

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**THE EFFECTIVENESS OF SOUTH AFRICAN LEGISLATION
IN PROTECTING BLACK EMPLOYEES FROM RACIAL
DISCRIMINATION**

BY

TEBOHO SHAUN PINYANE

Student Number: 3550056

UNIVERSITY of the

WESTERN CAPE

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Supervisor: Dr van de Rheede

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DEDICATION

This work is dedicated to Carina Conradie (High School Tutor) who has always believed in me and pushed me to achieve great things in life. I dedicate this work to my family who is always there for me and supportive. Finally, I want to dedicate this work to Westerford High School for giving me the opportunity to showcase my potential.



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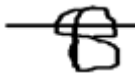
I acknowledge with great thanks and gratitude the assistance of the following persons:

Dr van de Rheede (my Supervisor) and Carina Conradie.



DECLARATION

I, TEBOHO SHAUN PINYANE, declare that *THE EFFECTIVENESS OF SOUTH AFRICAN LEGISLATION IN PROTECTING BLACK EMPLOYEES FROM RACIAL DISCRIMINATION* is my own work. It has never been submitted before for any degree or examination in any other university. All the sources that I have used or quoted have been indicated and acknowledged as complete references.

Signed 

Date: 20 October 2021

Student Number: 3550056


Supervisor: Dr van de Rheede



ABBREVIATIONS

ANC -	African National Congress
CC -	Constitutional Court
EEA -	Employment Equity Act 55 of 1998
IFP-	Inkatha Freedom Party
LGSETA-	Local Government Sector Education and Training Authority
ILO-	International Labour Organisation
LC-	Labour Court
PEPUDA-	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000



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ABSTRACT

The Apartheid government passed segregation laws which favoured the white minority and unfairly discriminated against black people. The Constitution of the Republic of South Africa acknowledges the hardships caused by Apartheid and thus contains an equality clause governed by section 9 of the Constitution which prohibits unfair discrimination. The Constitution places an obligation on parliament to enact legislation with the aim of advancing and protecting persons or categories of persons disadvantaged by unfair discrimination. The Employment Equity Act 55 of 1998 (EEA) is one such statute which aims to achieve equity in the workplace by promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination and to implement affirmative action measures. Research shows that black employees in South Africa are subjected to racial discrimination¹ as a consequence of the apartheid laws that existed in the past. It is for this reason that it is important to examine the laws that exist at present that aim to protect such employees.

This study contains a discussion on the provisions contained in the EEA governing unfair discrimination and affirmative action. The purpose of this study is to determine the extent to which the legislative governing racial discrimination protects black people in South Africa and whether these laws should be amended and/or supplemented. This will be done by discussing legislation, case law and journal articles which provides the outcomes of interviews that were conducted with employees as far as their experiences of racial discrimination and affirmative action are concerned.

KEYWORDS

- ❖ **Affirmative Action**
- ❖ **Apartheid**
- ❖ **Black People**
- ❖ **Constitution of the Republic of South Africa**

¹ Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 378.

- ❖ **Designated Employer**
- ❖ **Employment Equity Act 55 of 1998**
- ❖ **Equality**
- ❖ **People from Designated Groups**
- ❖ **Racial Discrimination**



CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

South Africa is stigmatised as a result of its history of segregation and unfair discrimination against black people.² During apartheid, the law permitted employers to discriminate against employees unfairly on grounds such as race thus making it difficult for black employees who were unfairly discriminated against to approach the courts.³ Employment policies which existed during apartheid prohibited black people from working in senior levels of a workplace, thus leaving black people to work as unskilled labourers and wage inequalities between black and white people existed.⁴ The enactment of the South African Constitution has been described as being a 'masterpiece of post conflict constitutional engineering in the post-cold war era'.⁵ The Constitution brought an end to the decades of legalised unfair discrimination.⁶ The Constitutional Court in *President of the Republic of South Africa v Hugo*⁷ explained the importance of eradicating racial discrimination in South Africa as follows:

'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievements of such a society in the context of our deeply in-egalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked'.⁸

² Strauss M 'A historical exposition of spatial injustice and segregated urban settlement in South Africa' (2019) 25 *Fundamina* 136.

³ Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) 11 *Law democr. Dev* 1.

⁴ Mcgregor M, 'A legal- historical perspective on affirmative action in South Africa' (Part 1) (2006) 12 *Fundamina* 92.

⁵ Powers BO *The "Reasonableness" of Poverty: Progress and Pitfalls in South Africa's Socioeconomic Jurisprudence* (published Senior Project thesis, Bard College, 2014) 33.

⁶ McConnachie C 'Review: Human dignity, 'unfair discrimination' and guidance' (2014) 34(3) *Oxf J Leg Stud* 610.

⁷ *President of the Republic of South Africa v Hugo* [1997] ZACC 4.

⁸ *President of the Republic of South Africa v Hugo* [1997] ZACC 4 para 41.

The Constitution established three vital fundamental provisions that apply to all citizens.⁹ First the Constitution guarantees everyone equal protection before the law¹⁰ and outlaws unfair discrimination based on grounds which includes race.¹¹ Secondly, the Constitution places a positive duty on the government to enact national legislation in order to eliminate unfair discrimination and promote equality.¹² The Employment Equity Act 55 of 1998 (EEA) was promulgated to give effect to section 9(2) of the Constitution.¹³

1.2 PROBLEM STATEMENT

The years of unfair discrimination and oppression created a legacy of inequality in the South African workplace.¹⁴ Legislative measures have been enacted with the aim of eliminating the inequalities.¹⁵ The EEA aims to achieve equity in the workplace by promoting equal opportunities and fair treatment, through the elimination of unfair discrimination and by implementing affirmative action measures.¹⁶ It has been argued that even though the EEA aims *inter alia* to create a representative workplace, a representative workplace does not always exist in South African workplaces.¹⁷ Even though affirmative action measures aim to advance people from designated groups, research shows that some black employees have negative opinions with regards to the manners in which affirmative action measures are implemented.

Research also shows that black employees are still subjected to racial discrimination.¹⁸ This is the case despite the provisions contained in the EEA prohibiting unfair discrimination and promoting equal opportunities.

⁹ Geldenhuys J & Kelly-Louw M 'Hate speech and racist slurs in the South African context: where to Start?' (2020) 23 *PER / PELJ* 5.

¹⁰ Section 9(1) of the Constitution of the Republic of South Africa 1996.

¹¹ Section 9(3) of the Constitution of the Republic of South Africa 1996.

¹² Section 9(4) of the Constitution of the Republic of South Africa 1996.

¹³ Preamble of the Employment Equity Act 55 of 1998.

¹⁴ Mushariwa M 'The cycles of affirmative action in the transformation of the workplace' (2020) 32 *SA Merc LJ* 99.

¹⁵ Mpedi LG 'Unfair discrimination in the workplace' (2016) 4 *TSAR* 835.

¹⁶ Dupper O 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' (2012) 2012(1) *Acta Juridica* 244.

¹⁷ Mushariwa M 'The cycles of affirmative action in the transformation of the workplace' (2020) 32 *SA Merc LJ* 99.

¹⁸ Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 390.

1.3 RESEARCH QUESTION

Flowing from the problems that prompted this research, this mini-thesis answers the research question: To what extent does the South African legislative framework protect black employees against racial discrimination? This study answers the sub-questions below:

- How does the law governing unfair discrimination protect black employees?
- How does the law governing affirmative action protect black employees?
- In which ways should the law governing unfair discrimination and affirmative action be amended and/or supplemented?

1.4 AIMS OF THE RESEARCH

This thesis contains a discussion on the legislative framework governing racial discrimination in the South African workplace. Similar to the EEA, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) was also enacted to give effect to section 9 of the Constitution.¹⁹ The EEA applies to workplace discrimination,²⁰ while PEPUDA applies to persons who are excluded from the scope of the EEA.²¹ This study focuses on the extent to which South African legislation protects black employees against racial discrimination. As a result of this research focusing on racial discrimination which black employees are subjected to this research will be limited to an examination of the provisions contained in the EEA. The EEA consists of two main parts. Chapter 2 of the EEA contains the provisions governing unfair discrimination. Chapter 3 of the EEA contains the provisions governing affirmative action. This thesis consists of a discussion on the provisions governing unfair discrimination and affirmative action to determine the extent to which black employees are protected.

While other forms of discrimination exist such as on the grounds of gender and disability, this study will be limited to a discussion on racial discrimination. Racial discrimination is the focus point of this research because South Africa's history is one of racial

¹⁹ Section 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

²⁰ Employment Equity Act 55 of 1998.

²¹ Section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

discrimination towards black people, and it is thus important to scrutinize the current law of South Africa to determine the manners in which black employees are currently protected by the laws governing racial discrimination.

1.5 SIGNIFICANCE OF THE RESEARCH

Racial discrimination and affirmative action are important issues in South Africa as a result of the fact that the country comes from a past that oppressed black people. It is thus important to examine the laws in place that prohibits racial discrimination in the workplace. Affirmative action measures exist with the aim of rectifying the imbalances caused by Apartheid. This research is important to black people since it will create awareness for black people on whether they are adequately protected by South African legislation. This research is important to employers in that it will assist in educating employers with regards to the importance of equality in the workplace and how racial discrimination affects black people in the workplace. Furthermore, this research is important to employers as it contains a discussion on the importance of affirmative action in promoting equality in the workplace and the procedures employers should follow in implementing employment equity measures. The fact that black employees are subjected to racial discrimination in the workplace is disturbing and concerning, it is thus important to determine the extent to which the South African legislative framework protects black people against racial discrimination.

1.6 LITERATURE REVIEW

Khumalo provides important information on racial discrimination in South African workplaces.²² In his study, he highlights the ongoing acts of racial discrimination in South African workplaces, despite the existence of laws that prohibit racial discrimination in the workplace.²³ The use of case law in Khumalo's discussion is valuable as it provides a view of the current situation insofar as racial discrimination in the workplace is

²² Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 377.

²³ Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 378.

concerned.²⁴ The current research differs from Khumalo's research in that this research examines not only the way in which the legislative provisions governing racial discrimination are applied in case law, but also examines the outcomes of interviews conducted with employees and employers that are contained in journal articles and reports to determine the ways in which these provisions are applied in the workplace.

Maqutu and Motloung's research is based on the judgment handed down by the Labour Appeal Court in *SAEWA obo Bester v Rustenburg Platinum Mine and Another*.²⁵ These authors argue that the Labour Appeal Court in the aforementioned case failed to recognise racism due to the fact that racism has been normalised in the South African workplaces where white dominance still prevails.²⁶ This research is useful as it provides guidelines on the ways in which to resolve matters involving racial discrimination in the workplace.²⁷ While this research is valuable, the current research examines not only the processes that should take place in the workplace, but also the remedies that are available to black employees who have been unfairly discriminated against on grounds such as on the ground of race.

Mokoena's research is based on the judgment that was handed down in *South African Revenue Service v CCMA and Others*.²⁸ Mokoena's research outlined the racial ideologies some employers and employees have inherited from colonial and Apartheid laws and how these ideologies still contribute to racial discrimination in South African workplaces.²⁹ Mokoena furthermore suggests that workplaces should speak about racism and its impact on victims.³⁰ While this research is important in determining one of the reasons for racial discrimination persisting in South African workplaces, the current research contains a discussion on the provisions that form part of the EEA in order to

²⁴ Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 378.

²⁵ *SAEWA obo Bester v Rustenburg Platinum Mine and Another* (2017) 38 ILJ 1779 (LAC).

²⁶ Maqutu L & Motloung S 'Hidden racial attitudes within the workplace: an evaluation of *Bester v Rustenburg Platinum Mine*' (2018) 34 *SAJHR* 263.

²⁷ Maqutu L & Motloung S 'Hidden racial attitudes within the workplace: an evaluation of *Bester v Rustenburg Platinum Mine*' (2018) 34 *SAJHR* 267.

²⁸ *South African Revenue Service v CCMA and Others* (2016) 37 ILJ 655 (LAC).

²⁹ Mokoena K 'The subtleties of racism in the South African Workplace' (2020) 3(1) *Int. J. Comput. Digit. Syst* 28.

³⁰ Mokoena K 'The subtleties of racism in the South African Workplace' (2020) 3(1) *Int. J. Comput. Digit. Syst* 35.

ascertain whether these provisions should be amended and/or supplemented to provide additional protection to black employees.

Mushariwa's research is based on the importance of affirmative action in promoting equality in South African workplace.³¹ In her research Mushariwa suggests that the goal of affirmative action should not only focus on promoting equality by placing people from designated groups in levels of the workplace where they are underrepresented, but should also focus on eliminating the barriers to employment that are affecting people from designated groups.³² While this research is important in understanding the aspects of affirmative action that should be focused on in the South African context, the current research will in addition to discussing the purpose of affirmative action and the forms of affirmative action measures that exist, also contain a discussion on the obligations placed on designated employers when implementing affirmative action measures in the workplace.

1.7 RESEARCH METHODOLOGY

This research adopts a desktop research methodology which consists of a discussion and an examination of primary and secondary sources. Primary sources such as the Constitution, legislation such as the Employment Equity Act 55 of 1998 (EEA), international conventions and case law is used in this thesis. The Constitution is discussed as a result of the fact that legislation enacted should be consistent with the provisions contained in the Constitution. The EEA will be discussed since it contains the provisions governing unfair discrimination and affirmative action. Case law will be used to answer the research question since courts are responsible for interpreting legislative provisions.

Secondary sources, such as books and journal articles have been used to discuss the different views of scholars on the subjects of racial discrimination and affirmative action in South Africa. Journal articles are also used where authors have conducted interviews

³¹ Mushariwa M 'The cycles of affirmative action in the transformation of the workplace' (2020) 32 SA *MERC LJ* 99 101.

³² Mushariwa M 'The cycles of affirmative action in the transformation of the Workplace' (2020) 32 SA *MERC LJ* 99 112.

with employers and employees on their experiences with regards to affirmative action and racial discrimination in order to examine the outcomes of the interviews that were conducted by the authors. Lastly, employment equity reports which include statistics will be used to determine what the current situation is and what the rate of improvement is insofar as the representation of black people in the South African workplace is concerned.

1.8 CHAPTER OUTLINE

The thesis consists of 5 chapters. Chapter 1 contains *inter alia* the problem statement, the aims of the research, the significance of the research, the literature review, and the research methodology.

Chapter 2 of this mini-thesis consists of a discussion on the legislative provisions governing racial discrimination and consists of a discussion on the meanings of discrimination and unfairness. This chapter also contains a discussion on the remedies that are available to employees. Chapter 3 of this mini-thesis contains a discussion on the legislative provisions governing affirmative action and the procedural obligations which the EEA places on designated employers.

Chapter 4 of this mini-thesis consists of a discussion on the experiences of black employees insofar as racial discrimination and affirmative action is concerned which have been obtained from literature such as journal articles. The objective of this chapter is to determine what the state of racial transformation is at present and the ways in which the legislative provisions are applied in practice. Chapter 5 consists of the conclusion which contains the closing remarks and the recommendations.

CHAPTER 2

THE SOUTH AFRICAN LEGISLATIVE PROVISIONS GOVERNING RACIAL DISCRIMINATION IN THE WORKPLACE

2.1 INTRODUCTION

The right to equality contained in the Constitution prohibits unfair discrimination. Section 9 of the Constitution contains the equality clause, which reads:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.³³
- (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.³⁴
- (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.³⁵
- (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.³⁶
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.³⁷

The EEA was enacted to give effect to section 9 of the Constitution and contains provisions governing the prohibition of unfair discrimination in the workplace.³⁸ In *Harksen v Lane NO and Others*³⁹ a three-pronged test was created to determine whether a statute is constitutional in terms of the equality clause or not.⁴⁰ The Constitutional Court outlined the stages of the enquiry as follows:

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If

³³ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

³⁴ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

³⁵ Section 9(3) of the Constitution of the Republic of South Africa, 1996.

³⁶ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

³⁷ Section 9(5) of the Constitution of the Republic of South Africa, 1996.

³⁸ Preamble of the EEA.

³⁹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

⁴⁰ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

it does not, then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground 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 adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause'.⁴¹

This test should not be used to determine whether an employer has unfairly discriminated against an employee.⁴² The reason for employees and courts not being allowed to make use of section 9 of the Constitution directly, is because legislation (in terms of which relief should be sought), has been enacted to give effect to section 9 of the Constitution. Employees and courts are not allowed to bypass national legislation (EEA) and relief should be sought in terms of legislation as opposed to in terms of section 9 of the Constitution directly.⁴³ An example of this error in the application of the law was witnessed in *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others*⁴⁴ where the respondent relied on the Constitution to justify a delay in holding a disciplinary procedure against the applicant rather than relying on the Labour Relations Act 66 of 1995 which gives effect to the Constitution in relation to employment disciplinary

⁴¹ *Harksen V Lane* No 1997 (11) BCLR 1489 (CC) para 42-45.

⁴² *Simmadari v Absa Bank Ltd* (2018) 39 ILJ 1819 (LC) para 41-43.

⁴³ *Mahwanqa v South African Human Rights Commission* (11208/2014) [2019] ZAGPJHC 125 (21 February 2019) para 25. (Exception is when there has been a constitutional challenge to the validity of the provisions of the legislation).

⁴⁴ *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (2019) 40 ILJ 773 (CC).

procedures.⁴⁵ South Africa ratified the Discrimination (Employment and Occupation) Convention, 1958(NO 111) (ILO Convention 111).⁴⁶ The EEA should be interpreted in terms of the Convention.⁴⁷ The ILO Convention 111 places a duty on member states to implement legislation that prohibits discrimination in the workplace and promote equality.⁴⁸ Since South Africa ratified the ILO Convention 111 South Africa is obligated to implement legislation that prohibits discrimination in the workplace and promote equality.⁴⁹ The implementation of the EEA was thus influenced by the ratification of the ILO Convention 111.

This chapter consists of a discussion on the statutory framework governing racial discrimination in the workplace. This chapter consists of a discussion on discrimination, unfairness and the remedies which are available to employees. This is discussed with a view to ascertaining the extent to which the legislative framework protects black employees against racial discrimination.

2.2 EMPLOYMENT EQUITY ACT 55 OF 1998

The purpose of the EEA is found in section 2 of the Act.⁵⁰ Section 2 provides 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 employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce'.⁵¹

Chapter 2 of the EEA contains the provisions governing the elimination of unfair discrimination. Chapter 3 on the other hand, contains the provisions governing affirmative

⁴⁵ *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others* (2019) 40 ILJ 773 (CC) para 38.

⁴⁶ Garbers C 'Employment discrimination law into the future' (2018) 2 *Stell LR* 237 240.

⁴⁷ Section 3 of the EEA.

⁴⁸ Article 2 of the International Labour Organisation Convention (No 111) Concerning Discrimination in respect of Employment and Occupation 1958.

⁴⁹ Article 2 of the ILO Convention.

⁵⁰ Section 2 of the EEA.

⁵¹ Section 2(b) of the EEA.

action. Chapter 2 of the EEA applies to all employers and employees, while chapter 3 only applies to designated employers and people from designated groups.⁵² People from “designated groups” consist of black people, women, and people with disabilities.⁵³ "Black people" is a generic term which means Africans, Coloureds, and Indians.⁵⁴ "Designated employer" means:

‘(a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement’.⁵⁵

The meaning of ‘unfair discrimination’ is discussed below.

2.3 UNFAIR DISCRIMINATION

The EEA was enacted to regulate unfair discrimination in the workplace and to promote equality.⁵⁶ This means that claims of unfair discrimination in the workplace should be instituted in terms of the provisions of the EEA and not in terms of the Constitution directly.⁵⁷ The EEA places an obligation on employers to take positive measures to eliminate unfair discrimination in the workplace.⁵⁸ In terms of section 5 of the EEA:

‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’.⁵⁹

⁵² Section 4 of the EEA.

⁵³ Section 1 of the EEA.

⁵⁴ Section 1 of the EEA.

⁵⁵ Section 1 of the EEA.

⁵⁶ Section 2 of the EEA.

⁵⁷ *Institute for Democracy in SA and Others v African National Congress* 2005 (10) BCLR 995 (C) para 17.

⁵⁸ Section 5 of the EEA.

⁵⁹ Section 5 of the EEA.

In terms of section 6(1) of the EEA:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.⁶⁰

As a result of chapter 2 of the EEA applying to all employees, black employees are protected as a result of the enactment of sections 5 and 6 of the EEA. Section 6(1) of the EEA does not prohibit discrimination but only prohibits 'unfair discrimination'.⁶¹ The test to determine unfair discrimination involves a two-stage enquiry.⁶² The first stage is to determine whether there has been a 'discrimination' and if the answer is in the affirmative, the second stage is to determine whether such discrimination was 'unfair'.⁶³ The meanings of 'discrimination' and 'unfairness' are discussed below.



2.3.1 DISCRIMINATION

The EEA does not define the concept of discrimination.⁶⁴ 'Differentiation', 'occurs when an employer treats employees differently or uses policies or practices that exclude certain groups of employees'.⁶⁵ Discrimination is closely linked to 'differentiation'. In other words, in order for discrimination to exist, there must be 'differentiation'. However, 'differentiation' does not necessarily lead to discrimination.⁶⁶ 'Differentiation' will only lead to discrimination when an employer treats an employee differently on an unacceptable ground.⁶⁷ These "unacceptable" grounds include those listed in section 6(1) of the EEA such as race. The EEA prohibits discrimination on the grounds listed in section 6(1) of the EEA such as race and on other arbitrary grounds.⁶⁸ The term 'arbitrary grounds' was

⁶⁰ Section 6(1) of the EEA.

