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Tittle: Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994

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1. Introduction

The apartheid system that prevailed prior to 1994 was based on inequality and unfair discrimination and deprived most South Africans of their fundamental rights. Black people, women, and people with disabilities faced significant disadvantages in employment as they were discriminated against through occupational segregation, inequalities in pay, job reservations for Whites, lack of access to training and development opportunities, and high levels of unemployment.[1]

In attempting to redress the previous inequalities caused by unfair discrimination, South Africa adopted a Constitution which guarantees the right to equality for everyone.[2] Equality is also one of the founding values of the Constitution.[3] The Constitution further recognised that measures to ensure freedom from discrimination were necessary to remedy the inequalities which defined the apartheid regime. The Employment Equity Act (EEA) was passed to give effect to the equality clause in the Constitution.

Since the adoption of the Constitution and the enactment of the EEA, several cases dealing with the application and implementation of affirmative action measures have been referred to courts for adjudication.

This paper reflects on employment equity and affirmative action through a review of the South African jurisprudence. It provides for a historical and legal background and then examines the legislative framework on employment equity and affirmative action. It focuses on affirmative action and revisits some important cases decided by South African courts. The paper ends with a brief conclusion.

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[1] See the *Explanatory Memorandum to the Employment Equity Bill* 1998 *ILJ* 19 (6) 1345 at 1346-1347. The inequalities were confirmed by the ILO in its country review report in 1996.
[2] Section 2 of the Constitution.
[3] Other values are human dignity and freedom.

2. Background

Racial discrimination existed in South Africa long before the National Party government came to power and the apartheid system was established in 1948. When Dutch East Indian Company landed at the Cape in 1652, slavery was the mode of service and Black people were expected to do manual labour only.[4] In 1911, the Mines and Works Act[5] was passed at the demand of skilled white miners who were at the time immigrants from overseas countries. This Act excluded Blacks from all skilled and certain semi-skilled jobs in the mines. Again in 1911, the Native Labour Regulations Act[6] was also passed. This Act prohibited any strike action by Black employees.[7] In 1912, the South African Native National Congress was formed to combat racial discrimination. It was the forerunner of the African National Congress (ANC).[8]

The government continued to pass laws limiting the rights and freedoms of Black South Africans. These laws included the Regulation of Wages, Apprentices and Improvers Act of 1918, which provided for the appointment of boards to fix minimum wages for apprentices, women and young people in certain trades and industries; and the Natives (Urban Areas) Act of 1923 which tightened the control on black labour.[9] In 1924, the Industrial Conciliation Act (ICA) empowered the Minister of Labour to reserve certain occupation on the ground of race and to compel employers to observe fixed ratios in the racial make-up of their workforce.[10] The ICA aggravated discrimination by expressly excluding Black people from the definition of an "employee" and as a result, Blacks could not benefit from its provisions.

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[4] On the colonial history of South Africa, see Du Toit MA, *South African Trade Union* (1976) 10-11; Finnemore & Van der Merwe, *Introduction to Labour Relations in South Africa* (1996) 21-22; Roux E., *Time Longer than Rope : A History of the Black Man's Struggle for Freedom in South Africa* (1948); Simos RE and SA., *Class and Colour in South Africa 1850-1950* (1969); Lewis J, "South African Labour History : A Historiographical Assessment" (1990) 46/7 *Radical History Review* 213; Maree J, *The Independent Trade Unions 1974-1984* (1987); Walker IL & Weinbren BJ, *2000 Casualties : A History of Trade Unions and Labour Movements in the Union of South Africa* (1967) 2-3; Stahl CW, "Migrant Labour Supplies, Past, Present and Future with Special Reference to the Gold-Mining Industry " in Bohning WR, (eds) *Black Migration to South Africa* (1981) 7-8. See also Budeli M., *Freedom of Association and Trade Unionism in South Africa: From Apartheid to the Democratic Constitutional Order* Unpublished PhD Thesis, (2007) University of Cape Town at 108.

[5] Act 12 of 1911.

[6] Act 15 of 1911

[7] See Brassey M., *Employment and Labour Law* Vol 1 (1998) at A1: 23.

[8] Finnemore & Van der Merwe, *Introduction to Labour Relations in South Africa* (1996) 24.

[9] Horrel M., *South African Trade Unionism* (1961)1

[10] See Webbster E, *Essays in South African Labour History* (1978) 68; Sewerynski M, (ed) *Collective Agreements and individual Contracts of Employment* (2003) 207; Brassey M, *Employment and Labour Law* Vol 1 (1998) A1:28-29; Jones R A, *Collective Bargaining in South Africa* (1982) 26; Coetzee JAG, *Industrial Relations in South Africa* (1976) 179.

Accordingly, under this Act only White and Coloured workers were permitted to form and join registered trade unions. The Wage Act of 1925 gave unions and representative groups of workers the right to have their White members' wages and conditions investigated by the Wage Board to the exclusion of Black workers.

Furthermore, the Bantu Building Workers Act of 1951 prohibited Black workers from taking skilled jobs in the construction industries outside the Black townships and homelands. [11]

The Apartheid system was formally established by the National Party government in 1948. The Afrikaans word "apartheid" literally meant "separation" or "apartness". The majority of the Black people were denied human rights, which were reserved for Whites only. Similarly, during this period, several laws were enacted that further institutionalised the dominance of white people over other races.[12] The Industrial Conciliation Act of 1956 intensified racial discrimination by excluding Blacks from the definition of "employee".

