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TOPIC

SETTING THE SUN DOWN ON AFFIRMATIVE ACTION: A SOUTH AFRICAN PERSPECTIVE

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May their souls rest in peace!!!

ABSTRACT

The Constitution of the Republic of South Africa (1996) laid the foundation for the promotion of achievement of equality and further provides for the legislative and other measures to be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. One such measure was the enactment of the *Employment Equity Act, No 55 of 1998. This the legislative measure aimed at* forms part of the transformation legislation aimed at promoting equity and eliminating discriminatory and unfair treatment in the workplace.

This Act was promulgated about 17 years ago, and its impact on transformation of the workplace into a representative establishments has to be measured. The private sector in particular, has shown reluctance in developing and/or implementing equity plans to advance the clearly stated objectives of the Constitution and the Act. This is evident in the number of organisations that are broad to book for failure to comply with the provisions of the Act. The Department of Labour reported on 24 July 2015 that 77 of South Africa's big and medium companies were the first of 1 400 to face unprecedented court action over their failure to comply with employment equity legislation. This reflects on the challenges South Africa is regarding affirmative action.

Several writers have shown their antagonism towards affirmative action. There have been calls that affirmative action must be ended. Claims such as that it is "reversed discrimination" and that it should not apply to the born-frees, have been canvassed widely. One such writer Valentine Mhungu, even produced a study that suggest that affirmative action should be terminated as it is not achieving its intended purpose but bring absurd and unintended results.

This study seeks to demystify affirmative action and serve as a counter to the findings of Valentine Mhungu and many other antagonists of affirmative action and proves that there is no need to end affirmative action or to subject it to a sun-set clause. It further acknowledges that affirmative action is not and cannot be a permanent feature of employment sector as it has to and will die its natural death. This study further proposes mechanisms to fast track the implementation of affirmative action in South Africa.

Table of Contents

Chapter 1

General Introduction

Chapter 2

Conceptual and Theoretical Framework

Chapter 3

International Labour Organisation (ILO) standards and the American perspective on affirmative action

Chapter 4

Implementation of Affirmative Action in South Africa

Chapter 5

Conclusion and recommendations

Chapter 1

General Introduction

1.1 Introduction

The South African society is a heterogeneous society[1] which is divided along various spectra, including colour, gender and age and other physiological attributes. Prior to 1994 these divisions were not only institutionalised, but also codified by the erstwhile government.[2] As a result, discrimination on various grounds manifested itself in the workplace. White males became advantaged and occupied almost all possible lucrative positions one can imagine.[3]

After rigorous negotiations between the erstwhile nationalist government and the liberation movements,[4] several compromises were made which led to the Interim Constitution[5] being adopted in 1993. The Interim Constitution was a tremendous milestone towards realisation of the ideal of a democratic and free South Africa and led to the first democratic election in April 1994.[6]

The newly born South African society needed to be transformed in order for the citizens to be truly equal and have equal opportunities. One of the measures to give effect to this ideal, was the

[1] Gradin *Race, Poverty, and Deprivation in South Africa* (2011) Universidad, Spain. Also see the preamble of the constitution of the Republic of South Africa which contains the phrase that says "…Believe that South Africa belongs to all who live in it, united in our diversity;.." and statistical release (Revised). Census 2011 on the population distribution publishedhttp://www.statssa.gov.za/publications/P03014/ P030142011.pdf (as at 17 August 2015).

[2] The history of apartheid in South Africa - http://www-csstudents.stanford.edu/~cale/cs201/apartheid. hist.html. Retrived 19 September 2015.

[3] Treiman DJ *The legacy of apartheid: racial inequalities in the new South Africa* (2005), Oxford University Press, Oxford. Los Angels USA.

[4] See generally Barnes, Catherine; de Klerk, Eldred "South Africa's multi-party constitutional negotiation process". *Owning the process: Public participation in peace making* (2002) Conciliation Resources. Retrieved 19 October 2011.

[5] The Interim Constitution was enacted as Constitution of Republic of South Africa Act 200 of 1993.

[6] See n 4.

entrenchment of the equality clause through section 8[7] of the Interim Constitution. The equality clause was later transcribed into the final Constitution which was adopted in 1996.[8] The equality clause is enshrined in section 9 of the Constitution. Section 9(2) specifically provide 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."

South Africa was re-admitted to the United Nations General Assembly in 1994 following the dismantling of apartheid and its transition into democracy[9] and also South Africa re-joined the International labour Organisation (ILO) on 26 May 1994.[10] As a member state, South Africa became a signatory of various United Nations Resolutions and as such adopted standards in dealing with inequalities.[11] Two important conventions relating to elimination of discrimination and advancement of the disadvantaged, became applicable. These are namely, Discrimination (Employment and Occupation) Convention[12] and the Equal Remuneration Convention[13] and their associated Recommendations. These two conventions have been named by the ILO's Governing

[7] This section provided as follows: "(1) Every person shall have the right to equality before the law and to equal protection of the law. (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

[8] See, generally, Van Heerden M "*The 1996 Constitution of the Republic of South Africa: Ultimately supreme without a number*" Politeia Vol. 26 No 1 2007 Unisa Press pp 33 – 44.

[9] South Africa online: *Towards a peoples history* - http://sahistory.org.za/dated-event/south-africa-becomes-charter-member-united-nations (accessed on 12 September 2015).

[10] http://www.nationsencyclopedia.com/United-Nations-Related-Agencies/The-International-Labour-Organization-ILO-MEMBERSHIP.html#ixzz3lgMXJeHL (as at 17 July 2015).

[11] Hlongwane M *Commentary on South Africa's position regarding equal pay for work of equal value* www.saflii.org/za/journals/LDD/2007/6.pdf (as at 17 July 2015).

[12] Discrimination (Employment and Occupation) Convention No. 111 1958.

[13] Equal Remuneration Convention No. 100 of 1951.

Body among the eight fundamental or core Conventions which all Member States should ratify.[14] They provided measures to eliminate all forms of unfair discrimination in the workplace, and the use of affirmative action (positive discrimination) to achieve that.[15]

McGregor[16] argues that:

> "…affirmative action policies, in seeking to bring about equality, may use extreme or irrelevant distinctions to achieve their objectives in a particular situation. To avoid this, affirmative action policies must be scrutinised and controlled so as not to undermine the principle of non-discrimination itself. In this regard, international law holds that evaluating distinctions introduced in the framework of an affirmative action policy should be the same as evaluating distinctions under the non-discrimination clauses of international instruments."

According to Coetzer,

> "Affirmative action is a topic with a tendency to evoke much emotion and spark heated debate among South Africans from all walks of life. Yet few can deny the need for measures of some sort to address the racial inequality in the labour market experienced during apartheid."[17]

The topic is emotional the way it is, understandably so.[18] The previously advantaged group feel that they are being disposed of their entitlement to remain elite, whereas the previously disadvantaged

[14] *Substantive provisions of labour legislation: The Elimination of Discrimination in Respect of Employment and Occupation* - http://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch7 (as at 30 July 2015).

[15] Ibid.

[16] McGregor M *Affirmative action and non-discrimination: South African law evaluated against international law* (2006) XXXIX CILSA.

[17] Coetzer N *Sword verse shield debate continues* (2009) 21 Merc LJ 92 - 101.

[18] See generally Odendaal BR *Employment Equity – Are we still on target?* (2013) *International Journal for Innovation Education and Research* Vol1-04 - www.ijier.net (20 August 2015) who submits that "Madi (1993: ix), postulates that Mandela summed up the debates surrounding the *highly explosive and emotive nature of affirmative action* by describing it as a positive symbol of hope to millions of South Africans." (emphasis added). Also see Tomei M *Affirmative Action for Racial Equality: Features, impact and challenges* (2005) International Labour Office Geneva who submits that "[a]ffirmative action in employment is a matter of heated debate and controversy."

group would like to see real change taking place and they acquiring similar positions as their counterparts.

The emotions behind this sensitive issue, also make it difficult for one to discuss without creeping into the attitudes of various groupings of people, including politicians, previously disadvantaged and previously advantaged and so on.

Given the fact that apartheid was a multi-dimensional phenomenon, mechanisms to reverse its effects, such as affirmative action, will always be comprehended from multi-disciplinary perspectives. These include legal, social, political, economic and psychological perspectives. This study focuses on affirmative action mainly from a legal perspective while also tapping into experience and knowledge developed in other disciplines.

1.2 Aim of the research

The aim of the study is to critically analyse the implementation of affirmative action in South Africa as to determine whether affirmative action has achieved its intended purpose; continued implementation of affirmative action is necessary; challenges regarding its continued implementation and to develop proposals on how to deal with them going forward, with specific emphasis on legal implications and its future in the workplace.

The aim of this study will be achieved through examining the implementation of employment equity, strides made in redressing the imbalances of the past, the jurisprudence on the right not to be unfairly discriminated in the workplace, the American perspective of affirmative action, and the standards set by the International Labour Organisation (ILO) in the area of affirmative action.

The American perspective is chosen because just like South African society the American society is heterogeneous and experienced the racial and gender discrimination. It must be noted that unlike in South Africa, it was the white majority in America who oppressed the black minority. ILO standards are used in this study because South Africa is a Member State of the United Nations and also a signatory of conventions dealing with workplace discrimination.

1.3 Rationale

Those who are opposed to affirmation action argue for a date upon which it should end.[19] They argue that unless that it is discrimination in reverse. According to McGregor, "[t]hey argue that unless a cut-off date is set, affirmative action has, at the best, the potential to be become permanent, and, at the worst, an institutionalised 'racial spoil system".[20]

Although there are various views regarding affirmative action, mainly distorted, some authors attempt to provide an exposition of this phenomenon. According to Van Niekerk e*t al* [21]

> "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 workplace of a designated employer".

In other words, affirmative action is not intended at appointing people merely by reason of belong to designated groups, but that they must first be suitably qualified.

According to Van Niekerk e*t al* [22] give a further clarity of what constitutes "suitably qualified". They submit with reference to section 20(3) [23] that a person may be suitably qualified for a job if one or more of the following requirements are present, namely, formal qualification; prior learning; relevant experience; and capacity to acquire, within a reasonable time, the ability to do the job.

The Constitutional Court laid the debate regarding the "compromising of standards" through implementation of the affirmative action to rest. In its *South African Police Service v Solidarity obo Barnard* [24]decision, Moseneke ACJ who delivered majority judgment had this to say:

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[19] Jagwanth S *Affirmative Action in a transformative context: South African experience* (2004) 36 Connecticut LR725 at 728 and n 20.

[20] McGregor M *Blowing a whistle on affirmative action: the future of affirmative action in South Africa (Part 2)* (2014) 26 SA Merc LJ 282 – 306.

[21] Van Niekerk et al *Law@work* (2015) LexisNexis 159. Also see Landis H and Grossett L *Employment and the Law: A practical guide for the workplace* (2014) (3rd ed.) Juta and Company (Pty) Ltd Claremont.

[22] Ibid.

[23] Employment Equity Act 55 of 1998.

[24] [2014] ZACC 23.

> "Section 15 describes the permissible character of affirmative action measures. They must be designed to ensure that "suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels". I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core objective at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public."[25]

According to Basson *et al* [26] equitable representation is determined by a consideration of the demographics profile of the national and regional economically active population, the pool of suitably qualified people in the designated groups from which the employer may reasonably be expected to promote or appoint employees, and also the economic and financial factors relevant to the sector in which the employer operates.

