages in employment. They suffered particular and pernicious disadvantages as a
result of a lack of skills and education under apartheid and its discriminatory laws. To this end, the Employment Equity Act, as section 15 subsection 2 explains, indicates that people should be retained (kept) and developed through training measures for the upliftment or advancement of skills. Simultaneously, the Employment Equity Act avoids discriminating against certain members of society.

Is there something like ‘unfair discrimination’? From an understanding of the history of South Africa in relation to the Employment Equity Act and its purposes, one realises that Affirmative Action emanated from measures to eliminate unfair discrimination. By unfair discrimination the Employment Equity Act, in terms of section 6 subsection 1, refers to any distinction, exclusion or preference made on one or more of the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

Although I said this chapter is on Affirmative Action and the Employment Equity Act, I find it fit to
include the Constitution of South Africa. That is why some of the above grounds also constitute section 9 subsection 2 and 3 of the Constitution of South Africa. They are grounds for unfair discrimination because they disadvantage certain members of some groups. So, they should be prohibited.

In terms of section 6 subsection 2 (a) of the Employment Equity Act it is not unfair, therefore for employer to discriminate against certain groups of people for the purpose of advancing Affirmative Action. That is, Affirmative Action discriminates, though in a fair manner. It is the aim of Affirmative Action to promote fairness in the workplace. Section 6 subsection 2(b) mentioned that the distinction in selecting for employment and exclusions in the workplace can also be permitted if they are “on the basis of inherent requirements of a job”.

When one looks at the above paragraph, it is evident that discrimination sometimes takes the form of direct and conscious decisions based on prejudices or stereotypes that exclude certain groups from jobs or promotions. Unfair discrimination should be prohibited in the workplace. Some employers, for instance, believe that women are not assertive enough
to supervise or manage other employees and thus will not consider employing women in senior positions. This should be prohibited.

The above paragraph shows that gender inequality is a problem in the job environment, with women having higher unemployment rates than men. And a white South African male, as a consequence of the history of South Africa, is more valued than white or black females in top management positions. These apartheid inequalities remain within the occupational and professional structures of the workforce.

There is little correlation between the composition of the workforce at technical, managerial and professional levels and the overall demographics of South Africa. In terms of section 42(a)(i), the demographic profiles of the national and regional economically active should be reflected in the employment areas of designated employers. This reflection will show that the workplace is redressed, and equality together with a diverse and representative workforce is achieved.

The above paragraph on the composition of the workforce shows that the occupational structures of
the South African workplace reflect misrepresentation created and reinforced by apartheid. This misrepresentation will not redress or eliminate itself automatically. Therefore, Affirmative Action is the solution or mechanism to ensure that apartheid and the legacy of inequalities in the workplace is eliminated.

Apartheid and its legacy of inequalities in the workplace can lead to economic decline if left unchallenged. South Africa is weak in terms of its economic growth. It should be clear that income and occupation inequalities by race, gender and all other forms of discrimination have had severe economic consequences and that a reduction of these inequalities is a way of promoting economic growth. When looking at section 42(a)(iv), it is evident that people from designated groups should be represented in relation to the “present and anticipated economic and financial circumstances of employers”. This means that South Africa is adversely affected by problems of economic incompetence and an unskilled workforce that emanated from unfair discrimination against major sections of the workforce. As a matter of fact, a skilled labour force increases a country’s competitiveness. Unlike the fair treatment of people,
racial discrimination, which is unfair discrimination, in education and access to employment coupled with the constant denial of opportunities to black people, women and people with disabilities, led to the very poor skills levels to be found in the South African labour market.

To explain the above notion further, section 15 subsection 2(d)(ii) of the Employment Equity Act states that Affirmative Action measures should allow designated employers to retain and develop people from designated groups and implement appropriate training measures, including measures of providing skills development.

