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## Restitution or Discrimination? Lessons on Affirmative Action from South African Employment Law

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### Summary

This article evaluates the usefulness of affirmative action, which appears to have become the cornerstone of South Africa's campaign to achieve racial equality. Whether or not affirmative action is an effective tool to combat disadvantage depends on the legislative approach and its best application to the specific problems. The approach taken by South Africa re-opens the debate on affirmative action and offers the international community a new perspective on overcoming past wrong. The importance of the subject is reopened particularly now that South Africa is at the forefront of the definition and implementation of what is generally termed affirmative action.

In 1996 South Africa constructed a Constitution that entails an equality clause and makes reference to racial equality in several other provisions (Employment Equity Act, Act 55 of 1998, and its forerunner the Labour Relations Act, Act 66 of 1995, the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000, and the Broad-Based Black Economic Empowerment Act (Act 53 of 2003)). The means to achieve racial equality and to overcome the legacy of past discrimination is without doubt a form of equality intended to compensate for that history through affirmative action (hereinafter referred to as restitutionary equality). Nevertheless, after more than ten years of democracy, enormous disparities between black and white still characterise employment. Despite the repeal of many discriminatory laws in employment such as the reservation of jobs for white people, high profile jobs are still occupied mainly by white people and white people still get the higher salaries (see Commission for Employment Equity 2007, Forgey et. al., 2000, at p. 294-296). Poverty today remains a black characteristic and as such is rising, even though there has been an increase in the average personal income (South African Institute of Race Relations, 2003). This article argues that not enough has been done to make restitutionary equality work at its best.

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## Introduction

South Africa's current problems are the result of several factors. Firstly, there is its past, a legacy that must be overcome. Secondly, and more importantly as part of this analysis, there is the current legislative framework and the approach taken for its implementation.

The main characteristic during apartheid had been deep division, inequality and racial discrimination, which placed political and economic power in the hands of the white minority. As a legacy, economic and social disparities still exist today and will persist for long to come. This is why the Constitution not only expressly forbids discrimination on the grounds of race but also provides for substantive equality. Nevertheless, problems arise during application. The judiciary struggles with the concept of the remedial component of equality, resulting in insufficient protection for the non-beneficiaries, and racial tokenism as well as stereotyping still exists. Against this background players struggle to convert substantive equality into practice.

This article does not intend to focus on the complex theoretical arguments about affirmative action, its relationship to discrimination and its legitimacy. Instead, it will focus on the effectiveness of affirmative action. To enable an informed analysis and debate, the following two sections present the legal framework and how the law has been implemented in practice. The penultimate section then evaluates its effectiveness by focusing on a number of criticisms.

## Legal Framework

### Affirmative action in the constitution and supporting legislation

South African jurisprudence, similar to the American affirmative action experience, has been cautious and slow. While some critics argued that the inclusion of affirmative action would lead to a rush on the courts, this fear has not materialised. On the contrary, it has taken more than ten years to define it conceptually and it has not yet been well established in practice.

South Africa recognises that its Constitution is not alone in striving for substantive equality. The Constitutional Court nevertheless states clearly that South Africa's equality jurisprudence differs substantively from the American approach to equality

and affirmative action. One way of establishing South Africa's uniqueness on this ground is the Court's preference for the term 'remedial or restitutionary equality' and the warning not to import inapt foreign equality jurisprudence, which may inflict on its own nascent equality jurisprudence American notions (*Minister of Finance v van Heerden*, (2004) 25 ILJ 1593 (CC)).

Authorisation to grant differential treatment on some grounds is set out not only in the Constitution but also in the Equality Act, and further legislation can be found in the Broad Based Black Empowerment Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, and the Labour Relations Act.