The above mentioned factors therefore suggest that a mere fact that a person belongs to a designated group, is not an entitlement to be considered for affirmative action. Various factors play a role in determining the affirmation of a particular employee. Basson *et al* perceive affirmative action as a measure that does not have permanency.[27]

They are of the view that once the objectives of affirmative action are achieved, then affirmative action must cease.[28] They further submit as long as the workplace representivity is not achieved, affirmative action will persist. The Labour Relations Act[29] provides mechanisms for the enforcement of employee's rights and as such an employee who feels unfairly treated may approach the relevant forum for enforcement.[30]

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[25] Ibid at par 41.

[26] Basson et al *Essential Labour Law* (2005): Labour Law Publications Cape Town page 216.

[27] Ibid.

[28] Ibid.

[29] Act 66 of 1995.

[30] The Labour Relations Act sets out how disputes over rights in the workplace must be handled. Generally disputes are referred to the relevant bargaining council and if there is no bargaining council, then to the Commission for Conciliation, Mediation and Arbitration.

In this study, an attempt will be made to elucidate affirmative action, its purpose and implementation, whether it has achieved its purpose, while determining whether it will be necessary to subject it to a *sun set* clause.[31] Put differently, is time for South Africa to set the sun down on affirmative action?

The focus of the study will be to determine the necessity for the South African society to continue to have measures of redressing the imbalances of the past in general and the need to continue with affirmative action in particular in other to achieve workplace representivity without offending the opportunities for members not belonging to the designated groups. The study will further untangle intricacies encapsulated in the implementation of affirmative action and propose mechanisms of accelerating the implementation of affirmative action.

1.4 The research questions

The main research question is whether the South African society has achieved equity in the workplace and as such the need for affirmative action has reached expiry date. This question is subdivided into the following sub-question:

(a) To what extend have employers complied with their statutory obligations to implement affirmative action and as such have achieved the objective of workplace representativity?
(b) Are there effective mechanisms for monitoring and assessing effective implementation of affirmative action?
(c) Is it fair to subject the "born frees"[32] to the same measures of affirmative action? Where do we draw the line?
(d) Have the affirmative action ideals been achieved in order for South Africa to put an end to it or does it still have a long way to go?

[31] In public policy, a sunset provision or clause is a measure within a statute, regulation or other law that provides that the law shall cease to have effect after a specific date, unless further legislative action is taken to extend the law - http://www.collinsdictionary.com/dictionary/english/sunset-clause, http://dictionary.reference.com/browse/sunset-clause, http://lexbook.net/en/sunset-clause (as at 10 August 2015).

[32] Born frees are defined by the British media as "Born since the country's first fully democratic elections in 1994, they have grown up without apartheid and the struggles of South Africa's older generation." http://www.bbc.com/news/world-africa-27146976 (as at 26 July 2015).

1.5 Research methodology

According to Oosthuizen *et al*, research method is a specific research technique utilised by the researcher to conduct a research on a particular problem.[33] Russo[34] argues that "the primary source of information when doing legal research is the law itself".[35] This author further submits that "…traditional method of doing law research is a systematic investigation which involves the interpretation and explanation of the law. Russo further submits that while legal research traditionally "is neither qualitative nor quantitative, legal researchers try to place legal disputes in perspective in order to inform practitioners about the meaning and status of the law".[36]

Van Vollenhoven[37] submits that legal research method is necessary since the nature of the law tends rather to be reactive than a proactive force. Past events (e.g. court interpretations) can thus lead to stability in its application. Therefore, it would be imperative to look at the Constitution, legislation and case law to determine how courts have interpreted statutory law in applying legal principles.
The study comprises the collection of data, particularly from the reports of the Employment Equity Commission and Statistics South Africa to an extent possible, and the study of relevant legal provisions (in books, statutes, internet resources and articles in journals. Local and foreign academic writings will be consulted in order to draw on the experience and/or approach of the writers. International Labour Organisation (ILO) standards on affirmative action and measures to combat workplace discrimination and the American perspective of affirmative action will be analysed to complete the study.

As indicated above the American perspective is chosen because just like South African society the American society is heterogeneous and has experienced racial and gender discrimination. However, history behind these two societies differs. One hand, in the American society, there was slavery.

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[33] Oosthuizen, Botha, Roos, Rossouw, and Smit (eds) (2009) Aspects of Education Law 4 ed 10.

[34] Russo C *Legal Research: The "Traditional" Method*. In: Schimmel D. (ed.). Research that makes a difference: Complementary methods for examining legal issues in education (1996) No. 56 in the NOLPE Monograph Series. Kansas: National Organization on Legal Problems of Education.

[35] Ibid.

[36] Ibid.

[37] Van Vollenhoven WJ *Learners' understanding of their right to freedom of Expression* (2006) PhD Proposal University of Pretoria - http://repository.up.ac.za/bitstream/handle/2263/25528/11 (as at 25 July 2015).

People of African and Asian origin were oppressed. There was oppression of the minorities by the majorities and discrimination was founded on, race and gender stereotype. On the other hand, in South Africa the majority was oppressed by the minority and discrimination was institutionalised through apartheid policies and laws.

The American society was the first to develop measures to advance those disadvantaged by discrimination. ILO standards are used in this study because South Africa is a Member State of the United Nations and also a signatory of conventions dealing with workplace discrimination, thereby providing a basis for international comparative study.

1.6 Delineation and limitations of the research

Notwithstanding multidisciplinary nature of affirmative action, this study will focus mainly on the legal inquiry of affirmative action in South Africa. However this does not suggest that the study can be concluded merely on legal point of view and as such reference will be made to other fields of study as and when necessary.

1.7 Outline of the research

1.7.1 Chapter 1: General background

This chapter provides the framework for the study. It describes the rationale behind the adoption and implementation of affirmative action in South Africa, the problem to be studied, the importance of this study, the limitation of the study, the applicable research methodology, and the structure of the study.

1.7.2 Chapter 2: Conceptual and theoretical framework

The concepts and theories regarding affirmative action differ from one population group to another, political ideology to another and so on. Therefore this chapter attempts to define the width and breadth of the relevant concepts and theories regarding affirmative action. This chapter differentiates between legal conceptualisation and theorisation of affirmative action from those of other disciplines.

1.7.3 Chapter 3: ILO standards and the American perspective on affirmative action

This chapter deals with measures puts in place by ILO and standards to eliminate workplace discrimination. It will also bring the Americans dimension of affirmative action given the fact that the concept of affirmative action was first developed in America and that the Americans society is heterogeneous like South African society and has experienced discrimination among its people and social groups. There are differences between these two societies though. For example, in the American society the majority oppressed the minority whereas in South Africa society the minority oppressed the majority.

1.7.4 Chapter 4: Implementation of Affirmative Action in South Africa

This chapter focuses on the implementation of affirmative action in South Africa by analysing the following important sources: the impact of the Constitution of redressing the imbalances of the past in the employment sector, the Employment Equity Act, jurisprudence on affirmative action, various works of academic and political writers.

1.7.5 Chapter 5: Conclusion and recommendations

This chapter clarifies the main objective of the study: to examine legal imperative and ramifications of setting the sun down on affirmative action; and it describes the approach taken to achieve this objective.

The literature review will also include an analysis of various legal sources and measures put in place to achieve equity in the workplace, provide strategies that bring about the delicate balance between redressing the imbalances of the past and protection of the undesignated groups against unfair discrimination in the South African workplace.

Chapter 2

Conceptual and Theoretical Framework

2.1 Introduction

There are two arguments regarding the nature and purpose of affirmative action in South Africa. On the one hand, there is a school of thought that argues that affirmative action is unnecessary and is causing more harm than good.[38] Proponents thereof argue that while they had to live with unbearable consequences of implementation of affirmative action, it cannot be allowed to continue.[39] They further argue that affirmative action cannot be a permanent arrangement and that at this stage, it is about time that the sun be set down on affirmative action. Solidarity[40] for example, uses the phrase "[a]ffirmatve action is already dead due to skills crisis".[41]

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[38] See, generally, Gaetani G *Affirmative Action: If or How?* (un-dated) www.fwdklerk.org (as at 23 September 2015). Also see Mashaba H *Affirmative Action: A noble but racist ideal* (2015) Rand Daily Mail www.rdm.co.za/politics/2015/05/21/affirmatve-action-a-noble-but-racist-ideal. Mashaba further argues that "the notion of empowering previously disadvantaged blacks is a noble ideal, noble, but racist." Mashaba argues further that "Affirmative action has enhanced the racist perceptions of blacks and white. Poor blacks are under the illusion that the whites are still the only beneficiaries of business. Whites feel that tables have been turned and that they are excluded from economic activity based on race."

[39] See Du Toit P *Affirmative Action and the Politics of Transformation: A survey of Public Opinion* (2004). A study commissioned by the FW De Klerk Foundation. University of Stellenbosch, South Africa. In this study, it is argued that "[t]he current way in which the Employment Equity Act and its attendant rules of affirmative action are applied puts South Africa at risk of reintroducing crucial aspects of these two structural features, albeit with a different content. South Africans are again classified into groups, again by force of law, this time in terms of race and gender. As with apartheid, ascriptive criteria prevail over the personal, interpersonal and social ties that bind and separate people."

[40] Solidarity is a South African trade union that negotiates on behalf of its members and attempts to protect workers' rights. Although the union is often involved in issues of political importance, it does not align or formally affiliate itself with any political party. www.google.co.za/search?q=what+is+solidarity+union (as at 20 November 2015).

[41] Joubert P and Calldo F *The Current position of affirmative action* (2008) Solidary Research Institute. Solidary in this report, strongly militates against affirmative action. Solidarity believes that "As the white share of SA's total population gradually declines, the effectiveness of affirmative action that discriminates on basis of race will continue to decline." Also see Musgrave A *Scrap EE as public services is equal-*

On the other hand, there is a school of thought that believes that the imbalances of the past have not been addressed.[42] The disparities that continue to exist in the South African society cannot be redressed within the short space of time. They argue that affirmative action has not come closer to achieving its intended purpose and as such setting the sun down on it will defeat the purpose of achieving an equal society, one free of prejudice and unfair discrimination.[43]

Accordingly, this school of thought does not support the idea of putting a sunset clause on affirmative action. Proponents of this school of thought argue that if the sun is set down on affirmative action, there will be a subtle maintenance of the status quo and the previously disadvantaged will continue to be disadvantaged.

In the light of the above, it is of paramount importance that the conceptual and the theoretical basis of this research be laid. This is crucial as it will provide the parameter within which the argument for and against setting the sun down on affirmative action can be understood. It is important, therefore, to provide a framework and the scope of key concepts and theories related to the implementation of affirmative action.

2.2 The concept of affirmative action

2.2.1 Historical development of affirmative action

The concept of affirmative action has its origin in the United States of America. On 06 March 1961 President John Frederick Kennedy issued Executive Order 10925.[44] This order required government

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Solidary (2014) The Star dated 19 March 2014, and an article by Dirk Hermann, CEO of Solidarity entitled *SA Affirmative Action To Be Challenged At The United Nations* dated 15 January 2015, www.sagoodnews.co.za/categories/42-bee/ (as at 29 September 2015).

[42] See generally Manyi J *Too early for Affirmative Action to come to an end*. Sunday Times 12 October 2008 (as at 29 September 2015).

[43] Mkhondo R *Affirmative action must help fix centuries of prejudice* (2014) http://www.iol.co.za/business/opinion/affirmative-action-must-help-fix-centuries-of-prejudice. (as at 18 September 2015).