⁶¹ *Naidoo and Others v Parliament of the Republic of South Africa* (C 865/ 2016) [2018] ZALCCT 38 para 34.

⁶² Du Toit D *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 660.

⁶³ Du Toit D *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 660.

⁶⁴ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 16.

⁶⁵ Dupper O *Essential Employment Discrimination Law* (2004) 33.

⁶⁶ *Germishuys v Upington Municipality* [2001] 3 BLLR 345 (LC) para 81.

⁶⁷ *Jooste v Score Supermarket Trading (Pty) Ltd* [1999] 2 BCLR 139 (CC) para 11.

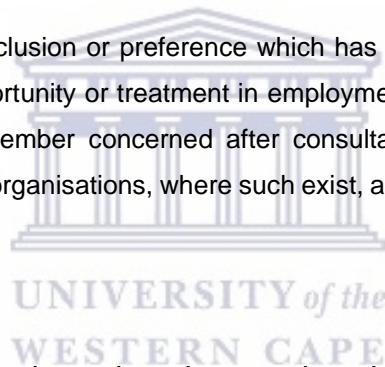
⁶⁸ Section 6(1) of the Employment Equity Amendment Act 47 of 2013.

inserted into section 6 of the EEA in 2013⁶⁹ to include any ground that is analogous to the grounds listed in section 6(1) and has the effect of impairing the dignity of the employee.⁷⁰

In *SACWU & Others v Sentrachim Ltd*⁷¹, the Industrial Court was required to determine whether the respondent's action to pay black employees lesser wages compared to that of their white colleagues employed on the same level and performing the same tasks amounted to racial discrimination. The Industrial Court defined the term 'discrimination' by referring to the definition contained in the ILO Convention 111. Article 1 of the Convention provides as follows:

'1. For the purpose of this Convention the term discrimination includes:

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies'.⁷²



Section 3 of the EEA provides that when interpreting the EEA, the EEA should be interpreted in accordance with the ILO Convention.⁷³ This therefore means that discrimination for the purposes of the EEA should be given the same meaning as the Convention.⁷⁴ The EEA prohibits both direct and indirect discrimination. Direct and Indirect discrimination is discussed below.

⁶⁹ *Naidoo and Others v Parliament of the Republic of South Africa* [2019] 3 BLLR 291 (LC) para 10.

⁷⁰ *Naidoo and Others v Parliament of the Republic of South Africa* [2019] 3 BLLR 291 (LC) para 10.

⁷¹ *SACWU & Others v Sentrachim Ltd* (1988) 9 ILJ 410 (IC).

⁷² Article 1 of the ILO Convention.

⁷³ Section 3 of the EEA.

⁷⁴ Nielsen HK 'Concept of discrimination in ILO Convention No.111' (1994) 43(4) *The International and Comparative Law Quarterly* 827-835.

2.3.1.1 Direct discrimination

Direct discrimination exists when an employer treats an employee differently from another based on a prohibited ground such as race.⁷⁵ In *Association of Professional Teachers & another v Minister of Education & others*⁷⁶, the Industrial Court provided an example of direct discrimination as follows:

'Direct discrimination is generally easily recognizable as it involves a direct differentiation between the two sexes. For example, an employer follows a policy of remunerating a female employee on a lower scale simply because she is a woman, whereas a male employee is remunerated at a much higher scale for the same work'.⁷⁷

The EEA prohibits direct discrimination on listed grounds and on any other arbitrary ground. According to the ILO Convention, the criterion in respect of a listed ground and an unlisted ground is whether 'differentiation on that ground has the effect of nullifying or impairing quality of opportunity or treatment in employment or occupation'.⁷⁸

In *SA Chemical Workers Union & others v Sentrachim Ltd*⁷⁹, black workers in all levels of the workplace were paid a lower salary compared to their white colleagues employed on the same level and performing the same tasks.⁸⁰ The Industrial Court in this case held that the Respondent discriminated against black employees on the ground of race.⁸¹ This case is an example of direct discrimination since it was evident that the black employees in all levels of the workplace earned a lower wage compared to their fellow white colleagues. The discrimination was based on the ground of race. In *NEHAWU obo Mofokeng & Others v Charlotte Theron Children's Home*⁸², the Appellant filed an unfair discrimination claim against the Respondent for failing to employ black housemothers to

⁷⁵ Abrahams D et al *Labour Law in Context* 2ed (2017) 72.

⁷⁶ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) 1048.

⁷⁷ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) para I.

⁷⁸ Article 1 of the ILO Convention.

⁷⁹ *SA Chemical Workers Union & others v Sentrachim Ltd* (1988) 9 ILJ 410 (IC).

⁸⁰ *SA Chemical Workers Union & others v Sentrachim Ltd* (1988) 9 ILJ 410 (IC) 439.

⁸¹ *SA Chemical Workers Union & others v Sentrachim Ltd* (1988) 9 ILJ 410 (IC) 439.

⁸² *NEHAWU obo Mofokeng & Others vs Charlotte Theron Children's Home* [2004] 10 BLLR 979.

look after white children.⁸³ Davis AJA held that the employment policy of the Respondent was clearly racist and poses a risk of creating potential racist employment policies in the future.⁸⁴ The Appellant was held to have unfairly discriminated against the Respondent on the ground of race.⁸⁵ This case is an example of direct discrimination as it was evident that the only reason why the black employees were not being hired was because of their race.

In *Harmse v City of Cape Town*⁸⁶, the Applicant claimed that the decision by the Respondent not to appoint him in all of the three job posts of the Respondent amounted to unfair discrimination in terms of section 6(1) of the EEA.⁸⁷ The Applicant argued that he was directly discriminated against on the ground of race since the two white candidates who applied for the same position were offered the job.⁸⁸ The Respondent argued that the Applicant had no cause of action since the Applicant never specified in his statement whether he was unfairly discriminated against directly or indirectly by the Respondent.⁸⁹ Waglay J held that there is no such rule in court that requires a claimant to specify whether they were discriminated against directly or indirectly.⁹⁰ He stated that, this distinction is only determined during a trial.⁹¹ The aforementioned case illustrates that when an employee has filed a claim of unfair discrimination, an employee is not required to specify whether he or she was discriminated against directly or indirectly.

An employee is under no obligation to prove 'intent' in circumstances where an employee raises a claim of direct discrimination.⁹² The effect that the discrimination has on the employee or employees is the most important.⁹³

⁸³ *NEHAWU obo Mofokeng & Others vs Charlotte Theron Children's Home* [2004] 10 BLLR 979 para 22.

⁸⁴ *NEHAWU obo Mofokeng & Others vs Charlotte Theron Children's Home* [2004] 10 BLLR 979 para 27.

⁸⁵ *NEHAWU obo Mofokeng & Others vs Charlotte Theron Children's Home* [2004] 10 BLLR 979 para 26-29.

⁸⁶ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003).

⁸⁷ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 15.

⁸⁸ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 15.

⁸⁹ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 17.

⁹⁰ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 17.

⁹¹ *Harmse v City of Cape Town* (C 966/2002) [2003] ZALC 53 (9 May 2003) para 17.

⁹² *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) 1083.

⁹³ Abrahams D et al *Labour Law in Context* 2ed (2017) 67.

In South Africa, it is not surprising that most cases of unfair discrimination claims heard by the courts are discrimination on the grounds of race.⁹⁴ The racial system of Apartheid did not only involve physical segregation but also consisted of mental oppression of black people and creating an ideology that white people are superior to black people in all forms of life.⁹⁵ Research shows that this ideology is one of the causes of racial discrimination in the workplace and black people remain a target.⁹⁶ The EEA in prohibiting direct racial discrimination in the workplace assists in protecting black employees against racial discrimination.

2.3.1.2 Indirect discrimination

Indirect discrimination is defined as 'a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups'.⁹⁷ In *Association of Professional Teachers & another v Minister of Education & others*⁹⁸, the Industrial Court explained the meaning of indirect discrimination as follows:

'It arises where an employer ... adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce'.⁹⁹

In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others*¹⁰⁰, the employer had three employment funds namely: staff benefit fund, pension fund and provident fund.¹⁰¹ All members of the staff benefit fund were all white and were

⁹⁴ Mokoena K 'The subtleties of racism in the South African workplace' (2020) 3(1) *Int. J. Comput. Digit. Syst* 26.

⁹⁵ Orr L & Goldman T 'Workplace discrimination: Early experience with the EEA' (2001) 18(3) *Indicator SA* 15-16.

⁹⁶ Orr L & Goldman T 'Workplace discrimination: Early experience with the EEA' (2001) 18(3) *Indicator SA* 15-16.

⁹⁷ *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae)* (2021) 42 ILJ 269 (CC) par 92.

⁹⁸ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC).

⁹⁹ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) 1083.

¹⁰⁰ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC).

¹⁰¹ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 287.

paid monthly except for four employees, members of the pension fund were black employees paid weekly and members of the provident fund were black employees paid monthly.¹⁰² The black employees instituted legal action against the employer based on unfair discrimination arguing that not being included in the staff benefit fund amounts to indirect discrimination on the ground of race since most of the monthly paid employees were white.¹⁰³ The Labour Court found that, distributing the fund on the basis of monthly or weekly paid employees amounted to indirect discrimination on the basis of race since only a small number of black employees were paid monthly.¹⁰⁴ The Labour Court described indirect discrimination as follows:

‘Indirect race discrimination occurs when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain race group in circumstances where they are not justifiable’.¹⁰⁵

The aforementioned case is an example of indirect discrimination since the policies of the employer’s employment funds were more in favour of white employees and prejudicial towards the majority of black employees.

As with direct discrimination, in the case of indirect discrimination employees do not have to prove ‘intent’ on the part of the employer.¹⁰⁶ In other words it is not necessary to determine why an employment policy discriminates against certain employees. What is required is that an objective test be applied to establish whether the policy, condition or criteria has a disproportionate effect on a certain group and whether it is objectively justifiable.¹⁰⁷

Since it is impossible for employers to create policies that expressly prejudice black people, some have found ways to mistreat black people in situations that might seem

¹⁰² *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 287.

¹⁰³ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 288.

¹⁰⁴ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 301.

¹⁰⁵ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 285.

¹⁰⁶ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) 1083.

¹⁰⁷ *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) 1083.

neutral but only targets black people.¹⁰⁸ The meaning of indirect discrimination protects a group of employees who have been discriminated against in the workplace rather than focusing on one individual.¹⁰⁹ Black people are thus protected by the definition of indirect discrimination in South Africa.

2.3.2 UNFAIRNESS

Once discrimination is proved to exist, it is necessary to establish whether the discrimination is unfair. The onus of proof is governed by section 11 of the EEA. This section stipulates that if an employee alleges unfair discrimination based on a listed ground such as race, the employer against whom the allegation is made must prove on a balance of probabilities that such discrimination did not happen¹¹⁰ or if the discrimination took place, the employer should prove that the discrimination is either rational and not unfair, or justifiable.¹¹¹ However, if the employee alleges discrimination on arbitrary grounds, the onus is on the employee to prove on a balance of probabilities that the conduct in question is not rational,¹¹² that it amounts to discrimination¹¹³ and that the discrimination is unfair.¹¹⁴

Section 11 of the EEA distinguishes between listed grounds and arbitrary grounds. The complainant is required to specify the ground(s) on which the alleged discrimination took place, since the ground determines on whom the onus rests. When differentiation has been successfully linked with a listed ground under section 6(1) of the EEA, this is not only discrimination, but the discrimination is also presumed to be unfair. The onus then shifts to the employer to show that the discrimination is justifiable.¹¹⁵

¹⁰⁸ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others* (1998) 19 ILJ 285 (LC) 285.

¹⁰⁹ Classen F 'Inequality in the workplace: what constitutes unfair discrimination?' (2019) 25(6) *Occupational Health Southern Africa* 201.

¹¹⁰ Section 11(1)(a) of the EEA.

¹¹¹ Section 11(1)(b) of the EEA.

¹¹² Section 11(2)(a) of the EEA.

¹¹³ Section 11(2)(b) of the EEA.

¹¹⁴ Section 11(2)(c) of the EEA.

¹¹⁵ Dupper O *Essential Employment Discrimination Law* (2004) 43.

In *Sasol Chemical Operations (Pty) Ltd v CCMA and Others*¹¹⁶, Mr Mokoena and Mr Sarel were employees employed for the same job¹¹⁷, however Mr Sarel who was a white employee earned a higher salary than Mr Mokoena who was a black employee even though they were employed for the same position.¹¹⁸ Sasol argued that Mr Sarel earned a higher salary because he had more experience than Mr Mokoena.¹¹⁹ The issue in this case was whether Sasol had unfairly discriminated against Mr Mokoena. The Labour Court in this case provided that:

“The term ‘alleged’ has not been consistently interpreted by the courts. It must be presumed to mean something less than making out a *prima facie* case, as would be required in the ordinary course with the burden of proof is not reversed. However, the weight of authority indicates that it means more than an unsupported contention or mere accusation”.¹²⁰

The Labour court in this case provided that a mere allegation of unfair discrimination is not sufficient in a claim of unfair discrimination, the claimant must prove on a balance of probabilities that the respondent discriminated against them on a ground such as race.¹²¹ In other words, there must be a link between the discrimination and race. In this case, Mr Mokoena failed to prove that the wage discrimination was because of his race.¹²²

Section 11(1) of the EEA places the burden of proof on the employer when an employee has raised allegations of discrimination on listed grounds such as race. This is different to the general burden of proof that is required by the law, that ‘he who alleges must prove’ because it places an unduly harsh burden of proof on an employee since the employee will be required to allege and furthermore provide evidence of such an allegation.¹²³ Section 11 of the EEA has made it easier for employees to raise a claim of racial discrimination by placing the burden on the employer. Black employees are thus protected as a consequence.¹²⁴

¹¹⁶ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB.

¹¹⁷ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 6.

¹¹⁸ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 6.

¹¹⁹ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 5.

¹²⁰ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 20.

¹²¹ *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 20.

¹²² *Sasol Chemical Operations (Pty) Ltd v CCMA and Others* (J2680/16) [2018] ZALCJHB 433 para 25.

¹²³ Dupper O *Essential Employment Discrimination Law* (2004) 463.

¹²⁴ Collier D et al *Labour Law in the South African: Context and Principles* (2018) 467.

Equal pay for work of equal value is discussed below. The reason for this topic being included in this research is that in terms of the EEA unequal pay for work of equal value can amount to unfair discrimination.

2.3.3 EQUAL PAY FOR WORK OF EQUAL VALUE

Prior to the amendment of the EEA wage discrimination on the ground of race was dealt with under section s6(1) of the EEA.¹²⁵ The Employment Equity Amendment Act 47 of 2013 amended section 6 of the EEA by inserting section 6(4) which prohibits wage discrimination in the workplace.¹²⁶ Section 6(4) reads:

‘A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground is unfair discrimination’.¹²⁷

Wage discrimination based on the listed grounds such as race was prohibited prior to the amendment of section 6 of the EEA.¹²⁸ Section 6(4) was enacted in response to the criticism by the International Labour Organisation to the effect that South Africa lacked a statutory provision that expressly prohibits wage discrimination based on prohibited grounds such as race.¹²⁹

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The Employment Equity Regulations (Regulations) prescribe the criteria and the methodology for assessing work of equal value. Clause 3 of the Regulations places a duty on employers to eliminate unfair discrimination in the workplace. Clause 3 of the Regulations reads:

‘(1) An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or

¹²⁵ Ebrahim S ‘Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom’ (2016) 19 *PER / PELJ* 2.

¹²⁶ Laubscher T ‘Equal pay for work of equal value – A South African perspective’ (2016) 37 *Indus. L.J (Juta)* 804.

¹²⁷ Section 6(4) of the Employment Equity Amendment Act 47 of 2013.

¹²⁸ *Ntai and others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) para 17.

¹²⁹ Ebrahim S ‘Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom’ (2016) 19 *PER / PELJ* 2.

indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1) of the Act.

- (2) Without limiting sub-regulation (1), an employer must ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability'.¹³⁰

Clause 3 of the Regulations places an obligation on employers to promote equality in the workplace by taking steps to eliminate differences in terms and conditions including paying employees who are doing work of equal value equal remuneration and not to unfairly discriminate against employees in terms of remuneration on unacceptable grounds such as race.

Clause 4 of the Regulations provides the meaning of work of equal value as follows:

'The work performed by an employee -

- (1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
- (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
- (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7'.¹³¹

Clause 4 provides the circumstances under which work is of equal value.¹³² An employer is thus prohibited from paying employees unequal pay when the work of employees is identical or interchangeable.¹³³ This was the issue in *Mangena & Others v Fila South Africa (Pty)*¹³⁴ where Mr Shabalala, a warehouse manager, alleged that he performed identical work to that performed by Ms McMullin, who was responsible for the company's sale or return programme.¹³⁵ Mr Shabalala claimed that he was unfairly discriminated against on the ground of race.¹³⁶ The Labour Court assessed the two roles and found that

¹³⁰ Clause 3 of the Employment Equity Regulations 2014 in GN R595 GG 37873 of 1 August 2014.

¹³¹ Clause 4 of the Employment Equity Regulations 2014 in GN R595 GG 37873 of 1 August 2014.

¹³² Clause 4 of the Employment Equity Regulations 2014 in GN R595 GG 37873 of 1 August 2014.

¹³³ Laubscher T 'Equal pay for work of equal value – A South African perspective' (2016) 37 *Indus. L.J (Juta)* 17.

¹³⁴ *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC).

¹³⁵ *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC) para 4.

¹³⁶ *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC) para 4.

Ms McMullin's role had more responsibilities and concluded that the two roles were not of equal value thus there was no unfair discrimination on the ground of race.¹³⁷

Clause 6 of the Regulations contains criteria to be considered when determining whether work is of equal value and provides as follows:

- (1) In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
- (a) the responsibility demanded of the work, including responsibility for people, finances and material;
 - (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
 - (c) physical, mental and emotional effort required to perform the work; and
 - (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.
- (2) In addition to the criteria specified in sub-regulation (1) any other factor indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.
- (3) The assessment undertaken in terms of sub-regulations (1) and (2) must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of section 6(1) of the Act'.¹³⁸

Clause 6 of the Regulations places an obligation on employers to take certain factors into consideration such as skills, qualifications and responsibilities when determining whether work is of equal value and further prohibits employers from unfairly discriminating against employees in terms of remuneration on grounds such as race when employees are performing work of equal value. Black employees are thus protected as a result of the aforementioned provisions.

Clause 7 of the Regulations lists several grounds that could justify a difference in treatment and provides as follows:

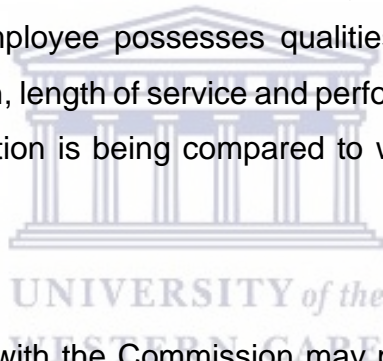
¹³⁷ *Mangena & Others v Fila South Africa (Pty) Limited and others* [2009] 12 BLLR 1224 (LC) para 15-17.

¹³⁸ Clause 6 of the Employment Equity Regulations 2014 in GN R595 GG 37873 of 1 August 2014.

'(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

- (a) the individuals' respective seniority or length of service;
- (b) the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- (c) the individuals' respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied'.¹³⁹

Clause 7 of the Regulations provides defences which an employer may raise when an employee has raised a claim of unfair discrimination in terms of remuneration against an employer. Clause 7 allows employers to discriminate against an employee in terms of remuneration when another employee possesses qualities listed in clause 7 such as occupying a more senior position, length of service and performs better than the employee to whom the employee in question is being compared to which justifies a difference in remuneration.



The Minister after consultation with the Commission may provide guidelines on how to assess work of equal value.¹⁴⁰ As a result of section 6(5) of the Act, the Minister issued the Code of Good Practice on Equal Pay /Remuneration for Work of Equal Value on the 1st of June 2015 (Code). This Code was issued 'to provide a practical guideline to employers and employees on how to apply the principles of equal pay/remuneration for work of equal value in their workplaces'.¹⁴¹ The Code provides three key questions that should be answered when assessing the issue of equal pay for work of equal value. These questions are as follows:

- '4.4.1. Are the jobs that are being compared the same, substantially the same or of equal value in terms of an objective assessment?

¹³⁹ Clause 7 of the Employment Equity Regulations 2014 in GN R595 GG 37873 of 1 August 2014.

¹⁴⁰ Section 6(5) of the Employment Equity Amendment Act 47 of 2013.

¹⁴¹ Provision 1.1 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015.

4.4.2. Is there a difference in the terms and conditions of employment, including pay remuneration, of the employees in the jobs that are being compared?

4.4.3. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?¹⁴²

This Code provides that unequal remuneration of employees of the same employer performing the same or similar tasks does not necessarily amount to unfair discrimination. It will only amount to unfair discrimination if the difference in remuneration is based on prohibited grounds under section 6 of the Act such as race.¹⁴³ In *Pioneer Foods (Pty) Ltd v Workers Against Regression & others*¹⁴⁴ Steenkamp J provided that in order to establish discrimination, the employee should show that the work performed is equal or of equal value to that of the employee earning a higher remuneration and that the discrimination is based on a prohibited ground such as race.¹⁴⁵ Wage inequalities between different races do not always amount to unfair discrimination.¹⁴⁶ There could be justifiable reasons for the difference in remuneration and factors such as the duration of service and qualifications should be taken into consideration.¹⁴⁷

The amendment to section 6 of the EEA to include the prohibition of unfair discrimination for work of equal value protects black people from being exploited in the workforce. The Regulations do not only place obligations on employers to take steps to remove differences in the remuneration of employees who are performing work of equal value, but also prohibits employers from paying employees who are doing work of equal value different remuneration based on race. This thus protects black employees from employers who can simply claim that the employees are not doing the same job.