Racial and sexual inequalities and even physical disabilities, for instance, lead to market distortion, which in turn result in the inadequate utilisation of resources. Employment discrimination and poor educational opportunities entail significant economic costs in terms of lower national output, labour market inefficiency, higher inflation and an excessively large workforce. Schedule 4 of the Employment Equity Act shows the table of turn-over threshold applicable to designated groups.
In the workplace the level of under-utilisation of certain race groups, women and people with disabilities, contributes to job dissatisfaction resulting in excessive rates of absenteeism, employee turn-over and grievances, which in turn lead to lower productivity. To this end, Affirmative Action must allow employers to redirect and re-examine the development of employment philosophy to create a climate conducive to the full satisfaction of the available resources. Employers must also create a positive and supportive environment for the Employment Equity Act and the transformation of the workforce.

In order to transform the workplace and the workforce, the government of South Africa decided to repeal some discriminatory laws and certain Acts of Parliament with the aim of eliminating unfair discrimination. Against this background, repealing discriminatory laws cannot, alone, redress the disadvantages experienced by certain groups of people in the workplace. That is, merely removing discriminatory laws will not lead to the advancement of unskilled members of previously disadvantaged groups.
For instance, repealing other items in the Labour Relations Act (No. 66 of 1995) does not mean the end of unfair discrimination that has crippled this country tremendously in the workplace. This is seen in Schedule 2 of the Employment Equity Act.

In redressing inequalities, skills, access to jobs and access to training and promotion of opportunities must be improved. In addition to these improvements, it is economically imperative to introduce measures to prohibit discrimination and stimulate active participation by all categories of the workforce.

Affirmative Action is needed, therefore, to ensure that equality does not just remain a formality but is achieved in a substantive way. It is recognised that the ordinary processes of laws are insufficient to break the roots of unfair discrimination.

Apart from the need to redress the inequalities of the past and to stimulate economic growth, a further rationale for the Employment Equity Act is the need to comply with the requirements of the Constitution of South Africa. Section 9 of the Constitution contains the equality clause and therefore ‘everyone is equal before the law and has the right to equal
protection and benefit of the law’. Accordingly, the Constitution supports the idea of Affirmative Action in the Employment Equity Act.

These sections show the necessity for Affirmative Action in the Employment Equity Act of South Africa.

3.3. AFFIRMATIVE ACTION IN THE EMPLOYMENT EQUITY ACT

Clearly, the South African government wishes to introduce measures to effectively address inequality, discrimination and underrepresentation in the workforce of designated employers. Measures to outlaw unfair discrimination and to encourage designated employers to develop a more diverse and representative workforce are necessary, not only to promote equality and justice but also to develop the disadvantaged groups and eventually promote equal employment opportunities.

In order to understand the concept of Affirmative Action, it is important to start by giving its definition as explained and implied in the Employment Equity Act.
From the rationale for Employment Equity Act presented above, section 2(b) of the Employment Equity Act understands Affirmative Action as a strategy to “redress the disadvantages in employment experienced by designated groups” and to eliminate unfair discrimination, to develop the skills of the disadvantaged groups and to enhance diversity and representation in the workforce in order to ensure equality in all occupational categories and levels in the workplace and to promote equal opportunities in employment. This definition revolves around five features that will be discussed next. They are (a) redress the disadvantages, (b) eliminate unfair discrimination, (c) develop the disadvantaged groups, (d) enhance diversity and representation in the workforce and (e) promote equal opportunities in employment.

3.3.1. Redress the disadvantages

The Employment Equity Act, as explained in section 15 subsection 2, understands redress to be the implementation of measures to identify and eliminate unfair discrimination, which adversely affects people from designated groups; as measures to further diversity in the workplace based on equal dignity and
respect for all people; and also making reasonable accommodation for people from designated groups to ensure equal opportunities and equitable representation in the workplace of designated employers.

By undertaking redress, Affirmative Action wants to show that despite the fact that in the past a white skin, maleness and physical fitness for example were passports to privilege, black skin, femaleness and physical disabilities should not be the basis of privilege for the future. In terms of section 2 (a) and 2 (b), redress does not aim at substituting the disadvantages experienced by designated groups with another form of discrimination. It eradicates the disparities and brings about equality in the workplace.