South Africa's constitutional equality provision states in Section 9:

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

The constitutional provision allowing for affirmative action measures is found in section 9(2). A similar provision in the Equality Act states in section 14(1):

It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

Indeed, affirmative action is seen as part of equality, and thus "fair" discrimination, and not as discrimination which needs to be justified. In accordance with this view, there is an underlying opinion that there are cases of unequal treatment that do not infringe upon the equality clause (*S v Ntuli*, 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) (henceforth *Ntuli*), at para 19; and *Prinsloo v van der Linde*, 1997 (3) SA 1012; 1997 (6) BCLR 759 (CC) (henceforth *Prinsloo*), at paras. 17 and 23). With this definition of the concept of equality the South African Constitutional Court is in line with the approach taken in European law, where the same distinction is being made under the principle of non-discrimination (*Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 23 July 1968, Volume 6, Series A, European Court of Human Rights, para. 10).

This approach was confirmed in *van Heerden (op cit.at [33])* where it was stated that if restitutionary measures, even if based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory. The court, at para.37, has created a strict test according to which a measure is examined to determine whether it can pass muster under section 9(2) (henceforth this will be referred to as the van Heerden test). According to this, the measure

- I. must target persons or categories of persons who have been disadvantaged by unfair discrimination;
- II. must be designed to protect or advance such persons or categories of persons; and
- III. must promote equality.

### Affirmative action as an obligation for the employer

Section 6(2) of the Employment Equity Act (EEA) also states that affirmative action does not constitute unfair discrimination, if consistent with the purpose of the Act. Section 2 of the same Act explains that

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

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in representation in all occupational categories and levels in the workforce.

Section 13 stipulates a set of duties resting on a designated employer-

- (1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.
- (2) A designated employer must-
  - (a) consult with its employees as required by section 16;
  - (b) conduct an analysis as required by section 19;
  - (c) prepare an employment equity plan as required by section 20; and
  - (d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

Section 1 of this Act defines ‘designated’ employer as employers that do not run small businesses, and people from ‘designated’ groups as black people, women and people with disabilities.

The objectives of the Broad-Based Black Economic Empowerment Act are similar to affirmative action programmes adopted in the United States:

#### Objectives of the Act

- (3) The objectives of this Act are to facilitate broad-based black economic empowerment by-
- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy;
  - (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
  - (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
  - (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
  - (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
  - (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; and
  - (g) promoting access to finance for black economic empowerment.

As can be seen, the Broad-Based Black Economic Empowerment Act aims to achieve a substantial change in the racial composition of ownership and management structures, increasing ownership and management by black women, targeting rural and local communities as well as aiming at financial support for black economic empowerment. The aim of affirmative action clearly is numerical diversity.

#### Implementation

The Commission of Employment Equity, established in terms of section 28 of the EEA, submits an annual report to the Minister of Labour regarding the implementation of employment equity. This report includes an analysis of the Employment Equity reports received by businesses. At the outset, most South African businesses had adopted affirmative action schemes (*Business Day*, 20 April 2001) but little had been known about their efficacy. The Department of Labour noted, after its analysis of the first round of reports from businesses with more than 150 employees, that no significant developments could be reported (Department of Labour 1999). The main reasons for this had been the failure of these businesses to provide the relevant information. The second round of reports from businesses with less than 150

employees, which had been due for 1 December 2000, had been analysed, but that report had not been made public. In 2001 the Commission for Employment Equity published an extensive report which covered the period from 1999-2001 (Commission for Employment Equity 2001). This report presents the data collected from 800 employers only. By May 2001 only 12 980 employers had reported to the registry. Of these, 4 980 reports had been insufficient or could not be used.

In its 2007 Report, which presents an analysis of the employment equity reports received in 2006, the number of reports received had dropped by nearly 27% when compared to the previous round of reporting (Commission for Employment Equity 2007, p.6). More than a third of the reports had to be discarded on quality grounds.