[44] Gratz J *Discriminating Towards Equality. Affirmative Action and Diversity of Charade. The Heritage Foundation* (2014) Backgrounder.http://www.heritage.org/research/reports/2014/02/discriminating-toward-equality-affirmative-action-and-the-diversity-charade (as at 10 September 2015).

contractors to "take action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."[45]

Affirmative action as enunciated in Executive Order 10925 was amplified by another Executive order by President Lyndon B Johnson.[46] President Johnson issued Executive Order 11246 on 24 September 1965. The Executive order was amended in 1967 to include sex on the list of attributes.[47]

Other countries followed the example of United States and developed their own affirmative action measures.[48] Countries such as Malaysia, India and Brazil ensured that the previously disadvantaged part of their population are advanced through their affirmative action measures.[49]

Although broadly speaking, affirmative action was used in various aspects of life including business and admission in educational institutions, its major focus was and is still bringing about employment equity.[50]

2.2.2 Other concepts used interchangeably with affirmative action

The concept of affirmative action is one of the most confused concepts in social and legal plains. Various writers ascribe different connotations to the concept. For example, Coetzee [51] commences her article by using the phrase "black advancement" as an alternative to the phrase "affirmative action". This signifies the author's narrow comprehension of the concept and how the author

[45] Ibid.

[46] Ibid.

[47] Ibid.

[48] Vongs P *Affirmative Action in Other Countries* (2003) Pacific News Service - http://www.alternet.org/story/16391/affirmative_action_in_other_countries (as at 21 August 2015).

[49] Ibid.

[50] See generally Alexander F et al (2012) *Affirmative Action Enriches*. http://www.thecrimson.com/article/2012/11/12/affirmative-action-response/ (18/09/2015)

[51] Coetzee M *Affirmative action: A theoretical perspective*. (2005) A research Thesis at the University of Pretoria.

misinterprets affirmative action as a colour based phenomenon. The International Debate Education Association uses the phrase "positive discrimination" as an alternative to "affirmative action".[52]

In terms of how affirmative action is applied, the International Debate Education Association[53] submits that:

> "Affirmative action can be implemented in many different ways. Some examples are quotas, preferential selection, preferential consideration, and additional support or access schemes such as college scholarships and bursaries among other things. They can be put in place in the public or private sector and are used by different businesses, governments, political parties and educational institutions around the world."[54]

According to Adam[55] "affirmative action in South Africa – sometimes referred to by euphemisms such as 'corrective action', 'reverse discrimination', or 'positive action'". The submission by Adam just adds to the already confusing naming of the concept of affirmative action and as such making it even more difficult to comprehend.

It is in that sense that this research focuses exclusively on affirmative action in employment sector and in its legal sense. In the employment sector, affirmative action was and is still used in promoting employment equity.[56] Odendaal goes on to say:

> "It is important to distinguish between employment equity and affirmative action, as these terms seem to be used interchangeably in South Africa. Employment equity is intended to achieve equity

[52] See n 41 regarding the organisation. The specific article where they used "affirmative action" and "positive discrimination" is entitled: *This house would use positive discrimination to increase diversity in university* - http://idebate.org/debatabase/debates/politics/house-would-use-positive-discrimination (as at 24 September 2015).

[53] An association established in 1999 that develops, organizes and promotes debate and debate-related activities in communities throughout the world - http://idebate.org/about/idea.

[54] According to their article: *This house believes in the use of affirmative action,* published on http://idebate.org/debatabase/debates/politics-economics/house-believes-use-affirmative-action (18/09/2015)

[55] Adam K *The Politics of Redress: South African Style Affirmative Action* (1997) - The Journal of Modern African Studies Volume 35 Issue 02, pp 231-249.

[56] See n 18.

in the workplace through the elimination of unfair discrimination through affirmative action strategies."[57]

There are other arguments, particularly from the previously advantaged population groups, that seem to suggest that the current affirmative action model which they consider to be "race-based" should be reformed into "equal opportunity" affirmative action.[58] Unfortunately, there is no proposed name that should be used instead of affirmative action.

2.2.3 Definition of affirmative action

Although the Constitution[59] and the Labour Relations Act[60] provided for elimination of discriminatory practices in the workplace, the concept of affirmative action was first introduced in South Africa by the Employment Equity Act. In this legislation, chapter 4 thereof is dedicated at concept of affirmative action. Sadly, the Employment Equity Act does not provide for the definition of affirmative action.[61] As correctly pointed out by Monate, there is no clear definition of affirmative action.[62] As a result, the concept has no precise meaning. Various authors attempted to provide or formulate a definition of the concept in order to provide clarity to the concept. This gave rise to different definitions and approaches to the concept and lack of certainty as to what the concept means. Some examples of the South African definition of affirmative action are as follows:

[57] Ibid.

[58] See generally Kelley R *The only problem with Affirmative Action? It's Its Name* (2010) Newsweek www.newsweek.com/why-we-still-need-affirmative-action. Also see Opperheimer M and Kok C *Non-Racial Affirmative Action in Employment* (2014) @ Liberty, a product of the IRR.

[59] Section 9, the Equality clause eliminates all form of discrimination. See n 6.

[60] Act 66 of 1995.

[61] Section 15 of the Act only defines "affirmative action measures" and not the concept of affirmative action itself. It is submitted that the former concept and the latter are not synonymous and as such it is incorrect to ascribe the meaning of one to the other. Also see the construction by Mhungu, V *Positive discrimination in South African employment law: Has affirmative action overstayed its welcome?* (2013) LLM - Minor Research, University of KwaZulu-Natal. The author equally invent the definition of affirmative action by simply taking the definition of "*affirmative action measures*".

[62] Monate AMM *The Implementation of Affirmative Action Strategy in a Large South African Organisation* (2000) A dissertation for Master of Art submitted Potchefstroom University for Christian Higher Education – Vanderbijl. p 155.

In amplifying the problem regarding ascribing the concept of affirmative action different meanings, Coetzee submits that:

> "[t]he term "affirmative action" (AA) is used in many different ways and it is not readily apparent what a person means when employing the term. It may indeed be that the context in which and the words chosen to describe whatever the speaker may mean, tell us more about his or her personal view than the actual meaning of the term. To add to the confusion, many alternative terms are used such as "black advancement", "transformation", or "restructuring"."[63]

Van Zyl and Kirsten submit that:

> "[i]n the debate on how to structure South African economy, the terms affirmative action, black economic empowerment, and black advancement are used interchangeably to describe ways of integrating and democratizing the South African economy and creating equal opportunities."[64]

According to Van Zyl and Kirsten the concept of affirmative action has variety of connotations. It refers to a range of programs and measures that attempt to redress the historical gender, class (caste), and racial inequalities.[65]

Grogan[66] sees affirmative action as "a policy designed to permit a measure of discrimination in favour of employees disadvantaged by discrimination in the past." Grogan adds to the problem by also mistaking the definition of affirmative action measures as that of affirmative action.[67]

Deane submits that:

> "thus affirmative action can be seen as a means to enable the disadvantaged to compete competitively with the advantaged of society. Its significance is to give real meaning to employment equity for the disadvantaged through the pursuit of substantive equality".[68]

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[63] See n 51.

[64] Van Zyl and Kirsten *Empowering black farmers. In the economics demoralisation of South Africa.* Cape Town: African Institute for Policy Analysis.

[65] Ibid.

[66] Grogan J *Workplace Law (*2015) Juta and Co. Ltd Cape Town 139.

[67] Ibid cf 140.

Affirmative action is, therefore, "the targeted action that is taken to redress the disadvantages experienced by designated groups in the workplace."[69]

Edigheji argues that "affirmative Action can be defined as corrective measures to ensure representation of all races, genders and people with disabilities in the public service."[70]

Pretorius,[71] just like Mhungu,[72] uses the definition of affirmative action measures in an attempt to define affirmative action. It is submitted that the approach by the authors which mistaken the concept of affirmative action measures with the concept of affirmative action, is incorrect. If the legislature wanted the two concepts to have the same meaning, it could have provided so in section 15 of the Employment Equity Act.

In the case of *Kemp v University of Cape Town*,[73] the Human Rights Commission defined affirmative action as "preferential treatment based on race, ethnicity or gender. The Commission went on to say "[g]enerally, the affirmative action programmes are designed to help eliminate existing and ongoing discrimination, to remedy effects of past discrimination, and to create systems that promote and achieve substantive equality."[74]

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[68] Deane T *The Constitutional Dimensions of Affirmative Action in South Africa* (2005). uir.unisa.ac.za/bitstream/handle/10500/2012/10 Chapter 9/pdf. (as at 10 September 2015).

[69] Ibid.

[70] Edigheji *Affirmative Action and State Capacity in a Democratic South Africa*. Policy: issues and actors (2007) Vol 20 no 4. Centre for Policy Studies Johannesburg, South Africa.

[71] Pretorius *Legal Evaluation of Affirmative Action in South Africa* (2001) Journal for Juridical Science 26(3) pages 12 – 28. Also see Pretorius *Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview* (2001) Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht – www.zaoerv.de (as at 28 August 2015).

[72] See n 51.

[73] Case Ref no. WC/2008/0411, at paragraph 3.2.1 www.sahrc.org.za/home/21/files/Finding/Kemp.pdf (as at 27 September 2015).

[74] Ibid.

Badat[75] uses the definition provided by Sach by quoting the latter as follows: "affirmative action as 'focussed and deliberate governmental intervention that takes account of the reality of race to deal with and overcome the problems associated with race'."

An American writer Swain defines affirmative action as "a range of governmental and private initiatives that offer preferential treatment to members of designated racial or ethnic … groups (or to groups thought to be disadvantaged), usually as a means of compensating them for the effects of past and present discrimination."[76]

In an attempt to ameliorate the quagmire regarding the definition of affirmative action, Tladi[77] draws a distinction between prescriptive and normative definitions of the concept. He argues that descriptive meaning concerns what the issue or situation has been or is.[78] He further argues that his analysis of affirmative action reveals that it is normative definition is a better option and as such uses it in his attempt to define affirmative action. [79]

After drawing the distinction between prescriptive and normative definitions, Tladi submits as follow:

> "Affirmative Action can be successfully distinguished from reversed discrimination and equal employment opportunity. This distinction aims at dispelling the misunderstanding and confusion about Affirmative Action. Affirmative action is not reversed 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 characteristic of equal employment opportunity. Affirmative

[75] Badat S *Redressing the Colonial or Apartheid Legacy. Social Equity, Redress, and Higher Education Admissions in Democratic South Africa* (2011) www.ru.ac.za/media/rhodesuniversity (at 25 September 2015).

[76] Swain CM *Race Versus Class: The New Affirmative Action Debate* (1996) Baltimore University Press of America.

[77] Tladi TM *Affirmative Action and Employment Equity of South Africa* (2001) A Master of Art in Philosophy Johannesburg.

[78] Ibid par 2.3.

[79] Ibid par 2.4.

> Action prefers hiring discriminated against groups because they were disadvantaged in the past. That is, they suffer from unfair discrimination of the past." [80]

Tladi then draws the conclusion that: "Affirmative Action redresses injustices, eliminates unfair discrimination, develops discriminated against groups and promotes equal employment opportunities."[81]

Wingrove defines affirmative action as "a process aimed at redressing the disadvantage caused by poor education, prejudice, segregation, job reservation, racism, the lack of political rights and the unequal distribution of wealth." [82]

This plethora of definitions of affirmative action demonstrate the challenges employers encounter when trying to give effect to the spirit and purport of the Constitution and legislation intended at advancing people disadvantaged by unfair discrimination. To have a proper understanding of this concept of affirmative action, it is important to first look at various concepts related to it. What follows is a brief exposition of concepts closely related to affirmative action.

