

## ANALYSEN UND BERICHTE

### Affirmative Action in South Africa: (M)Any Lessons for Europe?<sup>1</sup>

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#### A. Introduction

Since 1994, affirmative action has occupied a prominent place on the South African legal landscape. Despite explicit constitutional and legislative endorsement, affirmative action in South Africa has nevertheless remained deeply controversial. Many legal challenges have been launched against affirmative action programmes over the past number of years, meaning that South African courts, like courts elsewhere, have had to confront the now familiar tension between the equal treatment principle and substantive conceptions of equality.<sup>2</sup> In the South African context, affirmative action measures are said to be a means to promote the achievement of substantive equality, and not as an exception to a notion of formal equality.<sup>3</sup> Courts in South Africa therefore have to determine the permitted scope of preferential treatment by reference to a substantive notion of equality – something that

<sup>1</sup> During 2005, I presented this paper in various fora, including the Max-Planck-Institut für Ausländisches und Internationales Sozialrecht in München and the Deutsch-Südafrikanische Juristenvereinigung e.V. Jahreshauptversammlung in Hamburg. I would like to thank all the participants for their valuable comments. Particular thanks are due to Alex Graser for his extensive comments on an earlier draft.

<sup>2</sup> See *Hugh Collins*, “Discrimination, Equality and Social Inclusion”, (2003) 66 *Modern Law Review*, p. 17. What precisely is meant by the notion of “substantive equality” will not be explored in this paper, save to say that I acknowledge that equality is an elusive notion (see *Nicholas Bamforth*, “Conceptions of Anti-Discrimination Law”, (2004) 24 *Oxford Journal of Legal Studies*, p. 703), and that our numerous appeals to (substantive) equality is often an appeal to some deeper normative value (such as human dignity, redistribution, participative democracy, etc.) rather than to the value of equality (in this regard see, for example, *Joseph Raz*, *The Morality of Freedom*, Oxford: Clarendon Press, 1988, p. 235; and *Elisa Holmes*, “Anti-Discrimination Rights Without Equality”, (2005) 68 *The Modern Law Review*, p. 175).

<sup>3</sup> See section 9(2) of the Constitution of the Republic of South Africa, 1996. Also see *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par 26 and 27 (and the authorities referred to there).

European courts now also have to do in light of the recent equality directives.<sup>4</sup> This is of course a difficult assignment given that the precise parameters of the concept of substantive equality is ambiguous. Nevertheless, in grappling with this issue, South African courts bring a unique perspective to bear on the permitted scope of preferential treatment – a perspective that can be of benefit to other countries involved in similar efforts.

The issue of affirmative action (or “positive action” in European parlance) is of course not new to Europe. To name but a few examples: Since the 1980s, positive action in favour of women and ethnic minorities has been recognised in the Netherlands.<sup>5</sup> In Germany, at both federal and state (*Länder*) levels, specific statutes have been enacted that seek to promote women’s equal rights in employment by making provision for gender-based preferences under specific circumstances.<sup>6</sup> In addition, legislation in Northern Ireland places positive duties on employers to take measures to achieve fair participation in employment by members of the Protestant and Roman Catholic communities<sup>7</sup>, and in the United Kingdom, the Race Relations (Amendment) Act 2000 places positive duties on public authorities to promote race equality. The European Court of Justice has also had a number of opportunities to address the issue of affirmative action, albeit limited to the area of gender.<sup>8</sup> In light of the increasing support for the notion of substantive equality evident in the Treaty of Amsterdam<sup>9</sup> and in the most recent equality directives<sup>10</sup>, the issue is bound to become even more important in the years to come.

<sup>4</sup> Hugh Collins, “Discrimination, Equality and Social Inclusion”, op. cit., p. 17. Even though none of the new directives specifically require the imposition of positive duties, they are clearly permitted.

<sup>5</sup> See *Lilian Gonçalves-Ho Kang You and Louise Mulder*, “Positive Action: the Dutch Experience” in *Erna Appelt and Monika Jarosch* (eds.), *Combating Racial Discrimination: Affirmative Action as a Model for Europe*, Oxford: Berg Press, 2000, p. 174.

<sup>6</sup> For a good overview, see *Anne Peters*, *Women, Quotas and Constitutions*, The Hague: Kluwer Law International, 1999. Also see *Dagmar Schiek*, et.al., *Frauengleichstellungsgesetze des Bundes und der Länder*, Köln: Bund-Verlag, 2000.

<sup>7</sup> See Article 4, Fair Employment and Treatment (Northern Ireland) Order 1998. Also see *Christopher McCrudden, Robert Ford and Anthony Heath*, “Legal Regulation of Affirmative Action in Northern Ireland: An Empirical Assessment”, (2004) 24 Oxford Journal of Legal Studies, pp. 363-415.

<sup>8</sup> See, for example, *Commission v France* Case C-312/86 [1988] ECR 6315; *Kalanke v Freie-Hansestadt Bremen* Case C-450/93 [1995] ECR I-3051; *Marschall v Land Nordrhein-Westfalen* Case C-409/95 [1997] ECR I-6363; *Badeck v Hessen* Case C-158/97 [2000] ECR I-1875; *Abrahamsen v Fogelqvist* Case C-407/98 [2000] IRLR 732; *EFTA Surveillance Authority v Norway* Case E-1/02 24 January 2003 *Briheche v Ministre de l’Intérieur* Case C-319/03 30 September 2004.

<sup>9</sup> Article 141(2) of the Treaty Establishing the European Community reads as follows: “With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures pro-

In this paper, I describe and analyse the South African experience with regard to affirmative action under a number of headings. The aspects that come under the spotlight include terminology, the constitutional and legislative framework, the motivation for affirmative action, the grounds upon which affirmative action is pursued, the scope of application of affirmative action, the beneficiaries of affirmative action, the forms that affirmative action take, how affirmative action is justified, and, finally, whether and to what extent affirmative action has had an impact on the demographic profiles of those South African employers obliged to implement affirmative action. It is my hope that an assessment of these various elements of the South African experience with affirmative action will prove of some broader utility beyond South Africa itself. In the concluding section of the paper, I highlight some elements that I believe are unique to the South African experience and which may be of interest and possibly (if approached with the necessary circumspection) of benefit to Europe.

## B. Terminology

“Affirmative action” is a term that originated in the United States (US). At its inception, affirmative action was meant to redress state-sponsored discrimination, and was an attempt to remove government erected barriers to the fair and equal treatment of individuals. The term “affirmative action” was first used in 1961 in Executive Order 10925, which placed a duty on government contractors and subcontractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” The same terminology was used in Executive Order 11246, issued by Lyndon Johnson in 1965.

Even though the term “affirmative action” originated in the US, the application of affirmative action today is global.<sup>11</sup> However, for a variety of reasons, including an attempt in some countries to separate themselves from the controversy attached to the phrase in the US, different terms are used to refer to essentially the same phenomenon.<sup>12</sup> This was also

viding for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

10 See Article 2(8) of Directive 2002/73/EC of 23 September 2002 (“Equal Treatment Directive”); Article 7 of Directive 2000/78/EC of 27 November 2000 (“Employment Equality Directive”); and Article 5 of Directive 2000/43/EC of 29 June 2000 (“Race Directive”).

11 See *Mark Tushnet*, “United States Rules on Affirmative Action”, 2 (2004) International Journal of Constitutional Law, p. 158.