How can we redress disadvantages? Preferential treatment is one form of advancing redress. Section 15 subsection 3 shows that Affirmative Action measures “… include preferential treatment and numerical goals” as ways of achieving redress. This means that Affirmative Action provides for preferential treatment of designated groups.
Preferential treatment also includes the assurance of equitable representation of suitably qualified persons from designated groups as the goal of Affirmative Action. These groups will preferably be considered in as far as hiring, selection and promotion in workplace is concerned.

Through preferential treatment suitably qualified persons from designated groups must be retained, trained and developed by appropriate measures for training for the provision of skills development. This means when training people in the workplace preference will first be for the designated groups. The development and retention are done in order to fulfil the process of redressing the disadvantages experienced in the past. Affirmative Action has realised that some other discriminatory laws were repealed.

Merely removing discrimination will not ensure equality in employment opportunities for people who have been discriminated against in the past. Removal of discrimination alone does not mean the playing field is levelled.
Even though some discriminatory laws were repealed, employers do not disclose information relevant to the workplace. In terms of section 18 of the Employment Equity Act, entitled ‘Disclosure of information’, designated employers are obliged to introduce Affirmative Action to redress the disadvantages. The end result of Affirmative Action is to bring about an end to decades of inequalities that resulted from both apartheid prejudices and stereotypes. These disadvantages will be discussed hereunder as Affirmative Action eliminates unfair discrimination.

3.3.2. Eliminate unfair discrimination

The second part that forms the definition of Affirmative Action as conceptualised in the Employment Equity Act is that of elimination of unfair discrimination. A careful scrutiny of the Employment Equity Act and Affirmative Action reveals that the Employment Equity Act identifies unfair discrimination. That is why this section will focus on introducing the elimination of unfair discrimination as an aim of Affirmative Action.

In terms of section 5 of the Employment Equity Act, Affirmative Action entails that “Every employer must
take steps to promote equal opportunity in the workplace by elimination of unfair discrimination in the employment policy or practice”.

It is assumed that in the past other categories of people did not enjoy equal treatment due to unfair discrimination. This means persons from designated groups need to be provided the opportunities to be treated equally.

Section 13 subsection 1 shows that an employer who intends to comply with Affirmative Action must do so as a designated employer. This employer must promote equal opportunity in the workplace by prohibiting unfair discrimination. The designated employers must use Affirmative Action to eliminate unfair discrimination.

Unfair discrimination against employees in respect of employment policy or practice is prohibited. Section 1 of the Employment Equity Act entitled ‘Definitions’ states the employment policies as including among others, the following:

(a) recruitment procedures, advertising and selection procedures;
(b) appointments and appointment processes;
(c) job classification and grading;
(d) remuneration, employment benefits and terms and conditions of employment;
(e) job assignment;
(f) the working environment and facilities;
(g) training and development
(h) performance evaluation systems;
(i) promotion;
(j) transfer;
(k) demotion;
(l) disciplinary measures other than dismissal;
and
(m) dismissal.

Employers should not practice the above-mentioned policies unfairly. Section 11 of the Employment Equity Act indicates that “whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that this is fair”.

The above paragraph implies that all designated employers will have to ensure that their policies and/or practices in the workplace are free from unfair discrimination. By freeing themselves from unfair discrimination, the designated employers will
also raise economic efficiency throughout the economy and they will ensure a better allocation of labour resources. Employers need to ensure that adequate treatment is devoted to the people who did not receive this treatment in the past. The attention on allocation of resources and adequate treatment will also promote economic development and skills development.

3.3.3. Develop the skills of the disadvantaged groups

The third part of Affirmative Action as defined in the Employment Equity Act aims at developing the skills of the disadvantaged groups. Given the disparities in access to resources in South Africa and lack of skills, the Employment Equity Act indicates in section 20, that accelerated training programmes are important constituents of the Employment Equity Plan.

