THE LAWS REGULATING AFFIRMATIVE ACTION IN THE WORKPLACE AND ITS IMPACT ON COVID-19 PANDEMIC

BY

SKHOSANA, ZANELE MPHO

A MINI-DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF LAWS (LLM) IN LABOUR LAW

FACULTY OF MANAGEMENT & LAW, SCHOOL OF LAW

UNIVERSITY OF LIMPOPO

SUPERVISORS: ADV. LT NEVONDWE

CO-SUPERVISOR: MR. RM MATSHETA

2022

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

CHAPTER TWO: POLICY AND LEGISLATIVE FRAMEWORK OF AFFIRMATIVE ACTION

CHAPTER THREE: JUDICIAL JURISPRUDENCE ON AFFIRMATIVE ACTION

CHAPTER FOUR: COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND UNITED STATES OF AMERICA

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

BIBLIOGRAPHY

ABSTRACT

The aim of this research is to determine the laws that regulate affirmative action in the workplace and the impact Covid-19 has on affirmative action. This research focuses on the history of affirmative action in South Africa and the United States of America. Both countries have a similar history of discrimination and racial segregation. The United States of America is one of the most progressive countries on the issue of affirmative action. The comparison of South Africa with the United States of America will enhance the applicability and effectiveness of affirmative action.

Past discrimination is a huge contributing factor to the imbalances and inequalities experienced in the workplace. A measure in a form of affirmative action was established to redress past injustices, however, there are many controversies around the topic and its effectiveness. The Covid-19 pandemic has made matters worse in that many people have been laid off, resulting in the retrenchments and the regress of affirmative action and its purpose.

The findings of this research conclude that Covid-19 has negatively affected the process of affirmative action. As such, employers during this trying time prefer only individuals who are fully qualified and experienced as the employees have been reduced. As long as affirmative action applies to individuals or a group of individuals with certain skin colour or sex regardless of their past privileges this racial tension might never be relieved. In order to effectively implement affirmative action, South Africa has to focus on the institutions that cause the problem rather than dealing with the final results.

DECLRATATION BY SUPERVISOR

I, Adv. Lufuno Tokyo Nevondwe, hereby declare that this mini dissertation for the degree of Masters of Laws (LLM) in Labour law by Ms. Zanele Mpho Skhosana be accepted as examination.

Signed: 

Date: 8 March 2022

Adv. Lufuno Tokyo Nevondwe

Mr. Reginald Matsheta

DECLARATION BY STUDENT

I, Zanele Mpho Skhosana, declare that this mini dissertation for the degree of Masters of Laws (LLM) in Labour Law at the University of Limpopo hereby submitted, has not been previously submitted by me for a degree at this or any other university. This is my own work in design and execution and all materials contained herein have been duly acknowledged.

Signed: 

Date: 8 March 2022

Ms. Zanele Mpho Skhosana

DEDICATION

I dedicate this mini-dissertation to my family for nursing me with affection and love and their dedicated partnership for success in my life. Especially my parents Koena Julia Skhosana and Mgiji Piet Skhosana, not forgetting my supervisor Lufuno Nevondwe and my co-supervisor Reginald Matsheta, their assistance truly made the process less hard.

ACKNOWLEDGEMENT

The completion of this dissertation would not have been possible without the assistance of many special and wonderful individuals. Foremost, I would like to thank my supervisors, Adv. LT Nevondwe and Mr. R Matsheta. Their guidance and support greatly helped me to overcome the difficulties that I faced in completing this dissertation. Thanks for their patience in reading and editing my draft. It must have been an excruciating experience. I would like to thank and acknowledge the academics whose journals assisted in writing this mini-dissertation, Petty Junior Mtsweni for the unconditional support.

LIST OF ABBREVIATIONS AND ACRONYMS

ARP	Annual Review of Psychology
BBEEA	Broad Based Economic Empowerment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
CRA	Civil Rights Act
EEA	Employment Equity Act
HLELJ	Hofstra Labor and Employment Law Journal
JEP	Journal of Economic Perspectives
JJS	Journal for Juridical Science
JPIOC	Journal Psychological Issues in Organizational Culture
JREHD	Journal of Racial and Ethnic Health Disparities
KLJ	Kentucky Law Journal
LRE	London Review of Education
MLR	Mizan Law Review
NLR	National Law Review
NYULR	New York University Law Review
OFCCP	Office of Federal Contract Compliance Programs
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PINS	Psychology in Society
PPPFA	Preferential Procurement Policy Framework Act
SAFLII	Southern African Legal Information Institution
SDLR	South Dakota Law Review

USA	United States of America

TABLE OF CASES

USA CASE LAWS

TABLE OF STATUTES

Employment Equity Amendment Act 47 of 2013

Group Area Act 41 of 1950

Industrial Conciliation Act 11 of 1924

Labour Relations Act 66 of 1995

Mines and works Act 12 of 1911

Public service Act 111 of 1984

Preferential Procurement Policy Framework Act 5 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Unemployment Insurance Act 30 of 1966

Unemployment Insurance Act 63 of 2001

Wages Act 15 of 1977

USA LEGISLATION

Constitution of the United States (1868)

Executive Order 10925- Establishing the President's Committee on Equal Employment Opportunity

Executive Order 11114- Extending the Authority of the President's Committee on Equal Employment Opportunity