The statutory defences that may be raised by an employer are discussed below.

¹⁴² Provision 4 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015.

¹⁴³ Provision 4 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015.

¹⁴⁴ *Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (2016) 37 ILJ 2872 (LC).

¹⁴⁵ *Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (2016) 37 ILJ 2872 (LC) para 19.

¹⁴⁶ *Ntai and others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) par 17.

¹⁴⁷ Provision 7 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015.

2.3.4 STATUTORY DEFENCES

Section 6(2) of the EEA contains defences that an employer can raise when facing allegations of unfair discrimination. Section 6(2) of the EEA provides for two defences to a claim of unfair discrimination namely 'inherent requirement of the job' and 'affirmative action'.¹⁴⁸ The defence: an inherent requirement of the job will be discussed below, while affirmative action will be discussed in the chapter that follows. The defence that may be raised by an employer in terms of section 60 of the EEA is also discussed below.

The phrase "inherent requirement of a job" can be broken down into two parts namely: inherent and requirement. The word 'inherent' means that it is a permanent or an essential feature, and the word 'requirement' means that it is a necessary feature or a compulsion.¹⁴⁹ The term 'inherent requirement' is defined as:

'Those requirements the employer stipulates are necessary for a person to be appointed to the job and are necessary in order to enable an employee to perform the essential functions of the job'.¹⁵⁰

The employer is required to show that it is essential for an employee to possess the required feature in order to fulfil the job description.¹⁵¹ In other words, if the nature of the job can be fulfilled by an employee who does not possess the required features, then an employer cannot rely on the inherent requirement of the job as a defence.

In *Independent Municipal & Allied Workers Union & another v City of Cape Town*¹⁵² the respondent refused to appoint an employee on the grounds that he was an insulin dependent diabetic.¹⁵³ The employee raised a claim of unfair discrimination in terms of section 6(1) of the EEA.¹⁵⁴ The employer raised an inherent requirement of the job as a

¹⁴⁸ *South African Airways (Pty) Ltd v GJJVV* [2014] 8 BLLR 748 (LAC) para 45.

¹⁴⁹ Lebepe NN *Inherent Requirement of the Job as Defence to A Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010) 34.

¹⁵⁰ 4 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015.

¹⁵¹ Rycroft A 'Inherent requirements of the job' (2015) 36 *Indus. L.J.* (JUTA) 900 901.

¹⁵² *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC).

¹⁵³ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 2.

¹⁵⁴ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 2.

defence.¹⁵⁵ The issue was whether the respondent's imposition of a blank ban on the employment of diabetics as firefighters amounts to an unfair discrimination.¹⁵⁶ Murphy AJ in this case provided that an individual assessment is important when determining the fitness of an employee rather than generalising all diabetics as unfit to be firefighters.¹⁵⁷ He explained that the job is hazardous in nature and employees' fitness depends on individual assessment.¹⁵⁸ Murphy AJ found the respondent guilty of generalising all insulin dependent diabetics as unfit to be firefighters without conducting an individual assessment.¹⁵⁹ In other words, the blanket ban by the respondent amounted to unfair discrimination.¹⁶⁰

In *South African Municipal Workers Union obo Damons v City of Cape Town*,¹⁶¹ an employee employed as a firefighter applied for senior position in the workplace.¹⁶² The employee's application was however rejected due to the fact the employee had a disability which led to the employer declaring the employee unfit to work in the senior position at issue.¹⁶³ The employee then raised a claim of unfair discrimination on the ground of disability.¹⁶⁴ The employer raised inherent requirement of the job defence and argued that it was an inherent requirement of the job for an employee to undergo a physical assessment for the position.¹⁶⁵ The Labour Court held that the decision not to appoint the employee was unfair since the employee got injured while performing his duties¹⁶⁶ and

¹⁵⁵ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 3.

¹⁵⁶ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 1.

¹⁵⁷ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 113.

¹⁵⁸ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) para 108-111.

¹⁵⁹ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) 111.

¹⁶⁰ *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (CC) 111.

¹⁶¹ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9.

¹⁶² *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 3.

¹⁶³ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 5.

¹⁶⁴ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 1.

¹⁶⁵ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 4.

¹⁶⁶ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 21.

furthermore held that denying the employee promotion due to his disability impaired on his dignity.¹⁶⁷ The Labour Court held that the employer unfairly discriminated against the employee on the ground of disability.¹⁶⁸ The inherent requirement of the job defence is interpreted very restrictively by the South African courts thus employers have to justify the requirement.¹⁶⁹ This entails showing that the requirement is an essential feature of the job that is required in order to perform the proper functions of the job.¹⁷⁰ If the employer fails to show that the requirement is an essential feature of the job, then the differentiation could amount to unfair discrimination.¹⁷¹ The restrictive interpretation of the inherent requirement of the job defence thus protects black employees from unfair discrimination in the workplace.

An additional defence that may be raised by an employer is governed by section 60 of the EEA. It is possible for an employer to be held liable when an employee unfairly discriminates against another employee on a ground such as race and the employer fails to take consult with the parties concerned and fails to take the required steps to eliminate the alleged conduct.¹⁷² This issue was emphasised in *Bigger v City of JHB EMS*¹⁷³. In this case, the applicant and his family were racially harassed by his white colleagues in the resident provided by the respondent.¹⁷⁴ The applicant had complained about the racial harassments against him and his family to the respondent however this matter was taken lightly.¹⁷⁵ Lagrange J held that the respondent unfairly discriminated against the applicant by ignoring the seriousness of the matter.¹⁷⁶ In other words, the respondent failed to prove that he had taken serious action against the racial harassment experienced by the applicant in the workplace.

¹⁶⁷ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 21.

¹⁶⁸ *South African Municipal Workers Union obo Damons v City of Cape Town* (C306/2015) [2018] ZALCCT 9 para 23.

¹⁶⁹ *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 ILJ 1048 (IC) 1050.

¹⁷⁰ Basson AC et al *The New Essential Labour Law Handbook* 6 ed (2017) 237.

¹⁷¹ Rycroft A 'Inherent Requirements of the Job' (2015) 36 *Indus LJ* (Juta) 900.

¹⁷² Section 60(3) of the EEA.

¹⁷³ *Bigger v City of JHB EMS* [2011] ZALCJHB 5.

¹⁷⁴ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 4.

¹⁷⁵ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 5.

¹⁷⁶ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 30.

Section 60 of the EEA is a defence available to an employer when the employer done all that is reasonably practicable to ensure that the employee in question does not act in contravention of the EEA. Section 60 of the EEA protects black employees against unfair discrimination in the workplace by placing a duty on employers to protect employees against racial discrimination committed by other employees in the workplace and furthermore places a duty on employers to take positive measures to protect those employees who are victims of racial discrimination in the workplace. Section 60 furthermore protects black employees by holding employers accountable for failing to take positive measures to protect victims of racial discrimination in the workplace.

It is important for black employees to have knowledge of the remedies that are available to them in circumstances where they are successful with claims against their employers based on racial discrimination. These remedies are discussed below.

2.4. REMEDIES FOR UNFAIR DISCRIMINATION

Section 50(2) of the EEA provides appropriate remedies for employees in instances where they have been unfairly discriminated against. Section 50(2) states as follows:

'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

- (a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;
- (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
- (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
- (e) an order directing the removal of the employer's name from the register referred to in section 41; or
- (f) the publication of the Court's order'.¹⁷⁷

Section 50(2) of the EEA makes provision for both compensation and damages. Compensation is provided to the employee for the loss of their statutory right not to be

¹⁷⁷ Section 50(2) of the EEA.

unfairly discriminated against in the workplace and damages is awarded for the payment of money that has been lost.¹⁷⁸ The purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the employee in the financial position he or she would have been in had he, or she, not been unfairly discriminated against.¹⁷⁹ In cases where the employee suffered no patrimonial loss, the Labour Court through its discretion may make an award in the form of money to compensate the employee for the insult, humiliation and indignity or hurt that was suffered by the employee as a result of the unfair discrimination.¹⁸⁰

In *Reynhardt v University of South Africa*¹⁸¹, the Labour Court found that the respondent unfairly discriminated against the applicant on the ground of race for refusing to appoint the applicant for the Dean position.¹⁸² The Labour Court ordered the respondent to pay the applicant an amount equivalent to a Dean's twelve months' salary.¹⁸³ Secondly the respondent was ordered to pay damages to the applicant.¹⁸⁴ Thirdly the respondent was ordered to pay the amount owed to the applicant within 60 days of the order.¹⁸⁵ In the aforementioned case the order made by the Labour Court protected the employee because by the employee receiving a monetary value for pain and suffering caused by the respondent and for the violation of the employee's dignity. This order shows that racial discrimination is taken seriously in South Africa thus employees are encouraged to report acts of unfair discrimination in the workplace. Since employers may be required to compensate for patrimonial loss, this may discourage employers from discriminating against employees on a racial basis since such employers will suffer financial loss.

In *Bigger v City of JHB EMS*¹⁸⁶, the Labour Court held that the employer unfairly discriminated against the employee on the ground of race for failing to take appropriate measures to deal with the seriousness of racism in the workplace.¹⁸⁷ The Labour Court ordered the respondent to pay the applicant an amount of two months' salary at the applicant's current rate for failing to take the necessary steps to protect the applicant from

¹⁷⁸ Dupper O *Essential Employment Discrimination Law* (2004) 477.

¹⁷⁹ *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 ILJ 2774 (LAC) para 78-80.

¹⁸⁰ *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 ILJ 2774 (LAC) para 78-80.

¹⁸¹ *Reynhardt v University of South Africa* [2008] 4 BLLR 318 (LC).

¹⁸² *Reynhardt v University of South Africa* [2008] 4 BLLR 318 (LC) para 146.

¹⁸³ *Reynhardt v University of South Africa* [2008] 4 BLLR 318 (LC) para 146.

¹⁸⁴ *Reynhardt v University of South Africa* [2008] 4 BLLR 318 (LC) para 146.

¹⁸⁵ *Reynhardt v University of South Africa* [2008] 4 BLLR 318 (LC) para 146.

¹⁸⁶ *Bigger v City of JHB EMS* [2011] ZALCJHB 5.

¹⁸⁷ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 29.

racial discrimination in the workplace.¹⁸⁸ Secondly the respondent was ordered to pay the applicant one month's salary at the applicants current rate for unfairly discriminating against the applicant in taking disciplinary action against him alone, without charging the white employee who racially discriminated against the applicant.¹⁸⁹ Thirdly the respondent was ordered to review open positions in the workplace where the applicant is suitably qualified to work on the same remuneration package than the applicant currently receives.¹⁹⁰ Furthermore, the respondent was ordered to investigate any acts of racial discrimination present in the workplace and take disciplinary action against alleged perpetrators.¹⁹¹ In the aforementioned case, the order made by the Labour Court protected the employee in the following ways: firstly, the respondent was ordered to appoint the employee in available positions where the employee was suitably qualified. This allows the employee to be placed in a position that is different from the perpetrator to avoid psychological trauma. Secondly ordering the respondent to examine acts of racial discrimination in the workplace encourages employees to speak out about their racial experiences in the workplace. Furthermore, taking disciplinary actions against the perpetrators discourages acts of racial discrimination from taking place in the workplace.

The remedies available in terms of section 50(2) of the EEA are important to black employees who have been subjected to racial discrimination in the workplace. This is because the Labour Court can order the employer to pay damages in instances where the employee has suffered patrimonial loss in order to place the employee in the financial position, he or she would have been but for the unfair discrimination. In circumstances where the Labour Court orders the employer to compensate the employee as a consequence of the insult, humiliation and indignity or hurt that was suffered by the black employee this shows that racial discrimination is taken seriously. The order which the Labour Court may impose on the employer to take steps to prevent racial discrimination from reoccurring assists black employees from experiencing racial discrimination in the future. The Labour Court may order an employer who is not a designated employer to comply with the obligations set out in Chapter 3 of the EEA. The Minister of Labour (Minister) is required to keep a register of all designated employers who have submitted

¹⁸⁸ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 31.

¹⁸⁹ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 31.

¹⁹⁰ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 31

¹⁹¹ *Bigger v City of JHB EMS* [2011] ZALCJHB 5 para 31.

their employment equity report.¹⁹² The Labour Court is furthermore empowered to order the removal of the employer's name from the register of designated employers who has submitted their employment equity report to the Minister, and this protects black employees in that the removal of the employer's name from the register could result in a fine which may have the effect of discouraging racial discrimination.

2.5 CONCLUSION

This chapter consists of a discussion on the legislative provisions governing racial discrimination in the workplace. The objective of this chapter is to determine the extent to which black employees are protected against racial discrimination. Section 5 of the EEA protects black employees since this section places an obligation on employers to eliminate unfair discrimination in any employment policy or practice.

Section 6 of the EEA protects black employees by stating that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more of the grounds listed in section 6 which includes race. The EEA in prohibiting direct and indirect racial discrimination in the workplace assists in protecting black employees against racial discrimination.

The meaning of direct discrimination protects black employees from being unfairly discriminated in the workplace solely because of their race. The meaning of indirect discrimination protects black employees who are subjected to racial discrimination in instances where the employment criteria, policies or practises seem neutral however are prejudicial towards black employees. The prohibition against wage discrimination for work of equal value promotes equality in the workplace and prohibits employers from exploiting black employees by paying them a lower salary compared to white employees that are doing work of equal value.

Section 11 of the EEA has made it easier for employees to raise a claim of discrimination by eliminating the harsh burden which could have been on employees, however which is on employers in circumstances where claims of discrimination are based on listed grounds such as race.

¹⁹² Section 41 of the EEA.

The remedies which are available in section 50(2) of the EEA are important to black employees who have been subjected to racial discrimination since the employer may be ordered to pay damages to the employee concerned, or to compensate the employee. The Labour Court is also empowered to order the employer to take steps to prevent racial discrimination from reoccurring which assists black employees from experiencing racial discrimination in the future. The Labour Court can furthermore order the removal of the employer's name from the register of designated employers who have submitted their employment equity report to the Minister, and this protects black employees in that the removal of the employer's name from the register could result in a fine.

The chapter that follows contains a discussion on the provisions governing affirmative action in South Africa.



CHAPTER 3

THE SOUTH AFRICAN LEGISLATIVE PROVISIONS GOVERNING AFFIRMATIVE ACTION

3.1. INTRODUCTION

Chapter 2 contains a discussion on the meanings of discrimination, unfairness, and the remedies available to employees who institute claims on the grounds of racial discrimination. Sections 5 and 6 of the EEA are important in protecting black employees against racial discrimination. Chapter 2 confirms that black employees are protected by the EEA prohibiting direct and indirect racial discrimination and are further assisted by the burden of proof outlined in section 11 of the EEA which places a burden of proof on the employer when the employee has raised a claim of racial discrimination.

During Apartheid, legislation provided for racially segregated societies for black and white people.¹⁹³ This was achieved by the enactment of discriminatory legislative provisions, by separate education systems and racially segregated workplaces.¹⁹⁴ Section 9 of the Constitution places a positive duty on the State to promote equality by implementing legislative and other measures aimed at advancing those people who are disadvantaged by Apartheid laws.¹⁹⁵ Formal equality represents a uniform view of equality.¹⁹⁶ It focuses on the importance of neutral treatment where the law is applied equally to everyone without taking into consideration the circumstances or context of the individual or group.¹⁹⁷ In terms of formal equality affirmative action is an exception to the right to equality.¹⁹⁸ The aim of substantive equality is to bring about a social and economic transformation in which everyone has access to resources and amenities of life and can develop to their full human potential.¹⁹⁹ In terms of substantive equality, equality cannot

¹⁹³ Sihlangu P 'Critical analysis of transformative policy interventions to redress past Apartheid land segregation in South Africa: From exclusion to inclusive nation building' (2021) 5 *JoNPS* 73.

¹⁹⁴ Treiman DJ *The Legacy of Apartheid: Racial Inequalities in The New South Africa* (2005) 1-2.

¹⁹⁵ Section 9(2) of the Constitution of the Republic of South Africa 1996.

¹⁹⁶ Currie I & De Waal J *The Bill of Rights handbook* 6 ed (2013) 213.

¹⁹⁷ Nemaconde M 'Employment equity and affirmative action in South Africa: A Review of the Jurisprudence of the courts since 1994' (2016) 3 *African Journal of Democracy and Governance* 80.

¹⁹⁸ Smith A 'Equality constitutional adjudication in South Africa (2014) 14 *AHRLJ* 611.

¹⁹⁹ Langa P 'Transformative constitutionalism' (2006) 3 *Stell LR* 352.

be achieved through formal equality alone that guarantees equality before the law and protects the persons, property, and freedom to contract of each individual.²⁰⁰ Positive action is required by the state to ensure a more equitable distribution of resources since market outcomes are inherently unequal.²⁰¹ Some people are inherently more disadvantaged than others thus need more and different resources to enjoy genuine freedom and fair access to opportunities.²⁰² This however does not mean that the freedom of those who are inherently advantaged will have their freedom reduced. Substantive equality simply aims to increase the opportunities of those suffering persistent disadvantage.²⁰³

In the South African constitution a substantive approach to equality has been adopted by stating that measures need to be put in place in order to advance those who have been affected by Apartheid laws.²⁰⁴ The EEA was enacted to give effect to the Constitution, namely, to promote equality in the workplace and to redress the disadvantages in employment by implementing affirmative action measures.²⁰⁵ The EEA places a duty on designated employers to implement affirmative action measures in order to advance people from designated groups and by doing so promoting equality in the workplace.²⁰⁶ The reason for adopting a substantive approach to equality is follows:

'Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and

²⁰⁰ Dupper O & Garbers C *Equality in the workplace: Reflection from South Africa and Beyond* (2009) 9.

²⁰¹ Loenen T 'The equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13 *SAJHR* 4.

²⁰² Albertyn C, 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' 2018 *SAJHR* 441-442.

²⁰³ Dupper O & Garbers C *Equality in the workplace: Reflection from South Africa and Beyond* (2009) 9.

²⁰⁴ Mushariwa M 'The cycles of affirmative action in the transformation of the workplace' (2020) 32 *SA Merc LJ* 99.

²⁰⁵ Preamble of the EEA.

²⁰⁶ Section 15 of the EEA.

positive action designed to redress the imbalances of the past are therefore needed'.²⁰⁷

In favour of a substantive approach to equality, the Constitutional Court held that:

'We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved'.²⁰⁸

This chapter consists of a discussion on the legislative provisions governing affirmative action and the procedural obligations which the EEA places on designated employers. The aim of this chapter is to determine the extent to which the legislative provisions governing affirmative action protects black employees and whether the said provisions should be amended and/or supplemented.

3.2. THE MEANING OF AFFIRMATIVE ACTION IN TERMS OF THE EEA

Section 15(1) of the EEA defines affirmative action as:

'Measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workplace of a designated employer'.²⁰⁹

The overall goal of affirmative action is to achieve equality in the workplace²¹⁰ and this is achieved through positive measures being put in place to achieve that goal.²¹¹ A designated employer is required to implement affirmative action measures for people from designated groups in order to achieve employment equity.²¹² Affirmative action may constitute a duty and a defence. A designated employer has a duty to comply with section 15(2) of the EEA and furthermore has a duty to follow the procedural obligations in terms of section 13 of the EEA which includes: consulting with its employees, conducting an analysis, preparing an employment equity plan and reporting to the Director-General on

²⁰⁷ Provision 5 Explanatory Memorandum to the Employment Equity Bill in GN 1840 GG 18481 of 1 December 1997.

²⁰⁸ *President of the Republic of South Africa v Hugo* [1997] ZACC 4 68.

²⁰⁹ Section 15(1) of the Employment Equity Amendment Act 47 of 2013.

²¹⁰ Section 2(b) of the EEA.

²¹¹ Dupper & Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 11.

²¹² Section 13(1) of the EEA.

progress made in implementing its employment equity plan. Affirmative action as a duty will be discussed first which will be followed by a discussion on affirmative action which may be raised as a defence.

3.3 SECTION 15 OF THE EEA

In terms of section 15(2) of the EEA:

- '(2) Affirmative action measures implemented by a designated employer must include-
- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
 - (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
 - (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
 - (d) subject to subsection (3), measures to-
 - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
 - (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development'.²¹³

Each of the forms of affirmative action measures are discussed individually below.

3.3.1. Measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups

The first form of affirmative action measures consists of the identification and elimination of employment barriers. As far as the meaning of 'barrier' is concerned, 'a barrier exists where a policy, practice or an aspect of the work environment limits the opportunities of

²¹³ Section 15(2) of the EEA.

employees because they are from designated groups'.²¹⁴ Examples of barriers to employment equity implementation include: a lack of communication between human resources and the management team,²¹⁵ a lack of commitment by the management team to implement employment equity measures²¹⁶ and a lack of understanding of the purpose of an employment equity measure.²¹⁷ These measures include monitoring the processes that exist to ensure that the workplace is following the correct procedures when appointing and promoting candidates.²¹⁸ The designated employer should ensure that the recruitment team complies with the employment equity policy of the workplace.²¹⁹ Designated employers also have a duty to identify and remove constraints and/ or barriers that affect the process of complying with the employment equity plan.²²⁰

This measure protects black people since the EEA places a positive duty on designated employers to identify and eliminate employment barriers that adversely affect people from designated groups which includes black people. The prohibition of unfair discrimination applies to all employers however, the EEA only places an obligation on designated employers to implement affirmative action measures meaning that employees working for employers who are not designated employers are not protected by the obligation placed on designated employers to identify and eliminate employment barriers.²²¹ The scope of the meaning of designated employers in terms of the EEA should thus be extended so that more black employees can be protected as a result of the obligation that is placed on the employer to implement this measure.