Human rights violations in South Africa continued and South Africa's constitution of 1961[13] engraved the apartheid policy further. It made provisions for social and political participation in the highest affairs of the state by "Whites" only.[14] In 1962, the United Nations (UN) General Assembly passed a resolution condemning South Africa's apartheid policies and requesting all UN member states to cease military and economic relations with South Africa.[15] Apartheid was considered a crime against humanity that therefore needed to be eradicated by the international community.

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[11] For a detailed history of South African labour relations, see, for instance, Hahlo HR & Kahn E, *The South African History and its Background* (1973); Wilson M & Thompson L., *A History of South Africa to 1870* (1982); Robertson HM, "150 Years of Economic Contact Between Black and White" (1934) 2 *SA Journal of Economics* 403; Denoon D, *South Africa Since 1800* (1972) 136; Scheepers A, "The Challenges Facing Trade Unions", in Coetzee J.A.G., *Industrial Relations in South Africa* (1976); Walker TL & Weinbren B, *The History of trade Unions and the Labour Movement in the Union of South Africa* (1961); Togni LS, *The Struggle for Human Rights: An International and South African Perspective* (1994) 13; Horrel M, *South African Trade Unionism* (1961); Webbster E, *Essays in South African Labour History* (1978) 68; Du Toit *et al Labour Relations Law* (2000); Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2001); Brassey M, *Employment and Labour Law* Vol 1 (1998) A1:28-29; Jones R A, *Collective Bargaining in South Africa* (1982); Coetzee JAG, *Industrial Relations in South Africa* (1976); Kittner M *et al*, *Labour Law Under the Apartheid Regime* (1989), Budeli M., *Freedom of association and trade unionism in South Africa: from apartheid to the constitutional democratic order* (2007) unpublished thesis (University of Cape Town).

[12] For instance the Prohibition of Mixed Marriages Act of 1949, the Amendment to the Immorality Act of 1950, the Population Registration Act of 1950, and the Group Areas Act of 1950. The Bantu Labour (Settlement of Disputes) Act was also passed in 1953. This Act was later known as the Black Labour Regulation Act 48 of 1953 and sought to undermine the effectiveness of black trade unions.

[13] Act 32 of 1961.

[14] Burdzik J & Van Wyk D, "Apartheid Legislation 1976-1986" (1987) *Acta Juridica* 123.

[15] Resolution 1761 of 1962.

Towards 1976, calls for disinvestments in South Africa increased. As a result of pressure from the international community, the government appointed the Wiehahn Commission of Inquiry into labour legislation in 1977[16]. The Commission's report proposed fundamental changes into the industrial relations system.[17] Most importantly, the Commission recommended that freedom of association be granted to all employees regardless of sex, race or creed and trade unions be allowed to register irrespective of their composition in terms of colour, race or sex.[18] Jobs reservations were also abolished.[19] Most of the Commission's recommendations were accepted. Accordingly, the government embarked on reform which led to the adoption of a new constitution in 1983. This constitution allocated seats for Coloured and Indians in the House of Assembly.[20] However, Blacks were excluded. In 1985, the Congress of South African Trade Unions (COSATU) was formed and had a strong support for the ANC which was at the time banned alongside other anti-Apartheid organisations such as the South African Communists Party (SACP) and the Pan Africanist Congress (PAC).

In 1986, pass laws were repealed. FW de Klerk became the president of South Africa on 1989 and recognized the urgent need of including Black people into the South African political system. On 2 February 1990, President de Klerk announced the release of Nelson Mandela and the unbanning of the ANC, PAC and the SACP.

In 1991, some of the discriminatory legislation such as the Group Areas Act, the Land Act and the Population Registration Act were abolished.[21] In 1993, South Africa shifted towards the construction of a new political, social and economic dispensation. After long negotiations between the National Party government and other political parties the interim Constitution

[16] See Roos J, "Labour Law in South Africa 1976-1986: The Birth of the Legal Discipline" 1997 *Acta Juridica* 96-98.
[17] Ibid.
[18] Report for the Commission of Enquiry into Labour Legislation Part I RP 47/1979.
[19] Wiehahn Report (1979) parts 1-6. See also Pienaar *op cit* 168, Finnemore *op cit* 31, Van Jaarsveld & Van Eck *op cit* 255, Jones *op cit* 30; Pienaar *op cit* 147 at 169; Rycroft A, "Labour" in Ronald L *et al South African Human Rights and Labour Law Yearbook* Vol 7 (1996) 139-140; Olivier M *et al*, "Collective Agreements and Individual Contracts of Employment in Labour Law-South African Report" in Sewerynski M, (ed) *Collective Agreements and Individual Contracts of Employment* (2003) 207-208; Friedman S., *Building Tomorrow Today : African Workers in Trade Union 1970-1984* (1987) 14-15.
[20] Sections 41-43 of the 1983 Constitution.
[21] These Acts were the pillars of apartheid.

was adopted and promulgated in 1993.[22] This Constitution brought the apartheid regime to an end.

3. Legislative framework and affirmative action

3.1 Legislative framework

The 1993 Constitution recognised the rights of all citizens to equal protection and benefits of the law.[23] On the 27th of April 1994, all South Africans voted for the first time without any discrimination whatsoever and this marked the birth of the new South Africa – a country founded on fundamental human rights, human dignity and equality for all.[24] The enactment of labour rights in the Interim Constitution created a need for labour legislation to give effect to the constitutional provisions.[25] Accordingly the Labour Relations Act[26] was the first labour legislation passed under the new constitutional order.

The 1996 Constitution, which superseded the 1993 Constitution, contains the Bill of Rights (Chapter 2) that protects the rights of all the people in the country. Labour legislation such as the Basic Conditions of Employment Act (BCEA),[27] the Skills Development Act (SDA)[28] the Skills Development Levies Act (SDLA)[29] and EEA were passed.