Executive Order 11246- Equal Employment Opportunity

Executive Order 11375- Amending Executive Order No. 1124, Relating to Equal Employment Opportunity

INTERNATIONAL INSTRUMENTS

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Council Directive 76/207/EEC of 9 February 1976

Discrimination (Employment and Occupation) Convention (1958)

International Convention on the Elimination of All forms of Racial Discrimination (1965)

Universal Declaration of Human Rights (1948)

GOVERNMENT PUBLICATION

GN R1441 in GG 632 of 13 November 1998

GN 1840 in GG 18481 of 1 December 1997

GN R1 of 5 January 2001

Gen Not 564 in GG 1880 of 23 April 1998

Gen Not 1345 in GG 23702 of 19 August 2002

Gen Not 1840 in GG 17303 of 1 July 1996

CHAPTER ONE: INTRODUCTION

1.1 Historical Background of the study

The apartheid system discriminated against certain groups when it came to employment in South Africa.[1] Democracy brought change which included the protection of every person and redressed the past imbalances.[2] Even though in the 1990s legislation were enacted to redress the past injustices, the previously disadvantaged group were not equipped compared to the previously privileged group. There became a need for affirmative action. The affirmative action policies were then designed to address inequality and discrimination after the end of apartheid in 1994.[3] Despite the changes brought by democracy, there is little change in senior management positions.[4] The Covid-19 pandemic left a lot of people without a source of income, most are from disadvantaged backgrounds, entrepreneurs, and employees in the private sector.

The apartheid system divided South Africans into Whites, Coloureds, Asians or Indians and Blacks according to the importance and distribution of benefits within the apartheid system thereby institutionalising racial discrimination.[5] The legislation enacted by the apartheid government provided for racially segregated societies. Discrimination in the workplace was implemented through the Industrial Conciliation Act[6] and the Mines and Works Act.[7] These laws barred Black people from collective bargaining, it set aside specific occupations for White people.[8] Race and sex were determining factors for

---

[1] Martin Geraldine and Durrheim Kevin, 'Racial Recruitment on Post-Apartheid in South Africa: Dilemmas of Private Recruitment Agencies' (2006) 33 *Psychology in Society* 1.
[2] Ibid at 1.
[3] Archibong Uduak and Adejumo Oluyinka, 'Affirmative Action in South Africa: Are We Creating New Casualties?' (2013) 3(1) *Journal of Psychological Issues in Organisational Culture* 14.
[4] Martin (note 1 above) 12.
[5] Archibong (note 3 above) 14.
[6] Act 11 of 1924.
[7] Act 12 of 1911.
[8] McGregor Marie, 'A Legal Historical Perspective on Affirmative Action in South Africa' (2006) 12-2 *Fundamina* 87,92; Industrial Conciliation Act 11 of 1924; Mines and Works Act 12 of 1911.

wages, and it was regulated by the Wages Act.[9] The Group Area Act[10] determined the areas where certain groups of people are not allowed making it difficult to search for work.[11] The Public Service Act[12] made it legal to discriminate based on gender and the Unemployment Insurance Act[13] did not allow men and women to be entitled to equal benefits.[14]

In 1977 the Wiehahn Commission was established.[15] Its purpose was to investigate and recommend changes to the labour laws.[16] In 1979 the Industrial Court was established following the recommendations of the Wiehahn Commission. The court dealt with labour disputes[17] including discrimination and inequality in the workplace. The South African Law Commission had to investigate the group rights and the possibility of their extension after receiving national and international criticism concerning the apartheid policies.[18]

Section 8 of South Africa's interim Constitution states that everyone has a right to equality, and no one shall be unfairly discriminated against.[19] Section 8(3)(a) provides that:

> "This section shall not preclude measures designed to achieve the adequate protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, to enable their full and equal enjoyment of all rights and freedoms."[20]

---

[9] Act 15 of 1977.
[10] Act 41 of 1950.
[11] Ibid 92; Wages Act 15 of 1977; Group Area Act 41 of 1950.
[12] Act 111 of 1984.
[13] Act 30 of 1966.
[14] Ibid 93; SAHO, 'Apartheid Legislation 1850s-1970s' (27 August 2019) < https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s > accessed 31 May 2021.
[15] GilesFiles, 'Dare One Suggest: Another Wiehahn Commission' (31 August 2012) < https://www.gilesfiles.co.za/another-wiehanh-commission/ > accessed 27 May 2021.
[16] Ibid.
[17] SAFLII, 'South Africa: Industrial Court' (16 August 2018) < www.saflii.org/za.cases.ZAIC/ > accessed 27 May 2021.
[18] McGregor (note 8 above) 97.
[19] Section 1,2 of the Constitution of the Republic of South Africa Act 200 of 1993.
[20] Ibid at section 8(3)(a).