In practice, existing affirmative action programmes face considerable obstacles. Shortages in human and financial resource hamper the process (Louw 2000 and 2001, Shapiro 2001). Implementation requires a strong task team that many businesses have not created (Business Day, 31 October 2000). In addition, many employers create a policy of the last one in being the first one out (Business Day, 5 April 2001). And the appointment of skilled staff is often the result of a mere staff turnover (Business Day, 20 April 2001). Furthermore, schemes tend to aim at numerical representation primarily and focus less on the promotion of blacks' opportunity to compete equally at higher-level employment (Business Day, 6 June 2001). Enforcement mechanisms are inadequate and fines can easily be paid out by businesses (Business Report, 23 May 2007). This way, economic power remains in the hands of the white minority, and it is one reason why the pace of change is so slow (Cokayne 2001). The latest Employment Equity Report calls for a review of the Employment Equity Act, which should also focus on strengthening the enforcement and compliance mechanisms of the Act (Commission for Employment Equity 2007, p.54). The Broad-Based Black Economic Empowerment Act may well be a tool to overcome these shortcomings in employment equity. Nevertheless, it remains to be seen whether the strategies and codes of conduct under the Broad-Based Black Economic Empowerment Act will be effective.

## Evaluation

This section will concentrate on the pitfalls of affirmative action legislation, which arise due to a wrong didactic as well as practical approach.

### The need for a clear concept and strong enforcement

The *van Heerden* judgement had been a landmark decision with regard to the concept of affirmative action. This judgment brought conceptual clarity to the courts' earlier jurisprudence on affirmative action and its legal justification. In earlier decisions the affirmative action measure had been analysed under section 9(3) (see, *City Council v Walker*, 1998 (2) SA 363 (CC)). This approach considered even a restitutionary measure to be discriminatory, nevertheless, the unfairness of the measure could be rebutted by the State with a convincing justification in line with section 9(5).

This change of approach must be welcomed. The earlier analysis of a remedial measure may appear as a theoretical and terminological issue. However, in practical terms it would presume any differentiation on the grounds listed in section 9(3) to be unfair and in need of justification, thus requiring the judiciary to second guess the

motives of the legislature or executive, causing a situation that would violate their institutional independence. Affirmative action now is a composite part of equality rather than derogation from it. Furthermore, section 9 now appears as a more internally consistent provision and substantive equality is given more prominence (equality as a core and foundational value, see: Gutto, *Equality and Non-discrimination in South Africa: The Political Economy of Law and Law making*, 128).

It is all the more disappointing that the Labour Court recently based its analysis on the old approach in *Baxter v National Commissioner Correctional Services and Another* ((LP198/04) [2006] ZALC 23 (19 May 2006)). In this case the applicant claimed to be unfairly discriminated against after the human resource manager declined the recommendation to appoint him in terms of the department's equity plan. The court alleged a *prima facie* case of discrimination because the respondent differentiated on the ground of race. (see also *Stokke v Member of the Executive Council, Department of Education Eastern Cape Province and Another* (LP 131/03; P131/03) [2005] 8 BLLR 822 (LC)). There is an urgent need for the adoption of a coherent and conceptually clear approach if affirmative action is to be effective.

As can be concluded from the recent judgment *Thekiso v IBM South Africa (Pty) Ltd* (2007) 28 ILJ 177(LC) (which confirmed *Dudley v City of Cape Town* ((2004) 25 ILJ 305 (LC) and *Cupido v GlaxoSmithKline South Africa (Pty) Ltd* [2005] ZALC 8, [2005] 6 BLLR 55 (LC) (18 April 2005)), the Employment Equity Act clearly does not provide an individual entitlement to affirmative action. Instead, a failure to implement affirmative action measures by an employer can only give rise to an enforcement issue. Non compliance can result in a fine, which is determined by a court (*Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (D731/ 05) [2007] ZALC 27 (16 April 2007) (LC)). The labour courts made an important ruling in these recent decisions by negating an individual right to affirmative action.

However, it has become clear that in practice, fines, at least on their own, are not an effective means of enforcement or deterrent, since big businesses are able to pay these fines, which in the end may simply be considered as a calculated risk. It may well be that more drastic measures should be taken to strengthen enforcement, measures such as closing business until compliance is deemed to be under way.