It is worth stressing the most important component of the legal framework on employment equity and affirmative action, namely the Constitution and the EEA.

3.1.1 The Constitution

The 1996 Constitution entrenched fundamental human rights and freedoms of all people. Equality is one of the founding values of the South African Constitution and is provided for in section 9, which states that:

[22] Negotiations were suspended several times due to escalating violence during the transition.
[23] Section 8 of the Constitution.
[24] Section 1.
[25] Labour rights were entrenched in section 27 of the interim constitution.
[26] Act 66 of 1995.
[27] Act 75 of 1997.
[28] Act 97 of 1997.
[29] Act 9 of 1999.

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The State may not unfairly discriminate directly and indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[30]

In protecting the right to equality, the Constitution recognised that in order for equality to be attained in South Africa, the combination of both formal equality (prohibition of unfair discrimination)[31] and substantive equality (affirmative action)[32] was necessary.

Formal equality relates to sameness in treatment. It is also called equality in treatment.[33] It requires that individuals who are in similar circumstances should be treated similarly or alike. However, it does not take into account the actual social and economic disparities between groups.[34] Thus in term of the formal equality approach, when distributing benefit, the fact that one benefited from the past is not taken into account.

Substantive equality, on the other hand, goes beyond the principle of equal treatment. According to Fredman, substantive equality is born out of disappointments and frustrations at the limit of formal equality.[35] It aims to keep up the baton where formal equality leaves off.[36]

Substantive equality therefore, takes the actual social and economic disparities between groups and individuals into account in order to determine whether the Constitution's

[30] Section 9 of the 1996 Constitution.
[31] Section 9(3) and (4).
[32] Section 9(2).
[33] See Garber C., 'Employment Equity' in Basson *et al Essential Labour Law* (2000) Labour law publications at 267.
[34] Currie I., & De Waal Currie J., *The Bill of Rights handbook* (2005) 5th ed Juta 232.
[35] Fredman S., 'facing the future: substantive equality under the spotlight' in Dupper O., & Garbers C., (eds) *Equality in the workplace: reflections South Africa and beyond* (2009) Juta & Co, Ltd, Cape Town, South Africa at 16.
[36] Ibid.

commitment to equality is being upheld. Section 9(2) of the South African Constitution expressly recognises affirmative action as a means of achieving substantive equality.[37]

In terms of substantive equality, unequal treatment of people may be necessary to redress the previous inequalities. Accordingly, any measures taken to redress the existing inequalities are not in violation of the provisions of section 9 of the Constitution.[38]

3.1.2 The Employment Equity Act (EEA)

In order to give effect to the equality rights in section 9 of the Constitution, the EEA was passed to regulate issues of employment equity.[39] Chapter 2 of the EEA deals with the elimination of unfair discrimination and Chapter 3 with affirmative action.

Section 2 of the EEA aims to achieve equity in the workplace by:

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and
(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure equitable representation in all occupational categories and levels in the workforce.

Like Section 9 of the Constitution, Section 2 of the EEA provides for both formal[40] and substantive equality[41].

The EEA requires all employers to take steps to promote equal opportunity in the workplace by eliminating any unfair discrimination in any employment policy or practice.[42]

Unfair discrimination at the workplace is prohibited in terms of section 6 of the EEA, which provides:

(1) No person may unfairly discriminate, directly or indirectly, against any employee, in any employment policy or practice[43], on one or more grounds, including race, gender, sex, pregnancy,[44]

[37] Section 9(2) of the Constitution.
[38] This was also confirmed by the Constitutional Court in the case of the *Minister of Justice v Van Heerden* 2004(6) SA 121 (CC) at para 30.
[39] Act 55 of 1998.
[40] Section 2(1).
[41] Section 2(2).
[42] Section 5 of the EEA.
[43] Employment policy or practice is defined as 'including but not limited to recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration,

> marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or any other arbitrary ground.[45]
>
> (2) It is not unfair discrimination to:
>
> (a) take affirmative action measures consistent with the purpose of this Act, or
>
> (b) distinguish or exclude or prefer any person on the basis of an inherent requirement of a job.
>
> (3) Harassment of an employee is a form of unfair discrimination and is prohibited on anyone or combination of grounds of unfair discrimination listed in section 1`.[46]

The EEA protects all employees against any direct or indirect unfair discrimination. However, section 9 of the EEA extends the protection to job applicants.[47] Thus, employers cannot unfairly discriminate against job applicants.

Neither the Constitution nor the EEA defines "discrimination or unfair discrimination". The legislature left it to the courts to determine based on the facts of each and every case whether the conduct complained of falls within the scope of the prohibition.

In *Harksen v Lane*[48] the Constitutional Court formulated the test for unfair discrimination as follows:

> the determination as to whether a differentiation amounts to unfair discrimination… requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether secondly, it amounts to 'unfair discrimination'. It is well to keep these two stages of enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination on the grounds specified in section 8(2) of the interim constitution, which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.[49]

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employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation system; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal'. Thus employment policy and practice cover any aspect of employment relationship. See section 1 of the EEA.

[44] In terms of section 1 of the EEA, pregnancy is defined as including 'termination of pregnancy and any medical circumstances related to pregnancy'.

[45] Section 3 of the Employment Equity Amendment Act 47 of 2013.

[46] Section 6 of the EEA.

[47] Section 9 of the EEA provides that 'for purpose of sections 6, 7 and 8 employee includes an applicant for employment.'

[48] 1998 1 SA 300 (CC).

[49] At para 46.