Affirmative action is not a right but a procedure that entitles a certain group of people to some benefits. The Labour Relations Act 66 of 1995 (thereafter 'Act 66 of 1995')[21] empowers the Commission to give upon request employers, employees and others stated under section 115(3) advice or training relating to affirmative action and equal opportunities programs.[22]

The Employment Equity Act 55 of 1998 ('EEA') aims at redressing disadvantages emanating from past racial rules and accommodating different individuals in the workplace.[23] The objective of the EEA is to 'attain workplace fairness by putting in place effective measures to address the disadvantages that Black people, disable people and women experienced'.[24] The preamble of the 1996 Constitution shows that South Africans recognise past injustices.[25] The Constitution contains the equality clause.[26] Section 9 provides as follows:

> "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."[27]

The law is enacted to correct the employment difficulties experienced by designated groups by promoting equal employment opportunities and just treatment and eradicating unfair discrimination and just treatment, and implementing affirmative action measures, thereby achieving fairness in the workplace and ensuring their fair representation. All categories and occupational levels of the active population.[28]

When Covid-19 struck the world. It affected every aspect of life including the labour market. Most people were relieved from their work to decrease the remunerations paid by companies to be able to save to maintain the business

[21] Act 66 of 1995.
[22] Section 115(3)(h) of the Labour Relations Act 66 of 1995.
[23] See preamble of the Employment Equity Act 55 of 1998.
[24] Purpose in EEA; section 2 of the Employment Equity Amendment Act 47 of 2013.
[25] The preamble of the Constitution of the Republic of South Africa, 1996.
[26] Ibid at section 9.
[27] Constitution (note 25 above) at section 9(2).
[28] Section 2 of the EEA.

and to decrease the number of infections in South Africa. Covid-19 might have paved a way for the undermining of the affirmative action program.

1.2 Problem statement

The purpose of this investigation is to analyse the impact of Covid-19 on affirmative action in the workplace. It is known that before democracy people were discriminated against based on race and sex which resulted in imbalances and inequalities in terms of employment opportunities. In the 1990s affirmative action was established to redress past injustices. Affirmative action is effective on paper however in practice, it is partially effective. When the Covid-19 pandemic began everyone was required to stay at home except essential workers which later resulted in them losing their jobs which were done in a way that undid the affirmative action.

1.3 Literature review

Affirmative action is a set of policies and processes with an intention to eradicate discrimination against marginalised groups such as women and ethnic minorities. Its fundamental goal is to undo the effects of previous prejudice.[29] Affirmative action refers to when a purposeful measure is made to give preference in admissions, appointments, or nominations to positions of responsibility.[30] However, the focus on the underprivileged does not imply that the basic qualifications are overlooked.[31] Affirmative action is thought to be a temporary strategy designed to enable members of the disadvantaged group to participate in areas where they have been previously excluded.[32] Different authors have different views in regard to affirmative actions. Affirmative action, according to some authors, is the reversal of discrimination, while affirmative action, according to others, is discrimination in a different form.

[29] Onsongo Jane 'Affirmative Action, Gender Equity and University Admissions- Kenya, Uganda and Tanzania' (2009) 7 *London Review of Education* 71, 73, 74.
[30] Ibid at 74.
[31] Ibid at 74.
[32] Ibid at 74.

Section 9 of the Constitution states that:

> "Everyone is equal before the law and has the right to equal protection and benefits of the law".[33]

The Constitution encourages the attainment of equality, and the legislative and other actions to advance individuals or groups of people who have been unfairly discriminated against may be implemented.[34] The EEA was designed to govern the execution of constitutional affirmative action measures taken to address the impediment that certain people face in the workplace.[35] No person or the state may directly or indirectly discriminate against others unless the fairness of the discrimination has been proved.[36] Section 10 of the Constitution states that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected".[37]

Affirmative action is a contentious matter that elicits strong reactions from different individuals. The case of *Singh v Minister of Justice and Constitutional Development and others*[38] incorrectly applied the constitutional provision incorporated in section 174(2) which provides that:

> "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed",[39]

Therefore, it puts this section under a microscope. Section 4(2) of the PEPUDA provides that the existence of the systematic discrimination and disparities due to the historic and current unfair treatment as a result of apartheid must be taken into account when enforcing this Act.[40]

The benefit of affirmative action is that it would improve the lives of those who had previously been discriminated against. However, its drawback is

---

[33] Constitution (note 25 above) at section 9(1).
[34] Constitution (note 25 above) at section 9(2).
[35] Section 2 of the Employment Equity Act 47 of 2013.
[36] Constitution (note 25 above) at section 9(3), (4), (5); EEA (note 33 above) at section 3(a).
[37] Constitution (note 25 above) at section 10.
[38] 2013 (3) SA 66 (EqC).
[39] Constitution (note 25 above) at section 174(2).
[40] Section 4(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

that it stigmatises people. People are occasionally promoted based on favouritism instead of performance.[41] Affirmative action and the EEA, according to critics, may be a type of reverse discrimination because it is a continuance of racial discrimination.[42] There are policies that give complete priority to members of specific groups who meet the minimum employment qualifications. The selection is done regardless of how the non-designated candidates are affected as individuals.[43]

The court in the *University of South Africa v Reynhardt*[44] supported that an appointment made in terms of the EEA which was in agreement with the affirmative action was a discriminatory act. According to Ncume, the EEA establishes a right to affirmative action after examining the case of *Harmse v City of Cape Town.*[45] However, it is unclear if the status would be the same under an employer's EEA-mandated employment equity plan.[46]

According to White, most employers promote diversity to maximise profits rather than promoting diversity to redress the past discrimination against previously disadvantaged people in the workplace.[47] The Labour Court held that the enforcement procedures are not conditions for the Court to impose a penalty on the employer.[48] Most private employers fail to adopt affirmative action for several reasons thus making it hard to redress the past injustices.[49] The policies that regulate affirmative action are not enough to achieve the