Section 20, section 16 (a) and (b) claims that consultation can help identify the nature of the training required and enable the implementation of the human resources development of members of disadvantaged groups. The parties involved in consultation are the employer, representative trade
union, employees or representatives nominated by employees.

Employers are obliged to train and develop existing employees as part of the process of advancement. Training and development of people from designated groups constitute one of the most important positive measures in Affirmative Action. Affirmative Action aims at helping designated employers in the provision of measures to realise skills development to suitably qualified people from designated groups. In terms of section 15 the designated employers should look at measures that will “develop people from designated groups and to implement appropriate training measures … providing for skills development”. That is, designated employers will be required to train and develop people from designated groups.

By providing training and skills development, the Employment Equity Act assumes that people from designated groups lack skills due to unfair discrimination or the apartheid legacy of inequalities. In terms of section 42(a)(ii) and (iii) of the Employment Equity Act, each category and level of the workforce should be part of a “pool of suitably qualified people from designated groups from
which the employer may reasonably be expected to promote or appoint employees”. This will promote “economic and financial factors relevant to the sector in which the employer operates”.

The above section implies that Affirmative action develops skills that promote the economic development of the employer in particular and the country at large. Section 15 subsection 2 states that upgrading skills, improving access to jobs and occupations, training and promoting employees advance all members of the workforce and make it possible for them to achieve maximum productivity and efficiency. Failure to appoint these employees, with the argument that there are not enough of them in the labour market, will not be accepted by Employment Equity Act.

3.3.4. Enhance diversity and representation in the workforce

The Employment Equity Act assumes that people from designated groups are underrepresented in the workplace of the designated employers. Affirmative Action aims at achieving and promoting a diverse workforce, which broadly represents all people. In terms of section 15 subsection 4, Affirmative Action stresses that the promotion of a diverse workforce
should be done in a way that does not exclude the advancement prospect of any individual. In terms of section 42 (a)(ii), the Director-general of the department of Labour or any other person or body applying the Employment Equity Act should take into account that equitable representation in the workplace is based also on “suitably qualified people from designated groups from which employers may reasonably be expected to promote or appoint employees” in the workplace of a designated employer.

Section 15 subsection 2(b) maintains that Affirmative Action measures should “… further diversity in the workplace based on equal dignity and respect of all people”.

The emphasis on the dignity and respect of all people in the workplace means that designated employers must comply with the provision of Affirmative Action as implied in the Employment Equity Act. Section 42 agrees with section 13 and section 15 of the Employment Equity Act stating that the Director-general of the Department of Labour should not undermine the compliance of the employers with the Employment Equity Act. The Director-general sees to
it that suitably qualified people from designated
groups are equitably represented in the workforce.

In terms of section 42 of the Employment Equity Act,
equitable representation should be based on the
demographic profiles of the population, the number of
suitably qualified people from designated groups
flowing in the workplace, and progress made in
implementing employment equity by other designated
employers. But this does not mean that Affirmative
Action promotes quotas.

To this end, section 15 subsection 4 of the
Employment Equity Act explains that designated
employers are not required to undertake “an
employment policy or practice that would establish an
absolute barrier to the prospective or continued
employment or advancement of people who are not from
designated groups”. This policy or practice prohibits
unfair discrimination against members of society, for
instance black people, women and physically disabled
people.

Affirmative Action needs to promote and build a
diverse and representative workforce by filing the
positions, which are characterised by
underrepresentation of some groups in the workplace. Identifying a situation of underrepresentation of persons from designated groups can promote a diverse and representative workforce. That is why section 20 subsection 2(c) further explains that the Employment Equity Plan must state “where underrepresentation of people from designated groups has been identified by the analysis, numerical goals to achieve the equitable representation of suitably qualified people from designated groups” in the workplace of the designated employers.

The Employment Equity Act assumes that there is underrepresentation of people from designated groups. Therefore, because of Affirmative Action the groups will form part of the workforce that represents all people at all levels and categories in the workplace of designated employers.