12 For instance, the following terms are some of those used around the world: “Positive action” (European Union); “fair participation” or “fair access” (Northern Ireland), “employment equity” or “equitable representation” (Canada); “compensatory discrimination”, “special treatment”, “protective discrimination”, “progressive discrimination” and “reservations” (India).

initially the approach adopted in South Africa, where the term “positive measures” was used in the policy documents and the draft legislation leading up to the final version of the Employment Equity Act (EEA).<sup>13</sup> For reasons not entirely clear, the term “affirmative action” was reintroduced into the final version of the EEA adopted in 1998.<sup>14</sup> In the South African Constitution, where preferential treatment is explicitly authorised, the term “affirmative action” is not used. Section 9(2) instead refers to “measures designed to protect or advance persons, disadvantaged by unfair discrimination.”<sup>15</sup> The Constitutional Court recently made it clear that these “measures” should not be characterized as “reverse discrimination” or “positive discrimination”, with their concomitant negative connotations.<sup>16</sup> Because South Africa’s constitutional understanding of equality is “remedial or restitutive”, the measures referred to in section 9(2) should therefore not be viewed as a deviation from, or invasive of, the right to equality.<sup>17</sup> Although the terminology of “affirmative action” has found its way into general use in South Africa, the Constitutional Court warned that one should be careful not to import, through this route, inapt foreign (especially American) equality jurisprudence.<sup>18</sup>

### C. Constitutional and statutory equality framework

What separates the South African Constitution from most of its counterparts around the world is the explicit reference that it makes to affirmative action measures. Section 9(2) provides that in order 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”. Here in the Constitution, we find a clear indication of what is the essential goal that affirmative action policies aim to achieve – equality. Indeed, equality is one of the overarching goals laid down in the very first article of the Constitution.<sup>19</sup> Both from the text of section 9(2) and its interpretation by the Constitu-

<sup>13</sup> Act 55 of 1998. In terms of the EEA, “affirmative action” is viewed as one of two means to achieve “employment equity”, the other being the elimination of unfair discrimination (see section 2).

<sup>14</sup> In order to avoid confusion, the term “affirmative action” will be used in this paper.

<sup>15</sup> See section 9(2) of the Constitution of the Republic of South Africa, 1996.

<sup>16</sup> See *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 30 (per Justice Mosenke).

<sup>17</sup> *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 30 (per Justice Mosenke).

<sup>18</sup> See *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 30 (per Justice Mosenke).

<sup>19</sup> “The Republic of South Africa is one sovereign democratic state founded on the [...] values [of] human dignity, the achievement of equality and the advancement of human rights and freedoms” (Section 1(a)).

tional Court, it is clear that affirmative action measures are not to be viewed as contrary to, or as an exception to the idea of equality, but rather as a means towards achieving the substantive equality embraced by the Constitution.<sup>20</sup>

In order to give effect to section 9(2) of the Constitution, the Employment Equity Act (EEA) places an obligation on “designated employers” (primarily employers who employ 50 or more employees) to implement “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” (section 2). “Designated groups” is defined as black people, women, and people with disabilities (section 1).<sup>21</sup>

The EEA requires designated employers to do the following: implement affirmative action measures (section 15); ensure equitable representation of people from designated groups; consult with employees on a range of matters pertaining to employment equity (sections 16 and 17); conduct an analysis of employment policies, practices, procedures and the working environment in order to identify employment barriers (section 19); prepare an employment equity plan (section 20); and report either annually or bi-annually to the Director General of Labour on the progress made in implementing the employment equity plan (section 21).

Section 15 of the EEA provides a broad definition of what it regards as an “affirmative action measure”. This includes not just the preferential appointment of members of the designated groups to vacant positions, but also preferential promotion as well as development and training of employees in order to heighten their prospects for advancement; a duty on employers to examine their employment policies and practices to remove any discriminatory barriers inherent in them; measures to further diversity in the workplace; and a duty on employers to make “reasonable accommodation”.<sup>22</sup>

The term “equitable representation” mentioned above is not defined, but the Act provides important indicators as to the meaning of the term. In determining whether an employer has complied with the provisions of the Act, the Director General can take a number of factors into account, including the demographic profile of the national and regional economically active population; the pool of suitably qualified people from designated groups from which

<sup>20</sup> “Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole.” See *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 32 (per Justice Mosenke).

<sup>21</sup> For a more detailed analysis, see part E below.

<sup>22</sup> This means the modification or adjustment to a job or the working environment that will enable a person from a designated group to have access to or participate or advance in employment.

the employer may reasonably be expected to promote or appoint employees; the economic and financial factors relevant to the sector in which the employer operates; the present and anticipated economic and financial circumstances of the employer; the number of present and planned vacancies that exist in various categories and levels, and the employer's labour turnover (section 42).

As mentioned earlier, courts have regularly been called upon to evaluate the legality of affirmative action programmes in the workplace. Until recently it was thought that affirmative action measures, differentiating by its very nature on the basis of either race, sex or disability, attracted a presumption of unfairness.<sup>23</sup> This meant that the onus was placed on the defender of affirmative action to prove the fairness of the measures – an onus that at least one court noted “cannot be easily discharged”.<sup>24</sup> However, in the recent Constitutional Court decision of *Minister of Finance and others v. Van Heerden*<sup>25</sup>, the court held that measures that fall properly within the ambit of section 9(2) do not constitute unfair discrimination.<sup>26</sup> As Justice Mosenke explained:

“... I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination ...”<sup>27</sup>

The Court established a three-part test to determine whether a measure falls within section 9(2) of the Constitution. The first requirement 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 (meaning that it should not be arbitrary, capricious or display naked preferences); and the third requirement is whether the measure promotes the achievement of equality.<sup>28</sup>

<sup>23</sup> See *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) at 325A, where it was held that differentiation on one of the 16 specified grounds contained in the Constitution was presumed to amount to unfair discrimination.

<sup>24</sup> See *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 32 (referring to the High Court decision in the same matter).

<sup>25</sup> 2004 (11) BCLR 1125 (CC).

<sup>26</sup> In other words, the measures are not automatically suspect as is the case in the United States.

<sup>27</sup> *Minister of Finance and others v. Van Heerden*, op. cit., par. 33.

<sup>28</sup> *Minister of Finance and others v. Van Heerden*, op. cit., par. 37.

The Constitutional Court also enunciated a general approach that the judiciary should adopt when evaluating challenges to affirmative action measures:

"... Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way... Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged ..."<sup>29</sup>

Until recently, it was also thought that affirmative action can only be used as a "shield" and not a "sword", meaning that affirmative action can only be a defence available to employers against allegations of discrimination, not a right to be relied upon by individual members of designated groups, for example, to obtain an appointment or a promotion.<sup>30</sup> However, the Labour Court has recently taken the view that there is a duty on all employers to implement affirmative action (irrespective of whether the employer in question is a "designated employer" as defined by the EEA); that "suitably qualified" members of "designated groups" (as those terms are defined in the EEA) have a right to affirmative action; and that the absence of affirmative action may establish an unfair discrimination claim.<sup>31</sup> Even though this view was contradicted in a more recent Labour Court decision,<sup>32</sup> it is an indication of the extent to which some courts have been willing to go to give meaning to the concept of substantive equality in the South African context.

#### D. Motivation for affirmative action

As a social and legal system, apartheid has had a devastating effect on the social, economic, political and cultural life of especially black South Africans. Despite its demise in the early 1990s, the system of apartheid has left an indelible mark on the country. For instance, in a country review conducted in 1992 by the International Labour Organisation (ILO), it was found that South Africa had the highest levels of inequality of any country in the world for which the ILO had data.<sup>33</sup> Ten years later, in 2002, the World Development Report found that only Brazil had a higher level of inequality than South Africa as measured by the Gini coefficient.<sup>34</sup> Statistics show that poverty is overwhelmingly concentrated in the African

<sup>29</sup> *Minister of Finance and others v. Van Heerden* , op. cit., par. 152 (per Sachs J).

<sup>30</sup> See *Abbott v Bargaining Council for the Motor Industry* (1999) 20 ILJ 330 (LC) at p. 334 A- E.

<sup>31</sup> See *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC).

<sup>32</sup> *Dudley v City of Cape Town* [2004] 5 BLLR 413 (LC).

<sup>33</sup> Explanatory Memorandum to the Employment Equity Bill, General Notice 1840 of 1997, 1 December 1997, Government Gazette 18481, p. 6.