### The impact on the person or group of persons not targeted by the remedial measure

From the start, even though it approached the subject from a conceptually different starting point, the court has taken great care that the preferential treatment does not discriminate unfairly against those, who do not benefit. This point has been part of the Constitutional Court's first decision with regard to affirmative action. In *City Council of Pretoria v Walker*, (1998 (2) SA 363 (CC), henceforth *Walker*), the court clearly outlined the limits of affirmative action measures and awarded those who did not profit from the preferential treatment protection by requiring transparency: a clear, rational and coherent plan, which must be formulated and made public, so as to create awareness and the opportunity for all to monitor the implementation. This approach was also adopted by the Labour Court in *Baxter v National Commissioner Correctional Services and Another* (LP198/04) [2006] ZALC 23 (19 May 2006), at 49.

The fact that, since *van Heerden*, a remedial measure now falls within the ambit of section 9(2) at the same time means there is no need for the State, or a business, to prove within section 9(3) that the differentiation is not unfair. Thus, an important legal protection of the groups excluded from affirmative action is lost. To avoid a new era of systemic discrimination, it is essential that the interests of those not benefiting from affirmative action are protected. Unfortunately, the court has to date not clarified this issue. Nevertheless, the only way this can now be done is within the third leg of the *van Heerden* test, i.e. the requirement that the affirmative action measure 'promote the achievement of equality'. At this stage of the test the weighing of the interests of the benefiting groups against those not benefiting should take place.

It is suggested that this weighing of interests should be done by means of proportionality, such as it is employed by the European Court of Human Rights, which considers whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (generally on proportionality, Fordham 2002, Schwarze 1992). In line with the approach under the European Convention on Human Rights, proportionality would be satisfied if three criteria are fulfilled:

- I. the legislative objective must be sufficiently important to justify limiting a fundamental right.
- II. the measures designed to meet the legislative objective must be rationally connected to that objective- they must not be arbitrary, unfair or based on irrational considerations.
- III. the means used to impair the right or freedom must be no more than necessary to accomplish the legitimate objective – the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society.

Thus if a non-discriminatory alternative means of achieving the same end can be identified, proportionality is not adhered to (*Inze v Austria* (1987) 10 EHRR 394, ECt HR, at para. 44). As concerns the coherence of the South African constitution, this recommended solution would be supported by the Constitutional Court's approach to limitation of the rights in the Bill of Rights. There, the principle of proportionality has been applied, even though not consistently, in some landmark cases (*S v Makwanyane* at 339. Also: *S v Lawrence* 1997 (4) SA 1176 (CC) at 148). Very importantly, this weighing of interests would nonetheless be quite different to the limitation examination under section 36 of the South African constitution, in that affirmative action is not presumed unfair and in need of justification, but rather presumed fair unless proven otherwise.

The principle of proportionality, just as in European Law, would leave a discretionary area of judgment to the Constitutional Court, who would enjoy a margin of appreciation (Mahoney 1998, 1) in relation to the justification of affirmative action. This would be particularly suitable for the application of affirmative action, which is a living instrument and must be interpreted in the light of present day conditions. The nature of affirmative action is that it is not a rigid concept but necessarily a flexible one, which should serve as a balancing mechanism to remedy inequalities. During its continuing application, the composition of the disadvantaged group may change,



possibly even the identity of the group itself, and the group that is not benefiting today may need protection tomorrow.

### Racial tokenism, gender stereotyping

According to section 2 of the Employment Equity Act, affirmative action is limited to designated groups. 'Designated groups', according to section 1 of the EEA, are defined as black people, women and people with disabilities. Just like the Employment Equity Act, the Broad-Based Black Economic Empowerment Act limits affirmative action to members of categorised groups. Furthermore, the racial dimension is reinforced by extending affirmative action to black women. Two problems are connected with this, one of a symbolic kind, the other a substantive one. First, the Employment Equity Act limits affirmative action to members of groups who are identified by objective characteristics, in the same way as apartheid categorised groups. Thus, instead of moving away from the inherently racist categorisation of the past it reinforces racial differentiation. This way, the groundwork laid by apartheid continues to function even though the notorious Population Registration Act (Act 30 of 1950) has been abolished (du Pré 1994). Nevertheless, the past injustice has to be remedied and to do this efficiently, the victims of discrimination need to be identified clearly. The balance between these two arguments needs to be struck carefully, so as to avoid stigmatisation (Cohen 1977), which results from categorisation, but at the same time provide the most effective redress, which needs a clear target group. Avoiding stigmatisation as a result of categorisation whilst at the same time providing effective redress is a major challenge facing those who implement the Act.