---

[41] Ncume Alia Zuko, 'The Programmatic Enforcement of Affirmative Action' (LLM-dissertation Nelson Mandela Metropolitan University 2015) 13-14.
[42] Ibid at 14.
[43] *Du Preez v Minister of Justice and Constitutional Development and others* 2006 (27) ILJ 1811 (SE) para 40.
[44] 2010 (31) ILJ 2368 (LAC).
[45] 2003 (24) ILJ 1130 (LC).
[46] Ncume (note 41 above) 60, 61.
[47] White Rebecca Hanner, 'Affirmative Action in the Workplace: The Significance of Grutter?' (2003) 92 *Kentucky Law Journal* 263,276.
[48] *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* 2007 (9) BLLR 845 (LC) para 112.
[49] Appel Richard N, Gray Alison L and Loy Nilufer 'Affirmative Action in the Workplace: Forty Years Later' (2005) 22 *Hofstra Labor & Employment Law Journal* 549,574.

goal of workplace equality.[50] Motona believes that the successful implementation of affirmative action is the responsibility of all participants in the workplace, but that the employer should be held liable for non-compliance.[51]

Unemployment affects a lot of people mostly the previously disadvantaged group, the country must come up with a unified goal on how to redress the past injustices and avoid every kind of discrimination at all cost.[52]

1.4 Aims and objectives of the study

1.4.1 The aim of the study

This research aims to analyse the laws regulating affirmative action in the workplace.

1.4.2 The objectives of the study

The objectives of the study are:

- to know the affirmative action measures put in place to redress the past injustices,
- to determine the effectiveness of the measures put in place,
- to investigate the effect of Covid-19 on affirmative action,
- to find out if there is any legal solution to implementing affirmative action during and after Covid-19 and
- to determine how the USA laws can assist South Africa.

1.5 Significance of the study

[50] Crosby Faye Jacqueline, Iyer Aarti and Sincharoen Sirinda 'Understanding Affirmative Action' (2006) *Annual Review of Psychology* 585,594.
[51] Motona Johannes, 'Unfair Discrimination and Affirmative Action in the Workplace' (LLM-dissertation Nelson Mandela Metropolitan University 2018) 71,72.
[52] Mhambi Masonwabe Honest, 'Employment Equity: The Implementation and Application of Affirmative Action in the Workplace' (LLM-dissertation University of Pretoria 2014) 58, 59.

The research is significant because it points out the controversies around affirmative action and the ineffectiveness of the legal framework enacted to achieve goals such as equality in employment, promoting diversity and redressing the past wrongs. Covid-19 might have changed how people look at affirmative action, therefore, paving a way to abandon affirmative action through legal procedures such as retrenchment and the appointment of candidates only with experience since there are restrictions in place. Affirmative action procedures are not followed by most employers because they feel entitled to a lot of things. The government has not broken all the walls of discrimination. For affirmative action to work people need to see equality in all departments. The study intends to find a solution that will guarantee that employers observe the regulations of affirmative action and does not discriminate based on any ground indicated in the Constitution of the Republic of South Africa.

1.6 Research methodology

In this study, the research methodology used is qualitative. Qualitative research relies on linguistic methods and employs meaning-based data analysis.[53] Based on the jurisprudential analysis, comparative and historical techniques are used. The methods are applied to find solutions as to how better we can apply affirmative action in the workplace and how the USA has dealt with Covid-19 in that department. The study will determine how the law has dealt with affirmative action in the past and what improvements can be brought to the South African system. This research is based on materials obtained in the library and the Internet. The materials include textbooks, legislation, case law, journal articles, regulations, international instruments, reports, Internet sources and research done by other scholars.

1.7 Scope and limitation of the study

[53] Nieuwenhuis Jan, 'Introducing Qualitative Research' in Maree Kobus (ed), *First Steps in Research* (Van Schaik Pretoria 2020) 59.

This mini-dissertation consists of five chapters. Chapter one is an introductory chapter laying down the foundation of the research. Chapter two deals with the policy and legislative framework of affirmative action and chapter three deals with the case studies. Chapter four deals with a comparative study between South Africa and the USA. Chapter five deals with the conclusion drawn from the research and the recommendations.

CHAPTER TWO: POLICY AND LEGISLATIVE FRAMEWORKS

2.1 Introduction

The civil rights movement of the late 1950s and early 1960s encouraged the development of affirmative action. The United States of America (US) is regarded as a country of the origin of affirmative action, but other countries have had their form of affirmative action.[54] South Africa has different legislations and policies dealing with affirmative action. Affirmative action programs in South Africa were created to address injustice and prejudice, as well as to maintain a wide variety of diversity in many aspects of society after apartheid ended in 1994.[55] Affirmative action regulations do not propose the hiring of people who are not qualified.[56] Affirmative action laws require employers to focus on an employee's actual abilities, making race and gender not the only factors in the hiring process.[57]