<sup>34</sup> *The World Bank Group*, World Development Indicators, 2002, as referred to in *Haroon Bharat*, "Employment and Unemployment Trends in Post-Apartheid South Africa", p. 2 (paper prepared

and Coloured populations,<sup>35</sup> and that this racial inequality is reflected in unemployment figures too.<sup>36</sup> The latest annual report issued by the Commission for Employment Equity reveals that 76,3% of all top management positions are currently occupied by Whites, 14,9% by Africans, 4,9% by Indians, and 4,0% by Coloureds.<sup>37</sup>

It is acknowledged that the situation will not be effectively normalised by a mere prohibition of unfair discrimination. As noted in the Explanatory Memorandum to the Employment Equity Bill:

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 positive action designed to redress the imbalances of the past are therefore needed.*<sup>38</sup>

In South Africa, affirmative action forms part of a broad range of measures that are aimed at enhancing overall social and economic equality. As the Labour Market Commission explained:

[Affirmative action] "... involves a systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training, and in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority ...<sup>39</sup>

for the South African Presidency 10-Year Cabinet Review Process, 2002). The Gini coefficient is a summary statistic of income inequality that has a value between zero and one. The bigger the number, the more inequality exists. According to the World Bank report, the Gini coefficient for South Africa is 0,60, and for Brazil 0,607.

<sup>35</sup> Recent figures reveal that 62% of African households, 29% of Coloured households, and 11% of Indian households live below the poverty line, while just 4% of White households fall into this category. See *Lawrence Schlemmer*, "A better life for all? Poverty trends in South Africa", 26 (2002) Focus, p. 21.

<sup>36</sup> For example, the unemployment rate in September 2005 (the latest available figures) stood at 31,5% for Africans, 20,6% for Coloureds, 14% for Indians, and 3,6% for Whites. What also becomes clear when one examines the unemployment rates by sex, is that within each population group, unemployment rates are higher for women than for men. See *Statistics South Africa*, Labour Force Survey September 2005, p. xv (available at <http://www.statssa.gov.za>).

<sup>37</sup> Commission for Employment Equity Annual Report 2003–2004, p. 25 (available at <http://www.labour.gov.za>).

<sup>38</sup> Explanatory Memorandum to the Employment Equity Bill, General Notice 1840 of 1997, 1 December 1997, Government Gazette 18481, p. 5 (own emphasis).

<sup>39</sup> *Labour Market Commission*, Restructuring the South African Labour Market, 1996, par. 434.

## E. Grounds upon which affirmative action is pursued

According to section 9(2) of the Constitution, the beneficiaries of affirmative action measures may be “persons, or categories of persons, disadvantaged by unfair discrimination”. In the EEA, this broadly formulated category is narrowed down to individuals from “designated groups”. The EEA provides three operative definitions, indicating who the beneficiaries of affirmative action may be:

- (i) “designated groups” is defined to mean black people, women and people with disabilities;
- (ii) “black people” is defined to include Africans, Coloureds and Indians<sup>40</sup>;
- (iii) “people with disabilities” is defined to mean “people who have a long-term physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.

The purpose of the EEA is to ensure that the members of these groups are equitably represented in all occupational categories and levels in the workforce. One finds no evidence in the EEA of the issue of “intersectionality”, that is, for example, efforts aimed at advancing poor African women from rural areas, or women or black people who also fit the definition of disability.

<sup>40</sup> It may be necessary to remind some readers about the unique terminology of racial classification used in South Africa. The classifications “White”, “African”, “Coloured”, and “Indian” can be traced back to the Population Registration Act of 1950, which was repealed in 1991. Despite the fact that, under apartheid (under the influence of the Black Consciousness Movement) some non-whites identified themselves as “black” in deliberate reaction to the classificatory rigour of the apartheid state, the old four-fold classification still carries social and political significance as is evident by its use in the EEA. The term “African” denotes the indigenous peoples of South Africa as opposed to people whose origin can at least in part be traced to other continents. The term “Whites” refers primarily to those who descend from the original Dutch and British settlers who colonised South Africa in the 17<sup>th</sup> century; “Coloured” is a term that since the turn of the 20<sup>th</sup> century has been used to refer to mixed-race South Africans (not simply “mixes” of African and White, but also those whose racial background include descendants of Malay workers and slaves brought from the East Indies under Dutch rule, as well as the descendants of Southern Africa’s now virtually extinct “brown” peoples, the Khoikhoi and San); and “Indian” is a term that refers to those of Indian descent who came to the British colony of Natal in the 1860s to work on the sugar plantations. See *C. Ford*, “Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action” (1996) 43 UCLA Law Review, pp. 1985-1986; and *C. Lawrence III*, “Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation”, (1995) 47 Stanford Law Review, p. 827. The most recent figures (2005) reveal that Africans comprise 79,4% of the population of South Africa, Whites 9,3%, Coloureds 8,8%, and Indians 2,5%. In real numbers, there are 37.2 million Africans, 4,4 million Whites, 4,1 million Coloureds and 1,1 million Indians living in South Africa (see <http://www.statssa.gov.za>).

An interesting issue that has arisen in South Africa is the fact that employers themselves often differentiate between the various designated groups, making value judgments as to those groups most in need of advancement or redress. Evidence suggests that employers themselves often establish “degrees of disadvantage” in their affirmative action policies, advancing the interests of one disadvantaged group as against another. To date, the Courts have accepted the general proposition that members of the African group have been more severely discriminated against by the policy of apartheid than white women, and have upheld affirmative action policies that give preference to Africans in appointments or promotions.<sup>41</sup> However, it is questionable whether this approach is sustainable in cases where the relative disadvantage of the groups is not that apparent (for example a Indian disabled man versus a Coloured woman). The Constitutional Court has not yet directly addressed this issue, but has flagged it as a potential issue for future scrutiny.<sup>42</sup> It has been argued that in order to avoid complex arguments about the matter, especially in situations in which the relative disadvantage of the parties are not that obvious, employers will be best served by using the test of “representativity” – that is the degree to which persons of particular racial or gender groups are underrepresented in a particular occupational category or level within a workplace – in order to determine the appropriateness of affirmative action in respect of particular groups.<sup>43</sup>

<sup>41</sup> See, for example *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) and *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC).

<sup>42</sup> See *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 149 (per Sachs J).

<sup>43</sup> See *Ockert Dupper and Christoph Garbers*, “Affirmative Action”, in *E. Strydom* (ed.), *Essential Employment Discrimination Law*, Lansdowne: Juta Law, 2005, p. 266; *Darcy du Toit*, “When does affirmative action in favour of certain employees become unfair discrimination against others?”, paper presented at the conference Equality: Theory and Practice in South Africa and Elsewhere, University of Cape Town, January 2000, p. 14.

## F. Scope of application of affirmative action

Whereas the prohibition on unfair discrimination applies to all employers, the duty to implement affirmative action measures in the workplace only applies to “designated employers”. The EEA itself defines a designated employer to mean:

- (i) an employer who employs 50 or more employees
- (ii) an employer who employs fewer than 50 employees, but whose turnover in any given year is equal to or above the applicable annual turnover of a small business as set out in Schedule 4 of the Act (the figure varies from sector to sector)
- (iii) municipalities
- (iv) an organ of state
- (v) an employer appointed as a designated employer in terms of a collective agreement.