²¹⁴ Abrahams D et al *Labour Law in Context* 2 ed (2017) 82.

²¹⁵ Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 50.

²¹⁶ Maleka MJ & Siziba D 'Barriers to implementing employment equity in a government department' (2019) 54 *J Public Adm Res Theory* 76.

²¹⁷ Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 55.

²¹⁸ Du Toit D *Unfair Discrimination in the Workplace* (2014) 158.

²¹⁹ Provision 7.3 Code of good practice: Preparation, implementation and monitoring of employment equity plans in GN 1394 of 23 November 1999.

²²⁰ Provision 7.3 Code of good practice: Preparation, implementation and monitoring of employment equity plans in GN 1394 of 23 November 1999.

²²¹ Abrahams D et al *Labour Law in the Context* 2 ed (2017) 81.

3.3.2. Measures designed to further diversity in the workplace based on equal dignity and respect of all people

“Diversity management” refers to a ‘planned commitment by the employer and the recruitment team to recruit, retain and promote a diverse mix of employees’.²²² This measure does not focus solely on numerical targets but also encourages the workplace to make people from designated groups to feel welcomed by getting to learn different cultures and beliefs.²²³ This will allow people from designated groups to feel equally valued.²²⁴

Workplace policies should be discussed and these can include the workplace dress code.²²⁵ The workplace dress code is important because it may clash with the dress code of employees’ cultures and beliefs.²²⁶ The employer should attempt to accommodate employees’ cultures and beliefs or conclude an agreement with the employees in terms of dress code.²²⁷ In *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others*²²⁸, five male employees were dismissed from employment for wearing their dreadlocks to work.²²⁹ The employer argued that wearing dreadlocks to work was against the employment dress code.²³⁰ Three of the employees wore dreadlocks because they were Rastafarians, and the other two employees wore them for cultural purposes.²³¹ They argued that their employer had unfairly discriminated against them on the grounds of religion and/ or culture.²³² Maya JA held that the employer provided no evidence to show that having dreadlocks would affect the employees’ performance thus there was no rational connection between the purported purpose of the

²²² Ivancevich JM & Gilbert JA ‘Diversity management: Time for a new approach’ (2000) 29(1) *Public Pers Manage* 77.

²²³ Meyer M *Managing Human Resource Development: An Outcomes-Based Approach* (1999) 275.

²²⁴ Meyer M *Managing Human Resource Development: An Outcomes-Based Approach* (1999) 273.

²²⁵ *Dlamini and Others v Green Four Security* [2006] 11 BLLR 1074 (LC) para 55.

²²⁶ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 para 161.

²²⁷ *Dlamini and Others v Green Four Security* [2006] 11 BLLR 1074 (LC) para 32.

²²⁸ *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA).

²²⁹ *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) 1375.

²³⁰ *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) para 3.

²³¹ *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) 1375.

²³² *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) 1375.

discrimination and the measure taken.²³³ The importance of diversity management is to maximise every employee's potential to contribute towards the workplace's mission and goal.²³⁴ Since diversity management acknowledges differences among people, having different types of employees with different attributes contributes towards the workplace's success.²³⁵

The importance of this measure is that it teaches employers and employees to be open minded when it comes to diversity and encourages them to learn more about other employees' cultures and beliefs. Research shows that some black people in South Africa belong to a certain tribe (Xhosa, Sesotho or Zulu) and follow different cultures and beliefs based on the tribe they belong to.²³⁶ It is thus important for employers to accommodate different cultures and beliefs in the workplace so that black employees can feel free to follow their culture without the fear of being judged or unfairly discriminated against. This measure however only applies to designated employers which means that black employees working for employers who are not designated employers are not all protected by the obligation placed on designated employers to implement measures designed to further diversity in the workplace. It is for this reason that it is recommended that the meaning of designated employer be extended.

3.3.3 Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities

Section 1 of the EEA defines 'reasonable accommodation' as:

'Any modification or adjustments to a job or to the working environment that will enable a person from designated group to have access to or practice or advance in employment'.²³⁷

'Reasonable accommodation' may entail holding meetings during working hours so that those employees who have family responsibilities are not inconvenienced.²³⁸ If meetings

²³³ *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2013) 34 ILJ 1375 (SCA) para 25.

²³⁴ Gwele NS 'Diversity management in the workplace: beyond compliance' (2009) 32 *Curationis* 4.

²³⁵ Uys I 'Diversity management: Reasons and challenges' (2003) 3 *Politeia* 31.

²³⁶ Baloyi EM 'Tribalism: Thorny issue towards reconciliation in South Africa – A practical theological appraisal' (2018) 74(2) *HTS Teologiese Studies/Theological Studies* 4.

²³⁷ Section 1 of the EEA.

²³⁸ Du Toit D *Unfair Discrimination in The Workplace* (2014) 160.

are held after hours, employees should be notified in advance so that arrangements can be made.²³⁹ Reasonable accommodation may also entail accommodating those employees practicing a particular faith by allowing them to have their prayer sessions at work and excusing such employees from work on religious holidays.²⁴⁰ In case of people with disabilities, reasonable accommodation may involve, job-restructuring, providing transport, providing employee with a personal assistant, and providing reserved parking space for employee with disability.²⁴¹

This measure protects black people since the EEA places an obligation on designated employers to make reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities in the workplace. This measure however only applies to designated employers which means that black employees working for employers who are not designated employers are not all protected by the obligation placed on designated employers.

3.3.4. Ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce

A designated employer has a duty to ensure that there is an equal representation of suitably qualified people from designated groups in all occupational levels of employment.²⁴² A person is considered to be suitably qualified if they possess either one or a combination of the following qualities: formal qualifications, prior learning, experience in the relevant job or has the capacity to acquire, within a reasonable time, the ability to do the job.²⁴³ A designated employer is required to consider all these factors and should not unfairly discriminate against a designated employee solely because such an employee lacks relevant experience.²⁴⁴ The definition of 'suitably qualified persons' is wide and includes not only persons from designated groups who have obtained formal

²³⁹ Du Toit D *Unfair Discrimination in The Workplace* (2014) 160.

²⁴⁰ Bernard RB 'Reasonable accommodation in the workplace: To be or not to be' (2014) 17(6) *PER / PELJ* 2870.

²⁴¹ Basson AC et al *The New Essential Labour Law Handbook* 7 ed (2017) 217.

²⁴² Section 15(2)(i) of the EEA.

²⁴³ Section 20(3) of the EEA.

²⁴⁴ Section 20(5) of the EEA.

qualifications but also persons from designated groups who have not obtained formal qualifications, but who has the relevant experience and/or prior learning.²⁴⁵

In *Stoman v Minister of Safety & Security & others*²⁴⁶, the applicant applied for position of superintendent.²⁴⁷ He had obtained the highest marks out of all the candidates that had applied for the position and had been informed by one of the authorities that he was the most suitable candidate for the position.²⁴⁸ However, the position was given to a black candidate who had applied for the position late and obtained a lower mark than the applicant.²⁴⁹ The applicant then filed an unfair discrimination claim against the respondents on the grounds of race.²⁵⁰ The respondents argued that the decision taken was based on complying with the provisions of the EEA which places a duty on designated employers to implement affirmative action measures in order to advance those employees disadvantaged by unfair discrimination of the past.²⁵¹ Van der Westhuizen J held that affirmative action measures do not focus on an individual but rather focuses on advancing a group of people who were disadvantaged because of unfair discrimination in the past.²⁵² Van der Westhuizen held furthermore that since there was an overrepresentation of white people in the position, it was necessary to appoint a black candidate in order to promote racial equality.²⁵³ Van der Westhuizen held that the applicant failed to provide evidence of unfair discrimination.²⁵⁴

This measure is important since it places a duty on designated employers to appoint suitably qualified people from designated groups in levels of the workplace where they are underrepresented. This measure thus gives black people confidence to compete for top positions in the workplace. Furthermore, this measure protects black employees by preventing one race from dominating certain levels of the workplace. However, this affirmative action measure should only be complied with by designated employers thus black employees employed by employers who are not designated employers are still not

²⁴⁵ Section 20(3)(b) of the EEA.

²⁴⁶ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T).

²⁴⁷ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1023 A.

²⁴⁸ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1023 A.

²⁴⁹ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1023 H.

²⁵⁰ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1026 D.

²⁵¹ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1026 D.

²⁵² *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1035 H.

²⁵³ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1035 J.

²⁵⁴ *Stoman v Minister of Safety & Security & others* 2002 (3) SA 468 (T) 1036 I.

protected by this type of affirmative action measure. The meaning of designated employers should therefore be extended so that more black employees can be protected.

3.3.5 Retain and develop people from designated groups and to implement appropriate training measures

'Retention is the ability of an organisation to keep their employees working for their organisation, or the degree to which current staff members remain with an organisation over a given period'.²⁵⁵ This measure aims *inter alia* to retain people from designated groups in the workplace.²⁵⁶ Employers are encouraged to avoid a high turnover (this is a process where employees leave a workplace and are replaced by new staff members).²⁵⁷ Employers are also encouraged to monitor their turnover percentages and engage with employees on issues such as employees' needs and allow them to make suggestions on the manners in which employers can assist employees in their growth within the workplace.²⁵⁸ Through the proper training and development, the turnover of the workplace decreases since one of the reasons that cause a high turnover is the lack of adequate development and support.²⁵⁹ This measure also encompasses developing people from designated groups which allows employees to be equipped and have the necessary experience to grow in the workplace rather than employing new employees.²⁶⁰

This measure is important in protecting black employees since it places an obligation on designated employers to retain and provide training to people from designated groups to ensure that they obtain the necessary skills and knowledge to work effectively and be considered for promotions in the workplace. This measure also encourages employers to consider black employees within the workplace when implementing employment equity plans rather than hiring other employees outside the workplace who possess the required skills and knowledge. However, this affirmative action measure should only be complied

²⁵⁵ Local Government Sector Education and Training Authority (LGSETA) 'Staff turnover and retention in municipalities' 2019 *Civil Engineering* 52.

²⁵⁶ Joubert P et al 'Employee retention and talent management at a sugar mill in South Africa' (2017) 15(3) *Problems and Perspectives in Management* 310.

²⁵⁷ LGSETA 'Staff turnover and retention in municipalities' (2019) 27(7) *Civil Engineering* 52.

²⁵⁸ Meyer M & Botha E *Organisation Development and Transformation in South Africa* (2000) 228.

²⁵⁹ Meyer M & Botha E *Organisation Development and Transformation in South Africa* (2000) 228.

²⁶⁰ Habana R *Staff Retention: A Closer Look at The Financial Sector in SA.: The Impact of The Employment Equity Act on Staff Retention in the Financial Sector of South Africa* (2007) 9.

with by designated employers which means that black employees who are not employed by such employers are not protected by this form of affirmative action measure.

3.3.5.1 Quotas

The EEA permits designated employers to set numerical targets in order to promote equality in the workplace however prohibits the use of quotas as a measure to achieve employment equity.²⁶¹ The main difference between numerical targets and quotas relates to the flexibility of the two measures.²⁶² A 'quota' refers to a fixed number or a percentage that needs to be met by the employer in a certain occupational level that should not be exceeded and does not take into account other potential candidates who are suitable for the position.²⁶³ Research shows that a quota can amount to a complete barrier of employment since a suitable candidate applying for a particular position can be rejected in order to leave the position vacant for a desired group.²⁶⁴ An example of a quota is found in *Ethekweni Municipality v Nadesan and Others*²⁶⁵ where an Indian candidate's application for a Senior Storekeeper position was rejected even though there had not been any suitable African males(that were desired for the position) for over a year.²⁶⁶

Numerical targets on the other hand are numerical goals agreed upon among parties that are used as guidelines to employ employees from different groups taking other suitable candidates into consideration.²⁶⁷ Numerical targets are said to be more flexible since the number of desired candidates is not fixed and other potential candidates from different groups can be appointed.²⁶⁸ The EEA thus places an obligation on designate employers to implement measures in the workplace that promotes racial equality, however these measures should be flexible and should not amount to quotas.

²⁶¹ Section 15(3) of the EEA.

²⁶² *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 54.

²⁶³ *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others; InRe: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice and Constitutional Development and Others* [2015] 1 All SA 589 (WCC) para 212-214.

²⁶⁴ *Solidarity and Others v SA Police Services and Others* (JS 469/12) [2015] ZALCJHB 120 para 53-55.

²⁶⁵ *Ethekweni Municipality v Nadesan and Others* [2021] 6 BLLR 598 (LC).

²⁶⁶ *Ethekweni Municipality v Nadesan and Others* [2021] 6 BLLR 598 (LC) para 40.

²⁶⁷ *Solidarity and Others v SA Police Services and Others* (JS 469/12) [2015] ZALCJHB 120 para 50.

²⁶⁸ *Solidarity and Others v SA Police Services and Others* (JS 469/12) [2015] ZALCJHB 120 para 50.

3.4 PROCEDURAL OBLIGATIONS WHICH THE EEA PLACES ON DESIGNATED EMPLOYERS

The procedural obligations which the EEA places on designated employers are governed by section 13 of the EEA. A designated employer is required to consult with its employees,²⁶⁹ conduct an analysis,²⁷⁰ prepare an employment equity plan²⁷¹ and report to the Director-General of the Department of Labour on the progress made in implementing the employment equity plan.²⁷² The aforementioned procedural obligations which designated employers are required to comply with are discussed hereafter.

3.4.1 Consultation with employees

Section 16 of the EEA regulates the consultation process by the designated employer.²⁷³ A designated employer is required to consult with a representative trade union and its employees or representatives nominated by them and reach an agreement with the terms of the consultation.²⁷⁴ If there is no representative trade union then the designated employer is required to consult with its employees or representatives nominated by them.²⁷⁵

The employer is required to ensure that the content of the consultation is clear and takes place in a language which is understood by the employees so that the entire workplace fully understands what is being communicated.²⁷⁶ The designated employer is required to proceed with the consultation as early as possible during the employment equity process.²⁷⁷ The designated employer is required to be represented by at least one senior member during consultation.²⁷⁸ The consultation process allows employees and their representatives to discuss the procedures the designated employer will follow when

²⁶⁹ Section 13(2)(a) of the EEA.

²⁷⁰ Section 13(2)(b) of the EEA.

²⁷¹ Section 13(2)(c) of the EEA.

²⁷² Section 13(2)(d) of the EEA.

²⁷³ Section 16 of the EEA.

²⁷⁴ Section 16(1)(a) of the EEA.

²⁷⁵ Section 16(1)(b) of the EEA.

²⁷⁶ Provision 6.1.2 Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁷⁷ Provision 6.1.2.5 Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁷⁸ Provision 6.1.2.5 Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

implementing employment equity which includes, conducting an analysis, drafting an employment equity plan and submitting a report to the Director General of the Department of Labour.²⁷⁹ In situations where a representative or trade union refuses to participate in the consultation process, the designated employer should then explain the situation in writing and a copy of the document should be presented to the representative or trade union concerned.²⁸⁰

The consultation process should take place in good faith and the designated employer should ensure that no employee is prejudiced.²⁸¹ This measure protects black employees since the EEA places an obligation on designated employers to consult with its employees including the employees' representatives and trade unions so that everyone is aware of the employer's employment equity process. This obligation, however, only applies to designated employers which means that employees not employed by designated employers are not protected by this obligation.

3.4.2 Conducting an analysis

Section 19 of the EEA places a duty on designated employers to conduct an analysis and states as follows:

'19. (1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce'.²⁸²

²⁷⁹ Provision 6.1.2.6 Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁰ Provision 6.1.2.10 Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸¹ Deane T 'The regulation of affirmative action in the Employment Equity Act 55 of 1998: analyses' (2006) 18 SA Merc LJ 383.

²⁸² Section 19(1) of the EEA.

The purpose of the analysis is to examine the occupational levels within the workplace to determine where people from designated groups are underrepresented;²⁸³ evaluate the working environment together with its policies and procedures in order to identify the constraints and or/ barriers that are contributing to the low representation of people from designated groups in different occupational levels of the workplace;²⁸⁴ evaluate the factors that are hindering the promotion of diversity in the workplace;²⁸⁵ evaluate any other factors in the workplace that are affecting people from designated groups;²⁸⁶ and evaluate factors in the workplace that are making progress in promoting diversity in the working and providing reasonable accommodation to people from designated groups.²⁸⁷

The analysis process requires the designated employer to identify all the barriers that affect or may affect people from designated groups in the workplace.²⁸⁸ A designated employer is also required to find ways to eliminate the identified barriers in order to eliminate unfair discrimination in all levels of the workplace and by doing so promote employment equity.²⁸⁹ A designated employer is required to draw up a profile of the different levels of the workplace so that they can identify levels of the workplace where there is an underrepresentation of people from designated groups.²⁹⁰ When a designated employer collects information, the employer must request each employee in the workplace to complete a declaration using the EEA1 form.²⁹¹ An employee may add information to the form.²⁹² Where an employee refuses to complete the EEA1 form or provides inaccurate information, the employer may establish the designation of an employee by using reliable historical and existing data.²⁹³ A designated employer is required to refer to the relevant Codes of Good Practice as a guide when collecting

²⁸³ Provision 6.1.3.1(a) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁴ Provision 6.1.3.1(b)(i) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁵ Provision 6.1.3.1(b)(ii) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁶ Provision 6.1.3.1(b)(iii) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁷ Provision 6.1.3.1(b)(iv) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁸ Provision 6.1.3.1(b)(i) Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

²⁸⁹ Deane T 'The regulation of affirmative action in the Employment Equity Act 55 of 1998: Analyses' (2006) 18 *SA Merc LJ* 384.

²⁹⁰ Section 19(2) of the Employment Equity Act 55 of 1998.

²⁹¹ Clause 8(1) of the Employment Equity Regulations GG 37873 of 1 August 2014.

²⁹² Clause 8(2) of the Employment Equity Regulations GG 37873 of 1 August 2014.

²⁹³ Clause 8(3) of the Employment Equity Regulations GG 37873 of 1 August 2014.

information and conducting the analysis.²⁹⁴ When conducting the analysis, the designated employer may refer to the EEA8, a guide on the applicable national and regional economically active population (EAP);²⁹⁵ and the EEA9, which contains a description of occupational levels.²⁹⁶

This obligation protects black employees since the EEA places an obligation on designated employers to identify levels in the workplace where there is an under representation of people from designated groups and to employ or promote such persons in those levels in order to promote racial equality. Furthermore, the EEA places an obligation on designated employers to identify barriers that negatively affect people from designated groups which provides additional protection to black employees. This obligation however only applies to designated employers therefore employees not employed by such employers are not protected by the obligation placed on designated employers to conduct an analysis.

3.4.3 Employment equity plan

Designated employers are obliged to draft and implement an employment equity plan.²⁹⁷ The purpose of the employment equity plan is to enable the employer to “achieve reasonable progress towards employment equity”,²⁹⁸ to assist in eliminating unfair discrimination in the workplace,²⁹⁹ and to achieve equitable representation of people from designated groups by means of affirmative action measures.³⁰⁰

A designated employer is required to inform every employee including their representatives and trade unions (if applicable) of the plans to implement employment equity measures in the workplace.³⁰¹ An ad hoc decision to implement affirmation action is inconsistent with the principles of affirmative action in South Africa.³⁰² In *Gordon v Department of Health, KwaZulu-Natal*³⁰³, the appellant had applied for a senior position

²⁹⁴ Clause 8(5) of the Employment Equity Regulations GG 37873 of 1 August 2014.

²⁹⁵ Clause 8(6)(a) of the Employment Equity Regulations GG 37873 of 1 August 2014.

²⁹⁶ Clause 8(6)(b) of the Employment Equity Regulations GG 37873 of 1 August 2014.

²⁹⁷ Section 20(1) of the EEA.

²⁹⁸ Section 20(1) of the EEA.

²⁹⁹ Section 15(2) of the EEA.

³⁰⁰ Section 20(2)(b) of the EEA.

³⁰¹ Van Jaarsveld M ‘Labour law’ (2008) 2008(1) *Annu. Surv. S. Afr. Law* 639.

³⁰² *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

³⁰³ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA).

in the workplace.³⁰⁴ The appellant was recommended as the most suitably qualified candidate however the post was subsequently given to a black candidate.³⁰⁵ The respondent's argument in appointing the black candidate was that it was promoting employment equity in the workplace.³⁰⁶ The appellant claimed that the respondent unfairly discriminated against him on arbitrary grounds since he was never made aware of the employment equity plan.³⁰⁷ The issue in the Supreme Court of Appeal was whether the policy of the respondent was rational and in line with the purpose of affirmative action which is to achieve equality in the workplace.³⁰⁸ Mlamblo JA, held that an irrational and ad hoc policy cannot be said to be in line with the purpose of affirmative action in the workplace.³⁰⁹ Mlamblo JA held that an employment equity plan should be properly planned and formulated.³¹⁰ Mlamblo JA found that the respondent did not have a policy or overarching plan of affirmative action.³¹¹ Mlamblo JA held that the appointment was an ad hoc and arbitrary act.³¹²

The aforementioned case illustrates that an ad hoc decision to implement employment equity measures in the workplace is not in line with the purpose of affirmative action which is to promote equality in the workplace. Spontaneous affirmative action measures are regarded as irrational and can amount to unfair discrimination.

This obligation protects black employees since an obligation is placed on designated employers to draft and implement an employment equity plan. This duty also protects black employees by placing an obligation on designated employers to provide a timetable setting out the dates by when the measures should be implemented thus forcing the designated employer to ensure that the measures are implemented timeously. This obligation furthermore requires a designated employer to set out the procedures that will be followed in implementing the affirmative action measures and further monitor whether reasonable progress is made towards implementing such measures. This obligation protects black employees since employers have to monitor whether the measures are

³⁰⁴ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 523.