2.2.4 Affirmative action measures

Affirmative action measures in South Africa are founded in the Constitution. Firstly, "the Constitution establishes a new democratic order based on "human dignity, the achievement of equality and the advancement of human rights and freedoms."[83] Secondly, section 9 of the Constitution provides as follows:

[80] Ibid par 2.5.

[81] Ibid.

[82] Wingrove T *Affirmative Action A "how to" guide for managers* (1993) Randburg: Knowledge Resources South Africa.

[83] See *The Regulation of Affirmative Action and Discrimination in SA* (2012) www.unisa.ac.za/bitstream/handle/10500/2012/07 (as at 15 September 2015) par 6.2. Also see generally Monate, n 62 who argues that: "This section reaffirms that affirmative action is a necessary strategy to achieve equity and permits the limitation of rights if the purpose of such limitation is the advancement of persons disadvantaged by unfair discrimination."

> "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."[84]

Unlike the concept 'affirmative action', 'affirmative action measures' is defined in the Employment Equity Act. Section 15 specifically defines affirmative action measures as follows:

> "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."[85]

Basson et al[86] argue that the definition of affirmative action measures goes further than mere preferential appointment of designated groups to vacant positions. They submit that:

> "It also includes preferential promotion as well as development and training of employees in order to increase their prospects of advancement, a duty on the employer to inspect employment policies and practices in order to remove any employment barriers, measures to further diversify the workplace and a duty on the employer to make 'reasonable accommodation'."[87]

Van Niekerk *et al* conclude that affirmative action measures are "… a tool or a means to attain the end of 'equitable representivity' in the workplace".[88] They further go on to say "[i]t is part of a broader strategy to promote the achievement of equality as set out in the Constitution."[89]

As a guideline to determining affirmative action measures, the Department of Labour[90] requires employers to do the following:

- find and remove things that badly affect designated groups;

[84] See n 69.

[85] Section 15 of Employment Equity Act.

[86] Basson A *et al Essential Labour Law* (2005) Labour Law 219.

[87] Ibid.

[88] See (n 21) 159.

[89] Ibid.

[90] Department of Labour Basic Guide to Affirmative Action – www.labour.gov.za (as at 21 September 2015).

- support diversity through equal dignity and respect to all people;
- make changes to ensure designated groups have equal chances;
- ensure equal representation of designated in all job categories and levels in the workplace; and
- retain and develop designated groups.

Thus if designated employers are not certain what to do in developing the affirmative action measures, the may consider these guidelines. However, in the process of determining the measures, they must ensure that such measures are not arbitrary, otherwise they would not pass the constitutional muster of rationality and justifiability.

A classic example of the employer's failure to justify its affirmative action measures is found in the case of *Public Servants Association of South Africa v Minister of Justice*.[91] In this case, the employer, which is State Attorney's Office, an arm of the Department of Justice reserved certain post for affirmative action purpose. Unfortunately, this was done without a management plan in place. When candidates were recruited to fill the posts, a number of better qualified white males were excluded. The court found that the department adopted measures that were not intended to be implemented without a management plan and as such "haphazard, random and over-hasty".[92]

Pretorius, in summing up the requirement of validity of affirmative action measures, argues that:

> "This high constitutional standing of the purpose of redressing disadvantage caused by discrimination means that courts will hold the legitimacy of the purpose of a measure that falls within the ambit of section 9(2) of the Constitution, and, in a general sense, its importance too, to be beyond question. All measures with the purpose of "protection and advancement of persons or categories of persons disadvantaged by unfair discrimination", will enjoy the advantage bestowed by section 9(2)."[93]

It is clear, from the above-mentioned submissions, that in order for employers to comply with the constitutional and legislative obligation of implementing affirmative action, they must ensure that measures designed or adopted to achieve equity, are not just designed or adopted for compliance purpose. They are measures intended at realising the constitutional ideal of an equal society. The

[91] 1997 5 BCLR 577 (T).

[92] Ibid at par 18.

[93] See n 71.

measures should not be arbitrary or random, they must be able to pass the rationality and the justification tests which serve as pillar of the South African constitutional and democratic order.

2.2.5 The concept of employment equity

Section 2 of the Employment Equity Act[94] provides that "the purpose of this Act is to achieve equity in the workplace…". It is clear that the equity referred to in this section is none other than 'employment equity'. To comprehend the relationship between employment equity and affirmative action, it is important to define the former.

The concept of employment equity is also not defined anywhere in the South African employment legislation, including in the Employment Equity Regulations,[95] and as such, it is perhaps befitting to improvise a definition that will assist in ameliorating comprehension of the concept.

Owing to the fact that it is a compound noun,[96] that is a concept derived two words namely, "employment" and "equity", it is necessary to employ componential analysis at the concept in an attempt to devise its definition. Employment is defined firstly as "the state of having a paid job" and secondly as "a person's work or profession".[97] From the two definitions of "employment" it is conceivable that later definition will be more appropriate in this context.

This is particularly correct because section 15(2)(d)(i) of the Employment Equity Act provides that "affirmative action measures implemented by a designated employer must include subject to subsection (3) measures to ensure the *equitable representation of suitably qualified people in all occupational categories and levels in the workplace*."[98] (Emphasis added).

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[94] Act 55 of 1998.

[95] Regulations made by the Minister of Labour under section 55(1) of the Employment Equity Act.

[96] Is a combination of two or more words that are used as a single word – www.macmilliandictionary.com/thesaurus-category/british/linguistic-terms-relating-to-word-formation-and-phrase-building (22 September 2015).

[97] Waite M and Hawker S *"Oxford Paperback Dictionary and Thesaurus*" (2009) Oxford University Press Cape Town. Also see generally dictionary.cambrige.org/dictionary/English/employment. There are other definitions mainly focusing on the relationship between the employer and the employee, for example see www.duhaime.org>Legal Dictionary.

[98] See n 94.

Equity is defined as 'the quality of being fair and impartial'.[99] In the context of affirmative action, it means that a workplace must be free of prejudice.[100] Every worker or employee must be treated fairly and impartially (objectively) and should be able to achieve in accordance with his or her abilities.

In the light of the definitions of the components of 'employment equity', it is submitted that employment equity can be defined as a means to ensure that the imbalances of the past in the workplace are addressed in a fair and objective manner, free of prejudice in passage towards attainment of an equal society. Furthermore, "affirmative action also ensures that people who did not suffer from unfair discrimination in the past do not begin to suffer from it now."[101]

According to Mekwa[102] "employment equity is defined as a policy that gives preference of employment opportunities to qualified people that were previously discriminated against in the work environment."

Mekwa concludes that:

> "[b]ased on this definition EE *(employment equity)* can be understood as a transformational process aimed at affording fair and equitable opportunities to all employees, with specific focus on those who were previously discriminated against".[103]

Employment equity cannot be achieved by making affirmative action a race issue, or gender issue or even abled versus disabled issue. It needs to be a concerted effort of diversifying the workplace to reflect population demographics at all levels. It needs be carefully considered in the context of the totality of factors perpetuating disparity.

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[99] See n 83 and 84.

[100] It is submitted that anti-discrimination grounds list in section 9(3) of the Constitution, Section 6(1) of Employment Equity Act and section 4(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) provide un-exhaustive list of grounds.

[101] See (n 66) 42.

[102] Mekwa MS *The Implementation of Employment Equity in the Public Service with specific reference to the Department of Justice and Constitutional Development* (2012) MA Research dissertation University of South Africa.

[103] Ibid.

Moalusi defines employment equity as "the policy of giving preference in employment opportunities to qualified people from sectors of society that were previously discriminated against, for example: black people women and people with disabilities".[104]

Mc Gregor concludes that "…in assessing the use of race, sex and disability - the designated groups being blacks, women and the disabled in terms of the Employment Equity Act - as grounds or distinctions on which affirmative action is practised, it can be said that these grounds are 'sufficiently connected' or 'relevant' to the right to equality and affirmative action as a means to attain same in the South African context. These grounds are thus not 'arbitrary' and therefore not discriminatory, and complies with international law."[105]

2.2.6 Defining "disadvantaged persons"

Section 9[106] as a constitutional foundation for affirmative action refers to "…legislative and other measures designed to *protect or advance persons, or categories of persons, disadvantaged* by unfair discrimination…".[107]

In its preamble, Employment Equity Act[108] provides:

> Recognising-
>
> - That as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market, and
> - That those disparities created such pronounced *disadvantages* for certain categories of people that they cannot be redressed simply by repealing discrimination laws,…

[104] Moalusi KE *A Qualitative Study of the Experiences of Employment Equity Participants in a Fast-Track Management Development Programme* (2012). MA dissertation University of Pretoria South Africa. The author acknowledges that the definition was obtained from the undated source, namely Hr dictionary.com.

[105] See n 15 above.

[106] See n 6 above.

[107] Emphasis added.

[108] Act 55 of 1998.

In the preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act,[109] legislature uses the phrase '…of *historically disadvantaged individuals*…'.[110] Furthermore, in this Act there is consistent use of the "disadvantaged".

It can be inferred from the above extracts that there is a degree of relationship between benefiting under measures intended at redressing the imbalances and injustices of the past and the category of persons who should benefit from such measures. Put differently, if one has to benefit from affirmative action, one has to fall within the category of the disadvantaged persons and differences in the degree of disadvantages will determine who should be preferred above the other.[111]

The concept "disadvantaged persons" is also not defined in the South African labour legislation in particular and legislation dealing with discrimination in general. It is therefore necessary to attempt to understand the concept within the context of affirmative action in order to determine who qualifies to be affirmed and who does not qualify.

The first legislative definition of this concept is found in the Regulations[112] determined by the minister in terms of the Preferential Procurement Policy Framework Act.[113] In terms of these regulations, 'historically disadvantaged individual' means:

> A South African citizen –
> (1) Who due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) ("the Interim Constitution"); and/or
> (2) Who is a female; and/or
> (3) Who has disability:

[109] Act 4 of 2000.

[110] Emphasis added.

[111] See generally *Motala v University of Natal* 1995 (3) BCLR 374 (D). In this case the court found that although Indians fall within the category of previously disadvantaged, owing to the education system that was applicable at that stage, African learners suffered significantly more than their Indian counterpart and as such differentiation in admission scores was justified.

[112] Preferential Procurement Regulations 2001, Government Gazette 22549 GN R725.

[113] Act 5 of 2000.

> Provided that a person who obtained South African citizenship on or after the coming to effect of Interim Constitution, is deemed to be an HDI.

This definition was well received and applied by the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech System (Pty) Ltd and another*.[114] In this case, the court laid a clear principle against fronting, particularly where the tender is aimed at benefiting the previously disadvantaged people. It was held that if there is a complaint regarding suspected fronting in an advertised tender, such complaint must be investigated before awarding the tender, to ensure that the historically disadvantaged people benefit.

Mokoena[115] uses a definition borrowed from one of the measures put in place by the South African government for redress, namely, the National Empowerment Fund and submit that historically disadvantaged persons means:

> Those persons or categories of persons who, prior to the new democratic dispensation marked by the coming into force of the constitution of the Republic of South Africa (Act No. 108 of 1996), were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned or controlled by such persons.