3.3.5. Promote equal opportunity in employment

Equal opportunity in the workplace should not be confused with the assurance of equality as much as they are both goals of Affirmative Action. Equal opportunity in the workplace means that people should be given equality of access and opportunities. This
implies that all stakeholders in the workplace should be treated equally. Given the disparities and lack of opportunities for people from designated groups in South Africa, Affirmative Action tries by any means necessary to promote equal employment opportunities. By redressing the disadvantages of the past, Affirmative Action aims at achieving and promoting equal opportunity.

Consequently, when equality is assured through redress and the preferential treatment of people from designated groups, equal opportunity is promoted.

The promotion of equal opportunity in employment implies that after the skills of designated groups have been developed, Affirmative Action will only be a temporary intervention to get rid of unfair discrimination. It will cease immediately after the elimination of unfair discrimination and the achievement of equal employment opportunity. It will cease immediately once the disadvantages experienced in the past by certain groups of people have been overcome.

Section 13 agrees with section 15 of the Employment Equity Act on the question of Affirmative Action
measures. Accordingly, every designated employer must implement Affirmative Action measures to eradicate unfair discrimination throughout the workplace. Affirmative Action is designed to ensure that suitably qualified people from designated groups have equal employment opportunities and equal representation in the workplace of a designated employer.

3.4. Summary

The previous discussion has centred on the rationale for the Employment Equity Act, which is based on past discrimination and the resultant inequalities; the need for economic growth; the requirements of the Constitution and the inadequacies of removing discriminatory laws. These have laid the foundation for Affirmative Action. Affirmative Action in the Employment Equity (No. 55 of October 1998) has been analysed. Affirmative Action forms an important part of the Employment Equity Act. Apartheid has resulted in unfair discrimination and inequalities in the workplace. Some categories of people were given less weight and status than other groups, with adverse effects on these disadvantaged groups.
Affirmative Action is seen as a strategy to redress the disadvantages created in the past, to eliminate unfair discrimination, to develop the skills of the disadvantaged groups and to promote equal employment opportunities in employment.

In this chapter we also learn that Affirmative Action is a form of discrimination, though fair in the workplace. It is also a temporary strategy to redress the injustices of the past. It will give way to equal opportunities in employment when the demographic profiles of South Africa are reflected in the workplace, and when equity is achieved through Affirmative Action. Affirmative Action is not reverse discrimination because it does not repeat what has happened in the past.

The next chapter will evaluate Affirmative Action in the Employment Equity Act in terms of a normative definition of Affirmative Action. In other words, I am going to evaluate Affirmative Action as conceptualised in the Employment Equity Act in terms of a normative definition of Affirmative Action as developed in Chapter Two of this mini-dissertation.
CHAPTER FOUR

EVALUATION OF AFFIRMATIVE ACTION
THE EMPLOYMENT EQUITY ACT IN TERMS
OF A NORMATIVE DEFINITION OF
AFFIRMATIVE ACTION

4.1. Introduction

The purpose of this chapter is to evaluate Affirmative Action as conceptualised in the Employment Equity Act in terms of the normative definition of Affirmative Action developed in Chapter Two of this mini-dissertation. Does Affirmative Action as conceptualised in the Employment Equity Act satisfy and comply with a normative definition of Affirmative Action? This is the main question of this chapter.

4.2. Evaluation of Affirmative Action

According to Thompson (1993: 23), there is “broad consensus that all forms of race discrimination in a new society must be combated. There is a considerable
amount of support for the notion that policies of Affirmative Action must be developed in order to redress the past wrongs and achieve equality”.