From the aforementioned it is clear that compulsory affirmative action under the EEA covers both public and private sector employment. While non-designated employers are not required to implement affirmative action measures, they may of course do so provided that the measures meet with the requirements of section 9(2) of the Constitution.<sup>44</sup> In addition, it should be noted that not only designated employers, but also non-designated employers who want to conclude contracts with organs of state must declare (subject to verification by the Director-General of Labour) that it complies with the provisions of the Act, thereby potentially widening the net of employers covered by the provisions of the Act.<sup>45</sup>

## G. Selection methods – who benefits from positive action?

### (i) Individualised vs. group-based approach

One of the criticisms of affirmative action measures in general is that it assumes that all members of the designated groups are “disadvantaged”, irrespective of their individual circumstances. By focusing attention on groups rather than individuals, critics point out, individuals who are not “needy” will in fact receive benefits at the expense of those who have been handicapped most by the effects of discrimination and thus are most in need of “advancement”. As affirmative action usually works in practice, and this is certainly true in the case under consideration, South Africa, those who have suffered most under discrimination are seldom those who benefit from these policies. This means that one should devise a policy directed towards individuals *actually* discriminated against as opposed to one

<sup>44</sup> See the three-part test established in *Minister of Finance and others v. Van Heerden 2004 (11) BCLR 1125 (CC)*, discussed in part C above.

<sup>45</sup> Section 53.

directed towards disadvantaged groups as such.<sup>46</sup> Instances of this argument can be found in the South African debate.

However, an individualised approach to affirmative action has been rejected in South Africa. In the recent Constitutional Court decision of *Minister of Finance and others v. Van Heerden*<sup>47</sup>, Justice Mokgoro endorsed the group-based approach as follows:

The approach of apartheid was to categorise people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered (sic) out according to one's membership of a group. Recognising this, section 9(2) allows for measures to be enacted which target whole categories of persons. Therefore a person or groups of persons are advanced on the basis of membership of a group. The importance of this is that it is unnecessary for the state to show that each individual member of a group that was targeted by past unfair discrimination was in fact individually unfairly discriminated against when enacting a measure under section 9(2). It is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination in order to benefit from a provision enacted in terms of section 9(2).<sup>48</sup>

An additional argument in favour of a group-based approach to affirmative action is that since almost all members of the disadvantaged groups have in fact been disadvantaged by discrimination, it is surely not unjustifiable to design and institute programmes of special benefits to the groups as such.<sup>49</sup> The argument presupposes that there is in fact a very high correlation between being a black person or a woman and being a victim of discriminatory and harmful treatment. I believe that there cannot be any doubt that this is the case in the South African context, especially with respect to race. South Africa's past policy of apartheid has been branded a "crime against humanity" and its devastating effect on black communities has been so amply documented as to require no additional proof.<sup>50</sup> Indeed, the

<sup>46</sup> A good example of this approach in practice can be found in India, where the policy of affirmative action differentiates within beneficiary groups by imposing a means test for eligibility. Called the "creamy layer" approach, it aims at ensuring that reservations go to the most disadvantaged members of the disadvantaged groups (or castes). The Supreme Court of India has endorsed this approach, holding that affirmative action programs must exclude members of the "creamy layer" of the beneficiary class if the programs are to survive constitutional scrutiny. See *Clark D. Cunningham and N.R. Madhava Menon*, "Race, Class, Caste ...? Rethinking Affirmative Action", (1999) 97 Michigan Law Review, p. 1306; *Mark Tushnet*, "Interpreting Constitutions Comparatively: Some Cautionary Notes, With Reference to Affirmative Action", (2004) 36 Connecticut Law Review, pp. 655-656.

<sup>47</sup> 2004 (11) BCLR 1125 (CC).

<sup>48</sup> At par. 85.

<sup>49</sup> See *Ockert Dupper*, "In Defence of Affirmative Action in South Africa", (2004) 121 The South African Law Journal, p. 205.

<sup>50</sup> *Darcy du Toit*, "When does affirmative action in favour of certain employees become unfair discrimination against others?", op. cit., pp. 13-14.

argument has been made that, with respect to black people, disadvantage should be presumed with rebuttal possible only on relatively narrow grounds – for example, in the case of a black South African born and educated outside South Africa who at no stage suffered disadvantage of the kind which the Constitution and the EEA have set out to remedy. Darcy du Toit, who is a proponent of this argument, writes that “all things being equal, even relatively educated or prosperous black South Africans should be entitled to the benefit of affirmative action. The advantages that they enjoy were achieved despite the disadvantages imposed on them by apartheid. The presumption should remain, unless rebutted, that but for racial discrimination they are likely to have achieved even greater advantages.”<sup>51</sup> He argues that similar presumptions should apply, *mutatis mutandis*, to women who should also be absolved from proving facts that are not really in dispute.<sup>52</sup>

#### *(ii) Merit and its reassessment*

Against the background of the disparities in formal qualifications between members of designated and non-designated groups, disparities that can be traced back to the way education and other formal vocational training were managed under the apartheid system, and the fear that such lack of formal qualifications among disadvantaged groups will impede the progress of affirmative action, the EEA requires of an employer to do two things. First, to conduct an analysis of its employment policies, practices, procedures and the working environment “in order to identify employment barriers which adversely affect people from designated groups.”<sup>53</sup> This means that employers should not only review criteria for hiring, training, transfers, retrenchments and promotion to ensure that these criteria legitimately are related to the job in question and do not merely serve as a means of preventing the advancement of individuals from designated groups, but also redefine those criteria in terms of skills and experience rather than formal educational requirements precisely in order to avoid this entrenchment of past disadvantage.

Secondly, the EEA places an obligation on employers to review not only an applicant or employee’s formal qualifications, experience or “prior learning”<sup>54</sup> when making a hiring or promotion-decision, but also the person’s “capacity to acquire, within a reasonable period of time, the ability to do the job” in question.<sup>55</sup> This indicates that membership in a “desig-

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Section 19(1) EEA.

<sup>54</sup> This presumably means that any relevant (formal or informal) learning experience, even if not directly related to the job or profession in question, must be taken into account.

<sup>55</sup> See definition of “suitably qualified” in section 20(3) EEA.

inated group” is not only a tie-breaking factor when two candidates are equally qualified, but is a consideration that may even outweigh other qualifications, provided the person in question has, in the view of the employer, the potential to “grow” into the job within what is seen to be an acceptable period of time. This approach differs markedly from the approach adopted by the European Court of Justice, namely that in order for affirmative action to be lawful, the candidates must at least be “equally qualified”.<sup>56</sup>

#### H. Forms of positive action

A distinction can be drawn between “weak affirmative action” and “strong affirmative action”.<sup>57</sup> “Weak affirmative action” involves efforts to ensure equal opportunity for members of groups that have thus far been subject to discrimination. Examples of weak affirmative action measures include active recruitment of qualified applicants from the formerly excluded groups, special training programs to help them meet the standards for appointment, and measures to ensure that they are fairly considered in the selection process. “Strong affirmative action”, on the other hand, involves what has been termed “preferential treatment”, that is measures that allow giving preference to members of a certain group. This preference can either be allowed to influence decisions between candidates who are otherwise *equally qualified*, or might go beyond this and involve the selection, for example, of black people or women over other candidates who are in fact *better qualified* for the position.

Although the EEA includes elements of the weaker version,<sup>58</sup> it is clear that the emphasis is placed on the stronger version of affirmative action. As discussed in the previous section,

<sup>56</sup> This is in addition to the requirement that women must be underrepresented in the sector concerned, and the requirement that once the candidates are equally qualified, the woman may be only be preferred in case there were not any “reasons specific to an individual male candidate [to] tilt the balance in his favour”. See, for example, *Marschall v Land Nordrhein-Westfalen* Case C-409/95 [1997] ECR I-6363, par. 25(5).

<sup>57</sup> See *Thomas Nagel*, “A Defense of Affirmative Action”, in *Tom L. Beauchamp and Norman E. Bowie* (eds.) *Ethical Theory and Business*, Upper Saddle River: Prentice Hall, 1988, p. 345, and *T. M. Scanlon*, “Equality on Divided Societies: A Normative Overview”, unpublished manuscript, p. 7 (on file with the author).