³⁰⁵ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 523.

³⁰⁶ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 523.

³⁰⁷ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 523.

³⁰⁸ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

³⁰⁹ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

³¹⁰ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

³¹¹ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

³¹² *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) 524.

making progress towards achieving employment equity and if they are not making progress then the designated employer should follow a different procedure that promotes equality in the workplace. Since only designated employers are obligated to implement employment equity plans, employees not employed by designated employers are not protected.

3.4.4 Report

A designated employer is obliged to report on the development and progress of the employment equity plan in the workplace.³¹³ This obligation requires a designated employer to submit a report to the Director-General once every year, on the first working day of October or on the day prescribed by the EEA.³¹⁴ 'If the designated employer is unable to submit a report to the Director-General by the first working day of October the designated employer should notify the Director-General in writing before the last working day of August and should provide reasons why the designated employer could not submit on time'.³¹⁵

The Director-General may approach the Labour Court to impose a fine in circumstances where the designated employer has failed to submit a report in accordance with the requirements stipulated in terms of section 21,³¹⁶ or when the designated employer has not provided reasons for not submitting the report³¹⁷ or when the designated has provided false reasons to the Director-General.³¹⁸

This measure protects black employees as it places an obligation on designated employers to provide the Director-General with the development and progress of the employment equity plans in the workplace. This allows the Director-General to monitor the employment equity plans in the workplace and impose fines where a designated employer fails to comply with the requirements of the EEA. This obligation however only applies to designated employers therefore black employees not employed by designated employers are not protected.

³¹³ Section 21 of the Employment Equity Amendment Act 47 of 2013.

³¹⁴ Section 21(1) of the Employment Equity Amendment Act 47 of 2013.

³¹⁵ Section 21(4A) of the Employment Equity Amendment Act 47 of 2013.

³¹⁶ Section 21(4B)(a) of the Employment Equity Amendment Act 47 of 2013.

³¹⁷ Section 21(4B)(b) of the Employment Equity Amendment Act 47 of 2013.

³¹⁸ Section 21(4B)(c) of the Employment Equity Amendment Act 47 of 2013.

3.5 COMPLIANCE

Section 42 of the EEA contains the factors which the Director General or anybody or person should take into considering when determining whether a designated employer is complying with the obligations set out by the EEA.³¹⁹ These factors include considering the extent to which suitably qualified people from designated groups are represented in all levels of the workplace,³²⁰ considering their representation in national and regional economically active population,³²¹ the reasonable measures made by a designated employer in providing training to suitably qualified people from designated groups,³²² the reasonable measures made by the designated employer to implement an employment equity plan,³²³ the effort made by a designated employer in eliminating any barriers to employment equity³²⁴ and the effort made by the designated employer in employing and advancing suitably qualified people from designated groups.³²⁵ All the aforementioned factors will not apply to every designated employer therefore the Director- General should determine which factor(s) is/are the most relevant to a specific designated employer.³²⁶ Should the designated employer fail to comply with the obligations of the EEA, the designated employer may provide a reasonable justification to the Director-General for the failure to comply with the obligations.³²⁷

The Director-General may assess whether the designated employer has complied with its obligations of the EEA by requesting a designated employer to submit a copy of its analysis or employment equality plan³²⁸ or any book or record that contains information with regards to the employment equity measures to determine whether the designated employer is complying with the obligations of the EEA.³²⁹ The Director-General may also request to meet with the designated employer to discuss compliance with the

³¹⁹ Section 42(1) of the Employment Equity Amendment Act 47 of 2013.

³²⁰ Section 42(1)(a) of the Employment Equity Amendment Act 47 of 2013.

³²¹ Section 42(1)(a) of the Employment Equity Amendment Act 47 of 2013.

³²² Section 42(1)(b) of the Employment Equity Amendment Act 47 of 2013.

³²³ Section 42(1)(c) of the Employment Equity Amendment Act 47 of 2013.

³²⁴ Section 42(1)(d) of the Employment Equity Amendment Act 47 of 2013.

³²⁵ Section 42(1)(dA) of the Employment Equity Amendment Act 47 of 2013.

³²⁶ Du Toit D et al *Labour Relations Law* 5 ed (2006) 656.

³²⁷ Section 42(4) of the Employment Equity Amendment Act 47 of 2013.

³²⁸ Section 43(2)(a) of the EEA.

³²⁹ Section 43(2)(b) of the EEA.

employment equity obligations³³⁰ or request to meet with representative trade unions to determine compliance.³³¹ Once the Director-General has assessed the designated employer's employment equity plan, the Director-General will either approve the employment equity plan³³² or provide a period to the designated employer on which certain obligations should be followed.³³³ In the event of the designated employer's failure to comply with the obligations of the EEA, the Director-General may refer the matter to the Labour Court.³³⁴ The Labour Court may order the designated employer to comply with the obligations of the EEA³³⁵ or impose a fine on the designated employer for failing to comply with the provisions of the EEA.³³⁶

The EEA protects black employees by placing a duty on the Director-General to assess employment equity plans and ensure that designated employers comply with the employment equity obligations. Designated employers who fail to comply with the said obligations of the EEA may be ordered by the Labour Court to comply or may be fined for failing to comply with employment equity obligations. Black people are therefore protected in this regard. This obligation however only applies to designated employers meaning that employees working under employers who are not designated employers in terms of the EEA are not protected by this obligation. Therefore, the scope of designated employers should be extended so that more black people can be protected.

3.6 AFFIRMATIVE ACTION AS A DEFENCE

Employers may raise affirmative action as a defence to a claim of unfair discrimination. In *Willemse v Patelia NO & others*³³⁷, the applicant, a white disabled employee had applied for a senior post.³³⁸ The applicant was the most qualified for the post however his application was rejected by the respondent.³³⁹ The applicant filed an unfair discrimination claim to the Labour Court on the grounds of race and gender.³⁴⁰ The respondent claimed

³³⁰ Section 43(2)(c) of the EEA.

³³¹ Section 43(2)(d) of the EEA.

³³² Section 44(a) of the EEA.

³³³ Section 44 of the EEA.

³³⁴ Section 45 of the EEA.

³³⁵ Section 50(f) of the EEA.

³³⁶ Section 50(g) of the EEA.

³³⁷ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC).

³³⁸ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³³⁹ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴⁰ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

that the application was rejected due to employment equity measures.³⁴¹ The applicant claimed that there were no employment equity measures in place and that the measures were irrational.³⁴² The issue in the Labour Court was whether the defence of affirmative action raised by the respondent was valid.³⁴³ The Labour Court held that the respondent had no employment equity measure in place and further held that the respondent failed to take into consideration the representation of disabled people in the workplace who were underrepresented in the senior post.³⁴⁴ The Labour Court found that the measures taken by the respondent were irrational and unfair.³⁴⁵

An employment equity plan should exist in order for an employer to raise affirmative action as a defence. In *Coetzer & others v Minister of Safety & Security & another*³⁴⁶, the applicants, who were white males had applied for a post at the respondent's workplace.³⁴⁷ However, the applications of the applicants were rejected since the respondent claimed that the position was reserved for people from designated groups.³⁴⁸ In terms of the respondent's employment equity plan, the applicants fell under non-designated groups and the respondent claimed that there was adequate representation of people from non-designated groups in the post.³⁴⁹ The applicants then filed a claim of unfair discrimination against the respondent in the Labour Court on the grounds of race.³⁵⁰ The respondent claimed that the measures taken were for the purpose of implementing affirmative action measures in the workplace.³⁵¹ The issue before the Labour court was whether the respondent's defence of affirmative action was valid.³⁵² Landman J held that the measures taken by the respondent were purely based on the EEA's purpose of ensuring

³⁴¹ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴² *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴³ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴⁴ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴⁵ *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC) 429.

³⁴⁶ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC).

³⁴⁷ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

³⁴⁸ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

³⁴⁹ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

³⁵⁰ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

³⁵¹ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

³⁵² *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 164.

equal representation in the workplace and no regard to efficiency was made since there was a desperate need of employees in that post.³⁵³ Landman J held that the respondent had unfairly discriminated against the applicants on the grounds of race.³⁵⁴

In the aforementioned case, Landman J pointed out that, a designated employer can only raise affirmative action as a defence if an employment equity plan exists in the workplace.³⁵⁵ He furthermore brought light to the element of efficiency, that even though affirmative action measures are aimed at promoting employment equity, it is important to also consider efficiency and not implement measures that would affect the proper functioning of the job.³⁵⁶

In *Ethekwini Municipality v Nadesan & others*³⁵⁷ An Indian male employee had applied for a senior storekeeper position which had been vacant for over a year.³⁵⁸ The employee's application was rejected despite scoring the highest score for the position and recommended as the most suitable applicant by the recruiting team.³⁵⁹ The employee filed a claim of unfair discrimination against the employer on the basis of race.³⁶⁰ The employer raised affirmative action as a defence and claimed that Indian males were overrepresented in the aforementioned position.³⁶¹

The Labour Court found that the decision taken by the employer was irrational since the employee's application was rejected even though there were no suitably qualified African males for the position for over a year.³⁶² The Labour Court held furthermore that there were other available positions which African males could apply for.³⁶³ In the

³⁵³ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 177.

³⁵⁴ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) 177.

³⁵⁵ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) para 39.

³⁵⁶ *Coetzer & others v Minister of Safety & Security & another* 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC) para 40.

³⁵⁷ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC).

³⁵⁸ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 2.

³⁵⁹ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 6.

³⁶⁰ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 17.

³⁶¹ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 10.

³⁶² *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 40-41

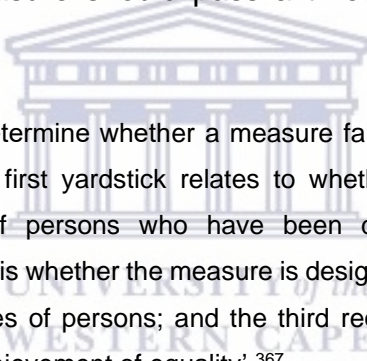
³⁶³ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 41.

aforementioned case, the Labour Court held that the rationality test was the most appropriate standard when determining the validity of the affirmative action measure.³⁶⁴

The issue that arises is to determine how affirmative action measures should be assessed. The various standards are discussed below.

3.6.1 THE RATIONALITY STANDARD

The rationality standard was created by the Constitutional Court in *Minister of Finance v Van Heerden*³⁶⁵. In *Minister of Finance v Van Heerden*,³⁶⁶ the Constitutional Court held that section 9(2) of the Constitution states that in order to promote equality, legislative measures must be taken to advance those who were disadvantaged by unfair discrimination and the EEA gives effect to section 9(2) of the Constitution. Moseneke J held that in order to determine whether an affirmative action measure is in line with section 9(2) of the Constitution the measure should pass a three-stage inquiry. He stated as follows:


'It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality'.³⁶⁷

In the aforementioned case, Moseneke J pointed out that, affirmative action measures should not only be in line with the rules of the EEA but must also be consistent with the principles of the Constitution since the EEA gives effect to section 9(2) of the Constitution.³⁶⁸ The purpose of the rationality test is to determine whether the measures taken by the designated employer are in line with the purpose of affirmative action which is to promote equality in the workplace by advancing those who were disadvantaged by unfair discrimination of the past.³⁶⁹

³⁶⁴ *Ethekwini Municipality v Nadesan & others* (2021) 42 ILJ 1480 (LC) para 43-44.

³⁶⁵ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

³⁶⁶ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

³⁶⁷ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 37.

³⁶⁸ McGregor M 'Affirmative action- a defence or a right?' (2003) 11(3) *Juta's Business Law* 166.

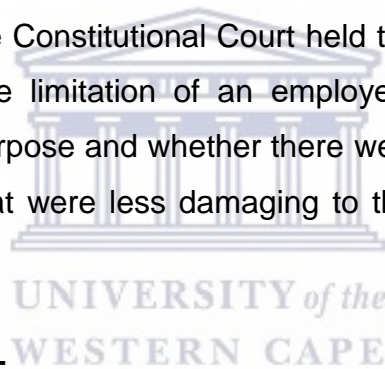
³⁶⁹ *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 37.

3.6.2 THE PROPORTIONALITY STANDARD

The proportionality standard was created by the Constitutional Court in *S v Makwanyane*³⁷⁰. This test is used to weigh up competing values when a constitutional right is limited for a specific purpose to determine whether the limitation is reasonable and necessary.³⁷¹ The Constitutional Court provided that:

'In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question'.³⁷²

In the aforementioned case, the Constitutional Court held that the proportionality test is used to determine whether the limitation of an employee's constitutional right was necessary to achieve a valid purpose and whether there were other available measures that could have been taken that were less damaging to the employee's constitutional right.³⁷³



3.6.3 THE FAIRNESS TEST

The Constitutional Court in *Harksen v Lane*³⁷⁴ established the fairness test.³⁷⁵ The Constitutional Court in this case provided that an impugned measure is presumed to be unfair if it discriminates against an employee on the listed grounds of the Constitution such as race.³⁷⁶ The fairness test focuses on whether an impugned measure has unfairly discriminated against an employee, and this will be presumed when the measure discriminates against an employee on the grounds listed under section 9 of the Constitution such as race.³⁷⁷

³⁷⁰ *S v Makwanyane* 1995 (6) BCLR 665.

³⁷¹ *S v Makwanyane* 1995 (6) BCLR 665 para 104.

³⁷² *S v Makwanyane* 1995 (6) BCLR 665 para 104.

³⁷³ *S v Makwanyane* 1995 (6) BCLR 665 para 104.

³⁷⁴ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

³⁷⁵ See para 2.1 above.

³⁷⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

³⁷⁷ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 42-53.

In *South African Police Service v Solidarity obo Barnard*³⁷⁸, Barnard, a white female police officer applied for a promotion to a specialised SAPS unit twice and was rejected both times despite having been the best candidate for the position.³⁷⁹ The National Commissioner justified its decision by arguing that it was following its employment equity plan and according to its plan white women were already overrepresented at the salary level.³⁸⁰ Barnard claimed that she was rejected because she is white and argued that the National Commissioner unfairly discriminated against her on the ground of race.³⁸¹ The Labour Court found in Barnard's favour³⁸² however; on appeal the Labour Appeal Court held that there was no discrimination because the vacancy was not filled.³⁸³ In a further appeal the SCA concluded that the National Commissioner did not discharge the presumption of unfairness attracted by Barnard's claim and ruled in her favour.³⁸⁴ In a further appeal the Constitutional Court delivered four judgments upholding the appeal.³⁸⁵

Moseneke ACJ held that the National Commissioner acted rationally. Cameron J, Froneman J and Majiedt AJ concurring with the majority judgement held that rationality should be a minimum requirement since all actions in terms of which public power is exercised must at least be rational.³⁸⁶ However, Cameron J held that fairness should be the appropriate standard for scrutiny.³⁸⁷ Cameron J held further that the EEA recognises the importance of fair treatment in employment thus employment equality measures must be implemented in a manner that considers the interests of other people from designated groups.³⁸⁸ Cameron J found that the measures taken by the National Commissioner were fair since there was an overrepresentation of white women in salary level 9.³⁸⁹

Van der Westhuizen J concurring with the majority judgement used the rationality test established by the Constitutional Court in *Van Heerden* and held that the first two prong

³⁷⁸ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC).

³⁷⁹ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 6-15.

³⁸⁰ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 6-15.

³⁸¹ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 17-21.

³⁸² *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 21.

³⁸³ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 22.

³⁸⁴ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 26.

³⁸⁵ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 73.

³⁸⁶ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 94.

³⁸⁷ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 98.

³⁸⁸ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 98.

³⁸⁹ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 123.

tests have been met since the National commissioner's employment equity measure were implemented to advance those disadvantaged by unfair discrimination in the past.³⁹⁰ Van der Westhuizen J furthermore held that the third prong test has been met since there was an overrepresentation of white women in salary level 9, it was necessary to appoint other candidates from other races in order to promote equality.³⁹¹ Van der Westhuizen J in this case held that the fairness standard is inappropriate in the context of affirmative action measures as fairness is a standard that is measured under section 9(3) disputes of unfair discrimination.³⁹² Since affirmative action measures are explicitly excluded from the definition of unfair discrimination, it would be vague to use it as a measure in the context of affirmative action.³⁹³ Van der Westhuizen J furthermore applied the proportionality standard and concluded that Barnard's Constitutional right to dignity was not violated by the employment equity measure since she was not prevented from applying in other levels of SAPS as level 9 already had an overrepresentation of white women and there was a need to promote racial equality.³⁹⁴

Jafta J concurring with the majority held that the legal question was whether the National Commissioner's employment equity measures were consistent with the purpose of the EEA.³⁹⁵ Jafta J held that the measures were consistent with the purpose of the EEA as they aimed to promote equality.³⁹⁶ Jafta J furthermore argued that fairness as a standard is inappropriate in this case as section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the EEA.³⁹⁷ Jafta J held furthermore that using the fairness standard to determine the validity of an affirmative action measure undermines the values of section 9(2) of the Constitution.³⁹⁸

The aforementioned case shows that the Constitutional Court has not determined what the most appropriate standard is to assess affirmative action measures.³⁹⁹ Different

³⁹⁰ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 144.

³⁹¹ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 156.

³⁹² *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 158.

³⁹³ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 159.

³⁹⁴ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 183.

³⁹⁵ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 225.

³⁹⁶ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 225.

³⁹⁷ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 223.

³⁹⁸ *South African Police Service obo Barnard* 2014 (6) SA 123 (CC) para 229.

³⁹⁹ *McConnachie C 'Affirmative action and intensity of review: South African Police Service v Solidarity obo Barnard'* (2015) 7(1) CCR 163.

judges have provided their views on what the appropriate standard is, however, there was no conclusion on what the appropriate standard is.

3.7 CONCLUSION

The purpose of this chapter is to determine the extent to which the legislative provisions governing affirmative action protects black employees and whether the said provisions should be amended and/or supplemented. The EEA places an obligation on designated employers to implement affirmative action measures in the workplace.

A designated employer is required to identify and eliminate barriers which adversely affects people from designated groups. This duty protects black people. The affirmative action measure designed to promote diversity in the workplace also protects black employees since it places an obligation on designated employers to promote diversity numerically and to accommodate the cultures and beliefs of employees so that employees can feel welcomed in the workplace.

A designated employer is required to make reasonable accommodation for people from designated groups. This measure protects black people since the EEA places an obligation on designated employers to make reasonable accommodation for people from designated groups which includes black employees in order to ensure that they enjoy equal opportunities in the workplace. Designated employers are required to ensure equitable representation of people from designated groups in the workplace. This affirmative action measure protects black employees since it places an obligation on the designated employer to place suitably qualified people from designated groups in levels of the workplace where they are underrepresented and by doing so promoting employment equity. Black employees are furthermore protected as a result of prior learning forming part of the meaning of suitably qualified.

Designated employers are also required to retain and develop people from designated groups and to implement appropriate training measures. This measure protects black employees since it encompasses an obligation on employers to train black people to gain the necessary skills and knowledge so that they can also be appointed in senior levels of

the workplace similar to their white counterparts. This measure also assists black employees in growing within the workplace since designated employers are obliged to appoint and promote people from designated groups which includes black people.

The aforementioned measures which are governed by section 15 of the EEA do not apply to employers who are not designated employers meaning that black employees not employed by such employers are not protected by these measures. It is thus recommended that the EEA be amended to extend the scope of the meaning of designated employers so that more black employees can be protected by the obligation that is placed on the employers to implement affirmative action measures.

Designated employers are required to consult with their employees. This measure protects black employees since the EEA places an obligation on designated employers to consult with its employees including the employees' representatives and trade unions so that everyone is aware of the employer's employment equity plan. Designated employers are required to conduct an analysis to identify levels of the workplace where people from designated groups are underrepresented and to identify barriers that adversely affect people from designated groups.

This obligation protects black employees since the EEA places an obligation on designated employers to employ or promote people from designated groups which includes black people on levels where they are underrepresented in order to promote equality. As a result of this obligation designated employers are required to identify barriers that negatively affects people from designated groups which provides additional protection to black employees. Designated employers are obliged to draft and implement an employment equity plan. This duty also protects black employees by placing an obligation on a designated employer to provide the procedures that will be followed in implementing employment equity measures and further monitor whether reasonable progress is being made towards promoting employment equity.

The obligation that designated employers are required to report to the Director-General also protects black employees since the Director-General plays an oversight function in assessing whether the designated employer has made reasonable progress in achieving employment equity. These procedural obligations are beneficial in providing protection to

black employees, however in circumstances where an employee is not employed by a designated employer, such an employee will not receive this protection.

The EEA furthermore protects black employees by providing powers to the Director-General to refer a matter of non-compliance to the Labour Court and the Labour Court may request a designated employer to comply with the obligations in terms of the EEA or impose a fine as a result of the designated employer's failure to comply.



CHAPTER 4

RACIAL DISCRIMINATION AND AFFIRMATIVE ACTION IN SOUTH AFRICA

4.1 INTRODUCTION

Chapter 2 contains a discussion on the legislative framework governing unfair discrimination in order to illustrate the extent to which black employees are protected. Black employees are protected as a result of the enactment of sections 5 and 6 of the EEA. Black employees are also protected as a result of the burden of proof being on employers where a claim of racial discrimination is brought by the employee against the employer. Chapter 3 contains a discussion on the provisions governing affirmative action measures. Where black employees are employed by designated employers, these employees are not only protected as a result of designated employers being required to implement the affirmative action measures contained in section 15(2) of the EEA, but also as a result of the procedural obligations which designated employers are required to comply with. The legislative provisions governing racial discrimination and affirmative action are important since South Africa's history is one where racial discrimination was legalised thus causing hardships for black people in the workplace.⁴⁰⁰

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This chapter contains a discussion on the experiences of employees insofar as racial discrimination and affirmative action are concerned, which have been obtained from case law and journal articles. This will be done with a view to determining the way in which the legislative provisions discussed in chapters 2 and 3 are applied in practice and in so doing, determine whether any of the provisions should be amended and/or supplemented.