Undoubtedly, discrimination stems from differentiation. Unjustified differentiation is discrimination.[50] As both the Constitution and the EEA do not prohibit discrimination but 'unfair discrimination', when does discrimination become unfair discrimination? After establishing the existence of discrimination, the second step is to establish its unfairness. Discrimination is presumed to be unfair if it is based on any ground listed in section 6(1). However, section 6(1) does not provide for an exhaustive list. Any other discrimination based on a ground not listed in section 6 can still be unfair if it is based on a ground similar to those mentioned in section 6(1).[51] A discrimination based on an unlisted ground is unfair if it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them in a comparable serious manner.[52] However, discrimination is not unfair if it is based on affirmative action and the inherent requirements of a job.[53]

Both the Constitution and the EEA expressly prohibit direct and indirect unfair discrimination.[54] It is easy to recognise direct discrimination as it is based on one or more grounds listed in section 6(1). Indirect discrimination occurs when an employer applies a rule which appears to be neutral to all employees on the face of it – but the application of that rule has a disproportionate effect on certain group of employees.[55]

In *Leonard Dingler Employee Representative Council v Leonard Dingler (pty) Ltd*[56] the Labour Court had to pronounce on whether the employer's conduct of differentiating between weekly-paid (mostly Black people) and monthly-paid (mostly white people) employees to determine eligibility for membership of a staff benefit fund constituted an unfair discrimination. The Labour Court held that the conduct of the employer constituted an indirect unfair discrimination since all weekly-paid employees were Black people and all monthly-paid employees were White people. Accordingly, the Labour Court did not see any justifiable reason for making such a distinction.[57] In deciding this case, the Labour Court

[50] Garbers C., "Employment Equity" in Basson *et all Essential Labour Law* (2000) *Labour Law Publications* at 269.
[51] See the case of *Hoffmann v South African Airways* 2001 (1) SA I CC. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).
[52] *Harksen v Lane No* 1998 (1) SA 300 (CC).
[53] Section 6(2)a-b of the EEA.
[54] Section 9(3) of the Constitution and section 6(1) of the EEA.
[55] Garbers C., "Employment Equity" in Basson *et all Essential Labour Law* (2000) *Labour Law Publications* at 271.
[56] (1998) 19 *ILJ* 285 (LC) or [1997] 11 BLLR 1438 (LC).
[57] (1998) 19 *ILJ* 285 (LC) at 294C-D.

drew its inspiration from the American jurisprudence especially from *Griggs v Duke Power Company*,[58] and Dothard *v Rowlinson.*[59]

3.2. Affirmative action

As Nelson Mandela pointed out:

> The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not…asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so black skin should be the basis of privilege in the future. Nor…is it our aim to do away with qualifications. What we are against is not the upholding of standards such but the sustaining of barriers to the attainment of standards; the special measures that we envisaged to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons but to see to it that those who have been denied qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination are at least given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality.[60]

Affirmative action in South Africa is therefore based on the Constitution and the EEA. Employers are required to enforce affirmative action which benefits some specific categories of employees defined by the EEA.

3.2.1. The Constitution, the Employment Equity Act and affirmative action

Neither the South African Constitution nor the EEA defines affirmative action. However, the EEA refers to affirmative action measures as "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".[61] The implementation of affirmative action measures to advance

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[58] 401 US 424 (1971). In *Griggs v Duke Power Company*, the American Court had to deal with the question whether the Company's hiring and promotion requirement of high school diploma discriminated against Black people. Directly the requirement looked neutral. However, it had the indirect effect of excluding Black people as most of them were unable to meet this requirement. Accordingly, the United States Supreme Court held that the requirement constituted an indirect unfair discrimination against Black people.

[59] 433 US 321 (1977). In *Dothard v Rowlinson*, the American Court held that the Alabama Board of Corrections requirement that applicants for the post of prison guard must be at least 5 feet 2 inches tall and 20 pounds in weight indirectly discriminated against women as such combination would exclude 41.13% of women and only 1% of men. Once the employee proves that she or he has been discriminated against, the employer must prove on balance of probabilities that it is a fair discrimination based on fair grounds.

[60] See the 'Explanatory Memorandum to the Employment Equity Bill' 1998 ILJ 19(6) 1345 at 1346. See also Human L., *Affirmative action and the development of people: a practical guide* Kenwyn: Juta (1993) 3.

[61] Section 15(1) of the EEA.

people from the designated groups is one of the primary purposes of the EEA.[62] The EEA recognises that mere removal of discrimination will not lead to the advancement of groups that have been previously disadvantaged and as such affirmative action measures are required to ensure that substantive equality is achieved. In line with the Constitution, the EEA is the first labour legislation that was passed to promote employment equity and affirmative action at the workplace.[63]

In terms of the EEA, the goal of affirmative action is to achieve equal employment opportunity. Equal employment opportunity relates to proving or giving people equal opportunities to realise their potential. Thus, equal employment opportunity entails treating people equally and giving them equal opportunities to realise their full potential in the workplace.[64]

Affirmative action does not require measures that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from a designated group.[65] Similarly, any dismissal of any employee purely in order to make a way for persons from designated groups constitutes an unfair dismissal and is not justifiable under the EEA.[66]

The EEA imposes obligations on some employers while determining employees who may benefit from affirmative action.

3.2.2 Employers, Employees and Affirmative Action

3.2.2.1 Designated Employers

In terms of the EEA, designated employers are responsible for implementing affirmative action measures. A designated employer means

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees but had a total turnover above specified in schedule 4 of the EEA;

[62] Section 2 of the EEA.
[63] Chapter 3 of the EEA.
[64] Tladi TM., "Affirmative action and the Employment Equity of South Africa" (2001) unpublished dissertation, Rand Afrikaans University at 15.
[65] Section 15(4).
[66] *Van Zyl and department of Labour* (1998) 7 CCMA.