### Reinforcing social stigma

As the United States Supreme Court mentions in the *Regents v Bakke*, 438 U.S. 265 (1978) (at 776-777), preferential treatment may serve to exacerbate racial and ethnic antagonism rather than alleviate them. Such a problem was indeed inherent in the gender discrimination case, *President of the Republic of South Africa v Hugo* (1999 (4) SA 147, 1997 (6) BCLR 708). In this case the Constitutional Court dealt with a Presidential pardon which granted release to three categories of prisoners, one of which was a group of single mothers in prison on May 10, 1994 with children under the age of 12 years. The Court considered whether the pardon violated the right not to be unfairly discriminated against after an imprisoned single father of a child under the age of 12 challenged the constitutionality of the pardon. The majority decided that the act did indeed discriminate on the grounds of sex, but held however, that such discrimination was not unfair. In doing this, the Court struggled over the question whether advantageous treatment of single mothers was unfair. In accepting the fairness of the measure it relied on a stereotyped view of the role of mothers: in other words, it accepted that mothers bore more responsibility for child-rearing in South African society than fathers (at para 37). This view was supported by an affidavit given by the National Director of the South African Council for Child and Family Welfare. Interestingly, the majority judgment accepted that there were cases where the mother was not the primary care giver. However, it went on to state that in that event her responsibilities would be taken on by another woman, such as the grandmother, stepmother, sister or aunt. Thus, even in its exceptions the court did not take the view that a man could be in practice responsible for child rearing.

Kriegler J, in his dissenting opinion, mentioned the danger involved in using such a generalisation for the establishment of fairness or unfairness of conduct. Irrespective of tradition, mothers were not the primary minders of children in the eyes of the law. Such an approach would, in his view, itself constitute unfair discrimination (Kriegler J, at paras 70, 80 and 85). This opinion was opposed by another dissenting judge who stated that it was not the generalisation relied upon by the Court which created a disadvantage for women but rather the social role played by women and the inequality which resulted from it. Furthermore, in her opinion, the use of a generalisation in a case which would result in a disadvantage for women would surely constitute unfair discrimination. However, in this case the outcome of the gender stereotyping adopted by the Court brought about an advantage for women, i.e. their release from prison (O'Regan J, at para 113). She does thus agree with the use of a generalisation if it is aimed at achieving the goal of greater substantive equality.

The equality issues that arise in relation to gender discrimination as a form of preferential treatment for a disadvantaged group of people are equally problematic in relation to affirmative action on the ground of race. Racial tokenism or gender stereotyping, as was inherent in *Hugo*, are so engraved in South African society that even the court seems to consider it as an appropriate legal reason. Racial tokenism, although in a more subtle way, was also inherent in the *Walker* case. There, a culture of non-payment was assumed to be a black characteristic (at para. 77). Such tokenism can only reinforce traditional habits and thinking and will not promote the ultimate goal of greater equality.

### **Efficient redress to further the most disadvantaged**

Affirmative action policies and policies to achieve black economic empowerment face the risk that their primary beneficiaries may be black elites rather than the most disadvantaged originally targeted (Business Report, 16 May 2007). South Africa still appears to have no strategy in place to combat this. It is understood that skills development has contributed to the rise of a black middle class. However, such skills development is currently only directed at those who are already employed and thus does not tackle the skills shortage sufficiently in the country. What is needed is targeting the unemployed and tackling poor education in schools to prepare pupils for the training offered at the workplace (Business Report, 6 May 2007).

The courts are clear that each business must have a policy in place and it appears that the focus so far has been on remedying disadvantage rather than merely correcting the skewed racial representation. In *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (21 ILJ (South Africa) 2000, p. 1119 (LC)) the Labour Court stated that affirmative action must be designed to achieve the adequate advancement of disadvantaged groups. However, the Court has failed to define what exactly constitutes “adequate” advancement and who would qualify as a “disadvantaged person”.