2.2 The Constitution of the Republic of South Africa, 1996

Section 2 of the Constitution of the Republic of South Africa declares the Constitution to be the supreme law of the republic.[58] South Africa is a unitary, autonomous and democratic state founded on equality, non-sexism, non-racialism and human dignity, as well as the supremacy of the constitution and the rule of law.[59] The Bill of Rights is the foundation of democratic government. It affirms democratic values of freedom, human dignity and equality while enshrining the rights of all persons in our country.[60] The state is responsible for respecting, promoting, protecting, and enforcing the rights outlined in the Bill of Rights.[61]

---

[54] USLEGAL, 'History of Affirmative Action' (date unknown) < https://civilrights.uslegal.com/affirmative-action/history-of-affirmative-action/ > accessed 02 August 2021.
[55] Archibong (note 3 above) 14.
[56] Lindeman Bradley, 'Diversifying the Workplace: Affirmative Action in the Private Sector After 1991' (1997) 42 *South Dakota Law Review* 434.
[57] Ibid at 435.
[58] Constitution (note 25 above) at section 2.
[59] Constitution (note 25 above) at section 1(a), (b), (c).
[60] Constitution (note 25 above) at section 7(1).
[61] Constitution (note 25 above) at section 7(2).

The courts must be equally accessible to all South Africans, regardless of whether they have historically been privileged or oppressed.[62] Section 8 of the interim Constitution[63] was enacted because discrimination against members of marginalised groups might result in patterns of disadvantage and harm of such groups. Such discrimination is unjust because it creates and entrenches inequality among various groups in society. The drafters of the Constitution realised that it was vital to forbid such types of discrimination while also allowing good efforts to mitigate their impact. The fundamental aims of section 8 and in particular subsections 2, 3 and 4 were to sanction such discriminatory tendencies and to redress their consequences.[64]

According to section 9 of the Constitution:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law. 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. The state nor any person may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, ethnicity or colour. National legislation must be enacted to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds listed is unfair unless it is established that the discrimination is fair."[65]

This section contains at least two fundamental concepts that must guide programs aiming at establishing substantive equality through differentiated treatment of persons who begin in unequal circumstances.[66]

A formal approach to equality implies that inequality is abnormal and that it can be eliminated by treating everyone equally. A substantive approach to equality, on the other hand, does not require a just social system. It acknowledges that discriminatory behaviours from the past have left scars on the present. Treating everyone in a nominally equal manner now will not

---

[62] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 123.
[63] Constitution of the Republic of South Africa Act 200 of 1993.
[64] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 42.
[65] Constitution (note 25 above) at section 9.
[66] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 104.

change historical trends, because inequality must be redressed, not merely abolished. This suggests that those who were previously deprived of resources have a right to an unequal share of resources now.[67]

According to *Minister of Finance and Others v Van Heerden*,[68] when it comes to recognising the diverse social and economic situations in which people find themselves, the definition of equality recognises that it may be essential to treat people differently at times. This acknowledges that treating unequal's as if they were equals can result in inequality.[69]

In the case *of President of the Republic of South Africa and Another v Hugo*[70] it was remarked while our goal is to build a society that treats each other equally based on freedom and equal worth, we would not be able to achieve that aim if we insist on equal treatment in all situations. Put differently, individuals in different circumstances need to be treated unequally based on their circumstances.in order to evaluate whether the overall impact of the discriminatory activity fosters the constitutional objective of equality, each case will require a comprehensive and detailed examination of the impact of the discriminatory conduct on the specific people concerned. In some cases, a classification that is unjust in one context may not be unjust in another.[71]

One of the most important South African cases dealing with equality is that of *Harksen v Lane*.[72] The case set out the test for discrimination. According to the Harksen case, various factors must be considered to evaluate if the discriminatory provision has unfairly impacted complainants,[73] which *inter alia* include the complainants' social status and whether they have previously

[67] Ibid at footnote 35.
[68] 2004 (6) SA 121 (CC).
[69] *Minister of Finance and other v Van Heerd*en 2004 (6) SA 121 (CC) para 119.
[70] 1997 (4) SA 1 (CC).
[71] *President of the Republic of South Africa and Another v Hug*o 1997 (4) SA 1 (CC) para 41.
[72] 1998 (1) SA 300 (CC).
[73] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 50.

been subjected to patterns of disadvantage, and as well as whether the prejudice in the case at hand is based on a specific reason or not, the nature of the provision or power, and goals that it aims to achieve. If the purpose is not to impair the complainants in the first place but to achieve a worthwhile and impactful social goal, it has a substantial influence on the question of whether the complainants have suffered the damage in question. Similarly taking into account any relevant facts, the extent to which the discrimination has affected the complainants' rights or interests, and if it has resulted in an impairment of their essential human dignity or a comparable serious character.[74]

According to Goldstone J, each case will necessitate a comprehensive and detailed examination of the impact of the discriminatory conduct on the individuals involved to establish whether the overall impact promotes the constitutional goal of equality. In some circumstances, an unjust classification in one context might not be wrong in another.[75]

Everyone has a right to be treated with respect and decency.[76] The importance of dignity as a founding value Constitution must be emphasised. Recognising and honouring a right to dignity is an appreciation of human beings' inherent worth. This principle underpins many of the rights contained in the Bill of Rights.[77] Every person has a right to freedom of expression however, the right does not promote advocacy of hatred that is based on race, ethnicity, gender, or religion.[78] The need for the judiciary to reflect South Africa's racial and gender diversity must be taken into consideration when choosing judicial officers.[79] According to the Constitution, there is a need for all Commissions established by chapter 9 of the Constitution, to