The definition that seems to be closer to the definition relevant to the context of affirmative action owing to the fact that it is drawn from the 'measures' intended at advancing the previously disadvantaged persons.

Bosch argues that "defining 'disadvantage' through the group element instead of focusing on the individual, however, is less conducive to the aim."[116] This author further submits that attaching individual element to the concept disadvantaged reinforces a misguided perception of Employment

[114] [2010] ZA CC 21.

[115] Mokoena *Improving the Life Styles of Previously Disadvantaged Individuals through a Personal Life Planning Programme* (2006) A PhD thesis in Psychology. Unisa South Africa. uir.unisa.ac.za/bitstream/handle/10500/1752/thesis.pdf (as at 26 September 2015).

[116] Bosch GS *Restitution or Discrimination? Lessons onAffirmative Action from South African Employment Law* (2007) 2 Web JCLI – http://webjcli.ncl.ac.uk/2007/issue4/bosch.html

Equity Act, namely that all members of a particular racial group are automatically in the same position.[117]

The above definition includes both natural and juristic persons. From the analysis of the definitions of "disadvantaged persons" in relation to natural persons, it would appear that for one to qualify to be classified as a disadvantaged person, he or she must meet the following criteria:

(a) Must have been disfranchised by the apartheid policies;
(b) Must have been a South African or naturalised prior to the coming into operation of the Interim Constitution; and
(c) All female and disabled people qualify regardless of their race.

With the definition of "disadvantaged persons", the focus now goes to the definition of "designated group". This is important because there is a direct relationship between the two concepts. As it will be explained below, one of the requirements of classification as a member of "designated group", is being previously disadvantaged.[118]

2.2.7 Defining "designated group"

The Constitution as the legal foundation for affirmative action refers to "…legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination…".[119] While affirmative action as provided for in the Constitution is broader, this study will focus on affirmative action in the labour law context. The Constitution does not define 'designated group' and as such other sources should be relied upon for the definition.

Prior to the commencement of the Employment Equity Amendment Act,[120] that is 1 August 2014, "designated group" was defined as "black people, women and people with disabilities".[121] The

[117] Ibid.

[118] See generally section 9(3) of the Constitution, n 78 and n 104 above.

[119] Ibid.

[120] Act 47 of 2013

[121] Section 15 of the Employment Equity Act.

definition of "black people" was extended to include people of Chinese descendants by the court in *Chinese Association of South Africa and Others v Minister of Labour and Others*.[122]

This definition is criticised by Van Niekerk *et al* as follow:

> A complicating factor with categorising groups is that, apart from simple, 'main-effects' discrimination, a person might also suffer 'multiple' discrimination. Eg, one person may be female, old and disabled – the intensity or severity of the disadvantage a person experience thus depends on the number and interplay of the personal characteristics that generate discrimination against a person (International Labour Conference 91st Session Report of the Director-General Time for Equality at Work Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work Report 1(B) (2003) at 36-37). In this regard, it has been argued that (a) there is a need to understand that complex forms of disadvantage based on race, gender and geographic location form 'distinct categories' of disadvantages which cannot be reduced to the sum of their parts; and (b) the intersectional nature of disadvantage creates different and multiple forms of inequality which cannot be explained or understood simply by reference to one ground of discrimination, such as gender (Albertyn and Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) SAJHR 14 at 248).[123]

The amendments introduced a new definition as follows:

> ""designated groups" means black people, women and people with disabilities who-
> (a) are citizens of the Republic of South Africa by birth or descent; or
> (b) became citizens of the Republic of South Africa by naturalisation-
> (i) before 27 April 1994; or
> (ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies;"[124]

From the above statutory definition, it is clear that South African citizenship is a requirement to benefit or be classified as a member of the designated group. However, du Toit *et al* identify the

[122] (59251/2007)[2008] ZAGPHC 174 (18 June 2008).

[123] See (n 20) 55 n 136.

[124] Section 1 of the Amended Act.

other problem regarding this definition.[125] They argue that "[t]he effect is to limit the scope of section 6(2)(a) to measures intended to advance people from designated groups only."[126] They further submit that "[a]ffirmative action, thus, seeks to promote equity and redress in a social sense rather than at individual level."[127]

The "group versus individual disadvantage" debate was settled by the Constitutional Court matter of *Minister of Finance and another v Van Heerden*[128] in its minority judgment. In its minority judgment, the court found that:

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

As demonstrated in *van Heerden* case[129] above, the fact that an individual was not unfairly discriminated against, or that he or she did not experience hardships ordinarily suffered by persons in a similar designated group, does not exclude him or her from benefit under affirmative action.

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[125] Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2015) NexisLexis Durban 688.

[126] Ibid. See generally n 274 where the authors submit that "[t]he definition of beneficiaries of affirmative action in this manner has been criticised. Noting that race is the predominant criterion in determining the beneficiaries of affirmative action, Dupper observes that there are 'significant costs involved in the replication of apartheid's racial categories', including 'a sharp increase in the levels of inequality within racial groups, especially among Africans' and negative perceptions of a policy that is intended to overcome social division."

[127] See n 124.

[128] [2004] 12 BLLR 1181 (CC) at par 85.

[129] Ibid.

From the above case, it can be concluded that in order for a person to benefit from affirmative action, the person must be a black person (including Chinese), woman or a person with disabilities; be a South African or must have qualified for citizenship, but for apartheid. Individual unfair discrimination is not a relevant consideration, as long a person belongs to the designated group.

Although there are various perceptions bedevilling the implementation of affirmative measures, generally based on the notion that it amounts to discrimination, there is a measure of protection for people not belonging to the designated group. Section 15(4) of the Employment Equity Act[130] provides that:

> "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 designated groups."

2.2.8 Defining "designated employer"

Section 1 of the Employment Equity Act[131] defines designated employer as:

(a) A person who employs 50 or more employees;
(b) A person who employs fewer than 50 employees but has a total annual turnover that is equal to the or above the applicable annual turnover of a small business in terms of the Schedule 4 of 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 Intelligence Agency and the South African Secret Services; and
(e) An employer bound by 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.

A designated employer has the following duties as imposed by section 13 of the Act: to consult with his employees; conduct staff analysis or staff audit; prepare and implement an employment equity plan; and report to the Director-General on progress made in implementing the plan."[132]

[130] Act 55 of 1998.

[131] Ibid.

[132] Du Plessis JV and Fouche MA *A Practical Guide to Labour Law* (2015) LexisNexis Durban 94.

2.2.9 The relationship between affirmative action and employment equity

In order to understand the relationship between affirmative action and employment equity, one has to consider various sources. According to Wingrove, employment equity is defined as:

> "… the point reached where AA (affirmative action) has eliminated all the disparities between diverse employees and all employees have been brought to a level at which they can compete equally and are afforded an equal opportunity to do so."[133]

To sum up the relationship between affirmative action and employment equity, Coetzee makes the following submission:

> Affirmative action forms part of an employment equity programme and, according to Bendix (2001), is the last step towards achieving true employment equity. Employment equity will exist when all discrimination barriers and past imbalances have been eliminated and everyone is able to compete on an equal footing. Hence the need to make use of fair discriminatory interventions (affirmative action) to achieve employment equity would no longer exist.[134]

From the above submissions it is clear that the concept of affirmative action and the employment equity are inextricably interwoven. In order to achieve employment equity, affirmative action measures must be implemented. If effectively and properly implemented, then the imbalances of the past will be eliminated. Therefore, employment equity cannot be achieved without affirmative action measures in place. As correctly pointed out by Dupper,[135] the attainment of employment equity in a workplace will not justify the demise of affirmative action.[136]

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[133] See (n 78) above.

[134] Ibid (n 47) above.

[135] Dupper O *Affirmative Action: Who, How and How Long?* 24: 425-435, SAJHR.

[136] Ibid. Dupper analyses two court cases namely, *Willemse v Patelia NO and Others* (2007) 28 ILJ 428 (LC) and *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) to determine whether the attainment of equity might lead to the demise of affirmative action. However, the two cases provide contrasting views, the former supporting the end of affirmative action upon attainment of employment equity and the later making it clear that affirmative action may be used for maintenance of the employment equity.

Chapter 3

International Labour Organisation (ILO) standards and the American perspective on affirmative action

3.1 Introduction

South Africa is part of the global community. [137] This membership of the global community caused South Africa to shift "from preserving apartheid to formulating, implementing and representing South Africa's priorities of democracy, human rights, socio-economic development, peace, security and stability in the global arena."[138]

As alluded to in chapter 1, the concept 'affirmative action' has its origin in the United States of America.[139] However, the idea of putting instruments in place to remedy the past injustices was developed by the United Nations through various instruments.[140] These measures provided standards which member states need to uphold to advance people disadvantaged by the past injustices and also to ensure that discrimination is eliminated in the workplace.[141]

This chapter deals with measures put in place by ILO as standards to eliminate workplace discrimination. Other relevant United Nations instruments will be consulted in order to formulate a clearer picture regarding affirmative action and its permanency or otherwise. It will also bring the American dimension of affirmative action given the fact that the concept of affirmative action was first developed in America and that the American society is heterogeneous like South African society. Owing to the limited scope of this study, the focus here will mainly be on whether the ILO and the American standards make provision for the 'sun-set clause' and how it is implemented on both jurisdictions.

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[137] See generally Simpson J *South Africa in the global arena* (2014) Vuk'uzenzele www.vukuzenzele.gov.za/south-africa-global-arena (28 September 2015).

[138] Ibid 2.

[139] See n 44.

[140] See Article 5(1) of the ILO Convention 111. Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

[141] Ibid Article 5(2).

3.2 International Labour Organisation (ILO) standards on affirmative action

Since its inception in October 1919[142] the ILO has adopted 188 conventions and 199 recommendations, some dating back as far as 1919.[143] All these legal instruments are directed at ensuring that all forms of unfair discrimination are eradicated and workplace equality is achieved.[144]

Some of the conventions and recommendations are more relevant to this study than other. In the light of this, only those instruments that conventions and recommendations that more relevant will be applied. Of particular importance to this study, are the following conventions and recommendations.

3.2.1 ILO Convention 111: Discrimination (Employment and Occupation) Convention, 1958

According to Dupper and Sankaran[145] this convention is the first international labour standard providing for special measures. Articles 5(1) of this convention provides that "[s]pecial 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." This sets the tone for the establishment of affirmative action at international level.[146]

Article 5(2) of the convention enjoins member states to consult with the representative employers' and workers' organisation in an effort to develop measures meet the needs of the disadvantaged people and if such measures exist, design other special measures. The article further identify grounds upon which special treatment may be afforded certain categories of people and not be deemed discrimination, namely: sex, age, disablement, family responsibilities or social or cultural status.[147]

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[142] See generally *Origins and History* http://www.ilo.org/global/about-the-ilo/history/lang.

[143] See generally *How International Labour Standards are created* http://www.ilo.org/global/about. standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm. The statistics regarding the ILO conventions and recommendations is as at 13 September 2015.

[144] See (n 17) 3

[145] Dupper O and Sankaran TS *Affirmative Action: A view from the Global South* (2014) Sun Press. See also McGregor (n 19) 42.

[146] See (n 17) 3.

[147] Ibid.