- a municipality; and
- organs of state.[67]

Employers who do not fall within the above specified categories may also be ordered to comply with affirmative action provisions by a bargaining council's collective agreement. An employer may also volunteer to comply with affirmative action provisions.

The EEA requires designated employers to adopt affirmative action measures to ensure that suitably qualified people from the designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce.[68] In terms of the EEA, designated employers are required to implement affirmative action measures including: measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affected people from designated groups; measures designed to further diversity in the workplace based on equal dignity and respect of all people; making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce; measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; measures to retain and develop people from designated groups and to implement appropriate training measures.[69]

In terms of the EEA, affirmative action measures may include preferential treatment of people from designated groups and numerical goals but excludes quotas.[70] The EEA creates a basis for consultation between employers, trade unions and employees to set numerical goals and put measures to achieve those goals.

A designated employer is required to consult with a representative trade union or employees or their representatives nominated for that in preparation for the employment equity plan. The employer must then conduct an analysis to identify bearers which adversely affect people from designated groups.[71] Such an analysis must also contain a profile of the employer's workforce. The profile must detail the composition of the workforce across all occupational

[67] Section 1 of the EEA.
[68] Section 15(1) of the EEA.
[69] Section 15(2) of the EEA.
[70] Section 15(3).
[71] Section 19 of the EEA.

category and level.[72] Based on the analysis, the employer must prepare an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.[73] Such a plan must include the annual objectives, affirmative action measures to be implemented, numerical goals to achieve equitable representation, annual time table for the achievement of goals and objectives, the duration of the plan, the procedure to monitor the implementation of the plan, dispute resolution procedure, and the person responsible for monitoring and implementing the plan.[74]The list provided for in section 15(2) is not an exhaustive list.

Designated employers may adopt some measures provided that they are intended to achieve the goals of the EEA. In the case of *Minister of Finance & Another v Van Heerden*[75] the Constitutional Court held that in order to pass the constitutional muster, affirmative action measures have to meet three requirements namely;

- they must target people or categories of people who had been disadvantaged by unfair discrimination;
- they must have been designed to protect or advance these people or categories of people, and
- they must promote the achievement of equality.[76]

Affirmative action measures that comply with the above requirements are not unconstitutional.

3.2.2.2 Beneficiaries of Affirmative Action

The goal of affirmative action is to ensure equitable representation of people from designated groups in all occupational categories and levels in the workplace.[77]

Affirmative action is intended to allow groups that have been previously discriminated against to catch up with those who were not disadvantaged.[78] It entails preferential treatment during recruitments, selection and promotion of previously disadvantaged groups of people.

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[72] Section 19(b) of the EEA.
[73] Section 20(1) of the EEA.
[74] Section 20(2) of the EEA.
[75] 2004 (6) SA 121 (CC).
[76] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para 37.
[77] Section 2 read with section 15 of the EEA.
[78] In theory, 'affirmative action' is intended to "level the playing field."

Unlike the Constitution, which does not expressly define the beneficiaries of affirmative action[79], the EEA defines the beneficiaries of affirmative action as people from the "designated groups". In terms of the Act, designated groups include Black people, women of all races and people with disabilities.[80] "Black people" means Africans, Coloureds and Indians who are citizens of the Republic of South Africa by birth or descent or became citizens of the republic of South Africa by naturalisation before 27 April 1994; or 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.[81]

For the purpose of the EEA and the Black Based Economic Employment (BBEE), "Black people" also includes South African of Chinese origin.[82]

In terms of the EEA, "People with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment.[83]

The EEA categorisation of beneficiaries for affirmative action is based on race, gender and disability. Arguably, although the Act expressly listed the three categories as beneficiaries, the actual implementation of affirmative action favours race over gender, disability and Africans over Coloured and Indians.[84]

According to the EEA, the beneficiaries of affirmative action should be "suitably qualified."[85] A person may be suitably qualified for a job as a result of one of or any combination of that person's-

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[79] Section 9(2) of the Constitution refers to "persons or categories of persons disadvantaged by unfair discrimination. "
[80] Section 1 of the EEA.
[81] See section 1 of the Employment Equity amendment Act 47 of 2013.
[82] See the case of Chinese Association of South Africa v Minister of Labour 2008 ZAGPHC 174.
[83] Section 1 of the EEA.
[84] See Dupper O., "The beneficiaries of affirmative action" in Dupper O., & Garbers C., (eds) *Equality in the workplace: reflections South Africa and beyond* (2009) Juta & Co, Ltd, Cape Town, South Africa at 301; Bentley & Habib, 'Racial redress, national identity and citizenship in post-apartheid South Africa' in Bentley & Habib (eds) *Racial redress and citizenship in post-apartheid South Africa* 2008 (HSRC) at 12. See also the cases of *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC); *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*); *Solidarity obo Barnard v South African Police Services* [2010] ZALC 10; 2010 (10) BCLR 1094 (LC); *Solidarity obo Barnard v South African Police Service* [2013] ZASCA 177; 2014 (2) SA 1 (SCA); *South African Police Services v Solidarity obo Barnard* [2012] ZALAC 31; 2013 (3) BCLR 320 (LAC).
[85] Section 15(1) of the EEA.

- formal qualification;
- prior learning;
- relevant experience; or
- capacity to acquire, within a reasonable time, the ability to do a job.[86]

When determining person's suitability for a job, employers must review all the factors and determine whether the person is able to do the job in terms of any one of or any combination of those factors.[87] Notably, a person from designated groups may not be unfairly discriminated against solely because that person lacks the relevant experience.[88]

4. Review of selected cases on Affirmative action

Affirmative action has been the subject of numerous court cases. This review concerns some of the cases that have decided since the enactment of the EEA.