In Chapter Two the following aspects of a normative definition of Affirmative Action were identified:

- Redressing injustices
- Eliminating unfair discrimination
- Developing discriminated against groups
- Promoting equal opportunities in employment

This section will evaluate these aspects because they also form the main part of Affirmative Action as conceptualised in the Employment Equity Act of South Africa. I will not be discussing the aspect of ‘enhancing diversity and representation in the workforce’ because this aspect of the Affirmative Action in the Employment Equity Act overlaps with all other aspects. Thus, it is not important to discuss it in detail. Does Affirmative Action in the Employment Equity Act comply with a normative definition of Affirmative Action? It seems that Affirmative Action in the Employment Equity Act does
comply with my normative definition of Affirmative Action.

The above-mentioned aspects of a normative definition of Affirmative Action seem to be similar to aspects of Affirmative Action in the Employment Equity Act. In order to evaluate Affirmative Action in the Employment Equity Act in terms of a normative definition of Affirmative Action, the four aspects will be discussed in detail.

4.2.1. Redress injustices

The first aspect of Affirmative Action to be evaluated in terms of my normative definition of Affirmative Action relate to correcting the injustices of the past against certain categories of people in the workplace. When one looks at redressing disadvantages in Affirmative Action as conceptualised in the Employment Equity Act, it is evident that the concept complies with a normative definition of Affirmative Action. Both my normative definition of Affirmative Action and the Employment Equity Act claim that redressing injustices should include eliminating unfair discrimination.
Preferential treatment is seen by both the normative definition of Affirmative Action and by Affirmative Action in the Employment Equity as a form of advancing redress. According to Himma (2001: 279), Affirmative Action defenders conclude that preferences are justified as morally legitimate responses to the harms to self-esteem caused by institutional discrimination. This is the reason why Affirmative Action is seen as an attempt to even the playing field by negating unfair competitive advantages.

Therefore, if redress of injustices as an aspect of Affirmative Action as conceptualised in the Employment Equity Act satisfies a normative definition of Affirmative Action, there will be fair treatment of all people irrespective of groups in the workplace. This fair treatment will help to level the playing field and overcome barriers of unfair discrimination, which prevent certain categories of people from enjoying equal treatment. There will not be any unqualified persons in the workplace because Affirmative Action does not include quotas.
4.2.2. Eliminate unfair discrimination

The elimination of unfair discrimination is the second part of Affirmative Action that we need to evaluate in terms of a normative definition of Affirmative Action. Affirmative Action, normatively, is a strategy to eliminate unfair discrimination rather than a process whereby one form of discrimination is replaced by another. Similarly, Affirmative Action must not be seen as a substitute for another form of discrimination (Rossouw, 1994: 73; Human, 1993: 2).

Affirmative Action in the Employment Equity Act seems to comply with the above paragraph, though I have identified some differences in relation to discrimination. When one looks at section 6 subsection 2 (a) of the Employment Equity Act, it is evident that there is discrimination according to Affirmative Action in the Employment Equity Act, though fair. This section explicitly stated that Affirmative Action is another form of discrimination though not unfair.

Therefore, if the elimination of unfair discrimination in Affirmative Action in the
Employment Equity Act complies with my normative definition of Affirmative Action, the workplace will be free from unfair discrimination. The workplace will not be characterised by immoral practices, which were experienced by certain groups in the past because of non-job-related characteristics. There will be respect for all people in the workplace irrespective of their specific characteristics. This means that the practice and implementation of Affirmative Action will be a form of fair discrimination.

4.2.3. Develop victims of discrimination

The third aspect of Affirmative Action that we need to evaluate is the development of victims of discrimination. Hlangani (2000: 16) argues that while ensuring equitable representation in all occupational categories and levels in the workplace, the development of skills is imperative. In terms of a normative definition of Affirmative Action, the development of victims of discrimination should be part of the general development of people in the workplace. But Affirmative Action in the Employment Equity Act only seems to focus on the development of the skills of groups that have been discriminated
against. This idea of selection is supported by section 15 subsection 3, which explains that Affirmative Action includes preferential treatment.

The groups that have been discriminated against are encouraged to advance their skills by attending relevant job-related off-the-job training and development courses, which meet individual training needs. Consultation in identifying the nature of training members of these groups plays an important role. Consultation enables important stakeholders like trade unions, employees and employers to provide input and to be consulted about the results (Human, 1993: 16).