<sup>58</sup> The Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (promulgated as Government Notice R1394, Government Gazette 20626, 23 November 1999) advocates transparent recruitment strategies, targeted advertising, increasing the pool of available candidates by means of community investment and bridging programmes, and training and development of people from designated groups (par. 8.3). In addition, the Employment and Occupational Equity Green Paper (the precursor of the EEA) refers to a systematic transformation of advertising procedures, such as the development of advertising mechanisms to reach all candidates for new opportunities, including people from historically disadvantaged groups (par. 4.5.2.1).

the Act provides for preferential treatment of members of certain designated groups who are “suitably qualified”, and this includes those who may not have the formal qualifications or experience required for the position, but (merely) the capacity to acquire the ability to do the job in question within a reasonable period of time (section 20).

The EEA foresees four ways in which compliance with its affirmative action measures may be ensured. Firstly, the Act provides that every employment equity plan has to include dispute resolution procedures to be used at the workplace for the interpretation or application of such a plan. Secondly, provision is made for administrative procedures under the auspices of the Department of Labour. Where a labour inspector has reasonable grounds to believe that an employer is not complying with the Act, endeavour should be made to secure a written undertaking from the employer that it will comply within a specified period and if the employer refuses, or fails to comply with the written undertaking, the labour inspector may issue a compliance order (sections 35-40). In terms of this administrative procedure, the Director-General of the Department of Labour may also undertake a review to determine whether an employer is complying with the Act and issue recommendations if a failure to comply is apparent (sections 43-45). Thirdly, the EEA assigns a range of powers to the Labour Court, including the imposition of fines if employers fail to comply with the Act.<sup>59</sup> And fourthly, state contracts are utilised as a means of ensuring compliance. For example, section 53 provides that designated employers who want to enter into commercial contracts with “organs of state” must comply with the EEA and attach to the offer either a certificate of compliance issued by the Minister of Labour or a statement that it does comply (subject to verification by the Minister).<sup>60</sup>

To date, the enforcement procedures described above have proved to be ineffectual. While the Department of Labour has undertaken a round of on-site visits to designated employers, it appears that this exercise has been largely formalistic in approach and aimed mainly at testing compliance with the formal requirements of the EEA rather than establishing the significance of real and perceived barriers.<sup>61</sup> Only two compliance orders have been issued since the EEA has come into effect, and to date no matter of non-compliance has been

and ending processes that neglect historically disadvantaged groups, such as advertising through newspapers or institutions with limited audiences (par. 4.5.2.2).

<sup>59</sup> Section 50(1). Schedule 1 to the Act provides for a sliding scale of fines ranging from R500 000 for an employer who is a first offender to R900 000 where a certain number of prior offences are involved. To date no fines have been issued.

<sup>60</sup> Bearing in mind that public procurement approaches 13% of South Africa’s GDP, this is a potentially powerful means of ensuring compliance with the Act.

<sup>61</sup> *M. Macewen, A. Louw, O. Dupper, Employment Equity in the Higher Education Sector: A Study of Transformation in the Western Cape*, Stellenbosch: African Sun Media, 2005, p. 210.

referred to the labour courts.<sup>62</sup> Given the problems related to enforcement, the Department of Labour has recently commissioned a study on ways in which the enforcement procedures of the EEA can be strengthened.

## I. Justification for positive action

A review of court decisions on the legality of affirmative action reveals two significant aspects. The first is the relative dearth of discussion by the judges of the possible justification for affirmative action in South Africa. In a significant number of judgments, the policy of affirmative action is justified by merely pointing to its explicit endorsement in the Constitution and the EEA.<sup>63</sup> It is as if the presence of explicit legal endorsement of the policy obviates the need for deeper philosophical probing. The second is the fact that, in the few instances where the question of justification is discussed at all, the focus is on affirmative action as a means of *redressing* the effects of apartheid, and thus essentially backward-looking:

"... (W)hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to *redress existing inequality*. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow ..."<sup>64</sup>

In the same Constitutional Court decision, Justice Sachs elaborated on this justification against the background of South Africa's discriminatory past, and the lingering effects of the discriminatory practices on black people and women:

"... The necessary reconciliation between the different interests of those positively and negatively affected by affirmative action should, I believe, be done in a manner that takes simultaneous and due account both of the severe degree of structured inequality with which we still live, and of the constitutional goal of achieving an egalitarian society based on non-racism and non-sexism. In this context, *redress* is not simply an

<sup>62</sup> D. Story, "Affirmative action plans – the proposed enforcement mechanisms", paper delivered at the seminar on Equality and Non-Discrimination in Employment, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa, 5 April 2005.

<sup>63</sup> The Constitutional provision on affirmative action views affirmative action measures as those that are designed "to protect or advance" persons or categories of persons disadvantaged by unfair discrimination. The EEA makes it plain that the main purpose of affirmative action measures is to "redress the disadvantages" in employment that the designated groups experience (section 2(b)).

<sup>64</sup> *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 31 (per Justice Mosenke) (emphasis added). See also *George v. Liberty Life Association of Africa Ltd* (1886) ILJ 571 (IC) at 592, and *Independent Municipal & Allied Workers Union v. Greater Louis Trichardt Transitional Local Council* (2000) ILJ 1119 (LC) at 1125.

option, it is an imperative. Without major transformation we cannot heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights ..."<sup>65</sup>

However, this is not to say that the debate in South Africa focuses exclusively on the past. Policy makers and disadvantaged groups frequently point not only to the character of the injustices that were perpetrated under apartheid, but also to the persistence and the scope of the wrongs at issue and their connection to broader problems of social justice such as poverty, homelessness, inadequate healthcare and unemployment.<sup>66</sup> The benefits of a diverse workforce was also alluded to in the Green Paper on Employment and Occupational Equity, where it is stated that "diversity at work brings many benefits, including greater flexibility, access to a broader pool of skills, and reduced hierarchy, which should ultimately boost productivity."<sup>67</sup> To the extent that these arguments move beyond past wrongs demanding redress, to continuing injustices in need of correction or general problems of distributive justice in society, they are no longer simply compensatory arguments for affirmative action, but point to different, forward-looking arguments involving a form of corrective or redistributive concerns. Thus we also find, despite the overwhelming focus in South Africa on the backward-looking justification for affirmative action, evidence of more forward-looking arguments.

Although explicitly backward-looking justifications of affirmative action as a form of compensation owed to victims of past injustices are common enough, (indeed, I believe that in a less articulate form, this idea of remedying an historical wrong, or making reparations for the iniquities of the past, represents the way many people perceive of these policies), they tend to call forth an equally common objection. Put simply, the objection says that the current beneficiaries of affirmative action are seldom the same persons as those who originally suffered the discrimination, and similarly those who now bear the burden of affirmative action are seldom the same persons as those who took part in the discriminatory practices in question.<sup>68</sup> I have argued elsewhere that a more forward-looking justification offers better arguments to the defender of affirmative action than does the focus on compensation for past injustices.<sup>69</sup> However, the backward-looking argument should not be rejected out-

<sup>65</sup> *Minister of Finance and others v. Van Heerden*, op. cit., paras. 136-137 (emphasis added).

<sup>66</sup> See *Ockert Dupper*, "Remedying the past or reshaping the future? Justifying race-based affirmative action in South African and the United States", (2005) 21 *The International Journal of Comparative Labour Law and Industrial Relations*, p. 97.

<sup>67</sup> Green Paper on Employment and Occupational Equity, Government Gazette No. 17303, 1 July 1996, par. 3.6.5.

<sup>68</sup> See for example *George Sher*, "Reverse Discrimination, The Future, and the Past", (1979) 90 *Ethics*, p. 81.

<sup>69</sup> See *Ockert Dupper*, "Remedying the past or reshaping the future? Justifying race-based affirmative action in South African and the United States", op. cit., pp. 89-130.

of-hand. It is clear that the justification for affirmative action on the basis of race in South Africa must, *at least in part*, be backward looking, even if merely to assist in identifying the groups that should benefit from affirmative action.