Closely linked to this convention, is the recommendation on Discrimination (Employment and Occupation) Recommendation.[148] This instrument provides that:

> "Application of the policy should not adversely affect 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."[149]

Notwithstanding immense support for the above standards[150], workplace discrimination remains a major challenge in the transformations of economy and achievement of equality. It is further submitted that "[d]iscrimination bars people from some occupations, denies them a job altogether or does not reward them according to their merit because of the colour of their skin or their sex or social background."[151]

McGregor argues that "ILO Convention 111 explicitly recognises 'special measures' for the purposes of special protection or assistance for certain groups of people. The wording is clear: affirmative action is not discrimination under the Convention."[152]

3.2.2 ILO Convention 100: Equal Remuneration Recommendation, 1951

The principle of equal remuneration for men and women for work of equal value, as set out in the Equal Remuneration Convention, 1951 (No. 100), needs to be implemented if equality is to be

[148] 1958 (No. 111).

[149] Ibid par 6.

[150] *Equality at work: Tackling the Challenges International Labour Conference 96th Session* (2007) Report I (B) International Labour Office Geneva p ix it is submitted that "National political commitment to combat discrimination and promote equal treatment and opportunities at the workplace is widespread, as shown by the almost universal ratification of the two main ILO instruments in this area, the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Only a handful of member States have yet to ratify these Conventions." Also see Oelze et al *Equal pay: introductory guide* (2013) International Labour Organization 3 where it is submitted that "[a]s of January 2013, Convention No. 100 was ratified by 171 member States, and Convention No. 111 by 172 member States.

[151] Ibid 1 par 2.

[152] See n 143.

promoted and pay discrimination is to be addressed effectively, particularly since women and men often do different jobs.[153]

Ratifying countries are required to implement their respective national policies to promote equality of opportunity and treatment of men and women in employment and occupation, in order to achieve equal remuneration ideal.[154] Article 2(2) further provides mechanisms that the members states can use to give effect to this ideal. These mechanisms include: (a) national laws or regulations; (b) legally established or recognised machinery for wage determination; (c) collective agreements between employers and workers; or (d) a combination of these various means.

The report to the director-general recognises that affirmative action may not be a permanent arrangement as follows:

> Special temporary measures, also known as affirmative action policies, may be also used to accelerate the pace of improvement of the situation of groups that are at a serious disadvantage because of past or present discrimination. They consist of a range of interventions that are temporary (although this does not necessarily mean short-term), may target different groups and may be justified by different rationales.[155]

3.2.3 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979

This convention was not adopted by ILO but by the United Nations General Assembly. It is relevant in this facet of the study as it provides a basis for an argument regarding the temporary nature of the affirmative action. Article 4(1) refers to "temporary special measures" that the member states must adopt to accelerate transformation and ensure equality between men and women.[156] This

[153] See n 148.

[154] Ibid 12.

[155] See n 147.

[156] See Article 4(1) and (2) which respectively provide as follows: "Adoption by States Parties of temporary special measures aimed at accelerating de facto equality 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." And "Adoption by States Parties of special

unequivocally indicates that affirmative action in whatever form, cannot be a permanent arrangement.

According to Tomei,[157] a committee of experts on the CEDAW discussed article 4 of the convention with a view of clarifying this article in order to make it user-friendly to the member states. The outcome was an amelioration of concepts wherein "special temporary measures" instead of "affirmative action measures" was preferred as it was considered less ambiguous and more accurate.[158]

3.2.4 Conclusion

The foregoing has demonstrated the fact that affirmative action is not only recognised in South Africa. In fact South Africa has designed measures to protect and advance the previously disadvantaged in line with its obligations to ILO and the United Nations. It is also clear that affirmative action is not meant to be a permanent arrangement. However, the international instruments do not unequivocally provide for a manner of ending the implementation of the measures. It would appear that the condition for ending the implementation is when the measures have achieved their purpose.

3.3 The American perspective of affirmative action

3.3.1 Introduction

Although the notion of the protection and advancement of people disadvantaged by discrimination has its origin from ILO convention, the first nation to develop and implement measures to that effect, was the American nation.[159] As correctly pointed out by President Lyndon Johnson,[160] the rationale behind the use of affirmative action was to achieve equal opportunity. In appreciation of

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measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

[157] See (n 17) 3.

[158] Ibid.

[159] See n 138.

[160] President Johnson became the 36th President of the United States on 22 November 1963 following the assassination of John F. Kennedy in Dallas, http://www.lbjlib.utexas.edu/johnson/archives.

the need to affirm people disadvantaged by discrimination, he said "[y]ou do not take a person, who for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say 'you are free to compete with all the others,' and still believe that you have been completely fair."[161]

3.3.2 Analysis of the American perspective

Leonard who conducted a study on the impact of affirmative action regulation and equal employment law on black employment, concludes that "[d]espite poor targeting, affirmative action has helped promote the employment of minorities and women…"[162]

Leonard goes on to say:

> "While the targeting of enforcement could be improved, and while the impact of affirmative action on other groups is still open to question, the evidence reviewed here is that affirmative action has been successful in the past in promoting the integration of blacks into American workplace."[163]

Pauwels who compares the diversity management in America with the affirmative action in France, argues that if there is a combination of diversity management and policy action from the state "racism and discrimination probably stand a better chance of being eradicated…"[164]

In a study that was conducted by Schemermund *et al*[165] among African American college student about their attitudes towards affirmative action as a function of racial identity, it was found that students generally endorsed affirmative action.

[161] http://www.civilrights.org/resources/civilrights101/affirmaction.

[162] Leonard JS *The impact of affirmative action regulation and equal employment law on black employment* (1990) The Journal of Economic Perspectives Vol. 4 47 – 63.

[163] Ibid.

[164] Pauwels C *Diversity Management in America and the Affirmative Action Debate in France* (2007) www.impact209.org/wp-content/uploads/2007/10/pauwels.pd (as at 10 October 2015).

[165] Schemermund A et al *Attitudes towards affirmative action as a function of racial identity among African American college students* (2001) Political Psychology Vol 22 no 4 2001.

Brunner and Rowen argue[166] that the American notion of "affirmative action required that active measures be taken to ensure that blacks and other minorities enjoyed the same opportunities…. that had been the nearly exclusive province of whites."[167] The duo further submit that "[f]rom the outset, affirmative action was *envisioned as a temporary remedy*[168] that would end once there was a "level playing field" for all Americans."[169]

The implementation of affirmative action in America was not without challenges.[170] A number of cases served before the Supreme Court[171] in which affirmative action, as it is applied in various aspects of human endeavour, was challenged. In the case of *Griggs V. Duke Power Company,*[172] the company required African- American to have a high school diploma and to complete an IQ test in order to be considered for appointment. The court found that compared to white candidates, African-Americans were accepted far less for positions.

Recently the United States Supreme Court dealt with two cases regarding affirmative action policy for admission into the University of Michigan. In both *Gratz v Bollinger* [173] and *Grutter*

[166] Brunner B and Rowen B *Affirmative Action History A History and Timeline of Affirmative Action* http://www.infoplease.com/spot/affirmative1.html (as at 12 October 2015).

[167] Ibid.

[168] Emphasis added.

[169] See n 165.

[170] See generally Dale *Federal Affirmative Action Law: A brief History* (2005) Congressional Research Service – The Library of the Congress fpc.state.gov/documents/organization/53577.pdf (as at 12 September 2015).

[171] See for example *Regents of the University of California v. Bakke* 438 U.S. 265 (1975) where the court declared inflexible quota systems in affirmative action programs unconstitutional, but upheld the legality of affirmative action per se. Also see *United Steelworkers v. Weber* 443 U.S. 193 (1979) in which the court approved the temporary remedial use of race or gender based selection criteria by private employers as provided for by Title VII. The court further accepted affirmative action measures as "a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer."

[172] 401 U.S. 424 (1971). It was also found that whites that had been working the jobs who fulfilled neither requirement did it just as well as those who did. Therefore the court found that if the requirements such as those set by Duke were impeding minorities, the business had to demonstrate that the tests were necessary for job. Duke was in violation of the Civil Rights Act.

[173] 539 U.S. 244 (2003).

v Bollinger,[174] the Supreme Court ruled that race can be one of many factors considered by colleges when selecting their students because it furthers "a compelling interest in obtaining the educational benefits that flow from a diverse student body."[175] This was the confirmation of the decision in *Bakke case*.[176]

Bowen[177] after conducting a study regarding the perceived stigma that beneficiaries of affirmative action admission policy would suffer, he concludes that the issue is only "a brilliant disguise" to detail focus from the real issues concerning the policy. Bowen provides the following explanation:

> "When minorities are treated as "aesthetic" and not as individuals with a contextualized historical and contemporary human experience, we forget why diversity is needed in higher education: to correct past and current discrimination in the academy and beyond… Affirmative action provides but one important tool in the tool box of equitable education. It unmasks the brilliant disguise of the stigma fallacy and demonstrates the power of critical mass."[178]

3.3.3 Conclusion

Contrary to the popular view, affirmative action has its place in the American society.[179] Tomasson [180] *et al* in concluding their study of the implementation of affirmative action in the USA have this to say:

[174] 539 U.S. 306 (2003).

[175] Also see Brunner and Rowen *Affirmative Action History: A History and Timeline of Affirmative Action* http://www.infoplease.com/spot/affirmative1.html (as at 29 September 2015) for the general comment on these cases. It is submitted that the court further ruled that ruled that although affirmative action was no longer justified as a way of redressing past oppression and injustice, it promoted a "compelling state interest" in diversity at all levels of society.

[176] See n 169.

[177] See generally Bowen DM *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action* (2010) *Indiana Law Journal* Vol. 85:1197.

[178] Ibid 1244.

[179] The decisions of the Supreme Court above are a clear demonstration of how the American society continues to endeavour to implement affirmative action notwithstanding academic and sponsored views bedevilling it.

> "Affirmative action is a steadily effective policy. Its accomplishments are measurable, if not dramatic. Its potential negative side effects, which loom large in the eyes of some pessimists and media gurus, are generally more apparent than real."

The American president, President Obama was quoted as saying "[n]o rush to end affirmative action" when addressing a campaign rally for Maryland gubernatorial candidate Antony Brown at Wise High School, on 19 October 2014 at Upper Marlboro.[181]

In conclusion, the American society has been grabbling with affirmative action since 1961 and has yet to achieve equality. In this nation, it was the minorities that were disadvantaged. It can be discerned that a nation that has a history of the discrimination and oppression of the majorities, like South Africa, will not achieve equality and workplace representation within the short period of time in which affirmative action is being implemented. It would therefore be unrealistic and unfair to argue that affirmative action should be ended.

[180] Tomasson RF, Crosby FJ and Herzberger S *Affirmative Action: The pros and cons of policy and practice* (2001) Rowan and Littlefield publisher, Inc New York derived from https://books.googles.co.za (20 October 2015).