Trade unions, in South Africa for instance, are consulted on matters relevant to the workplace. Section 16 of the Employment Equity Act agrees and complies with the notion of consultation, which further develops the disadvantaged groups. In terms of this section, consultation should involve designated groups, representative trade unions, employees or representatives nominated by trade unions.
What does a normative definition of Affirmative Action say about development? It says that development rests on the assumption that the maintenance of standards relies on well-trained staff who are responsible for the development of those reporting to them.

According to Isrealstam (2001 (b): 6), the employers have to develop the skills of their employees through training and advancing the careers of designated groups. Where employers do not have enough employees in the designated groups or fail to develop them the employer can face punishment. This is supported by Schedule 1 of the Employment Equity Act.

Therefore, if Affirmative Action in the Employment Equity Act complies with my normative definition of Affirmative Action in terms of development, it means that groups that have been discriminated against will have training opportunities. The Employment Equity Plan will be drawn. This plan contains the aspect of setting goals for the provision of Affirmative Action in the workplace.
4.2.4. Promote equal opportunities in employment

The fourth and final aspect of Affirmative Action we need to evaluate relates to the promotion of equal opportunities in the workplace. This aspect of Affirmative Action in the Employment Equity Act seems to comply with the normative definition of Affirmative Action.

In terms of section 15 subsection 2 (c), reasonable accommodation should be made for suitably qualified persons from designated groups to ensure that they enjoy equal opportunities in employment.

In terms of section 42, Affirmative Action as conceptualised in the Employment Equity Act is seen as a temporary intervention that will cease when the demographic profiles of the South African population are reflected in the employment area of a designated employer. This is what a normative definition of Affirmative Action promotes. Accordingly, Affirmative Action is a temporary intervention, which will give way to equal opportunities in employment.

What is also significant is that the above two paragraphs show that Affirmative Action in the
Employment Equity Act is for a certain period only and it will cease when its goal of equal opportunities has been achieved.

But Horwitz (1998: 81) is hesitant about the Employment Equity Act and Affirmative Action in relation to the goal of a diverse and representative workforce and the temporary nature of the strategy. Accordingly, it seems unlikely that it will be an interim measure. The employment equity plan, programmes and reporting requirements will continue indefinitely although they will be subject to review.

Affirmative Action as conceptualised in the Employment Equity Act guards against quotas, which the normative definition also guards against. Section 15 subsection 3 explicitly states that measures of Affirmative Action do exclude quotas. Accordingly, quotas make provision for putting unqualified persons in the positions that they are not qualified for to achieve the goal of reflecting demographic profiles of the country. According to Rossouw (1994: 74) Affirmative Action strategies “deem it important that the demographic profile of a society should be reflected” in the workplace of a society. But
Affirmative Action will not promote or hire unqualified persons.

Therefore, if the promotion of equal opportunity in employment as an aspect of Affirmative Action as conceptualised in the Employment Equity Act complies with the normative definition of Affirmative Action, it means that competition, selection, promotion, hiring and firing will eventually be based on equal and merit-based opportunities. This means those harmed by unfair discrimination will compete on par with those who did not suffer from unfair discrimination.

4.3. Conclusion

Affirmative Action as conceptualised in the Employment Equity Act of South Africa was evaluated in terms of a normative definition of Affirmative Action developed in Chapter Two of this mini-dissertation.

The concept of Affirmative Action in the Employment Equity Act complies with the normative definition of Affirmative Action. Although these two understandings of Affirmative Action converge, there are some
discrepancies, which were discussed in this chapter. For instance, Affirmative Action in the Employment Equity Act has shown to be discrimination, though not unfair. This idea does not comply with the normative definition of Affirmative Action fully.
CHAPTER FIVE: CONCLUSION

In Chapter One I traced the historical background of Affirmative Action in two countries, namely the United States of America and Malaysia. These two countries were selected because they were reputed to be leading the world in Affirmative Action. I found that Affirmative Action originated in the United States of America to prohibit unfair discrimination against certain groups in all spheres of life. And after Malaysian independence in 1957, the Malaysian government introduced Affirmative Action to improve the education and the employment opportunities of the Bumiputra. The Bumiputra are one of Malaysia’s ethnic groups that have suffered from unfair discrimination.