⁴⁰⁰ Tshishonga N 'The Legacy of Apartheid on democracy and citizenship in post-Apartheid South Africa: An inclusionary and exclusionary binary?' (2019) 9(1) *AFFRIKA Journal of Politics, Economics and Society* 168.

4.2. RACIAL DISCRIMINATION IN THE WORKPLACE

As discussed in this thesis, chapter 2 of the EEA contains the provisions governing unfair discrimination and thus the provisions governing racial discrimination. Black employees' experiences of racial discrimination are discussed below.

4.2.1 Discrimination

The EEA does not define the concept of discrimination.⁴⁰¹ Discrimination is defined as any distinction, exclusion or preference made on the basis of race, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁴⁰²

4.2.1.1 Direct discrimination

The EEA prohibits direct discrimination.⁴⁰³ Direct discrimination takes place when an employee is treated adversely as a result of such employee possessing a certain characteristic whether arbitrary or listed such as race.⁴⁰⁴

In a research conducted within the legal profession, a black attorney reported that racial discrimination takes place within the legal profession, and in support of this view the black attorney stated that a white senior advocate treated the black junior counsel differently to the white junior counsel.⁴⁰⁵ The said attorney stated that senior advocates tend to pay less attention to junior advocates in general, however they still pay more attention to white junior advocates in comparison to a black junior advocate.⁴⁰⁶ Another black candidate attorney who participated in the said study stated that, she was told that: she will never be like her white male counterpart and that while she is required to deliver documents to various destinations and required to make photocopies, the white candidate attorney is

⁴⁰¹ See para 2.3.1.

⁴⁰² See para 2.3.1.

⁴⁰³ See para 2.3.1.1.

⁴⁰⁴ See para 2.3.1.1.

⁴⁰⁵ Jele MN 'Report: Transformation of the legal profession' (2014) *De Rebus* 19.

⁴⁰⁶ Jele MN 'Report: Transformation of the legal profession' (2014) *De Rebus* 19.

taken by their seniors to attend meetings to gain legal experience.’⁴⁰⁷ Both of the aforementioned accounts are examples of direct discrimination in the workplace since in both situations black employees are adversely treated as a result of their race.

In *Sun International Ltd v SA Commercial Catering & Allied Workers Union on behalf of Ramerafe*,⁴⁰⁸ a black female employee filed a claim of racial discrimination against the employer for unfairly discriminating against the employee in terms of remuneration since a white male employee employed by the same employer and performing the same work as the black employee was paid a higher salary compared to the black employee.⁴⁰⁹ The CCMA held that the employer unfairly discriminated against the employee on the ground of race and ordered the employer to place the black employee in the same salary bracket as the white employee.⁴¹⁰ The aforementioned case is an example of direct discrimination since the black employee was discriminated against in terms of remuneration solely because she was black. The aforementioned case and the discussion on the outcome of the interviews conducted with employees in South Africa illustrates that black people are still subjected to racial discrimination. The outcome of the case demonstrates that in circumstances where a black employee institutes legal action against his or her employer on the grounds of racial discrimination, black employees are protected as a result of the meaning of direct discrimination.



4.2.1.2 Indirect Discrimination

The EEA prohibits employers from indirectly discriminating against employees.⁴¹¹ Indirect race discrimination ‘occurs when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain race group in circumstances where they are not justifiable’.⁴¹²

⁴⁰⁷ Jele MN ‘Report: Transformation of the legal profession’ (2014) *De Rebus* 19.

⁴⁰⁸ *Sun International Ltd v SA Commercial Catering & Allied Workers Union on behalf of Ramerafe & others* (2019) 40 ILJ 1873 (LC).

⁴⁰⁹ *Sun International Ltd v SA Commercial Catering & Allied Workers Union on behalf of Ramerafe & others* (2019) 40 ILJ 1873 (LC) 1873.

⁴¹⁰ *Sun International Ltd v SA Commercial Catering & Allied Workers Union on behalf of Ramerafe & others* (2019) 40 ILJ 1873 (LC) 1874.

⁴¹¹ See para 2.3.

⁴¹² See para 2.3.1.2.

In *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae)*⁴¹³ domestic workers were excluded from employment funeral covers since they were excluded from the definition of employees in terms of labour law.⁴¹⁴ The Constitutional Court in this case held that the exclusion of domestic workers from employment funeral covers amounted to indirect discrimination on the ground of race since domestic workers are predominately black women and excluding them from employment benefits causes hardships towards them and furthermore violates their inherent human dignity.⁴¹⁵

The aforementioned case is an example of indirect discrimination since the employment policy that excluded domestic workers from the employment benefits affected black people since the majority of domestic workers in South Africa are black women. The fact that the Constitutional Court held that this is an example of indirect discrimination, further confirms that black employees are protected as a result of the meaning of indirect discrimination.

Marumoagae's research sets out the experiences of black employees with regards to indirect discrimination in the legal profession.⁴¹⁶ In his research, Marumoagae provides that there is a low number of black students compared to white students who are recruited as candidate attorneys in both public and private law firms.⁴¹⁷ Marumoagae argues that this is due to seemingly neutral policies and procedures that adversely affect black people.⁴¹⁸ Marumoagae argues that the policy of appointing law students that do very well academically indirectly discriminates against black students.⁴¹⁹ Marumoagae argues that:

“Although there has never been a formal exclusion of black South Africans from legal professional or educational ranks, and although there have been prominent examples of black lawyers who have assumed a leading role in professional and

⁴¹³ *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae)* (2021) 42 ILJ 269 (CC).

⁴¹⁴ *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae)* (2021) 42 ILJ 269 (CC) para 18.

⁴¹⁵ *Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae)* (2021) 42 ILJ 269 (CC) para 18.

⁴¹⁶ Marumoagae C 'Driver's licence: A barrier preventing entry into the attorneys' profession' (2017) *DE REBUS* – November 42.

⁴¹⁷ Marumoagae C 'Driver's licence: A barrier preventing entry into the attorneys' profession' (2017) *DE REBUS* – November 42.

⁴¹⁸ Marumoagae C 'Driver's licence: A barrier preventing entry into the attorneys' profession' (2017) *DE REBUS* – November 42.

⁴¹⁹ Marumoagae C 'Driver's licence: A barrier preventing entry into the attorneys' profession' (2017) *DE REBUS* – November 42.

political circles, access to the profession for black South Africans has always been much harder than for whites”.⁴²⁰

Marumoagae stated that there is no empirical evidence that links academic performance to excellence in the legal profession.⁴²¹ Since English is not the mother tongue of most black people in South Africa, it is harder for black law students to do well academically compared to white law students and therefore appointing law students on the basis of their compliance with this requirement indirectly discriminates against black people.

Marumoagae furthermore argued that requiring law students to obtain a driver’s licence and have their own car also indirectly discriminates against black people.⁴²² Marumoagae states that “requiring a driver’s licence from a law graduate indicates a total ignorance of the socio-economic climate of South Africa”.⁴²³ In the aforementioned statement, Marumoagae argues that the requirement of a driver’s licence favours white people since the majority of black students depend on employment in order to obtain a driver’s licence.⁴²⁴ This requirement thus indirectly discriminates against black employees. However, the Legal Practice Council has published a notice stating that sections 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 had been amended to prohibit law firms from requesting law students to obtain a driver’s licence.⁴²⁵ The amendments made by the Council shows that the definition of indirect discrimination protects black employees in South Africa.



4.2.2 Unfairness

As far as the burden of proof is concerned, where ‘unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination did not take place as alleged;

⁴²⁰ Marumoagae C ‘Driver’s licence: A barrier preventing entry into the attorneys’ profession’ (2017) *DE REBUS* – November 42.

⁴²¹ Marumoagae C ‘Driver’s licence: A barrier preventing entry into the attorneys’ profession’ (2017) *DE REBUS* – November 43.

⁴²² Marumoagae C ‘Driver’s licence: A barrier preventing entry into the attorneys’ profession’ (2017) *DE REBUS* – November 42.

⁴²³ Marumoagae C ‘Driver’s licence: A barrier preventing entry into the attorneys’ profession’ (2017) *DE REBUS* – November 43.

⁴²⁴ Marumoagae C ‘Driver’s licence: A barrier preventing entry into the attorneys’ profession’ (2017) *DE REBUS* – November 43.

⁴²⁵ Clause 1 & 2 The South African Legal Practice Council Notice in Terms of Section 95(4) of The Legal Practice act 28 of 2014 in GN 6 GG 44068 of 15 January 2021.

or is rational and not unfair, or is otherwise justifiable'.⁴²⁶ During 2015 to 2016, 16% of equality related cases were reported to the CCMA of which the majority of those cases were claims of racial discrimination.⁴²⁷ Research shows that there has been an increase in racial discrimination cases since previous years.⁴²⁸ The South African Human Rights Commission reported that during 2012, only 10% of the cases were based on unfair discrimination on the ground of race, while during 2016 this number increased to 16%.⁴²⁹ The Commission is of the view that the increase in cases relating to racial discrimination in South Africa is due to employees being educated with regard to their rights as well as the legal requirements (such that the burden of proof is on the employer in the case of racial discrimination cases) and are empowered to stand up for themselves.⁴³⁰ This thus indicates that section 11 of the EEA assists in protecting black employees.

The EEA protects black employees by prohibiting discrimination against employees directly and indirectly on grounds which includes the ground of race.⁴³¹ Despite the fact that the EEA prohibits unfair discrimination in the workplace, black employees are still racially discriminated against as is confirmed by the experiences of black employees discussed above. As previously indicated, this may be due to some employers carrying racial ideologies that have been influenced by the Apartheid system.⁴³² While the meanings of direct and indirect discrimination, as well as the burden of proof contained in the EEA protects black employees against racial discrimination, in order for racial discrimination to be reduced, it is recommended that employers should be educated with regard to the need to eliminate racial discrimination. This recommendation is made to ensure that the place of employment is more productive and that mechanisms can be put in place which encourages honest dialogue between employers and employees.

⁴²⁶ See para 2.3.2.

⁴²⁷ South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace* (2017) 35.

⁴²⁸ South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace* (2017) 28.

⁴²⁹ South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace* (2017) 28.

⁴³⁰ South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace* (2017) 28.

⁴³¹ Section 6 of the EEA.

⁴³² See para 2.3.1.1.

4.3 AFFIRMATIVE ACTION IN THE WORKPLACE

4.3.1 Measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups

Designated employers are required to eliminate employment barriers that adversely affect people from designated groups.⁴³³ Despite the aforementioned obligation, research shows that, some employees have expressed that barriers still exist in their workplace.⁴³⁴ In an interview that was conducted by Goldman, a black employee expressed her personal experience with regard to barriers that affect employment equity in the workplace where she is employed as follows:

“We even have to negotiate what a barrier is. When we raise our views about what we see as barriers they say, 'no we don't think so' and leave it there.”⁴³⁵

The aforementioned statement made by the employee shows that some employers are not always open to obtaining feedback from employees on barriers that employees are affected by which may result in these employers not implementing this affirmative action measure in the workplace.

One of the employees interviewed by Booysen identified the lack of understanding of the value of employment equity as being an employment barrier, since in the employee in question's workplace employment equity is viewed as being a compliance issue. The employee concerned stated that:

“There is no communication or understanding of employment equity, and... employment equity is seen as a necessary evil, face value buy in and lip service because Mr X says so, in addition, limited or no contextual understanding of the need of employment equity occurs in the organization. Therefore, employment equity is not taken seriously... Also, people need to be more committed to the business case. We do not have a shared view on the meaning of diversity and employment equity. At the moment EE is interpreted in terms of legislation and numbers / ratios”.⁴³⁶

⁴³³ See para 3.3.1.

⁴³⁴ Orr L & Goldman T 'Workplace discrimination: Early experience with the EEA' (2001) 18(3) *Indicator SA* 15.

⁴³⁵ Orr L & Goldman T 'Workplace discrimination: Early experience with the EEA' (2001) 18(3) *Indicator SA* 15.

⁴³⁶ Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 55.

The statement above shows that some designated employers do not understand the purpose of implementing affirmative action in the workplace and are still of the view that it relates solely to increasing the numbers of people from designated groups rather than viewing affirmative action as a measure that is put in place in order to promote equality in the workplace. Designated employers should thus be educated with regard to the purpose of affirmative action in the workplace and its value.

In an additional interview that was conducted by Booysen with one of the employees, the said employee stated that, the workplace does have policies and strategies that have been drafted in accordance with the EEA however, they seem to struggle with executing the employment equity measures efficiently.⁴³⁷ The employee in question stated that:

“Better than it was but not where it should be and things are beginning to happen, however, implementation is still in its infancy – still crawling, and we are starting to be serious about it now. We left it till quite late -therefore, we will experience pain.”⁴³⁸

The aforementioned statement made by the employee shows that affirmative action measures are implemented however the pace of the progress that is expected from employees is not always made due to some employers lacking the required knowledge to implement the measures correctly. This statement is an example of a barrier since a lack of understanding and/or commitment in implementing affirmative action may delay the process of achieving employment equity which has an adverse effect on people from designated groups. It is thus recommended that the EEA be supplemented in terms of which a provision should be included that training should be provided to employers so that they are well equipped when it comes to implementing affirmative action measures in the workplace.

4.3.2 Measures designed to further diversity in the workplace based on equal dignity and respect of all people

Designated employers are required to implement measures designed to further diversity in the workplace.⁴³⁹ In *SA Commercial Catering & Allied Workers Union on behalf of*

⁴³⁷ Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 55.

⁴³⁸ Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 55.

⁴³⁹ See para 3.3.2.

*Sikhundla and Radisson Blu Hotel Waterfront*⁴⁴⁰ an employer had asked a black employee who was a sangoma to remove her sangoma beads since the beads did not form part of the workplace dress code.⁴⁴¹ The employee refused to remove her beads since she claimed that that the beads formed part of her beliefs..⁴⁴² The employee was issued with a written warning.⁴⁴³ After some discussions, the employer and the employee agreed that the employee could continue to wear the beads, however on condition that she covers the beads with suitable work clothing.⁴⁴⁴ This case illustrates that a mutual agreement between an employer and an employee can be very useful, however this would require the employer to discuss issues which the employees are experiencing insofar as inclusion and diversity is concerned. For the purposes of an improved working environment, it is important that the employer keeps as open-minded when it comes to employees' beliefs, or culture in order to promote diversity in the workplace.

In an interview that was conducted by Joubert, black employees disclosed their experiences of diversity management in the workplace.⁴⁴⁵ A black employee that was interviewed stated that diversity management that is not properly enforced in the workplace could lead to stereotypes with regard to employees' cultures and language barriers which may result in a lack of communication.⁴⁴⁶ She stated that "...unintentionally from ignorance of other cultures and religions; it will also result in language and communication gaps".⁴⁴⁷

An additional black employee who was interviewed by Joubert had the following to say with regard to diversity: "If you understand the person better, there will be better

⁴⁴⁰ *SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA).

⁴⁴¹ *SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA) 1500.

⁴⁴² *SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA) 1500.

⁴⁴³ *SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA) 1500.

⁴⁴⁴ *SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA) 1500.

⁴⁴⁵ Joubert Y 'Workplace diversity in South Africa: Its qualities and management' (2017) 27(4) *J. Psychol. Afr* 369.

⁴⁴⁶ Joubert Y 'Workplace diversity in South Africa: Its qualities and management' (2017) 27(4) *J. Psychol. Afr* 369.

⁴⁴⁷ Joubert Y 'Workplace diversity in South Africa: Its qualities and management' (2017) 27(4) *J. Psychol. Afr* 369.

communication and it helps you to know more diverse people”.⁴⁴⁸ One black employee that was interviewed spoke about her experience of diversity in the workplace and stated that “you get exposed to many different types of people and cultures - when I started to work, I had different friends and learnt about different cultures”.⁴⁴⁹ The aforementioned account demonstrates that in some workplaces, employers are complying with this form of affirmative action measure.

The aforementioned discussion shows that diversity management is important in the workplace since it allows employers to learn more about employees’ cultures and beliefs and by doing so eliminating stereotypes about certain groups which may lead to racial discrimination. Diversity management protects black employees since a number of black employees in South Africa belong to different tribes and practice different cultures and beliefs.⁴⁵⁰

4.3.3 Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities

The EEA places an obligation on designated employers to make reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities in the workplace.⁴⁵¹ A dispute concerning reasonable accommodation came before the Labour Appeal Court in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others*.⁴⁵² In this case, a black employee had applied for unpaid leave of a 5 week period to attend a sangoma initiation.⁴⁵³ The employee explained to the employer that she had been experiencing a spiritual ‘calling’ for which leave was required.⁴⁵⁴ The employer refused to provide the employee with leave for the period requested and instead only granted leave for a period of one week..⁴⁵⁵ The employee defied the decision made by the employer and took leave for the period she requested.⁴⁵⁶

⁴⁴⁸ Joubert Y ‘Workplace diversity in South Africa: Its qualities and management’ (2017) 27(4) *J. Psychol. Afr* 369.

⁴⁴⁹ Joubert Y ‘Workplace diversity in South Africa: Its qualities and management’ (2017) 27(4) *J. Psychol. Afr* 369.

⁴⁵⁰ See para 3.3.2.

⁴⁵¹ see para 3.3.3.

⁴⁵² *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC).

⁴⁵³ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 6.

⁴⁵⁴ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 23.

⁴⁵⁵ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 6.

⁴⁵⁶ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 7.

The issue before the Labour Appeal Court was whether the employer had taken reasonable measures to accommodate the employee's culture.⁴⁵⁷ The Labour Appeal Court dismissed the employer's appeal and ruled that the employer had failed to take reasonable measures to accommodate the employee's culture.⁴⁵⁸ The aforementioned case illustrates that adverse orders are made against designated employers who fail to comply with the obligation to implement this form of affirmative action measure. This obligation thus protects black employees.

In *TDF Network Africa (Pty) Ltd v Faris*⁴⁵⁹ an employee was a member of the Seventh Day Adventist religious group.⁴⁶⁰ The employee claimed that her religion prohibited her from working on Saturdays since Saturdays were considered to be holy days.⁴⁶¹ The employee furthermore claimed that she had informed her employer during her interview that she would not be working on Saturdays.⁴⁶² The Labour Appeal Court held that the employer had failed to reasonably accommodate the employee's religious beliefs since her absence from work on Saturdays would not have affected the proper functioning of the job.⁴⁶³ Furthermore, the Labour Appeal Court held that providing reasonable accommodation to the employee would not open a flood gate for all employees to require accommodation since the employee was the only one who requested to be accommodated in this regard.⁴⁶⁴ The aforementioned case illustrates that designated employers are held legally accountable in circumstances where they fail to accommodate people from designated groups. This obligation thus protects black employees.

4.3.4 Ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce

An employment equity plan should contain numerical targets aimed at promoting an equal representation of suitably qualified people from designated groups within each occupational level of the workplace where underrepresentation of people from designated

⁴⁵⁷ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 20-26.

⁴⁵⁸ *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others* (2012) 33 ILJ 2812 (LAC) para 26-29.

⁴⁵⁹ *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30

⁴⁶⁰ *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 para 2.

⁴⁶¹ *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 para 2.

⁴⁶² *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 para 3.

⁴⁶³ *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 para 50.

⁴⁶⁴ *TDF Network Africa (Pty) Ltd v Faris* (CA 4/17) [2018] ZALAC 30 para 44.

groups has been identified.⁴⁶⁵ The Commission for Employment Equity has reported that there is still a high percentage of white people represented in top management positions. White people make up 65.6%, while there is a 15.2% representation in respect of black people.⁴⁶⁶ In senior management levels the extent of representation of white people is 53,7% while the extent of representation of black people is 23.5%.⁴⁶⁷ These figures show that black people are still underrepresented in the South African workplace and that top management positions are dominated by white people.

In some workplaces employee parties are of the view that there is a need for a quota system (number pushing) since progress in promoting employment equity is not being made.⁴⁶⁸ In an interview that was conducted by Roman and Mason, a trade union chairperson showed support for the quota system and stated that he 'sees no problem in pushing numbers'.⁴⁶⁹ The reason behind the chairperson's statement was that employment equity measures have not been making progress in promoting employment equity in the workplace.⁴⁷⁰ The chairperson stated that "plans are placed on the table and two years later we still don't see any implementation or transformation taking place."⁴⁷¹ This statement made by the chairperson shows that employment equity measures are being implemented in workplaces however progress is not made at the pace that is expected from some employees. The fact that while the chairperson's impatience with the progress made in achieving employment equity is understandable, the quota system is prohibited.⁴⁷²

⁴⁶⁵ Section 20(2) of the EEA.

⁴⁶⁶ Commission for Employment Equity *20th Commission for Employment Equity Annual report 2019 – 20 (2020)* 4.

⁴⁶⁷ Commission for Employment Equity *20th Commission for Employment Equity Annual report 2019 – 20 (2020)* 4.

⁴⁶⁸ Roman LJ & Mason RB 'Employment equity in the South African retail sector: Legal versus competence and business imperatives' (2015) 39(2) *SAJLR* 92.

⁴⁶⁹ Roman LJ & Mason RB 'Employment equity in the South African retail sector: Legal versus competence and business imperatives' (2015) 39(2) *SAJLR* 92.