[74] Ibid.
[75] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41.
[76] Constitution (note 25 above) at section 10.
[77] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 328.
[78] Constitution (note 25 above) at section 16(1), (2).
[79] Constitution (note 25 above) at section 174(2).

consider the race and gender composition of South Africa when members are appointed.[80]

The values and principles contained in the Constitution must guide public administration. To achieve broad Representation, employment and personnel management procedures must be based on ability, impartiality, justice, and the need to correct the past inequities.[81]

When a government organ or any other institution identified in national law contracts for goods and services, it must do so following a fair, equitable, transparent, competitive, and cost-effective system.[82] This does not preclude the organs of the state or the other institutions from implementing a procurement policy that gives categories of preference in contracting and protects or advances those who have been unfairly discriminated against.[83] The policy referred to above must be implemented within a framework prescribed by national legislation.[84]

The Preferential Procurement Policy Framework Act (thereafter 'Act 5 of 2000')[85] was then enacted. The purpose of the Act is to give effect to section 217(3) of the Constitution, which requires that national legislation prescribes a framework in which a policy in terms of subsection 2 must be implemented, by establishing a framework for implementing the procurement strategy proposed by section 217(2).[86] The framework for the implementation of preferential procurement policy is contained in section 2 of the PPPFA.[87]

[80] Constitution (note 25 above) at section 193(2).
[81] Constitution (note 25 above) at section 195(1)(i).
[82] Constitution (note 25 above) at section 217(1).
[83] Constitution (note 25 above) at section 217(2).
[84] Constitution (note 25 above) at section 217(3).
[85] Preferential Procurement Policy Framework Act 5 of 2000.
[86] Ibid at the Preamble; Constitution (note 25 above) at section 217(3).
[87] PPPFA (note 85 above) at section 2.

Section 2 of the PPPFA provides that an organ of state must develop and implement a preferential procurement policy.[88] Acceptable tenders with higher prices on a prorated basis, based on their tender prices in comparison to the lowest acceptable tender, according to a formula.[89] Contracting with people or groups of people who have been historically disadvantaged by unfair discrimination on the grounds of race, gender, or disability could be one of the specific goals.[90] Put differently, PPPFA pursues the advancement process of redressing the historically unjust treatment by *inter alia* employing the provision captured in terms of section 2 of the Act.

International Convention on the Elimination of All Forms of Racial Discrimination law provides that special measures applied only for the aim of ensuring proper progress of specific racial or ethnic groups or people who require such protection to ensure equitable enjoyment or exercise of human rights and basic freedoms are not considered racial discrimination.[91] In layman's terms, preference given to previously disadvantaged is not to be construed to be tantamount to racial discrimination.

Affirmative action policies are criticized for a variety of reasons, including their impact on existing contractual rights, arbitrariness, or restrictions on specific rights, such, as administrative justice, occupational freedom, or property, but their discriminatory effect on non-designated groups is particularly noteworthy.[92] The limiting clause, however, is found in section 36 of the Constitution.[93] Other than this section, no law may restrict any the Bill of Rights' rights.[94]

---

[88] PPPFA (note 85 above) at section 2(1).
[89] PPPFA (note 85 above) at section 2(1)(c).
[90] PPPFA (note 85 above) at section 2(1)(d)(i).
[91] A 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination 1965.
[92] Pretorius Jan Loot, 'Legal Evaluation of Affirmative Action in South Africa' (2001) 26(3) *Journal for Juridical Science* 12,14.
[93] Constitution (note 25 above) at section 36.
[94]Constitution (note 25 above) at section 36(2).

Section 36(1) provides that:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
> the nature of the right,
> the importance of the purpose of the limitation,
> the nature and extent of the limitation,
> the relation between the limitation and its purpose and
> less restrictive means to achieve the purpose."[95]

According to Chaskalson P in the case of *S v Makwanyane*[96] limiting constitutional rights for a fair and necessary purpose in a democratic society necessitates a balance of conflicting interests and ultimately, a proportionality evaluation.[97] Since different rights have different implications, there is no objective test for judging reasonableness and necessity in an open and democratic society founded on equality and freedom, this is implied in section 36 of the Constitution, previously known as section 33.[98]

People's rights are invariably competing and contradictory.[99] The limitation clause establishes a standard that must be met by any limitation. Reasonability and proportionality are the two key principles in this assessment. Any restriction on a right must be reasonable and proportional, in the sense that the impact or scope of restriction must be proportional to the importance of the goal served by the restriction of the right.[100] Differential treatment processes that have the legitimate goal of achieving true equality should not be carried out in a way that offends and marginalises those who identify with groups that previously had an advantage.[101]

2.3 Labour Relations Act 66 of 1995

[95] Constitution (note 25 above) at section 36(1).
[96] 1995 (3) SA 391 (CC).
[97] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 104.
[98] Ibid at para 104.
[99] Constitutional Court of South Africa, 'The Bill of Rights' (date unknown) < https://www.concourt.org.za/index.php/constitution/your-rights/the-bill-of-rights > accessed 29 July 2021.
[100] Ibid.
[101] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 123.