Based on this historical background stated, this mini-dissertation attempted to dispel misunderstandings about Affirmative Action. It distinguished Affirmative Action from concepts such as reverse discrimination and equal employment opportunity. In relation to equal employment opportunity, I agree with Rossouw (1994: 73), who concluded that “Affirmative Action is therefore more than merely providing equally and merit-
opportunities”. Rather, Affirmative Action will give way to equal opportunities after unfair discrimination has been eliminated and groups that have been discriminated against have been developed. It was found that unlike reverse discrimination, Affirmative Action does not reverse discrimination. This means that groups that did not suffer unfair discrimination in the past will not be unfairly discriminated against. This mini-dissertation also provided a clear distinction between descriptive definitions and normative definitions. It opted for a normative definition in order to develop what Affirmative Action ought to be.

As indicated above, Affirmative Action can be distinguished from equal opportunity in employment and reverse discrimination. Affirmative Action will give way to equal opportunity in employment once the workplace reflects the demographic profile of South Africa.

This mini-dissertation found that Affirmative Action is a holistic strategy to redress injustices experienced by certain categories of people in the past. Affirmative Action aims at eliminating unfair discrimination and developing discriminated against
groups in order to promote equal opportunities in employment. This mini-dissertation found that Affirmative Action redresses historical injustices, takes constraints into account, and considers the accelerated advancement of disadvantaged groups in order to achieve its goal.

Groups that have been discriminated against will be developed. This development will occur through training and retaining these groups. This means that there will be a series of programmes on organisational culture, career planning, succession, policies and procedures to train the disadvantaged group. Isrealstam (2001 (a): 6) confirms that career planning is important because retaining skilled employees is crucial to every employer. We do not have an over-abundance of high-level skills.

It is impossible to summarise the content of this mini-dissertation without looking at the pillars of the concept of Affirmative Action in the Employment Equity Act. The Employment Equity Act emanated from a democratic Constitution. It has its roots in the Constitution. Section 9 of the Constitution is more or less similar to section 6 of the Employment Equity Act. Accordingly, section 9 of the Constitution talks
about equality whereas section 6 of the Employment Equity Act discusses the prohibition of unfair discrimination. In terms of section 9, subsection 3 of the Constitution, 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”. The same applies to section 6 of the Employment Equity Act. The only difference is that the Employment Equity Act also includes family responsibility, HIV status and political opinion.

Equally important, the Constitution and the Employment Equity Act prohibit unfair discrimination on the above-mentioned grounds.

Affirmative Action in the Employment Equity Act is another form of discrimination but it is seen to be fair. It promotes equity in the workplace.

Chapter Four shows that, although Affirmative Action in the Employment Equity Act discriminates fairly, it complies with my normative definition of Affirmative Action developed in Chapter Two. By redressing the
injustices, eliminating unfair discrimination, developing groups discriminated against and promoting equal opportunities in employment, show that Affirmative Action is fair. Ramphele (1995: 25) says equity “is more contextually defined and can mean both equal treatment and preferential treatment”. This treatment does not mean Affirmative Action will not consider the qualifications of candidates in hiring, promotion and selection procedures.

One of the major misunderstandings about Affirmative Action has to do with quotas. Goals are based on actual availability statistics and relate to positions, which have become vacant. If a qualified person is not available, failure to achieve goals will be penalised. Affirmative Action does not include quotas, but preferential treatment and numerical goals are considered. This is supported by section 15 subsection 3 about quotas and preferential treatment and numerical goals. Section 20 also supported the question of goals and time-tables in the Employment Equity Plan. The South African situation requires realistic numerical goals based on workforce requirements.
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