4.1 *Independent Municipal & Allied Trade Union v Greater Louis Trichardt Local Council*[89]

In this case, the Labour Court had to decide on whether a designated employer could rely on affirmative action to appoint a less qualified candidate to the detriment of a more qualified one from the same designated group. The Municipality advertised a position for a Town Treasurer. Several people applied for the position. Amongst the shortlisted were three Black males and two white males. At the interviews and tests conducted, two white males scored higher followed by two Black males. The successful candidate was a Black male who scored less than all other candidates.

The applicant union approached the Labour Court alleging that the employer's conduct constituted an unfair labour practice against the other applicant as there was no defined affirmative programme followed by the employer. The Union further argued that the

[86] Section 20(3) of the EEA.
[87] Section 20(4) of the EEA.
[88] Section 20(5) of the EEA.
[89] [1999] ZALC 107 also reported as (2000) 21 *ILJ* 1119 (LC).

employer's conduct in appointing the less qualified candidate from a designated group while there were more qualified candidates from the same group was not justifiable.[90]

On the other hand, the employer argued that its conduct was justified in terms of Schedule 7 Part B item 2(2) of the LRA which empowers employers to adopt and/or implement employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination. The respondent (employer) further argued that his decision to employ the said candidate was in line with the Constitution.[91]

After considering the provisions of Item 2(1)[92] and 2(2)[93] of Schedule 7 of the LRA, the Labour Court held that the appointment was not based on any formulated policy.[94] The Court concluded that the appointment of a less qualified candidate although from a designated group could not be justified on affirmative action grounds since merit and experience should be taken into account for any affirmative action appointment. The Court found it absurd that the less qualified candidate was preferred over other two African candidates who scored higher than him.[95] Accordingly the Court ruled that the decision of the respondent (municipality) to appoint a less qualified candidate amounted to an unfair labour practice within the meaning of Item 2(1) (a) of schedule 7 of the LRA and therefore should be set aside. Arguably, this was a right decision made by the Labour Court since the appointment could not be justified in terms of affirmative action measures and when candidates from the same designated groups are competing for employment the most suitable candidate should be appointed.

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[90] [1999] ZALC 107 at paras 4-5.
[91] [1999] ZALC 107 at para 7.
[92] It provides that **'**For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."
[93]"For the purposes of sub-item (1)(a)-an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms".
[94] [1999] ZALC 107 at para 25.
[95] [1999] ZALC 107 at para 32.

4.2 *Fourie v Provincial Commissioner of the SAPS (Northwest province)*[96]

In this case, a white female police officer unsuccessfully applied for a promotional post. An African male police officer was appointed instead. The applicant contended that she had been discriminated against on the ground of race. The South African Police Service (SAPS) argued that its decision was rational and based on the EEA as it intended to rectify the underrepresentation of African police officers. The Labour Court held that this discrimination was fair and consistent with the EEA. The SAPS' decision to appoint an African male candidate was declared rational, justifiable and fair since it was based on equity. In the Police Service, although they all belonged to designated groups, Africans were underrepresented as compared to Whites, including white females. It is clear from this case that in terms of affirmative action a beneficiary from one of the designated groups can be preferred over another if he/she belongs to a group which was more less represented than others.

4.3. *Solidarity obo Christiaans and Eskom Holdings Ltd*[97]

After the retirement of one of its employees, Eskom, a designated employer created a vacancy and advertised the position. Two applicants were shortlisted for the position - a Coloured male and an African male. Both applicants met the minimum requirements of the job. After the interviews, the interviewing committee recommended that the coloured mail be employed. The committee's recommendation was rejected by Eskom's senior management, which decided to appoint the African male. The applicant referred the matter for arbitration on the basis that Eskom had committed an unfair labour practice by refusing to appoint him as recommended by the panel. The applicant argued that he was unfair discrimination against on the ground of his skin colour. However, the arbitrator held that Eskom's conduct was not discriminatory as it was aimed at reducing the level of under-representation of Africans who had been significantly disadvantaged. The decision was based on the same ground as that of the Labour Court in the *Fourie* case. This confirmed the new trend in the jurisprudence dealing with employment equity and affirmative action in South Africa. Even when employees are from the same designated groups that should benefit from affirmative action, preference may be given to candidates belonging to the group that was the most under-represented under apartheid.

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[96] [2004] 9 BLLR 895 (LC).
[97] (2006) 27 ILJ 1292 (ARB).

4.4 *Reynhardt v University of South Africa*[98]

In this case, the applicant, Professor Reynhardt, a white male applied for a position of Dean of Science at the University of South Africa (UNISA). The selection committee recommended his appointment. However, UNISA overlooked the committee's recommendation and appointed a less qualified professor because he was "coloured" and the University's equity policy required that more Deans should be appointed from previously disadvantaged groups. As a result, the applicant resigned and referred the dispute to the Labour Court on the ground that he had been discriminated against on the ground of race.

In deciding this case, the Labour Court referred to the case of *Harksen v Lane NO and Others*[99] were the Constitutional Court held that where an employee alleged that he or she was unfairly discriminated against, the onus was on him/her to prove the existence of the alleged discrimination. Once that has been proved, the onus shifted to the employer to prove on balance of probabilities that the discrimination was not unfair.

The Court commended the employer's affirmative action policy. However, it criticized its application in this instance. The Court held that the applicant had been unfairly discriminated against on the ground of race and awarded him compensation plus punitive damages.