No clear definition can be found in the *McInnes* and *auf der Heyde* cases. In *McInnes v Technikon Natal* ([2000] 6 BLLR 701 (LC)) a white female academic alleged discrimination on the ground of race in that she had been rejected as part of an affirmative action programme. In *Thomas auf der Heyde v University of Cape Town* ((LC) 25 May 2000, C 285/99) Mr auf der Heyde, a white applicant argued that application of the University's Equal Opportunity Employment Policy was unfair. In

both judgements, although race was a defining factor in the application of affirmative action schemes, merit still played a dominant role in the appointment (*Thomas auf der Heyde v University of Cape Town* at para. 19). In doing this, affirmative action policies, as they have been developed by employers (*McInnes v Technikon Natal* at para. 36), and as they have been scrutinised by the courts, have broadened the initial group of “target beneficiaries” (a term that is used in *Thomas auf der Heyde v University of Cape Town*, at para. 69) of affirmative action in the Employment Equity Act. The court reasoned that the affirmative action policy does not have regard to race as a sole criterion where two persons are ‘appointable’ (at para. 10/38). This way, the narrow approach that the Employment Equity Act had taken has been eliminated.

In a later decision, however, race as a defining criterion in affirmative action appointments appeared to regain prominence. It was stated in the *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (21 ILJ (South Africa) 2000, 1119, at p. 1129, para. [31] B) that merit and experience will remain relevant insofar as the applicants previously disadvantaged by unfair discrimination are concerned in their own group. This means that while affirmative action appointments should be based on race, choices from within a group should be made on the basis of merit and experience. Thus, the court has gone one step forward and two steps back. First it broadened the restricted formal approach of the Employment Equity Act. However, it then turned back to the criterion of the Employment Equity Act and this way revived not only the narrow approach but also a contradiction of its preceding adjudication (See *McInnes v Technikon Natal*, at para. 10/38).

Instead of clarifying what is meant by a person who has been disadvantaged by unfair discrimination, the court has merely indicated the characteristics of those persons who do not qualify. Thus, nationality is an essential limiting criterion for the target beneficiaries of affirmative action. (*Auf der Heyde v University of Cape Town* at para. 69). Furthermore, it does not have to be shown that the particular individual is disadvantaged. Rather, it is enough to show that the group of which the individual is a member is disadvantaged by societal discrimination, whether direct or indirect (*Auf der Heyde v University of Cape Town* at para. 70). These two negative requirements bring the Employment Equity Act’s approach more in line with the approach taken by the constitutional guarantee. The Broad-Based Black Economic Empowerment Act, which only targets black persons, seems to confirm this approach.

By limiting the application of affirmative action policies to South African nationals the court in *Auf der Heyde v University of Cape Town* provides a vital safeguard to affirmative action policy. Whereas the Employment Equity Act clearly focuses on creating a more racially representative business world, this ruling closes the back door through which this aim could have been achieved by appointing non-white applicants from outside South Africa. The court, however, incorrectly stated that no authority can be found for this argument. The restriction to South African nationals is entirely consistent with the Constitution. The goal of redressing past discrimination is exactly what the constitution had in mind in espousing affirmative action.

Defining “disadvantage” through the group element instead of focusing on the individual, however, is less conducive to this aim. It reinforces a misguided perception of the Employment Equity Act, namely that all members of a particular racial group are automatically in the same position (Grimond 2001). Through being

categorised as members of a group that has been unfairly discriminated against in the past, they may profit undeservedly from positive measures. Moreover, merit and experience will remain relevant insofar as the disadvantaged applicants are concerned within their own group, as was the approach taken in the *Workers Union* case. That means that members of the growing black middle class will benefit when evaluated within their group, making it possible for them to be favoured over other black applicants or employees. Such a definition of “disadvantage” therefore potentially distorts the initial aim of affirmative action set by the Constitution by benefiting the wrong persons. However, this is an inherent problem with affirmative action, the negative effect of which may be reduced through accommodating an affirmative action scheme in a particular context, thus leading to schemes, which differ from one geographical area to another.