[181] The Washington Times - Monday, October 20, 2014 http://www.washingtontimes.com/news

Chapter 4

Implementation of Affirmative Action in South Africa

4.1 Introduction

The first President of the democratic South Africa, Mr Mandela, reflected on the need to implement affirmative action and other measures in order to heal and build a new South Africa. This reflection was made in the state of the nation address on 9 February 1996 where he stated:

> "We can neither heal nor build, if we continue to have people in positions of influence and power who, at best, pay lip service to affirmative action, black economic empowerment and the emancipation of women, or who are, in reality, oppose to these goals; if we have people who continue with blind arrogance to practice racism in the workplace and schools, despite the appeal we made in our very first address to this parliament. We must work together to ensure the equitable distribution of wealth, opportunity and power in our society."[182]

As a precursor to the enactment of Employment Equity Act, Mr Mandela alluded to the negative perception and anti-transformation campaigns as follows:

> "In the work –place, the departure from apartheid practices will be felt more keenly as we finalise and implement the bill on employment equity. And let us hasten to add in this regard, that we shall not be discouraged by sirens of self-interest that are being sounded in defence of privilege, and the insults that equate women, Africans, Indians, Coloureds and the disabled with lowering standards. As we have said before, affirmative action is corrective action. There is no other way of moving away from racial discrimination to true equality. We therefore reject campaigns which are based on fear, rumour and gossip."[183]

[182] State of the Nation Address by Mr NR Mandela at the opening of Parliament, 9 February 1996 www.sahistory.org.za/archive/1996, also www.gov.za/node (as at 27 September 2015).

[183] State of the Nation Address by Mr NR Mandela at the opening of Parliament 6 February 1998) www.sahistory.org.za/archive/1996, also www.gov.za/node (as at 27 September 2015).

As indicated in various literature, affirmative action is not a measure to be bluntly applied but is subject to the constitutional principles that underpin the South African democracy.[184] In its re-affirming of the values underpinning the South African constitutional democracy, the Constitutional Court in *van Heerden case,*[185] through Moseneke J had this to say:

> "However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long-term promote equality, we must bear in mind this constitutional vision. 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."[186]

From these extracts it is evident that there were already calls to stop attainment of equality in South Africa through measures provided for in the Constitution, including the implementation of affirmative and the employment equity.[187] If one thinks away measures such as affirmative action as means to redress the injustices of the past and attainment of employment equity, the question that remains is "how else can equality be attained"?

The implementation of affirmative action has its origin in the Constitution.[188] The Constitutional Court had clarified the need for achievement of an equal society through the implementation of affirmative action as follows:

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[184] See generally Habib A and Bentley K *Racial Redress and Citizenship in South Africa* (2008) 80, 83 and 94HSRC Press Cape Town. Also see Dupper n 133 and McGregor n 19. These authors generally refer to the constitutional principle applicable to affirmative action which ensure that affirmative action is not used to promote racism and sexism

[185] See n 126.

[186] Ibid par 44.

[187] See n 126.

[188] Section 9(2) requires that legislative and other measures be designed to protect or advance persons, disadvantaged by unfair discrimination to be taken.

> "Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality."[189]

The court went on to express its faith in the use of measures to achieve equality and submitted that:

> "Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow." [190]

In South Africa legislative measures were taken through the enactment of the Employment Equity Act[191] and Promotion of Equality and Prevention of Unfair Discrimination Act,[192] among others, "… to protect and advance, persons or categories of persons, disadvantaged by unfair discrimination…"[193] as required by the constitution. In other words, the spirit and purport section 9 of the Constitution was given effect to.

Although affirmative action is a broad concept[194] and applies to various aspect of human life, in this study the focus is limited to the context of employment equity. The study seeks to determine whether affirmative action is achieving or has achieved its objectives in the workplace and as such needs to be subject to a sun set clause.

[189] See n 122 par 31. Also see Van Niekerk (n) 125.

[190] Ibid.

[191] See n 107.

[192] See n 108.

[193] See n 129.

[194] See Deane n 68 above, who quotes Sach A with acknowledgement as follows: "[A]ffirmative action in the South African context has extremely broad connotations, touching, as apartheid did and still does, on every area of life ... affirmative action covers all purposive activity designed to eliminate the effects of apartheid and to create a society where everyone has the same chance to get on in life...". Also see McGregor *Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces* 2011 *De Jure* 115.

What follows is the analysis of how affirmative action has been implemented in South Africa, the progress made in attaining equality through measures such as employment equity as enunciated in the Constitution and the Employment Equity Act, and the implementation of affirmative action across various sectors and levels. This is done through analysis of the reports of the Commission for Employment Equity and Statistics South Africa, courts' interpretation of some important provisions of the Employment Equity Act academic writings on affirmative action.

4.2 Implications of court decisions on the implementation of affirmative action

The Constitution enjoins the legislature to promote the achievement of equality through "legislative and other measures designed to protect or to advance persons, or categories of persons, disadvantaged by unfair discrimination…".[195] This expressed need for "…measures…to protect or to advance persons…, disadvantaged by unfair discrimination…" clearly justifies Employment Equity Act and the implementation of affirmative action.

In order to implement affirmative action, employers in general[196] and designated employers[197] in particular must develop affirmative action measures contemplated in section 15 of the Employment Equity Act.[198] This section commences by clearly stating that:

> "Affirmative action measures are measures designed to ensure that *suitably qualified*[199] people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer."[200]

[195] S 9(2) of the Constitution.

[196] See s 5 of the Employment Equity Act which provides that "Every employer *must* take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. " (Emphasis added). It is submitted that in the scheme of s 5, all employers are compelled to eliminate unfair discrimination and to take steps to promote equal opportunity. In terms of section 14 of the Employment Equity Act, non-designated employer may notify the Director General of the Department of Labour that it intends to voluntarily comply with the relevant provisions of the Act as if it were designated employer. Also see Van Niekerk et al Law@work (2015) 165.

[197] Designated employers are defined s 1 of the Act.

[198] Act 55 of 1998.

[199] Emphasis added.

[200] Ibid section 15(1). See generally Coetzee n 51. Also see Pretorius n 71.

Plain interpretation of the above mentioned section reveals that a person may not benefit from the affirmative action measures if the person is not suitably qualified. In other words, notwithstanding the fact that the employer is designated or has opted to voluntarily comply, and that the employee or candidate comes from the designated group, if the employee or candidate is not suitably qualified, he or she would not qualify for advancement in terms of affirmative action measures. The emphasis of the requirement of *'suitably qualified'*[201] is found in section 15(2)(d)(i) which provides "…ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce;…"

Section 15(2) of the Act goes on to provide some guidelines in developing the affirmative action measures.[202] The courts have interpreted the above provisions as placing an obligation on a designated employer to ensure that affirmative action is implemented in its workplace without giving the designated employee an individual right to affirmative action.[203] This decision was confirmed by the labour appeal court in the *Dudley v City of Cape Town*[204] by stating that "[i]n its judgment the Labour Court decided that what can loosely be referred to as "the right to affirmative action" is not an individual right."

[201] See n 145.

[202] 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) subject to subsection (3), measures to - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational 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.

[203] *Dudley v City of Cape Town and Another* (2004) 25 ILJ 305 (LC). This decision also served to correct an earlier decision of *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) where the court at par 49 said "On an analysis of the Constitution and the Act I am satisfied that the Act and specifically sections 20(3) to (5) read with Chapter II do indeed provide for a right to affirmative action."

[204] (CA 1/05) [2008] ZALAC 10; [2008] 12 BLLR 1155 (LAC) (21 August 2008), at par 55. See also *Thekiso v IBM South Africa (Pty) Ltd* [200] 3 BLLR 253 (LC).

In the *Dudley case* [205] the labour appeal court emphasised that the scheme of chapter III of the Employment Equity Act places the duty to enforce affirmative action on the Director General of the Department of Labour, and as such, if the designated employer fails, the aggrieved employee must approach the department for assistance.[206]

As observed above, an individual member who feels aggrieved by the manner affirmative action is implemented in his or her workplace, must report his or her disenchantment to the director general of the Department of Labour.[207] The director general has the duty to approach the labour court to determine the fine to impose in the event of non-compliance. [208]

The labour appeal court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[209] considered the question whether an employee may claim through Employment Equity Act and the Labour Relations Act where a single conduct of the employer that results in two or more violation of the employees' rights. The court came to a conclusion that:

> "Where claims are made both in terms of the LRA and the EEA and the court is satisfied that the dismissal was based on unfair discrimination as provided for in the LRA and that the employee was unfairly discriminated in terms of the EEA, the court must ensure that the employer is not penalised twice for the same wrong. In seeking to determine compensation under the LRA and the EEA, the court must not consider awarding separate amounts as compensation but consider what is just and equitable compensation that the employer should be ordered to pay the employee for the humiliation he/she suffered in having his/her dignity impaired." [210]

[205] Ibid.

[206] Ibid par 45.

[207] Section 45 provides that, if an employer fails to comply with a request made by the Director-General in terms of section 43(2) or a recommendation made by the Director-General in terms of section 44(b), the Director-General may refer the employer's noncompliance to the Labour Court.

[208] See generally *Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (D731/05) [2007] ZALC 27 (16 April 2007).

[209] (DA3/13) [2015] ZALAC 34 (21 August 2015).

[210] Ibid par 30.

South African Courts do not accept the implementation of affirmative action that is based on an ad hoc, haphazard arbitrary and random manner owing to lack of employment equity plan. This the court found to be offending the Constitution and the Employment Equity Act.[211]

In reaffirming the importance of employment equity plan, the court ruled that the Department of Correctional Services is required to take immediate steps to ensure that both national and regional demographics are taken into account in respect of members of the designated groups, i.e. black people, women and people with disabilities when setting targets at all occupational levels of its workforce.[212]

Furthermore, discrimination on any ground that is not justified is considered unfair. This was demonstrated in the case of *Dwenga and Others v Surgen-General of the South Africa Military Services and Others*,[213] in which the court ordered that aspirant members that were HIV positive must be appointed as if they were HIV negative.

4.3 Analysis of the commission for employment equity reports

The commission for employment equity was established in terms of section 28 of Employment Equity Act[214] and commenced its work in 1999. The commission develops its annual reports through analysing reports submitted by designated employers. For purposes of this study, focus will only be on the commission's 2014/15 report as it provides comparative analysis for the years 2010, 2012 and 2014. The data extracted from the report is presented in a tabular form and where necessary, other charts are developed.

[211] *Mgolozeli v Gauteng Department of Finance* [2015] 3 BLLR 308 (LC).

[212] *Solidarity v Department of Correctional Services* (Case no. C 368/12) [2015] ZALAC 6; 2015 (4) SA 277 (LAC) (10 April 2015).

[213] (Case No. 40844/2013) [2014] ZAGPPHC 727 (26 September 2014).

[214] Act 55 of 1998.

Table 1: National Economically Active Population by Population Group /Race and Gender[215]

Population Group	**Male**	**Female**	**Total**
African	41.7%	34.6%	76.2%
Coloured	5.7%	4.9%	10.6%
Indian	1.8%	1.0%	2.8%
White	10.3%	4.5%	5.8%
TOTAL	55.0%	45.0%	100.0%

Source: Commission for Employment Equity 2014/15

Table 2. Data on top management in percentages (%) for the years 2010, 2012 and 2014 by race[216]

	African	Coloured	Indians	White	Foreign Nationals
2010	12.7	4.6	6.8	73.1	2.9
2012	12.3	4.6	7.3	72.6	3.1
2014	13.6	4.7	8.4	70.0	3.4

Source: Commission for Employment Equity 2014/15

Table 3. Data on top management in percentages (%) for the years 2010, 2012 and 2014 by gender[217]

	Male	Female
2010	81	19
2012	80.2	19.8
2014	79.2	20.8

Source: Commission for Employment Equity 2014/15

[215] Adapted from Commission foe employment equity report for 2014/15 financial year

[216] Ibid.

[217] Ibid.