⁴⁷⁰ Roman LJ & Mason RB 'Employment equity in the South African retail sector: Legal versus competence and business imperatives' (2015) 39(2) *SAJLR* 92.

⁴⁷¹ Roman LJ & Mason RB 'Employment equity in the South African retail sector: Legal versus competence and business imperatives' (2015) 39(2) *SAJLR* 92.

⁴⁷² See para 3.3.5.1.

4.3.5.1 Retain and develop people from designated groups and to implement appropriate training measures

In an interview that was conducted by Booysen some black employees mentioned that a lack of mentorship is one of the reasons why black employees are not retained in the workplace.⁴⁷³ A black employee stated that “we do not have enough black male or female mentors and role models.”⁴⁷⁴ Another black employee added that “the insecurity felt here by black women is perpetuated by the lack of follow-up and coaching in a predominantly white male environment”.⁴⁷⁵ In the aforementioned interviews, the black employees have also mentioned that due to the lack of adequate training and mentorship, some black employees do not have confidence to work in senior levels of the workplace. The argument raised by the aforementioned interviews is also supported by a black employee interviewed by Nzukuma and Bussin who stated that “I did not trust my colleagues and felt I was being set up for failure all the time... There was no mentorship”.⁴⁷⁶ The aforementioned interview indicates that some black employees are of the view that they are not provided with the necessary training and mentorship deliberately to prevent them from being promoted to senior levels of the workplace.

Some black employees interviewed by Booysen stated that an additional reason for the lack of retention and development of black employees in the workplace is the belief by persons in senior management that black employees are incompetent to work in senior levels of the workplace.⁴⁷⁷ A black employee stated that “you can have the title, but you are not good enough to take the extra responsibility or handle the authority”.⁴⁷⁸ Another black employee added that “the perception that you have been accepted in an affirmative action position and therefore you are not totally competent to handle the responsibilities

⁴⁷³ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 60.

⁴⁷⁴ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 60.

⁴⁷⁵ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 60.

⁴⁷⁶ Nzukuma KCC & Bussin M ‘Job-hopping amongst African black senior management in South Africa’ (2011) 9(1) *SA J. Hum. Resour. Manag* 8.

⁴⁷⁷ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 59.

⁴⁷⁸ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 59.

of the job”.⁴⁷⁹ The aforementioned interviews indicate that one of the causes of the lack of retention of black employees in the workplace is the ideology that black employees are incompetent and are thus unable to work in senior levels of the workplace. This thus discourages black employees from applying for positions on senior levels of the workplace. An employee interviewed by Nzukuma and Bussin also argued that a lack of support by top managers in the workplace is one of the reasons that causes a lack of retention of black employees.⁴⁸⁰ The employee stated that “the most frustrating part was that I could not see where my career was going... I left my job because of my line manager; he did not support advancement of blacks”.⁴⁸¹ The aforementioned account indicates that some black employees end up stagnating in the workplace due to the lack of support from senior management.

In the aforementioned interviews the common views expressed by black employees is that some black employees are not receiving adequate training and that they are being set up for failure when they are promoted to senior positions. With regards to retention, black employees in some workplaces believe that the ideology that black employees are incompetent to work in senior levels of the workplace is one of the reasons why there is a lack of retention of black employees in the workplace. It is thus recommended that designated employers should be trained on the manners in which to mentor black employees so that they can gain confidence to work in senior levels of the workplace and in this way be retained in the workplace.

4.4. THE ADVANTAGES AND DISADVANTAGES OF AFFIRMATIVE ACTION

Affirmative action is important since it aims to achieve equality and create a society where people are not restricted in obtaining employment and promotions as a result of their race.⁴⁸² In some places of employment black employees view affirmative action in a positive light. They see these measures as an opportunity to prove that black people are

⁴⁷⁹ Booysen L ‘Barriers to employment equity implementation and retention of blacks in management in South Africa’ (2007) 31(1) *SAJLR* 59.

⁴⁸⁰ Nzukuma KCC & Bussin M ‘Job-hopping amongst African black senior management in South Africa’ (2011) 9(1) *SA J. Hum. Resour. Manag* 8.

⁴⁸¹ Nzukuma KCC & Bussin M ‘Job-hopping amongst African black senior management in South Africa’ (2011) 9(1) *SA J. Hum. Resour. Manag* 8.

⁴⁸² Bergmann BR *In Defence of Affirmative Action* (1996) 28.

as competent as white people and deserve to be placed in senior levels of the workplace. A black employee that was interviewed stated that “I think the way that we've gone about it is to demonstrate our competence. We can do the job and that we want to be held accountable where we fail.”⁴⁸³

A different black employee interviewed by Barnard described affirmative action in the following way:

“To be given an opportunity on an equal footing with other people to prove one's worth. To be able to change perceptions about blacks (specifically black women) in the workplace.”⁴⁸⁴

Affirmative action is important in redressing the inequalities caused by apartheid. Since senior positions were reserved for white people only, affirmative action aims to reduce the large difference in the representation of black and white people in such positions and, this gap gradually decreases.⁴⁸⁵ Since employers are required to ensure equitable representation of people from designated groups in all occupational levels of the workplace, this assists in contributing towards more black people being promoted thereby obtaining increased salaries and also assists in the promotion of diversity in the workplace.⁴⁸⁶ Diversity in employment plays an important role in reducing unfair discrimination by creating a working environment where employees and employers are able to learn about different cultures and beliefs.

Charlton and Van Niekerk are of the view that affirmative action is another form of positive discrimination.⁴⁸⁷ These authors argue that affirmative action is a form of racial discrimination and increases the already strained tension of racial discrimination in South Africa.⁴⁸⁸ Charlton argues that the reservation of jobs to benefit black people means that the government is excluding white employees from certain vacant positions, and this causes hardships to white employees.⁴⁸⁹ In other words, affirmative action is considered

⁴⁸³ Motileng BB et al 'Black middle managers' experience of affirmative action in a media company' (2006) 32(1) *SA J. Ind. Psychol* 14.

⁴⁸⁴ Motileng BB et al 'Black middle managers' experience of affirmative action in a media company' (2006) 32(1) *SA J. Ind. Psychol* 14.

⁴⁸⁵ Charlton & van Niekerk *Affirmative Action-Beyond 1994* (1994) 13.

⁴⁸⁶ Thomas A *Beyond Affirmative Action: Managing Diversity for Competitive Advantage in South Africa* (1996) 91.

⁴⁸⁷ Charlton & van Niekerk *Affirmative Action-Beyond 1994* (1994) 13.

⁴⁸⁸ Charlton & van Niekerk *Affirmative Action-Beyond 1994* (1994) 13.

⁴⁸⁹ Charlton & van Niekerk *Affirmative Action-Beyond 1994* (1994) 13.

to amount to reverse discrimination. Charlton furthermore argues that affirmative action measures are aimed at seeking revenge for historical segregation and racial discrimination.

Affirmative action is said to focus on race rather than on poverty leaving the most vulnerable people in disadvantaged positions.⁴⁹⁰ Authors argue that affirmative action is condescending to beneficiaries in the sense that views exist that affirmative action is necessary to succeed rather than focusing on the objective requirements which employees should possess.⁴⁹¹ Alexander argues that affirmative action only caters for the small middle-class elite since they stand a better chance of being appointed or promoted by virtue of the fact that only 'suitably qualified people' are taken into consideration, who are usually educated persons.⁴⁹² According to Benator, the numerical targets set by employers in their affirmative action policies leads to the appointment of unskilled employees since there is a desperate need of black people in a specific position.

According to Dupper, 'unless a cut-off date is set, affirmative action has, at the best, the potential to become permanent, and at worst, an institutionalised 'racial spoil system'.⁴⁹³ The negative effects that could arise in circumstances where affirmative action becomes permanent is also a concern that was raised by Dupper.

4.4 CONCLUSION

This chapter contains a discussion on the experiences of employees insofar as racial discrimination and affirmative action is concerned, which have been obtained from case law and journal articles. This was done with a view to determining the way in which the legislative provisions discussed in chapters 2 and 3 are applied in practice and in so doing, determine whether the said provisions should be amended and/or supplemented. Racial discrimination still persists in South African workplaces; however, the outcomes of

⁴⁹⁰ Alexander N 'Debate- Affirmative action at the perpetuation of racial Identities in post-Apartheid South Africa' 2007 *Transformation* 95.

⁴⁹¹ Oosthuizen RM 'Subjective experiences of employment equity in South African organisations' 2019 *SAJHRM* 6.

⁴⁹² Alexander N 'Debate- Affirmative action at the perpetuation of racial Identities in post-Apartheid South Africa' 2007 *Transformation* 95.

⁴⁹³ Dupper O 'Affirmative action: Who, how and how long?' (2008) 24 *SAJHR* 439.

the court cases do indicate that black employees are protected as a result of the meanings of direct and indirect discrimination. In order for racial discrimination to be reduced, it is recommended that the EEA be supplemented requiring that employers be educated on the reasons for the need to eliminate racial discrimination in the workplace.

This chapter contains a discussion on black employees' experiences with regards to barriers to employment equity and it has illustrated that one of the barriers to employment equity is employers' lack of commitment and knowledge on the manners in which to implement the affirmative action measure to identify and eliminate employment barriers. It is thus recommended that the EEA be supplemented in terms of which a provision should be included that should be provided to designated employers on the manners in which to implement affirmative action. This chapter also illustrates that it may be useful for employers and employees to conclude agreements to cater to some of the reasonable requests of employees that relate to diversity to ensure that all employees feel included irrespective of their background, culture, or race. As far as equitable representation in the workplace is concerned, this chapter confirms that while progress is being made in promoting racial equality in the workplace black people are still underrepresented. Black employees have disclosed the fact that the training which they require is lacking and that there are insufficient mentors. It is thus recommended that the EEA be supplemented in such a way that designated employers will be required to obtain training on the ways in which to mentor the employees.

The chapter that follows contains the conclusion and the recommendations

CHAPTER 5

CONCLUSION

5.1. INTRODUCTION

During Apartheid, laws existed that legalised racial discrimination and enforced racial segregation between black and white people.⁴⁹⁴ The segregation included separate and unequal education, racially divided living areas and workplace segregation where white people were employed in top positions while black people were employed in lower levels of the workplace or worked as unskilled labourers.⁴⁹⁵ The Constitution was enacted to redress the inequalities caused by apartheid and create a society based on democratic values, social justice and equal rights where everyone is equally protected by the law.⁴⁹⁶

Section 9 of the Constitution contains the equality clause.⁴⁹⁷ Section 9(1) of the Constitution guarantees everyone equal protection before the law and section 9(2) of the Constitution places an obligation on the State to promote equality by implementing legislative measures to protect and advance those who were previously disadvantaged by the laws of the past.⁴⁹⁸ The EEA was thus enacted *inter alia* to give effect to the right to equality.⁴⁹⁹

This thesis contains a discussion on the legislative provisions in South Africa that govern racial discrimination in the workplace. It aims to determine to the extent to which the South African legislative framework protects black employees against racial discrimination. It also aims to determine the ways in which the law governing racial discrimination should be amended and/or supplemented.

The EEA contains two main parts: Chapter 2 contains the provisions governing the elimination of unfair discrimination and Chapter 3 contains the provisions governing affirmative action.⁵⁰⁰ Similar to the EEA, chapter 2 of this thesis contains a discussion on the legislative provisions governing unfair discrimination, while chapter 3 of this thesis contains a discussion on the law governing affirmative action. Employees experiences

⁴⁹⁴ See para 1.1.

⁴⁹⁵ See para 1.1.

⁴⁹⁶ See para 1.1.

⁴⁹⁷ See para 1.1.

⁴⁹⁸ See para 1.1.

⁴⁹⁹ See para 1.1.

⁵⁰⁰ See para 2.2.

with regard to racial discrimination and affirmative action as obtained from journal articles, reports and case law are discussed in chapter 4 of this thesis. This conclusion is thus structured under the topics: discrimination on the ground of race and affirmative action.

5.2. RACIAL DISCRIMINATION

Section 5 of the EEA protects black employees since this section places an obligation on employers to eliminate unfair discrimination in any employment policy or practice.⁵⁰¹ Section 6 of the EEA protects black employees by stating that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race.⁵⁰² The EEA in prohibiting direct racial discrimination in the workplace assists in protecting black employees against racial discrimination. Direct discrimination occurs when an employee is treated adversely as a result of such employee possessing a certain characteristic whether arbitrary or listed such as race.⁵⁰³ The meaning of indirect discrimination protects black employees in workplaces in situations where employment policies and practices seem to be equal however unfairly discriminates against a group of black employees.⁵⁰⁴ The outcomes of the judgments discussed in chapter 4 further confirm that while black employees are still subjected to racial discrimination, black employees are protected as a result of the meanings of direct and indirect discrimination. Section 11 of the EEA has made it easier for employees to raise a claim of racial discrimination by placing the burden on employers to prove either that there was no discrimination, or that the discrimination is rational or justifiable.⁵⁰⁵ Black employees are thus protected as a result of the contents of section 11 of the EEA.

Section 6(4) of the EEA provides that differences in terms and conditions of employment for employees working for the same employer who are performing the same job or job of equal value that is directly or indirectly based on a prohibited grounds which includes the ground of race amounts to unfair discrimination.⁵⁰⁶ Clause 3 of the Regulations places an

⁵⁰¹ See para 2.3.

⁵⁰² See para 2.3.

⁵⁰³ See para. 2.3.1.1.

⁵⁰⁴ See 2.3.1.2.

⁵⁰⁵ See para 2.3.2.

⁵⁰⁶ See para 2.3.3.

obligation on employers to take steps to eliminate unfair discrimination in terms of remuneration when employees are performing the same job or doing work of equal value.⁵⁰⁷ A difference in terms of remuneration does not necessary amount to unfair discrimination and factors such as seniority, length of service and qualifications may justify a difference in terms of remuneration.⁵⁰⁸ The prohibition against wage discrimination for work of equal value promotes equality in the workplace and prohibits employers from exploiting black employees by paying them a lower salary compared to white employees that are employed on the same level and performing the same tasks.⁵⁰⁹

The remedies provided in terms of section 50(2) of the EEA protects black employees. In terms of the EEA, the Labour Court may order the employer to pay damages to an employee who is successful with a claim based on racial discrimination.⁵¹⁰ Black people are also protected in instances where the Labour Court orders the employer to compensate the employee for pain and suffering and for the employer's violation of the employee's human dignity due to unfair discrimination.⁵¹¹ The Labour Court may order the employer to take positive measures to prevent racial discrimination from reoccurring.⁵¹² The EEA also contains a remedy empowering the Labour Court to remove the designated employer's name from the Minister's employment equity report.⁵¹³ Black employees are thus protected as a result of the remedies contained in the EEA.

Research shows that black employees are still racially discriminated against.⁵¹⁴ This may be due to employers still carrying racial ideologies that have been influenced by the apartheid system.⁵¹⁵ In order for racial discrimination to be reduced, it is recommended that the EEA be supplemented requiring employers to obtain training on the need to eliminate racial discrimination to ensure that the place of employment is more productive.

⁵⁰⁷ See para 2.3.3.

⁵⁰⁸ See para 2.3.3.

⁵⁰⁹ See para 2.3.3.

⁵¹⁰ See para 2.4.

⁵¹¹ See para 2.4.

⁵¹² See para 2.4.

⁵¹³ See para 2.4.

⁵¹⁴ See para 4.2.2.

⁵¹⁵ See para 2.3.1.1.

5.3. AFFIRMATIVE ACTION

The EEA places an obligation on designated employers to implement affirmative action measures in the workplace.⁵¹⁶ Designated employers are required to identify and eliminate barriers which adversely affects people from designated groups.⁵¹⁷ This duty protects black people who are employed by a designated employer. Designated employers are also obliged to promote diversity in the workplace.⁵¹⁸ This duty assists in removing negative stereotypes. As far as diversity is concerned, chapter 4 illustrates that it may be useful for employers and employees to conclude agreements where it is possible for employers to cater to reasonable requests made by employees in this regard. Black employees who are employed by designated employers are protected as a result of this form of affirmative action measure.

The EEA places an obligation on designated employers to make reasonable accommodation for people from designated groups.⁵¹⁹ Failure by the employer to make reasonable accommodation where it can be made without undue hardship may amount to unfair discrimination.⁵²⁰ Chapter 4 of this thesis revealed that adverse orders may be made against employers who fail to provide reasonable accommodation where it is possible to do so without undue hardship. Designated employers are required to ensure equitable representation of people from designated groups in the workplace.⁵²¹ Chapter 4 has confirmed that black people are still underrepresented in management positions. As a result of the aforementioned, this affirmative action measure is necessary. For this reason, this measure protects black employees since it places an obligation on designated employers to place suitably qualified people from designated groups in levels of the workplace where they are underrepresented and by doing so promote racial equality in the workplace.

Designated employers are required to retain and develop people from designated groups and to implement appropriate training measures.⁵²² This measure protects black

⁵¹⁶ See para 3.1.

⁵¹⁷ See para 3.3.1.

⁵¹⁸ See para 3.3.2.

⁵¹⁹ See para 3.3.3.

⁵²⁰ See para 4.3.3.

⁵²¹ See para 3.3.4.

⁵²² See para 3.3.5.

employees who are employed by a designated employer since designated employers are obliged to promote suitably qualified people from designated groups within the workplace rather than employing employees from outside the workplace. This measure protects black employees since it places an obligation on designated employers to provide training to people from designated groups so that they can obtain the necessary knowledge and skills to work efficiently.

Designated employers are required to consult with the employee parties.⁵²³ The consultation process provides designated employers with the opportunity to discuss the procedures to be followed when implementing employment equity. This obligation protects black employees who are employed by a designated employer since the consultation should be done in good faith and employees are hereby made aware of the content of the consultation.⁵²⁴ Designated employers are also required to conduct an analysis to identify barriers in employment policies, practice and the working environment. The analysis should also include a profile to determine where people from designated groups are underrepresented. Black employees who are employed by designated employers are protected as a result of designated employers being required to comply with this obligation.

Designated employers are required to draft and implement an employment equity plan.⁵²⁵ This obligation furthermore requires a designated employer to provide the procedures that will be followed in implementing employment equity.⁵²⁶ This obligation protects black employees who are employed by a designated employer since designated employers are obliged to monitor the progress of an employment equity plan and make the necessary changes in instances where the equity plans are not making progress.

Designated employers are required to report to the Director- General.⁵²⁷ This obligation protects black employees who are employed by a designated employer since designated employers can be held accountable to the Director -General should the designated employer not comply with the obligation.

⁵²³ See para 3.4.1.

⁵²⁴ See para 3.4.1.

⁵²⁵ See para 3.4.3.

⁵²⁶ See para 3.4.3

⁵²⁷ See para 3.4.4.

Employers may raise affirmative action as a defence to a claim of unfair discrimination.⁵²⁸ However, an employment equity plan should exist in order for an employer to raise affirmative action as a defence.⁵²⁹ Black employees are protected by the fact that affirmative action can be raised by the employer as a defence. The fact that employers are allowed to do so implies that employers can appoint or promote black people where an employment equity plan exists to support such appointment or promotion, without fear of being unsuccessful in a case where a white person claims racial discrimination. Research shows that some designated employers do not understand the purpose of implementing affirmative action in the workplace.⁵³⁰ Research also shows that affirmative action measures in workplaces are being implemented however in some workplaces they are not progressing efficiently due to workplaces not knowing how to execute the measures properly.⁵³¹

5.4. RECOMMENDATIONS

This thesis contains a discussion on the extent to which black employees are protected by the legislative framework governing racial discrimination. This thesis shows that black employees are protected as a result of sections 5 and 6 of the EEA, the meanings of direct and indirect discrimination, the burden of proof, the law governing equal pay for work of equal value and the remedies that are available to employees. Since this thesis confirms that black employees are subjected to racial discrimination, it is recommended that the EEA be supplemented to include a provision that employers be provided with training to educate them on the importance of eradicating racial discrimination in the workplace. Black employees who are employed by a designated employer are protected not only as a result of designated employers being required to implement affirmative action measures, but also as a result of the procedural obligations which designated employers are required to comply with. Since the EEA only places an obligation on designated employers to implement affirmative action measures in the workplace and to comply with the procedural obligations, black employees not employed by designated

⁵²⁸ See para 3.5.

⁵²⁹ See para 3.5.

⁵³⁰ See para 4.3.1.

⁵³¹ See para 4.3.1.

employers are not protected by the EEA as far as these obligations are concerned. The definition of designated employers in the EEA should therefore be amended to extend the meaning of 'designated employer'. Chapter 4 of this thesis shows that training and mentorship is a challenging issue for black employees. It is thus recommended that the EEA should be supplemented in terms of which a provision should be included that training be provided to employers on the ways in which to mentor. Chapter 4 of this thesis also shows that while affirmative action protects black employees, there are workplaces where the implementation of these measures is problematic. For this reason, it is recommended that the EEA should be supplemented in terms of which a provision should be included that training be provided to employers to assist with the implementation of affirmative action.

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BIBLIOGRAPHY

Constitution

Constitution of the Republic of South Africa 1996

Legislation

Employment Equality Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Employment Equity Regulations, 2014 GN R595 in GG 37873 of 1 August 2014

Promotion of Equality and Prevention of Unfair Discrimination Act of 2000

Conventions

International Convention on the Elimination of all Forms of Racial Discrimination 1965

International Labour Organisation Convention (No 111) Concerning Discrimination in respect of Employment and Occupation 1958

Codes of Good Practice

Code of good practice: Preparation, implementation and monitoring of employment equity plans in GN 1394 of 23 November 1999

Code of Good Practice: Preparation, Implementation and Monitoring of the Employment Equity Plan GG 40817 of 28 APRIL 2017.

Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value in GN 448 GG 38837 of 1 June 2015

Case Law

Alexandre v Provincial Administration of the Western Cape Department of Health (2003) 26 ILJ 765 (LC) 777

Antoinette Mclnnes v Technikon Natal (2000) 21 ILJ 1138 (LC)

Association of Professional Teachers & another v Minister of Education & Others (1995) 16 ILJ 1048 (IC)

Auf der Heyde v. University of Cape Town (2000) 21 ILJ 1758 (LC)

Bigger v City of JHB EMS [2011] ZALCJHB 5

City Council of Pretoria v Walker 1998 2 SA 363 (CC)

Coetzer & others v Minister of Safety & Security & another 2003 (3) SA 368 (LC); (2003) 24 ILJ 163 (LC)

Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others (2002) 23 ILJ 863 (LAC)

Department of Correctional Services & another v Police & Prisons Civil Rights Union & others (2013) 34 ILJ 1375 (SCA)

Dlamini & others v Green Four Security (2006) 27 ILJ 2098 (LC)

Durban Metropolitan Council and SAMWU obo Lootzy (1998) 7 ARB. 6.9.5

Du Plessis & Others v De Klerk and another 1996(3) SA 850 (CC)

Ethekwini Municipality v Nadesan & others (2021) 42 ILJ 1480 (LC)

George v Liberty Life Association of Africa Ltd (1998) 17 ILJ 571 (LC)

Germishuys v Upington Municipality [2001] 3 BLLR 345 (LC)

Gordon v Department of Health: KwaZulu-Natal (2008) 29 ILJ 2535 (SCA)

Harksen v Lane NO and Others 1998 (1) SA 300 (CC)

Harmse v City of Cape Town (C 966/2002) [2003] ZALC 53 (9 May 2003)

Independent Municipal & Allied Workers Union & another v City of Cape Town (2005) 26 ILJ 1404 (CC)

Institute for Democracy in SA and Others v African National Congress 2005 (10) BCLR 995 (C)

Johnson v Transport Agency 480 US 616. 639 (1987)

Jooste v Score Supermarket Trading (Pty) Ltd [1999] 2 BCLR 139 (CC)

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others (2012) 33 ILJ 2812 (LAC)

Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) & others (1998) 19 ILJ 285 (LC)

Louw v Golden Arrow Bus Service (Pty) Ltd (C 37/97) [1999] ZALC 166 (23 November 1999)

Mahlangu & another v Minister of Labour & others (Commission for Gender Equality & another as Amici Curiae) (2021) 42 ILJ 269 (CC)

Mahwanqa v South African Human Rights Commission (11208/2014) [2019] ZAGPJHC 125 (21 February 2019)

Mangena & Others v Fila South Africa (Pty) Limited and others [2009] 12 BLLR 1224 (LC)

Mbana v Shepstone & Wylie (2015) 36 ILJ 1805 (CC)

Minister of Finance and Others v Van Heerden (CCT 63/03) [2004] ZACC 3.

Naidoo and Others v Parliament of the Republic of South Africa (C 865/ 2016) [2018] ZALCCT 38

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998(12) BLLR 1517,60 (CC)

Ndudula and Others v Metrorail PRASA (Western Cape) (C1012/2015) [2017] ZALCCT 12

NEHAWU obo Mofokeng & Others vs Charlotte Theron Children's Home [2004] 10 BLLR 979

Ntai and others v SA Breweries Ltd (2001) 22 ILJ 214 (LC)

Pioneer Foods (Pty) Ltd v Workers Against Regression & others (2016) 37 ILJ 2872 (LC)

President of the Republic of South Africa v Hugo [1997] ZACC 4

Reynhardt v University of South Africa [2008] 4 BLLR 318 (LC)

SAEWA obo Bester v Rustenburg Platinum Mine and Another 38 ILJ 1779 (LAC)

SAMKA v Shoprite Checkers (Pty) Ltd & others (2020) 41 ILJ 1945 (LAC)

Sasol Chemical Operations (Pty) Ltd v CCMA and Others (J2680/16) [2018] ZALCJHB

Simmadari v Absa Bank Ltd (2018) 39 ILJ 1819 (LC)

Solidarity v Minister of Labour and Others (2020) 41 ILJ 273 (LC)

SA Airways (Pty) Ltd v Jansen van Vuuren & another (2014) 35 ILJ 2774 (LAC)

SA Commercial Catering & Allied Workers Union on behalf of Sikhundla and Radisson Blu Hotel Waterfront (2010) 31 ILJ 1500 (CCMA)

SAEWA obo Bester v Rustenburg Platinum Mine and Another (2017) 38 ILJ 1779 (LAC)

SA Transport & Allied Workers Union obo Dlamini and Transnet Freight Rail & another (2009) 30 ILJ 1692 (ARB)

Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union & another as Amici Curiae) (2016) 37 ILJ 1995 (CC)

South African Airways (Pty) Ltd v GJJVV [2014] 8 BLLR 748 (LAC)

South African Municipal Workers Union obo Damons v City of Cape Town (C306/2015) [2018] ZALCCT 9

South African Police Service obo Barnard 2014 (6) SA 123 (CC)

South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others; InRe: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice and Constitutional Development and Others [2015] 1 All SA 589 (WCC)

South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2017] 1 BLLR 8 (CC)

Stoman v Minister of Safety & Security & Others (2002) 23 ILJ 1020 (T)

Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & others (2019) 40 ILJ 773 (CC)

Sun International Ltd v SA Commercial Catering & Allied Workers Union on behalf of Ramerafe & others (2019) 40 ILJ 1873 (LC)

University of South Africa v Reyhardt (2010) 31 ILJ 2368 (LAC)

Willemse v Patelia No and Others (2007) 28 ILJ 428 (LC)

Woolworths (Pty) Ltd v Whitehead 2000 (3) SA 529 (LAC); (2000) 21 ILJ 571 (LAC)

Books

- Abrahams D et al *Labour Law in Context* 2ed (2017). South Africa: Pearson Education South Africa
- Basson AC et al, *The New Essential Labour Law Handbook* 6 ed (2017) South Africa: Mace
- Bentley K et al *Racial Redress and Citizenship in South Africa* (2008) South Africa: HSRC Press Place
- Bergmann BR *In Defence of Affirmative Action* (1996) New York: Basic Books
- Boninelli I & Meyer T *Building Human Capital: South African Perspectives* (2004). South Africa: Knowledge Resources Publishing Pty Ltd
- Charlton & van Niekerk *Affirmative Action-Beyond 1994* (1994) Cape Town: Juta Place
- Collier D et al *Labour Law in the South African: Context and Principles* (2018). South Africa: Oxford University Press
- Currie I & De Waal J *The Bill of Rights Handbook* 6 ed (2013) Cape Town: Juta Place
- Dugard J *Confronting Apartheid: A Personal History of South Africa, Namibia and Palestine* (2018). Johannesburg: Jacana Media
- Dupper O et al *Essential Employment Discrimination Law* (2004) Wetton: Juta Place
- Dupper O et al *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) Claremont: Juta Place
- Dupper O et al *Understanding the Employment Equity Act* (2009) Cape Town: Juta Place
- Du Toit D *Labour Relations Law: A Comprehensive Guide* 6ed (2015) South Africa: Lexis Nexis
- Du Toit D *Unfair Discrimination in the Workplace* (2014) Cape Town: Juta & Co
- Gann & Duignan *Colonialism in Africa, 1870-1960: The History and Politics of Colonialism 1870-1914* (1969). New York: Cambridge University Press Place
- Habana R *Staff retention: a Closer Look at the Financial Sector in SA.: The Impact of the Employment Equity Act on Staff Retention in the Financial Sector of South Africa* (2007). South Africa: Vdm Verlag Dr. Muller
- Loenen T & Rodrigues P *Non-Discrimination Law: Comparative Perspectives* (1999). The Hague: Kluwer Law International Place

MacDonald M *Why Race Matters in South Africa* (2006) United States of America: Harvard University Press Place

Meyer M *Managing Human Resource Development: An Outcomes-Based Approach* (1999). South Africa: Butterworths

Meyer M & Botha E *Organisation Development and Transformation in South Africa* (2000). South Africa: LexisNexis

Nel P S et al *South African Employment Relations: Theory and Practice* (2016). South Africa: Van Schaik Publishers

O' Regan K *Addressing the Legacy of the Past: Equality in the South African Constitution* (1999). England: Oxford Law Faculty

Thomas A *Beyond Affirmative Action: Managing Diversity for Competitive Advantage in South Africa* (1996) South Africa: Thorold's Africana Books

Thompson L *A History of South Africa* (2001). United States: Yale Press Place

Tomasson et al *Affirmative Action: The Pros and Cons of Policy and Practice* (1996) USA: American University Press

Van Niekerk et al *Law @ Work* 5 ed (2015) South Africa: Lexis Nexis

Journal Articles

Abdelrahman A 'Affirmative Action in the United States and South Africa: Why South Africa should not Follow in Our Footsteps' (1999) 19 *N.Y.L. Sch. J. Int'l & Comp.L.* 195-214

Albertyn C 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' 2018 *SAJHR* 441-468

Albertyn C 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253-276

Alexander N 'Debate- Affirmative Action at the perpetuation of racial identities in post post-apartheid South Africa' (2007) 63 *Transformation* 92-108

Baloyi EM 'Tribalism: Thorny issue towards reconciliation in South Africa – A practical theological appraisal' (2018) 74(2) *HTS Teologiese Studies/Theological Studies* 1-7

Benatar D 'Justice, Diversity and Racial Preference: A Critique of Affirmative Action' (2008) 124 *S. Africa L.J.* 274-306

Bernard RB 'Reasonable Accommodation in the Workplace: To Be or Not to Be' (2014) 17(6) *PER / PELJ* 2870-2891

Booyesen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31(1) *SAJLR* 47-71

Bowen P et al 'Harassment and discrimination experienced by quantity surveyors in South Africa' (2013) *Acta Structilia: Journal for the Physical and Development Sciences* 50-77

Classen F 'Inequality in the workplace: what constitutes unfair discrimination?' (2019) 25(6) *Occupational Health Southern Africa* 201-204

Cunningham C et al 'Race, Class, and Caste? Rethinking Affirmative Action' (1999) 97 *Michigan LR* 1296-1310

Deane T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998: analyses' (2006) 18 *SA Merc LJ* 382-388

Dupper O 'Affirmative Action and Substantive Equality: The South African Experience' (2004) 14 *Merc* 275 -292

Dupper O 'Affirmative Action; Who How and How Long?' (2008) 24 *SAJHR* 425-444

Dupper O 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' (2012) 2012(1) *Acta Juridica* 244-269

Du Toit D 'Affirmative Action of Positive Action in the Employment Context: Comparing the Interpretation of Equality by the European Court of Justice with that of the South African Constitutional Court.' (2015) 36 *Comp. Lab. L. Poly J.* 423-444

Du Toit D 'Protection against unfair discrimination in the workplace: Are the Courts Getting It Right?' (2007) 11 *Law democr. Dev.* 1-15

Du Toit D 'The Evolution of the Concept of Unfair Discrimination in South African Labour Law.' (2006) 27 *Indus. L.J. (Juta)* 1311-1341

Du Toit D 'When does affirmative Action in Favour of Certain Employees Become Unfair Discrimination against Others' (2001) 5 *Int'l J. Discrimination & L.* 147-166

Ebrahim S 'Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom' (2016) 19 *PER / PELJ* 1-27

Fredman S 'Providing Equality: Substantive Equality and The Positive Duty to Provide' (2005) 21 *SAJHR* 163-190

Fredman S 'Redistribution and Recognition: Reconciling inequalities' (2007) 23 *SAJHR* 214-234

Garbers C 'Employment Discrimination Law into the Future' (2018) 2 *StellLR* 237-269

Geldenhuys J & Kelly-Louw M 'Hate Speech and Racist Slurs in the South African Context: Where to Start?' (2020) 23 *PER / PELJ* 1-46

Gwele NS 'Diversity management in the workplace: beyond compliance' (2009) 32 *Curationis* 4-10

Ivancevich JM & Gilbert JA 'Diversity management: Time for a new approach' (2000) 29(1) *Public Pers Manage* 75-92

Jagwanth S 'Affirmative Action in a Transformative Context: The South African Experience' (2004) 36(3) *Conn. L. Rev.* 725-746

Jele MN 'Report: Transformation of the Legal Profession' (2014) *De Rebus*

Joubert P et al 'Employee retention and talent management at a sugar mill in South Africa' (2017) 15(3) *Problems and Perspectives in Management* 306-315

Joubert Y 'Workplace diversity in South Africa: Its qualities and management' (2017) 27(4) *J. Psychol. Afr.* 367-371

Khumalo B 'Racism in the workplace: A view from the jurisprudence of courts in the past decade' (2018) 30 *SA Merc LJ* 377-394

Laubscher T 'Equal Pay for Work of Equal Value – A South African Perspective' (2016) 37(2) *Indus. L.J (Juta)* 804-830

Langa P 'Transformative Constitutionalism' (2006) 17(3) *Stell LR* 351-360

Leonard JS 'The Impact of Affirmative Action Regulation and Equal Law on Black Employment' (1990) 4(4) *The Journal of Economic Perspectives* 47-63

Loenen T, 'The Equality clause in the South African Constitution: Some remarks from a comparative perspective' (1997) 13(3) *SAJHR* 401-429

Lodge T 'The South African General Elections, April 1994: Results, Analysis and Implications' (1995) 94 *Afr Aff* 471-500

Local Government Sector Education and Training Authority (LGSETA) 'Staff turnover and retention in municipalities' (2019) 27(7) *Civil Engineering* 52

- Makhaye C 'I've Changed' Says South African Law: Has the Judiciary Opened up to Black Women Lawyers?' (2020) 14(2) *Pretoria Student L. Rev* 31-44
- Maqutu L & Motloug S 'Hidden racial attitudes within the workplace: an evaluation of *Bester v Rustenburg Platinum Mine*' (2018) 34 *SAJHR* 254–267
- Maleka MJ & Siziba D 'Barriers to Implementing Employment Equity in a Government Department' (2019) 54 *J Public Adm Res Theory* 75-85
- Maré G 'Race Counts in contemporary South Africa: an illusion of ordinariness' (2001) 47 *Transformation* 75-93
- Mariotti M 'Labour markets during apartheid in South Africa' (2012) 65 *Econ Hist Rev* 1100-1122
- McGregor M 'A Legal- Historical Perspective on Affirmative Action in South Africa' (Part 1) (2006) 12 *Fundamina* 87-99
- McConnachie C 'Affirmative action and intensity of review: *South African Police Service v Solidarity obo Barnard*' (2015) 7(1) *CCR* 163-197
- McConnachie C 'Review: Human Dignity, 'Unfair Discrimination' and Guidance' (2014) 34(3) *Oxf J Leg Stud* 609-629
- Mcgregor M 'Affirmative Action- a defence or a right?' (2003) 11(3) *Juta's Business Law* 164-175
- McGregor M 'Blowing a Whistle on Affirmative Action: The Future of Affirmative Action in South Africa' (Part2) (2014) 26 *SA Merc LJ* 282-306
- McGregor M 'Racial harassment in the workplace: context as indicator *SA Transport & Allied Workers Union obo Dlamini and Transnet Freight Rail 2009 ILJ* 1692 (ARB): regspraak' (2014) 2014(3) *TSAR* 649-656
- Mokoena K 'The Subtleties of Racism in the South African Workplace' (2020) 3(1) *Int. J. Comput. Digit. Syst* 25-36
- Motileng BB et al 'Black Middle Managers' Experience of Affirmative Action in a Media Company' (2006) 32(1) *SA J. Ind. Psychol.* 11-16
- Mpedi LG et al' 'Unfair Discrimination in The Workplace' (2016) 2016(4) *TSAR* 835-837
- Mushariwa M 'The Cycles of Affirmative Action in The Transformation of the Workplace' (2020) 32 *SA MERC LJ* 99-112

- Nemakonde M 'Employment Equity and Affirmative Action in South Africa: A Review of the Jurisprudence of the Courts since 1994' (2016) 3 *African Journal of Democracy and Governance* 75-106
- Nielsen HK 'Concept of Discrimination in ILO Convention No.111' (1994) 43(4) *The International and Comparative Law Quarterly* 827-856
- Nzukuma KCC & Bussin M 'Job-hopping amongst African Black senior management in South Africa' (2011) 9(1) *SA J. Hum. Resour. Manag* 1-12
- Oosthuizen RM 'Attitudes Towards and Experience of employment equity' (2010) 30(1) *SA J. Ind. Psychol.* 1-9
- Oosthuizen RM 'Subjective experiences of employment equity in South African organisations' 2019 *SA J. Hum. Resour. Manag.* 1-12
- Op't Hoog C et al 'Affirmed identities? The experience of black middle managers dealing with affirmative action and equal opportunity policies at a South African mine' (2010) 34(2) *SAJLR* 60-83
- Orr L & Goldman T 'Workplace discrimination: Early Experience with the EEA' (2001) 18(3) *Indicator SA* 13-23
- Paust J 'Race-Based Affirmative Action and International Law' (1997) 18 *Mich. J. Int'l. L.* 659-677
- Roman LJ & Mason RB 'Employment equity in the South African retail sector: Legal versus competence and business imperatives' (2015) 39(2) *SAJLR* 84-104
- Rycroft A 'Inherent Requirements of the Job' (2015) 36 *Indus. L.J.* 900-906
- Sihlangu P 'Critical Analysis of Transformative Policy Interventions to Redress Past Apartheid Land Segregation in South Africa: From Exclusion to Inclusive Nation Building' (2021) 5(1) *Journal of Nation-building and Policy Studies* 91-113
- Smith A 'Equality constitutional adjudication in South Africa (2014) 14 *AHRLJ* 609-632
- Spears K 'Institutionalized Racism and the Education of Blacks' (1978) 9(2) *Anthropol. Educ. Q.* 127-136
- Strauss M 'A Historical Exposition of Spatial Injustice and Segregated Urban Settlement in South Africa' (2019) 25 *Fundamina* 135-168
- Treiman D 'The Legacy of Apartheid: Racial Inequalities in The New South Africa' 2005 *UCLA: California Center for Population Research* 1-48

Tshishonga N 'The Legacy of Apartheid on Democracy and Citizenship in Post-Apartheid South Africa: An Inclusionary and Exclusionary binary?' (2019) 9(1) *AFFRIKA Journal of Politics, Economics and Society* 167-191

Uys I 'Diversity Management: Reasons and Challenges' (2003) 3 *Politeia* 30-44

Van Jaarsveld M 'Labour law' (2008) 2008(1) *Annu. Surv. S. Afr. Law* 639-807

Reports

Commission for Employment Equity *20th Commission for Employment Equity Annual report 2019 – 20* (2020)

Explanatory Memorandum to the Employment Equity Bill in GN 1840 GG 18481 of 1 December 1997

South African Human Rights Commission *National Hearing on Unfair Discrimination in the Workplace* (2017)

The South African Legal Practice Council Notice in Terms of Section 95(4) of The Legal Practice Act 28 of 2014 in GN 6 GG 44068 of 15 January 2021

Internet websites

Brand South Africa 'South Africa's population' available at <https://www.brandsouthafrica.com/people-culture/people/south-africa-population> (accessed 20 May 2020)

Beaubien J 'The Country With The Worst Inequality Is...' available at <https://www.npr.org/sections/goatsandsoda/2018/04/02/598864666/the-country-with-the-worst-inequality-is> (accessed 20 May 2020)

Human Rights Commission 'SAHR Equality Report 2017/18' available at https://www.sahr.org.za/name/21/files/SAHR%20Equality%Report%202017_18pdf (accessed 18 May 2020)

Labour Guide '19th CEE-Annual Report.' Available at <https://www.labourguide.co.za/workshop/1692-19th-cee-annual-report/file> (accessed 20 May 2020)

Molley O' 'Multi-Party Negotiation Process Leading to Constitution' available at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv0209/06lv02099.htm> (accessed 18 May 2020)

OHCHR 'South Africa to face review by UN Committee on Elimination of Racial Discrimination'. Available at

<https://www.ohcr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20335>

(accessed 18 May 2020)

Tejas K 'Has the Reservation Policy Been Able to Bring About Development of The Dalits? Available at <https://www.longdom.org/articles/has-the-reservation-policy-been-able-to-bring-about-development-of-the-dalits.pdf> (accessed 18 May 2020)

Thesis

Katiyatiya L, *Substantive Equality, Affirmative Action, and the Alleviation of Poverty in South Africa: A Socio- Legal Inquiry* (unpublished LLM thesis, University of Stellenbosch, 2014)

Lebepe NN *Inherent Requirement of the Job as Defence to A Claim of Unfair Discrimination: Comparison Between South Africa and United States of America* (unpublished LLM thesis, University of Limpopo, 2010)

Mbutho SB ' *Judicial Defence for Affirmative Action Measures: A Critique of the Rationality Standard of Judicial Review*' (unpublished LLM thesis, University of Kwazulu Natal, 2015)

Mhungu V *Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed its Welcome?* (unpublished LLM thesis, University of Kwazulu Natal, 2013)

Nkosi SA *Inclusivity and Equality in The Quest for Transformation in Employment Opportunities* (unpublished LLM thesis, University of Kwazulu Natal, 2018)

Powers BO *The "Reasonableness" of Poverty: Progress and Pitfalls in South Africa's Socioeconomic Jurisprudence* (Senior Project thesis, Bard College, 2014)

Ramafoko MS ' *Setting The Sun Down on Affirmative Action: A South African Perspective*' (unpublished LLM thesis, University of Johannesburg, 2012)