#### J. Impact assessment

The Commission on Employment Equity (CEE) was established in terms of the EEA primarily to advise the Minister of Labour on codes of practice, regulations, and policy and other matters concerning the EEA. To date, the CEE has issued four annual reports, covering the reporting periods between 2000 and 2003. These reports provide some insight into the impact that the EEA has had on the diversification of the South African workforce.<sup>70</sup>

A purely quantitative analysis of the reports reveals some improvement in the representation of members of designated groups in occupations and levels in which they are underrepresented. For example, the percentage of African employees in top management rose from 6.2% in 2000 to 14.9% in 2003, in senior management from 8.7% in 2000 to 14.2% in 2003, and in the mid management level from 32.8% in 2000 to 39% in 2003. However, the latest report still shows that while white employees made up only 22.9% of the permanent workforce of designated employers in 2003, they occupied 76.3% of all top management positions and 72.7% of senior management positions. This nevertheless represents an improvement over the situation in 2000, when white employees occupied 87.7% of top management positions and 82.4% of senior management positions. Black employees still dominate the lower occupational levels of designated employers. In 2003, for example African, Coloured and Indian employees combined represented 84.7% of all semi-skilled and 97.5% of all unskilled employees. The figures also show that, contrary to public perception, more whites than blacks are recruited and promoted to top- and senior management positions. In 2003, Blacks (Africans, Coloureds and Indians) only accounted for 41.4% of all top management recruits and 38.2% of all senior management recruits. As far as promotions are concerned, Blacks accounted for 33.8% and Whites 66.2% of all promotions in top management, while in the senior management bracket, Blacks accounted for 36.3% and Whites 63.7% of all promotions.

In respect of women, the figures reveal that the overall number of women employed in permanent positions dropped marginally from 37.5% in 2000 to 36.3% in 2003. Their representation in occupational levels in which they are underrepresented showed only slight improvement, a situation that the CEE describes as “very unsatisfactory” and “of serious

<sup>70</sup> The reports can be accessed at <http://www.labour.gov.za/>.

concern".<sup>71</sup> For example, the representation of women in top management rose from 12.4 % in 2000 to 14.1% in 2003 and in senior management from 21% in 2000 to 22.3% in 2003. The position of disabled employees remains a matter of concern. The number of disabled employees employed by designated employers have essentially remained low and flat, only marginally increasing between 2000 and 2003 (0.52% in 2000 to 1,0% in 2003). The figures for people with disabilities in the top three management levels were so insignificant that they could not even be converted into a fraction of a percent.<sup>72</sup>

Two things become clear from the figures contained in the four annual reports of the CEE. The first is that since it came into force, the EEA has had some impact on the workforce profiles of designated employers. Even though the changes have been gradual, the representation of members of designated groups have nonetheless shown a constant upward trend. The second is that race is prioritised over gender and disability when it comes to the recruitment and promotion of members of the designated groups.

In respect of the first observation: the reasons for the relatively slow pace of change are complex and multiple. In the first place, it has to be acknowledged that many designated employers are simply not committed to employment equity (or in the words of the CEE, "are not pulling their weight on the issue of employment equity")<sup>73</sup>, and are therefore not meeting their obligations in terms of the CEE beyond that of the purely formalistic.<sup>74</sup> This problem becomes more pronounced in light of the fact that the EEA is (currently) not effectively enforced. Turning to other reasons for the slow pace of change, it may be instructive to examine the barriers that employers themselves have identified in their annual or bi-annual reports. For example, training and development were listed by most employers as the primary barrier to employment equity. Under this heading, many employers mentioned that access to training and development were primarily aimed at those in senior levels, where the majority of employees were white. In respect of recruitment and selection, employers mainly referred to a shortage of skilled applicants. Predictably, lack of skills as a barrier was cited most frequently in industries such as construction, mining and engineer-

<sup>71</sup> See *Commission for Employment Equity*, Annual Report 2003 – 2004, p. ix.

<sup>72</sup> Ibid.

<sup>73</sup> *Commission for Employment Equity*, op. cit., p. 62.

<sup>74</sup> This means that employers formally meet their obligations of consultation, the drafting of employment equity plans, and reporting annually or bi-annually to the Department of Labour. As the Council on Higher Education has observed: "There is some evidence that some [employers] may have shaped their plans simply to comply with the minimum requirements of the (EEA), rather than by specific rigorous institutional analysis, with the outcome being a numerical target-driven approach" (see *Council on Higher Education*, Annual Report 2000/01, Pretoria: Council on Higher Education, 2001, p. 32). For general criticism of these aspects, see M. Macewen, A. Louw, O. Dupper *Employment Equity in the Higher Education Sector: A Study of Transformation in the Western Cape*, op. cit., pp. 230-231.

ing. Other barriers listed included a white and male-dominated corporate culture that is resistant to change, low employee turnover, and general financial constraints (that impact negatively, for example, on training and development).

In respect of the second observation: it comes as no surprise, after decades of enforced racial segregation, that the dominant conception of affirmative action is perceived “as a strategy to recruit potential black managers and prepare them for senior positions, especially those effectively reserved for whites in the past.”<sup>75</sup> Even before the EEA was enacted, most employers focused their “voluntary” affirmative action efforts on increasing the number of black people in senior positions.<sup>76</sup> The so-called business case for affirmative action emphasises the potential benefits of increased black representation in especially the upper echelons of organisations:

The business need for affirmative action appears compelling in organisations with mandates from the top to recruit and promote an increasing number of blacks. Diversity is wanted, not only to redress the injustices of the past but to be successful against competitors and ultimately in terms of profit. In order to have credibility in affluent black markets, organisations must be more representative – especially in management structures. The increasing financial clout of a growing black middle class whose consumer loyalty is sought ensures a market-driven perspective as regards the implementation of affirmative action. As embourgeoisement proceeds apace, with more and more blacks enjoying a lifestyle that is commensurate with their newly attained corporate positions, South Africa’s fledgling black middle class is visibly growing.<sup>77</sup>

In further appears that the focus by employers on race is highly gendered, with black women benefiting far less from affirmative action measures than their male counterparts. The CEE even remarked in their most recent report that “(t)he position of Black women generally, and African women in particular, *appears to be worsening*.<sup>78</sup> Evidence further suggests that many employers, when targeting women at all, tend to target white women, whom they consider a “soft option” for transformation.<sup>79</sup> In order to reverse this trend, the CEE states, “it is imperative that aggressive strategies are developed to increase the recruitment and promotion of women, especially Black females who face the compounded disadvantage that stems from the intersection of race and gender.”<sup>80</sup> Finally, the position of people with disabilities as a designated group remains a matter of serious concern. Given

<sup>75</sup> See Kanya Adam, “The Politics of Redress: South African Style Affirmative Action”, (1997) 35 *Journal of African Studies*, p. 233.

<sup>76</sup> Ibid.

<sup>77</sup> Adam, op. cit. p. 236.

<sup>78</sup> Commission for Employment Equity, Annual Report 2003 – 2004, op. cit., p. ix (own emphasis).

<sup>79</sup> See M. Macewen, A. Louw, O. Dupper *Employment Equity in the Higher Education Sector: A Study of Transformation in the Western Cape*, op. cit. p. 99.

<sup>80</sup> Commission for Employment Equity, op. cit., p. x.

the attention that designated employers pay to race (and gender to a far lesser extent), the appointment, promotion and training of people with disabilities appear to be honoured more in the breach than in the observance. While the reasons for this are multifaceted and beyond the scope of this paper, it is expected that the recently released *Code of Good Practice on the Employment of People with Disabilities*<sup>81</sup> and the *Technical Assistance Guidelines on the Employment of People with Disabilities*<sup>82</sup> will raise awareness of this important (but seemingly forgotten) dimension of employment equity in South Africa.