Furthermore, any policy must be stated clearly and individual schemes should be scrutinised and monitored closely. The *Workers Union* case has also stated that clarity is an essential condition of a scheme so that random application can be avoided (*Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*, 21 ILJ (South Africa) 2000, 1119, at 1129). However, in this regard the Labour Court has not been vigilant. For example, in the *Abbot* case (*Abbot v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC)) it observed that at least two views about the affirmative action policy had been put forward. One view was that only black candidates should be appointed and white males should not be considered at all (at para. 23). Another view was that a black person should be preferred if there were equally good candidates of both races (at para. 23). The court noted that neither of these interpretations appeared on the affirmative action document (at para. 24).

Surely, if there are several contradicting versions, an affirmative action policy is not sufficiently clear. Vagueness, in theory at any rate, renders it powerless to rebut an allegation of unfair discrimination. However, in the *Abbot* case the court simply gave its own view of the policy’s meaning and purpose and moved on to examine the proper application in the case before it. This is not the obligation of a Labour Court but rather that of the businesses concerned, which should be supported by institutions such as the Employment Equity Commission, and the Black Economic Advisory Council. Nevertheless, if the court does not resolve such uncertainty, an imprecise affirmative action policy will form a basis for racial appointments. This would be even more contrary to the constitutional mandate. The Labour Court, by filling the gap, therefore opted for the lesser of two evils. Once there exists a clear and adequate affirmative action policy, any promotional appointment must take place in line with that policy framework. With regard to this, the Labour Court has made it clear that an employee derives no individual rights from the affirmative action policy.

The employer is thus under no legal duty to an individual to apply affirmative action in its final selection of employees (*Abbot* at para. 26. See also *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1010 (T) at 1035H-I). That means a black applicant will not be able to make a claim of unfair discrimination based on race because of an existing affirmative action policy in order to be appointed over a white employee (*Independent Municipality and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC), *Baxter v National Commissioner Correctional Services and another* (LP198/04) [2006] ZALC 23 (19

May 2006) at 48). Thus, enforcement of affirmative action depends on mechanisms other than the court. If the reporting obligation is enforced more efficiently then businesses will feel more pressure to implement affirmative action in order to reach the level of racial representation that is expected of them.

It is suggested that this issue can only be dealt with effectively if legislation and the courts target disadvantage as such, rather than award preferential treatment on the basis of race. While it is the case that disadvantage is often a characteristic of black people it is not necessarily true that every black person is disadvantaged. The Employment Equity Act seems to assume that people from designated groups are automatically disadvantaged. That is a misconception. Thus, the legislation effectively aims to promote the advancement of black people irrespective of their economic situation and, also, irrespective of their nationality. The emphasis on race rather than the specific issue of retribution for apartheid's consequences (*Shabalala & others v The Attorney-General of the Transvaal & another* 1996 (1) SA 725 (CC) at para. 16), could leave the majority of black South Africans poor and disadvantaged even as the employment sector becomes more representative of the racial composition of the population (Abedian 2004). An apparent racial balance in the workforce could be only of a formal nature, in effect comprising the growing black middle class. As such, affirmative action does not take account of the fact that group identities may change and that the group in need of protection now may not be in need of protection in the future.

A 'creamy layer test', as has been imposed in India to prevent such inefficiency of affirmative action (*Indira Sawhney v Union of India*, 16 November 1992, recently reiterated by *Nair Service Society v State of Kerala*, 23 February 2007), may be a solution to these shortfalls of an affirmative action policy. The Indian Apex Court added new criteria to determine individual eligibility for affirmative action in the form of a quota within a quota. In line with this the State must use a means test to eliminate persons from affluent or professional families, i.e. the creamy layer. Included in the 'creamy layer' were the children belonging to Class I and Defence Officers and children whose parents had an income above 100,000 Rupees per annum. This limit was further revised in 2004 and extended to 250,000 Rupees.

The creamy layer test has been criticised on the basis that it is more difficult to ascertain socio-economic status than ethnic identity (Weisskopf 2004, Weisskopf 2005). However, this criticism is not convincing. States ascertain such status frequently through tax accreditation and the award of social benefit. It is true that socio-economic status is easier to alter and to falsify than ethnic identity, yet it is argued the advantages of moving to class-based rather than race-based preferential treatment far outweigh these difficulties.