The Labour Relations Act 66 of 1995 (thereafter 'Act 66 of 1995)[102] was enacted to change the law governing labour relations.[103] This is one of the first anti-discrimination legislation. No one may treat an employee unfairly for exercising any right granted by the Act.[104] Section 86(1) provides that:

> "Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning measures designed to protect and advance persons disadvantaged unfair discrimination."[105]

According to section 187, any dismissal based on discrimination against an employee directly or indirectly, on the ground of race, sex, gender or ethnicity and the employees' pregnancy or any reason related to her pregnancy is automatically unfair.[106] However, the employer may use section 187(2) as a defence, which provides that a dismissal is fair if the basis for the dismissal is based on an inherent requirement of the particular job.[107] The Commission for Conciliation, Mediation and Arbitration may provide advice or training of affirmative action and equal opportunity programmes to employers, employees, unions, federations and councils.[108]

The principle of equal treatment means that no discrimination will be made on the basis of sex, either directly or indirectly, by reference to family or marital status, in any way.[109] This principle dictates that no unjust discrimination based on gender will be tolerated in any condition, including selection criteria, for all occupations or positions, regardless of sector or branch of activity, and at all levels of the occupational hierarchy.[110]

---

[102] Act 66 of 1995.
[103] LRA (note 22 above) at preamble.
[104] LRA (note 22 above) at section 5(1).
[105] LRA (note 22 above) at section 86(1)(c).
[106] LRA (note 22 above) at section 187(1)(e), (f).
[107] LRA (note 22 above) at section 187(2)(a).
[108] LRA (note 22 above) at section 115(3)(h).
[109] A 2(1) of the Council Directive 76/207/EEC of 9 February 1976; *Woolworths (Pty) ltd v Whitehead* 2000 ZALAC 4 para 107.
[110] Ibid at A 3(1). See also *Woolworths (Pty) ltd v Whitehead* 2000 ZALAC 4 108.

It is noteworthy to recognise that only women can be denied work based on pregnancy and that such a rejection constituted direct sex discrimination. A refusal of employment on the financial effects of maternity leave must be viewed as primarily based on the pregnancy. Such prejudice cannot be justified based on the financial loss that an employer would incur if she hired a pregnant woman for the duration of the maternity leave.[111]

The Basic Conditions of Employment Act 75 of 1997 (thereafter 'Act 75 of 1995')[112] caters to the needs of pregnant employees. Under section 25, the Act allows employees to take maternity leave for four months[113] and six weeks for an employee who had a miscarriage during or after the third trimester.[114] No employer may force or permit a pregnant or breastfeeding employee to conduct work that is harmful to her or her child's health.[115] For the time being, the employer must allocate an alternate and suitable job for the employee.[116] Similarly, section 24 of the Unemployment Insurance Act[117] gives a contributor the right to maternity benefits.[118]

Further, the right to bodily and psychological integrity, which includes the freedom to make reproductive decisions, which also grants everyone accesses to health care services, including reproductive health care.[119] Pregnancy may not be used as a reason for discrimination or dismissal.[120]

According to international law, state parties must condemn all forms of discrimination against women, agree to pursue a policy of eliminating discrimination against women using appropriate means and without delay

---

[111] *Woolworths (Pty) ltd v Whitehead* 2000 ZALAC 4 para 105.
[112] Act 75 of 1997.
[113] Section 25(1) of the Basic Conditions of Employment Act 75 of 1997.
[114] BCEA (note 112 above) at section 25(4).
[115] BCEA (note 112 above) at section 26(1).
[116] BCEA (note 112 above) at section 26(2).
[117] Act 63 of 2001.
[118] Section 24 of the Unemployment Insurance Act 63 of 2001.
[119] Reg 4.1 in GN R1441 in GG 6342 of 13 November 1998.
[120] Ibid at ref 4.2.

and to this end, commit to enshrining the principle of equality of men and women in their national legislation and ensuring the practical realisation of this principle through law and other appropriate means.[121] All national provisions that discriminate against women should be repealed.[122]

Additionally, the Discrimination Convention provides that discrimination constitutes a violation of rights.[123] A distinction, exclusion or preference based on the inherent requirements of a job does not amount to discrimination.[124] According to the International Convention on the Elimination of All Forms of Racial Discrimination special measures taken solely for the purpose of ensuring adequate advancement of certain racial or ethnic groups or individuals may be deemed racial discrimination. Such measures do not result in the maintenance of separate rights for different racial groups and that racial discrimination is not committed.[125]

2.4 Employment Equity Act 55 of 1998

The Employment Equity Act 55 of 1998 (thereafter 'Act 55 of 1998')[126] was enacted to ensure that every individual enjoys equal opportunities and fair treatment in the workplace. The Act recognises the discriminatory laws and practices in the workplace which are results of apartheid and that the previously disadvantaged people cannot be redressed by only repealing discriminatory laws. The Act aims to:

> "eliminate unfair discrimination and ensure the implementation of employment equity to redress the effects of discrimination."[127]

---

[121] A 2(a) of the Convention on the Elimination of All Forms of Discrimination against Women (1979).
[122] Ibid at A 2(g).
[123] Preamble of the Discrimination (Employment and Occupation) Convention (1958).
[124] Ibid at A 1(2).
[125] A (1)(4) of International Convention on the Elimination of All Forms of Racial Discrimination (1965).
[126] Act 55 of 1998.
[127] EEA (note 28 above) the preamble.