## K. Concluding remarks

The South African experience with affirmative action measures is unique in a number of respects, of which two stand out. The first relates to the constitutional and legislative framework. Unlike the situation in many other countries, the South African Constitution makes explicit reference to affirmative action. In addition, it refers to affirmative action in terms that leave no doubt that such measures are not to be viewed not as a deviation from an equal treatment principle, but as a means to ensure the achievement of substantive equality. In addition, the Constitutional Court has made it clear that affirmative action measures that fall within the parameters of the constitutional provision (section 9(2)) are not only presumptively fair (thereby placing the onus on those challenging such measures to prove its unfairness), but that courts should be reluctant (in light of South Africa's historical circumstances and the inequalities that plague the society) to interfere with such measures.<sup>83</sup> Finally, in this regard, we have seen that in order to give effect to the Constitutional provision, the EEA places an obligation on designated employers to implement affirmative action measures, and establishes mechanisms for the monitoring and enforcement of this obligation.

Secondly, in giving meaning to the notion of substantive equality, the legislature and the judiciary in South Africa have challenged many conventional wisdoms in the area of affirmative action, one of the most significant being what I reluctantly call the "traditional" or "conventional" understanding of the notion of merit.<sup>84</sup> The most common way in which

<sup>81</sup> GN 1345, published in Government Gazette 23702, 19 August 2002.

<sup>82</sup> Released on 3 November 2003. See <http://www.labour.gov.za>.

<sup>83</sup> *Minister of Finance and others v. Van Heerden* 2004 (11) BCLR 1125 (CC), par. 152 (per Sachs J).

<sup>84</sup> I deliberately use inverted commas to indicate these concepts are contested, and that there are various competing conceptions of what merit in the context of the distribution of jobs and employment opportunities means. For a discussion of the different meanings ascribed to the term "merit" and its importance in discussions of the appropriate scope of affirmative action measures, see Christopher McCrudden, "Merit Principles", (1998) 18 Oxford Journal of Legal Studies, pp. 543-579.

the merit principle is currently defined is that a position should be awarded to the most “qualified” applicant for the position in question.<sup>85</sup> The manner in which the EEA envisions the allocation of positions represents a significant deviation from this understanding. It provides that in order to benefit from affirmative action measures, a candidate must be “suitably qualified”, and this, as we have seen, includes those who may not have the formal qualifications or experience required for the position, but (merely) the capacity to acquire the ability to do the job in question within a reasonable period of time. In contrast, the European Court of Justice (ECJ) has made it clear that one of the criteria for lawful affirmative action is that the two candidates must be “equally qualified”.<sup>86</sup>

On its face, the definition of a “suitably qualified person” appears to open the South African EEA up to the criticism that it will force employers to implement affirmative action measures that will lead to a lowering of standards, which in turn will lead to performance below the level normally expected of people in a particular position (the so-called “threshold level” of performance).<sup>87</sup> And this will surely reinforce rather than change stereotypical and prejudicial views towards members of disadvantaged groups. This is undoubtedly a serious concern and the strategy of changing attitudes will not work if employers fail to pay heed to it.

Nevertheless, there is sufficient evidence to indicate that proponents of the EEA are aware of this potential danger and intend to guard against it, despite the seemingly open-ended nature of the definition of “suitably qualified” in the Act. For example, the Employment Equity Bill makes it clear that the purpose of affirmative action measures is not to appoint

<sup>85</sup> This is of course a highly problematic definition. As McCrudden points out, there are at least three aspects that can be criticised. First, there is the issue of what the qualification criteria should be; second, there is the issue of what the exact job requirements are; and third, assuming agreement as to both these, there is the issue of what weight should be attached to each of the qualification criteria. See McCrudden, *op. cit.*, p. 560.

<sup>86</sup> In *Marschall*, the ECJ acknowledged that “even where candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances” (see *Marschall v Land Nordrhein-Westfalen* Case C-409/95 [1997] ECR I-6363, paras. 29 and 30). This shift is significant, because the Court was willing to accept the existence of group-based disadvantage and allow the law to act to counteract this disadvantage. Nevertheless, this does not detract from the basic requirement that lawful affirmative action measures in the European context can only be triggered in situations where the two candidates are of equal (or almost equal) merit (see *Abrahamsen v Fogelqvist* Case C-407/98 [2000] IRLR 732).

<sup>87</sup> See *Ockert Dupper*, “Remedying the past or reshaping the future? Justifying race-based affirmative action in South African and the United States”, *op. cit.*, pp. 120-122.

or promote people who do not meet the minimum requirements for the jobs in question.<sup>88</sup> As Nelson Mandela put it prior to the Act coming into force:

"... We are not ... asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor ... is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination, are at last given their due ..."<sup>89</sup>

Normal business principles further dictate that employers will endeavour to achieve a balance between the principle of efficiency and greater diversity. For employers it will be short-sighted and self-defeating to adopt a strategy whereby any person, merely by virtue of being a member of a designated group, will qualify for appointment or promotion. Hence the need to employ the idea of a threshold of performance that candidates for a certain position must attain. Note, however, that the criteria for what constitutes necessary qualifications for a certain job or position can themselves reflect past prejudices and be in need of revision. For example, an employer could demand a matriculation (or school-leaving) certificate that is not strictly speaking needed for successful performance of a job, but which could have the result of disproportionately affecting black people who because of past discriminatory education policies may not have been given the opportunity to attain such a certificate.<sup>90</sup>

The more general point is that tokenism, that is to say appointing a black person or woman solely on the basis of race or sex, would be counterproductive. Nevertheless, the requirement of current EC law, namely that employees have to be "equally qualified" before positive action policies can be triggered, is too rigid and has the effect of stifling large-scale

<sup>88</sup> See clause 12(3)(b).

<sup>89</sup> Nelson Mandela, October 1991 as quoted in the Explanatory Memorandum to the Employment Equity Bill, *op. cit.*, p. 2.

<sup>90</sup> In South Africa in particular, these concerns are also reflected in the policy document leading up to the enactment of the EEA. Against the background of the disparities in formal qualifications, that, as just mentioned, can be traced back to the way education and other formal vocational training were managed under the apartheid system, the Green Paper on Employment and Occupational Equity requires of employers to do two things. First, to review criteria for hiring, training, transfers, retrenchments and promotion to ensure that these criteria legitimately are related to the job in question and do not merely serve as a means of preventing the advancement of individuals from designated groups. And second, to redefine those criteria in terms of skills and experience rather than formal educational requirements precisely in order to avoid this entrenchment of past disadvantage. See Green Paper on Employment and Occupational Equity, *op. cit.*, paras 4.5.3.1 – 4.5.3.3.

transformation.<sup>91</sup> The South African experience illustrates that one can move away from the controversial (and it is submitted indeterminate) notion of “equal qualifications” and still achieve the twin goals of efficiency and diversity.<sup>92</sup> It is interesting to note that a requirement that balances the issue of efficiency with greater diversity has been formally entrenched in the South African Constitution. Section 195(1)(b) of the Constitution states that public administration must be governed, *inter alia*, by the principle of “*efficient, economic and effective use of resources*”, while subsection (i) declares that “(p)ublic administration must be broadly representative of the South African people”.<sup>93</sup>

Given these two features that I have argued make the South African experience with affirmative action relatively unique, the final question that remains is whether Europe can learn anything from this experience. In light of the fact that the permitted scope for positive action in European law now also has to be determined in part by a reference to substantive equality, it is submitted that it can. However, it goes without saying that the South African experience with affirmative action cannot be transposed onto societies with considerably different legal, political, and socio-economic backgrounds.

<sup>91</sup> As one commentator has noted: “While their validity by E.C. standards is beyond question, the effectiveness of positive action plans is a different matter. Where these schemes have been applied, the proportion of women in the workplace has remained static rather than having improved. One reason for this may lie in the plans’ most debatable feature – the need to demonstrate equivalent qualifications of male and female candidates before any preferential criterion is triggered.” *Daniela Caruso*, “Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives”, (2003) 44 *Harvard International Law Journal*, pp. 341-342.