Such a creamy layer test could include a regular means test to eliminate those individuals falling within the 'group of disadvantaged people' as defined by section 14 of the Equality Act, but who have now achieved a good economical standing. Such a standing would need to be determined by a means test, which would need to be re-adjusted regularly depending on the country's average income.

Thus, the alternative would be to base preferential treatment on socio-economic status, thus arguing with the idea of the greatest good, or common good. This way, affirmative action may provide disadvantaged groups, irrespective of race, gender or

ability with greater opportunities. At the same time, it is argued, affirmative action would not be under pressure to succeed within a time limit or to work towards a definite ending. Instead, the argument behind affirmative action would be to provide a balancing mechanism to remedy socio-economic inequalities. Such an approach to the implementation of affirmative action will not only ensure that the most disadvantaged benefit from it, but also help prevent the danger of reinforcing stigma connected to race.

Furthermore, it is argued that affirmative action should rather aim at integration than diversity. This has been the recent development in the United States as becomes clear through the argument in the recent decisions of *Grutter v Bollinger* and *Gratz v Bollinger* (The Michigan cases, see 539 U.S. 244 (2003), at 336; 135F. Supp.2d 790 (2001) at 796-797). While these cases relate to University admission, applied to employment law they do still make clear that affirmative action can only achieve numerical diversity speedily and efficiently if there are a sufficient number of sufficiently qualified applicants for vacancies. Thus, in order to increase this number, additional affirmative action measures will need to be implemented earlier in the individuals' careers, and as far back as primary education.

## Conclusion

The Employment Equity Act and the Broad-Based Black Economic Empowerment Act were enacted to combat two obstacles in the implementation of racial equality in employment in South Africa. First, there are internal problems within the labour sector, such as appointment, and then there are the problems outside the labour market such as the disparities left by apartheid. The legislative framework offers two tools to overcome these problems, namely the right to non-discrimination and affirmative action. However, even though businesses are implementing affirmative action policies they are struggling to do so efficiently. The current poverty statistics reveal that the distribution of poverty is not really changing despite the programmes of the new government.

Even though some employment cases have already been heard by the South African Labour Court, the number of reported cases is small. They show that there are no clear guidelines on how affirmative action is to be constructed and implemented. During the first ten years the goal of affirmative action has changed slightly by aiming more at racial representation and less at a remedial cause. It also targets a limited group of beneficiaries. This does not make it inappropriate as a tool to achieve more racial equality, yet it does curtail its efficiency.

What also curtails the potential affirmative action severely is the fact that there are no sufficient enforcement mechanisms. These obstacles, the lack of guidelines and the lack of encouragement through supporting institutions make affirmative action less effective, despite the additional specialised legislation. Furthermore, another obstacle is the involvement of subjective choices and preferences by the employer against which the law cannot be an efficient tool.

South Africa is taking the risk of racial tokenism and stigmatism, by defining the affirmative action target groups along the same lines that past discrimination justified. This is an enormous risk to take, although it may be justified by the goal of greater equality. Nevertheless, this can only be the case if the length of time that affirmative

action is used is minimised. And this can only be done by setting a clear deadline and making affirmative action as efficient as possible. Currently, neither of these two points is adhered to in South Africa.

Another principal danger, due to the lack of guidelines, the unclear concept and the involvement of subjective choices, is the risk of discrimination against the groups not targeted by affirmative action. Unless these groups are provided with sufficient protection, preferential treatment and discrimination might result in a vicious circle.

In line with these principal problems, it is argued that a race-neutral approach combined with a creamy layer test would be more suitable. As such, preferential treatment would be targeting those who really need advancement and at the same time protect those who are not 'furthered'. The weighing of interests should be strictly and continuously scrutinised through the principle of proportionality. This would allow affirmative action to act as a long term balancing mechanism to achieve an egalitarian and integrated society. At the same time, advancement must be accompanied by measures to further integration as far back as early education with the ultimate goal of integration rather than diversity.

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