Table 4. Data on senior management in percentages (%) for the years 2010, 2012 and 2014 by race[218]

	African	Coloured	Indians	White	Foreign Nationals
2010	12.7	4.6	6.8	73.1	2.9
2012	18.3	7.1	9.5	62.4	2.5
2014	20.5	7.2	9.9	59.3	3.1

Source: Commission for Employment Equity 2014/15

Table 5. Data on top management in percentages (%) for the years 2010, 2012 and 2014 by gender[219]

	Male	Female
2010	81	19
2012	69.2	30.7
2014	67.9	32.1

Source: Commission for Employment Equity 2014/15

From table 1 above the data shows that 76.2% of the economically active population in South Africa are Africans. This number is followed by the coloureds at 10.6%, white of the 5.6% and Indians at 2.8%. However the picture changes drastically when it comes to the top management and senior management.

Table 2 reveals that at top management level, as at 2014, Africans occupied only 13.6%, Coloureds stood at 4.7%, Indians at 8.4% and whites account for 70% of the population. In the year under review, at senior management Africans occupy 20.5% of the positions, Coloureds 7.2%, Indians 9.9% while 59.3% of the positions is occupied by whites, as per table 4.

When comparing the data in table 1 and tables 3 and 5, it is found that women form 45% of the economically active population but are not adequately represented in top management and senior

[218] Ibid.

[219] Ibid.

management. In 2014, women only constituted at top management 20.2%. They also form 32.1% of senior management positions.

The report further reveals that the representation of persons with disabilities has been on a steady increase from 1.7% in 2012 to 2% in 2014 at this level.[220] According to the report, male representation is triple than that of females at this level. This is the picture that the commission refer to as "concerning".[221]

In confirming the blurry picture of transformation of the South African society through affirmative action measures as espoused in the Employment Equity Act, the commission submitted that:

> "The South African labour market continues to be racialised and gendered with little progress over the years since the commencement of the Employment Equity Act. As one goes up the occupational levels, the whiter it becomes. Relative progress is smaller at the higher occupational levels. This appears to be a reflection of the lower numbers of employees at higher levels and the lag between the time taken for transformation improvements in representivity and suitable qualification at lower levels to filter up in the organisational hierarchy."[222]

4.4 Conclusion

There is a need for employers to ensure that their equity plans are not just compliance instruments, but serve the purpose they are designed for. Every employer must ensure that when implementing affirmative action measures, it does not trump the equality principle. Furthermore, there must be political willingness to transform South Africa into a truly equal society. Lip-service should not be paid to the rhetoric of a "rainbow nation", employment statistics must reflect this notion.

[220] Ibid 57.

[221] Ibid.

[222] Ibid 58.

Chapter 5

Conclusion and recommendations

5.1 Introduction

The purpose of this study was to investigate whether it is necessary to put sun set clause on affirmative action. In other words, has the time arrived to set the sun down on affirmative action in South Africa? In order to answer this question, a few sub questions intended at exploring this issue were asked as follows:

(a) To what extend have employers complied with their statutory obligations to implement affirmative action and as such have achieved the objective of workplace representativity?
(b) Are there effective mechanisms for monitoring and assessing the effective implementation of affirmative action?
(c) Is it fair to subject the "born frees" to the same measures of affirmative action? Where do we draw the line?
(d) Have the affirmative action ideals been achieved in order for South Africa to put an end to it or does it still have a long way to go?

5.2 Response to the first research question

With regard to the first question, there are two elements drawing from this research. Firstly, the snail pace at which transformation is being pursued, particularly in the private sector and secondly, the jurisprudence provided by the South African courts regarding the endless implementation of affirmative action. The two elements are discussed separately as follows:

(a) the snail pace at which transformation is taking place

From the reports of the commission for employment equity discussed above, it is clear that 21 years into democracy South Africa has not moved sufficiently towards achievement of employment equity. The analysis of the data from the reports reveal that the transformation towards employment equity is moving at a retarded speed. This is an indication that in the absence of willingness to

transform the South African society into a just and equal society, employment will continue to be a pipe dream.

(b) the jurisprudence provided by the South African courts regarding the endless implementation of affirmative action

South African courts have laid down clear jurisprudence regarding the relationship between affirmative action measures and the achievement of equity in the workplace. The purpose of affirmative action measures is two-fold. Firstly is the achievement of employment equity and secondly to maintain it. Once equity is achieved, the designated employer can continue to use affirmative action measures maintain the equity provided that the appointment of non-designated persons is not offended. Once there is no justification for appointing persons from designated group that might amount to unfair discrimination.

If the employer uses affirmative action to maintain equity, then the discrimination against anyone who is not from the designated group becomes unfair and as such cannot be justified. Thus it can be argued that affirmative action measures have 'a built-in' mechanism to bring affirmative action automatically to an end. Therefore, there is no need to 'set the sun down' on affirmative action as this will happen as soon as a particular designated employer attains equity.

5.3 Response to the second research question

With regard to the question whether there are effective mechanisms for monitoring and assessing effective implementation of affirmative action, there is a huge move towards monitoring and enforcement by the Department of Labour. This is evident from the huge increase in the number of reports submitted to the department and encapsulated in the Employment Equity Commission reports. This study has revealed that there is an upward trend in compliance by the designated employers. The total number of employment equity reports received increased from 22 012 in 2011/12 to 24 291 in 2014/15.[223] This marks 10.4% increase in number of reports submitted, which is encouraging. Thus the question is answered in affirmative.

[223] Ibid 17.

5.4 Response to the third research question

The third question asked, is one regularly raised by those who negate the implementation of affirmative action. It has been vigorously lobbied that the "born frees" from the non-designated groups should be excluded from the implementation of affirmative action and be allowed to compete with their counterparts from the designated groups without the effect of affirmative action being meted on. It is submitted that this argument is emotive, narrow and deceitful.

As correctly expounded upon in the by Van de Westhuizen J in the Constitutional Court judgment of *Barnard* [224] the implementation of measures intended to protect or advance the previously disadvantaged people is not foreign to South Africa. The learned judge borrows from the words of the former American President John F Kennedy and submits that "it is the fate of this generation…to live with the struggle we did not start, in a world we did not make."[225]
He submits that "[t]hese… capture something of the responsibility to deal with the consequences of the past, falling even on those who played no part in it."[226]

> "So it may be a historical fact that the innocent often have to account for sins committed before they were born or able to act independently. However, "innocence" of conduct by one's ancestors or predecessors that in hindsight are widely recognised as morally repulsive, does not mean that innocent have not over time benefitted from injustice. One can benefit from wrong without being guilty of wrongdoing. Unjust enrichment as a cause of action is an example. Nor does it mean that measures to restructure a society, heal a country and promote dignity and equality are not necessary. Several societies have struggled with efforts to overcome past discrimination and injustice. Others have neglected to do so and allowed people to be separated further from each other and painful cleavages to deepen."[227]

In conclusion of his judgment Van der Westhuizen J concludes that the South African constitution recognises human dignity and the achievement of equality as founding values and fundamental rights. He reiterate the well settled legal position that the Constitution prohibits unfair discrimination while at the same time allowing measures designed to protect or advance people

[224] See n 23.

[225] See n 158.

[226] Ibid.

[227] Ibid par 128.

disadvantaged by past unfair discrimination. He submits that "the statutory and other measures applicable to this (Barnard) case pass constitutional muster."[228]

There is no more argument whether South Africa needs affirmative action or not, much as the argument whether affirmative action is racist or sexiest or not. The same goes for "group versus individual" benefit. The Constitutional Court has put these issue beyond argument and what needs to be debated, perhaps, is whether measures designed and applied by a particular designated employer trumps the equality clause in the constitution or in the employment equity.[229]

It creates an impression that affirmative action is a race issue and ignores principles underpinning the South African society, particularly the need for transformation of the society into an equal society.

Furthermore, the issue of "group versus individual disadvantage" is settled law in South Africa. To suggest that "born frees" should be excluded from affirmative action is to open a door for maintaining the *status quo* as desired ideals of section 9 of the Constitution will not be realised. If all enforcement mechanisms in place not achieving the ideal of a just and equal society, what more would happen if the door was opened by excluding a certain category of non-designated group from the application of affirmative action. This question can therefore be answered in affirmative and until employment equity is achieved, there cannot be exceptions.

[228] Ibid par 195.

[229] Ibid par 140. The court accentuated the fact that affirmative action measures "are not immune from scrutiny". It further submits that "[s]chemes and conduct based on race, which arbitrarily benefit some and violate the rights of others, can never qualify as a legitimate measure under section 9(2)."

5.5 Response to the fourth research question

As to the question whether affirmative action ideals have been achieved in order for South Africa to put an end to it or does it still have a long way to go, the answer is in negative. The reports alluded to in chapter 4 above, have demonstrated the frustration the Employment Equity Commission has to go through annually when reckoning the statistics regarding the implementation of affirmative action in South Africa. More still needs to be done to ensure that the "democratic values of a society based on human dignity, equality and freedom" and affirmative action "…continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds."[230]

Finally, there is a constant shift in labour market trends. Various organisations require different types of skills at different times. To put a sun set clause to affirmative action inadvertently might lead to a one-size fits all approach. What is meant by this is that those employers with high labour turn overs might stop implementing affirmative action measures arguing that such is no longer part of the South Africa labour law. This will, in a subtle way, lead to retrogression, over and above the fact that affirmative action has not been implemented with much success, particularly in private sector.

Although the courts have not dealt with this issue, it can be inferred from the words of Revelas J in the *Robinson and Others v PWC*[231] that "… Thorn's retrenchment would benefit the respondent's affirmative action policy. Affirmative action is not, and never has been legitimate ground for retrenchment." Thus, affirmative action cannot be used to remove non-designated employees with a view of replacing them with designated ones.

5.6 Recommendations

Owing to various factors including the fact that employees cannot be retrenched to create posts for affirmative action candidates, shortage of skills among the people from the designated groups, global economic meltdown and so on, different employers will reach the employment equity targets at different times. Therefore, subjecting affirmative action to sun-set clause will put undue pressure

[230] See n 24. Par 29.

[231] (2006) 27 ILJ 836 (LC) par 22.

on the designated employers or will lead to premature ending of affirmative action without it having achieved its noble purpose of workplace equality.

The Minister of Labour was quoted saying: "[w]hether affirmative action will be a permanent feature of the constitutional democracy is mainly dependent on the action taken by those with the economic power to bring about change and transformation in their workplaces by creating working environments that are free from unfair discrimination and filled with equal opportunities for all, irrespective of race, gender, disability, marital status and so forth,".[232] She further submitted that "[a]s long as our workplaces remain as unequal as they are now, that is how long it will take to remove affirmative action from our national agenda."[233]

In conclusion, it is clear that affirmative action is not about to achieve its objectives. The process is moving at a snail pace and therefore it would not be in the best interest of South Africa to let the sun go down on it. In fact, measures to accelerate the attainment of employment equity, such as the imposition of heavier fines and imprisonment[234] of those at the helm of various organisation, for failure to implement affirmative action, should be put in place.

The sun cannot be set down on affirmative action!!!

[232] www.bdlive.co.za/.../affirmative-action-to-stay-until-equity-achieved-say retrieved 04 December 2012.

[233] Ibid.

[234] Although the spirit and purport of labour legislation is not to impose criminal sanction, it is submitted that there are those instances where it is necessary to have criminal sanction ensure compliance. There are already examples of criminal sanction enforcement of Employment Equity Act. Section 59(3) and 61(3) which provides that "[a] person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R30 000.00". It is respectfully submitted that nothing stops the legislature to impose prison terms for contravention or non-implementation of affirmative action.

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