UNISA then approached Labour Appeal Court.[100] On appeal, the University argued that its employment equity plan served the purpose of section 2 of the EEA. It further argued that the appointment of the less qualified person from designated groups was made in terms of section 2 of the EEA and therefore consistent with section 6(2) of the EEA.[101]

The Labour Appeal Court remarked:

> the appellant's case was flawed, not because of a commendable policy, but because of the manner in which it sought to implement its policy in this case. Once the target has been achieved, its own policy announced to all its employees that remedial measures would no longer apply in the making of further appointments.[102]

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[98] (2008) 29 ILJ 725 (LC).
[99] (1998) 1 SA 300 (CC) at par 53.
[100] See *University of south Africa v Reynhardt* Case No: JA 36/08.
[101] *University of South Africa v Reynhardt* at para 15.
[102] *University of South Africa v Reynhardt* at para 35.

Accordingly the Labour Appeal Court held that the appellant failed to implement its affirmative action programme. The appeal was dismissed with costs. This case confirms the point that affirmative action is a temporary measure. Once equitably representation has been reached, the measure falls away.

4.5 *Minister of Finance and Another v Van Heerden*[103]

Mr. Frederik Jacobus Van Heerden, a former parliamentarian was a member the National Party and the Pension Fund before 1994. He was also a member of the Closed Pension Fund, a fund set up by the tricameral Parliament in 1993 to provide pensions exclusively for political office bearers of the previous parliament. In 1994, when the new democratic Parliament was established, the Minister of Finance introduced a new pension scheme that favoured new members who were mainly black. The Scheme differentiated employers' contributions depending on the category of employees. Mr Van Heerden approached the High Court complaining that the differentiation in the employers' contributions laid down by Rule 4.2.1 constituted an unfair discrimination against certain groups of members, especially white people who had been members of the previous Parliament like himself. According to Mr Van Heerden the rule was unconstitutional.[104]

The High Court found in favour of Mr Van Heerden. It held that the Minister of Finance and the Fund failed to discharge the onus of proof that the provisions of the scheme were not unfair or constitutional.

The Minister of Finance and the Pension Fund approached the Constitutional Court for leave to appeal against the order of the High Court. They argued that the High Court misconceived the true nature of the equality protection recognised by the Constitution by resorting to a formal rather than a substantive notion of equality.[105] They further held that the purpose of the differentiated scheme of employees' benefits was to advance equality.

Writing for the majority, Moseneke J found that legislative and other measures that properly fell within the requirements of section 9(2) of the Constitution were not presumptively

[103] 2004 (6) SA 121 (CC)
[104] At para 12.
[105] At para 17.

unfair.[106] In this case, the Constitutional Court formulated a test for affirmative action measures to comply with section 9(2) of the Constitution. The Court held that in order to pass the constitutional muster, an affirmative action measure had to meet three requirements namely; the measure must target people or categories of people who had been disadvantaged by unfair discrimination; it must have been designed to protect or advance these people or categories of people; and lastly it must promote the achievement of equality.[107]

After referring to the above requirements, the Court found that remedial measures were not derogatory, but a substantive and composite part of section 9 and of the Constitution as a whole as their primary object was to promote equality.[108]

Most prominently, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination was warranted provided that the measures are shown to conform to the internal test set by section 9(2).[109] It was further held that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), passed the constitutional muster under section 9(2), they could not be presumed to be unfairly discriminatory.[110]

4.6 *South African Police Service v Solidarity obo Barnard case*[111]

This is the latest case on affirmative action decided by the Constitutional Court of South Africa on 2 September 2014. This was one of the most controversial cases on affirmative action in the history of South Africa. It took eight years for this issue to finally come to rest. At the Labour Court, the case was first reported as Solidarity obo *Barnard v South African police Service.*[112] At the Labour appeal Court it was reported as *South African Police Service v Solidarity obo Barnard*[113] and at the Supreme Court of Appeal as *Solidarity obo Barnard v South African Police Service.*[114]

[106] At para 32.
[107] At Para 37.
[108] Ibid.
[109] Ibid.
[110] At para 33.
[111] [2014] ZACC 23.
[112] [2010] ZALC 10.
[113] [2012] ZALAC 31.
[114] [2013] ZASCA 177.

In this case, in 2005, the National Police Commissioner advertised a promotion position for the rank of a superintendent. The post was located within the National Inspectorate. It related to "evaluation and investigation priority and ordinary complaints nationally" to improve the service delivery of the Police Service to the public.[115] On its advertisement, the post was not reserved for designated groups. Accordingly, Ms Barnard, a white female together with other six applicants responded to the advert. During the interview, Ms Barnard scored 86.67%, which was the highest score. The only African male candidate who was shortlisted scored 69.17%, which was 17.5% less than Ms Barnard. The panel took the view that the African male candidate could not be appointed without compromising service delivery and recommended Ms Barnard.

The Divisional Commissioner remarked that Black men and women were underrepresented in that division and that if any of the first three recommended candidates were to be appointed the problem would be exacerbated. He declined to support the recommendation and as a result no one was appointed.

Six months later, the same position was advertised. Ms Barnard again applied and obtained the highest score and she was recommended by the panel. An African male who scored 7.33% less than Ms Barnard was the second recommended candidate.