<sup>92</sup> An equally interesting issue (that unfortunately I can only touch upon here) is whether there may in fact be an increase in efficiency by taking race or gender into consideration as criteria when filling a position. Think of the hiring of black policemen in a predominantly black area, or female police officers in divisions that investigate sexual assault, on the ground that they would be more effective in their respective positions (perhaps because black policemen can better interact with the black community, or because female victims would feel more at ease being interviewed by female officers). It is not clear whether this is always borne out in reality, or even whether it is a good thing that one thus perpetuates racial or gender thinking. But one thing we must be wary of is to think that affirmative action always leads to a decrease in efficiency. It might, as these examples reveal, have quite the opposite effect.

<sup>93</sup> In at least one decision, this principle of efficiency has played a decisive role. In *PSA v Minister of Justice* (1997) 18 ILJ 241 (T), the Supreme Court (as it was then known) declared invalid an affirmative action policy where the cost in efficiency had not been sufficiently justified (see also *Stoman v Minister of Safety & Security & Others* 2002 (3) SA 468 (TPD)). In a recent decision, the Labour Court invalidated a policy in which promotions from inspector to captain in the explosives unit of the South African Police Service had been demarcated as “affirmative action” promotions, effectively excluding white males from applying. The court held that this policy effectively sacrificed the constitutional imperative of efficiency in a service desperately in need of a highly skilled and experienced workforce (see *Coetzer v Minister of Safety & Security & Another* (2003) 24 ILJ 163 (LC)).

To put it simplistically, perhaps too simplistically, the question whether legal rules can be transplanted from society to society has (in modern legal thought) been dominated by so-called “mirror theories of law”. One version of the theory first appeared in the eighteenth century, and received its most influential statement in the works of Montesquieu, who declared that:

“... [The political and civil laws of each nation] should be so closely tailored to the people for whom they are made, that it would be pure chance if the laws of one nation could meet the needs of another ... They should be relative to the geography of the country; to its climate, whether cold or tropical or temperate; to the quality of the land, its situation, and its extent; to the form of life of the people, whether farmers, hunters, or shepherds; they should be relative to the degree of liberty that the situation can tolerate; to the religion of the inhabitants, to their inclinations, wealth, number, commerce, customs, manners ...”<sup>94</sup>

In other words, mirror theories, or at least the most extreme version thereof, claim that “(n)othing in law is autonomous; rather, law is a mirror of society, and every aspect of the law is molded by economy and society.”<sup>95</sup> Mirror theories claim that legal rules change in response to forces *outside* of the law (be it power relations of society, the workings of the market, the cunning of the *Weltgeist*, the political ideology of the age, the self interest of the dominant class), and therefore cannot readily be transported from society to society.

However, mirror theories have been subject to stringent critique – so much so that it can hardly any longer be called a general theory (or theories) of law.<sup>96</sup> More nuanced theories have emerged – theories that point out that the relationship between law and society is neither non-existent, nor a simple mirroring, but a subtle and intricate interrelationship that must be studied on a case-by-case basis.<sup>97</sup> Otto Kahn-Freund’s theory of comparative

<sup>94</sup> Charles de Secondat Montesquieu, *De l'esprit des lois*, book I, ch. 3 (De lois positives) (1748), as cited by William Ewald, “Comparative Jurisprudence (II): The Logic of Legal Transplants”, (1995) 43 *American Journal of Comparative Law*, p. 493.

<sup>95</sup> Ibid, p. 492.

<sup>96</sup> As Ewald writes, “(I)egal theorists are no longer entitled to make glib assertions about the pre-established harmony between law and society: that law ‘mirrors’ society or that it ‘fits society like a glove’.” Ibid., p. 495.

<sup>97</sup> Relevant in this regard is what von Jhering so pointedly remarked over 150 years ago: “*Die Frage von der Rezeption fremder Rechtseinrichtungen ist nicht eine Frage der Nationalität, sondern eine einfache Frage der Zwecknäßigkeit, des Bedürfnisses. Niemand wird von der Ferne holen, was er daheim ebensogut oder besser hat, aber nur ein Narr wird die Chinarinde aus dem Grunde zurückweisen, weil sie nicht auf seinem Krautacker gewachsen ist.*” (“The reception of foreign legal institutions is not a question of nationality, but a simple question of expedience, of need. Nobody will fetch from afar what can be obtained just as well or even better at home, but only a fool will reject cinchona for the mere reason that it wasn’t grown in his own backyard.”) Rudolph von Jhering, *Der Geist des römischen Rechts*, Erster Teil (1852), p. 8, cited in Alex

legislation is one example of this more nuanced way of thinking about legal transplantation.<sup>98</sup> He arranges legal rules and institutions along a spectrum that ranges from the “mechanical” (which is relatively easy to transplant) to the “organic” (which is not). Kahn-Freund summarizes his thesis as follows:

“... (T)he degree to which any rule ... or institution ... can be transplanted, its distance from the organic and from the mechanical end of the spectrum depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialized world to a very greatly diminished extent. The question is in many cases no longer how deeply it is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden. Or, in non-metaphorical language: how closely it is linked with the foreign power structure, whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law ...”<sup>99</sup>

To be sure, we are in this case not talking about directly transplanting legal rules, because the assumption is that the background legal arrangement is both South Africa and Europe is the same, namely that the scope of affirmative action / positive action has to be determined in part by reference to a substantive notion of equality. Nevertheless, given that assumption, we are still asking whether the South African experience can, if not directly be transplanted, at least serve as a useful model for Europe to consider. A detailed assessment of this question is for another paper (or for others to answer in more detail), but it is submitted that there are enough similarities between South Africa and Europe on the issue to answer that question in the affirmative.

It is important for legal scholars to engage in comparative work, not only in the descriptive sense, which is often likened to “a trip to the zoo or academic tourism”,<sup>100</sup> but also in the analytical sense, which aims at “better understand(ing) the inarticulate assumptions and social values that are expressed in each country's ... law and practice.”<sup>101</sup> Some two

*Graser, Dezentrale Wohlfahrtsstaatlichkeit im föderalen Binnenmarkt?*, Berlin: Duncker & Humblot, 2001, p. 118.

<sup>98</sup> See *Otto Kahn-Freund*, “On Uses and Misuses of Comparative Law”, (1972) 37 *Modern Law Review*, p. 1.

<sup>99</sup> *Ibid.*, pp. 12-13.

<sup>100</sup> *Clyde W. Summers*, “Comparative Labor Law in America: Its Foibles, Functions, and Future”, (2003) 25 *Comparative Labor Law and Policy Journal*, p. 115.

<sup>101</sup> *Ibid.*, p. 126. Summers described the value of comparative work as follows: “Most of us are bound by unconscious premises and have difficulty envisioning what we have not seen. When we have known only one ... system we are captives of its purported premises and their claimed consequences. We cannot easily imagine that essential parts might be otherwise; we do not see many of

hundred years earlier, the poet Johann Wolfgang von Goethe, in a totally different context (during a journey to Italy) reflected on the benefits of “travelling” (literally in this case) to other countries (or in legal terms, other jurisdictions)

*“Das Bekannte wird neu durch unerwartete Bezüge und erregt, mit neuen Gegenständen verknüpft, Aufmerksamkeit, Nachdenken und Urteil.”*<sup>102</sup>

I trust that this paper has illuminated some questions worth asking and will begin to shed new light onto some of the familiar issues in the area of affirmative action. That is as much as any academic can ask for.

the questions worth asking” (*Clyde W. Summers*, “Comparisons in Labor Law: Sweden and the United States”, in (1983) 68 *Svensk Juristtidning*, p. 615).

<sup>102</sup> “The well-known is shown in a new light thanks to unexpected connections and, because of being associated with new objects, attracts attention, reflection, and estimation.” *Johannes Schregle, “Überlegungen zur internationalen Vergleichung im Arbeitsrecht”,* in *Franz Gamillscheg* (ed.), *In Memoriam: Sir Otto Kahn-Freund*, München: Beck Verlag, 1980, p. 675.