The interviewing panel recognized that Ms Barnard's appointment would not enhance representivity but would not aggravate the racial representivity of the division either since she was already part of the division. The panel recommended Ms Barnard. This time around the Divisional Commissioner agreed with the panel that Ms Barnard be appointed. He was convinced that her appointment would advance service delivery within the Police Service.[116]

Ten days later, the Divisional Commissioner met with the National Commissioner to present the recommendation. The National Commissioner declined to appoint Ms Barnard or the second candidate who was an African male. He recommended that since the post was not critical, it should be withdrawn and re-advertised. The post was then advertised again. This time Ms Barnard did not apply, as she was aggrieved by the National Commissioner's decision not to appoint her. She then filed a complaint following the South African Police Service procedure. The Police Service responded to her with a letter explaining the reasons

[115] [2014] ZACC 23 at para 7.
[116] See [2014] ZACC 23 at para 13.

for her non-appointment. Ms Barnard then referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) but it remained unresolved.[117]

She approached the Labour Court. She requested an order declaring that she had been unfairly discriminated against on the ground of race contrary to section 6(1) of the EEA and directing that she be promoted retrospectively to the rank of superintendent from 1 December 2005.

The Labour Court upheld Ms Barnard's claim. It found that the reasons given by the National Commissioner were "scant and insufficient". It held that the Police Service had failed to discharge the onus and thus the decision not to appoint Ms Barnard was unfair and invalid.

The Police Service appealed to Labour Appeal Court. The Labour appeal Court upheld the appeal and set aside the order of the Labour Court. The Labour Appeal Court held that the National Commissioner had not overlooked Ms Barnard and preferred or appointed another candidate and therefore there was no discrimination because no appointment had been made.

Ms Barnard then approached the Supreme Court of Appeal. The Supreme Court of Appeal reversed the decision of the Labour Appeal Court and re-instated the decision of the Labour Court. The Supreme Court of Appeal reasoned that the National Commissioner's decision not to appoint Ms Barnard amounted to discrimination on the impermissible ground of race. It concluded that the South African Police Service failed to prove that discrimination was not unfair.

The Police Service then approached the Constitutional Court for leave to appeal against the decision of the Supreme Court of Appeal. The Constitutional Court granted leave to appeal. The Constitutional Court noted that the SAPS was a designated employer and was required to implement several measures in pursuit of affirmative action.[118] The Court further noted that the Police Service had an employment equity plan which provided for numeric employment equity targets.

[117] See [2014] ZACC 23 at para 17.
[118] [118][2014] ZACC 23 at paras 40-42.

The Constitutional Court contended that the Supreme Court of Appeal's finding that the SAPS failed to discharge prove that the discrimination was fair was misconceived.[119] According to the Constitutional Court, the Supreme Court of Appeal should have approached the equality claim through section 9(2) of the Constitution and section 6(2) of the EEA. The Constitutional Court averred that the challenge was not on the employment equity plan but on the National Commissioner's decision under the plan.[120] The Court concluded that there was no need for the Supreme Court of Appeal to burden the Police Service with an onus to prove the fairness of the dismissal and to find that it had failed to discharge such proof. According to the Constitutional Court, the appeal at the Supreme Court of Appeal was decided on a wrong principle.[121]

The Constitutional Court noted that the employment equity plan obliged the National Commissioner to take steps to achieve the set targets, provided he acted rationally. The Constitutional Court concluded that the Commissioner was within his right and indeed had a duty to take steps that would achieve the set targets.[122] The Police service employment equity plan was therefore a "restitutionary measure" envisaged by both the Constitution and the EEA.

This case reveals the complexity of the South African jurisprudence on employment equity and affirmative action that is developing as "rainbow jurisprudence" Cockrell[123] complained about almost twenty years ago. It shows some lack of consistency in the South African jurisprudence as two Courts namely the Labour Court and the Supreme Court of Appeal found the discrimination in the name of affirmative action to be unfair while the Labour Court of Appeal and the Constitutional Court held the contrary.

4 Conclusion

For more than half a century, South Africa went through the odious system of Apartheid that denied human rights to the Black people who yet constitute the overwhelming majority of the population on the ground of race or skin colour. Employment equity and affirmative action aimed to achieve substantive equality at the workplace. In so far as they concern the

[119] At para 51.
[120] At para 51.
[121] At para 53.
[122] At para 66.
[123] Cockrell, A., "Rainbow Jurisprudence" 1996 (12) *SAJHR* 1-38.

promotion of human rights, especially the right to equality and non-discrimination, employment equity and affirmative action are closely related to constitutionalism.

Since Apartheid was based on racial discrimination, equality was the first right the South African people fought for. This explains why it is also the first right enshrined in the Bill of Rights.[124]

Since the establishment of the post-apartheid legal order with the adoption of the 1993 Constitution which was replaced with the 1996 Constitution which gives, the right to equality and non-discrimination has been given a pride in all the spheres of life, including at the workplace. South Africa has passed several pieces of legislation aimed at promoting employment equity and equality. The most important is the EEA. On the other hand, South African Courts have delivered a number of judgements that have contributed to a growing jurisprudence on employment equity and affirmative action.

The South African situation is a peculiar one since unlike several other countries like the US where affirmative action was devised to promote the right to equality of those who were historically discriminated against and who are the minority of the population, the Black people who were discriminated against during Apartheid constitute the overwhelming majority of the South African population.

The paper reflected on the road that South Africa has gone to achieve employment equity since the demise of Apartheid in 1994 and the contribution of the courts in this regard. It is clear that the necessary legislative framework has been created to combat inequality and discrimination at the workplace that prevailed during Apartheid. South African courts' contribution to equality at the workplace should also be recognised despite some contradictions that have emerged from the most recent rulings on employment equity and affirmative action. However, other measures such as those designed to improve education of people from the previously disadvantaged groups should be taken into account in order to promote equality.

[124] Chapter 2, Section 9 of the 1996 Constitution.

The promotion of constitutionalism in South Africa twenty years after apartheid requires that when deciding or ruling on employment equity and affirmative action, all state organs, individual and private persons continue to abide by the Constitution and respect the rights of everyone at the work place in the country.