Amendment Act 47 of 2003 (thereafter 'Act 47 of 2003').[128] The purpose of the amendment was to tighten up the laws prohibiting employers from discriminating against their employees.[129]

According to section 2 of the Act:

> "The purpose of the Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and 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 workplace."[130]

The Act must be interpreted in compliance with the Constitution and observation to international law standards.[131] International law demands that all human beings be treated equally since they are all born free and with the same dignity and rights.[132]

Every employer is required by section 5 of the Act to promote equal opportunity in the workplace by ensuring that any employment policy or practice is free of unfair discrimination.[133] Affirmative action initiatives that are consistent with the purpose of the Employment Equity Act are not considered unfair discrimination.[134]

Every designated employer must undertake affirmative action measures for people from designated groups in order to promote employment equity, as required by the Act.[135] Black people, women, and people with disabilities are all classified as designated groups.[136] Section 15 of the Act provides that:

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

[128] Act 47 of 2003.
[129] The preamble of the Employment Equity Amendment Act 47 of 2003.
[130] EEA (note 28 above) at section 2(a), (b).
[131] EEA (note 28 above) at section 3(a), (d).
[132] A 1 of the Universal Declaration of Human Rights (1948).
[133] EEA (note 28 above) at section 5.
[134] EEA (note 28 above) at section 6(2)(a).
[135] EEA (note 28 above) at section 13(1).
[136] EEA (note 28 above) at section 1.

> implemented by a designated employer must include measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups, measures designed to further diversity in the workplace based on equal dignity and respect of all people, making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer, subject to subsection (3), measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce and 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."[137]

In summation, the above provision of the EEA appreciates that, where a choice must be made for the appointment of people who are qualified, a preference must be afforded to people with disabilities and women in line with the spirit of affirmative action.

People with disabilities are defined as people who have a long-term and recurring physical and emotional impairment that makes it difficult for them to enter or advance in the workforce, according to the Code of Good Practice.[138] The extent of workplace protection for individuals with disabilities focuses on the impact of the disability on people in relation to their working environment, rather than the impairment itself.[139]

According to the Code of Good Practice, employers must make reasonable accommodations for people with impairments. The purpose of the accommodation is to lessen the impact of the person's inability to perform the job's core functions.[140] The employer may use the most cost-effective methods consistent with effectively removing the barrier to the person's ability to perform the work and equitable access to employment benefits and opportunities.[141]

---

[137] EEA (note 28 above) at section 15(1) and (2); EEAA (note 24 above) at section 7.
[138] Item 5.1 in Gen Not 1345 in GG 23702 of 19 August 2002.
[139] Ibid.
[140] Ibid at item 6.1.
[141] Ibid at item 6.2.

Article 1 of the Discrimination Convention views affirmative action as a non-discriminatory method.[142] International law requires that member states declare and implement a national policy aimed at promoting equality of opportunities and treatment in employment and occupation, to eliminate all forms of discrimination in these regions.[143]

The only provision that explicitly addresses the question of fairness and proportionality states that an employer is not required to make any decision regarding an employment policy or practice that would create an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups. As a result, it appears that the Act neither requires nor prohibits such policies.[144]

Section 20 of the EEA, elucidates that a designated employer must develop and implement an employment equity plan to make reasonable progress toward achieving employment equity in their workforce.[145] The employment equity plan must state the affirmative action measures to be implemented as required by section 15(2).[146] A designated employer must prepare a future employment equity plan before the term of its present employment equity plan expires.[147]

According to Waglay J, another subject to be considered is whether or not employees have a right to affirmative action as a result of an employment equity plan. Employees may have a realistic expectation that the employer will act in line with the plan if an employer adopts an employment equity plan that regulates appointments and promotions.[148]

---

[142] A 1(2) of the Discrimination (Employment and Occupation) Convention (1958).
[143] Ibid at A 2.
[144] EEA (note 28 above) at section 15(4); Pretorius (note 89 above) 20.
[145] EEA (note 28 above) at section 20(1).
[146] EEA (note 28 above) at section 20(2)(b).
[147] EEA (note 28 above) at section 23.
[148] *Harmse v City of Cape Town* 2003 ZALC 53 para 48.

The affirmative action requirements are enforced in both formal and informal ways under chapter V of the EEA. Employees and trade union representatives may bring violations to the attention of the employer, a trade union, a labour inspector, the Director-General of the Department of Employment and Labour or the Employment Equity Act's Commission for Employment Equity.[149] In a more formal way, the labour inspectors enforce the Act by getting written assurances from employers that they will comply with the Act, issuing compliance orders, seeking Director-General reviews, or referring cases of persistent non-compliance to the Labour Court by the Director-General.[150]

In addition to the factors listed in section 15, the Director-General or other person or body applying the Employment Equity Act must consider certain factors when considering whether a designated employer is implementing employment equity as per this Act.[151] The factors include the extent to which each occupational category and level in an employer's workforce is equally represented by appropriately qualified employees from among the several specified groups,[152] the progress and the reasonable efforts made by the designated employers,[153] the level to which the employer has progressed in removing employment barriers that adversely affect people from designated groups and any other prescribed factor.[154] In other words, the Act dictates that the employer must illustrate the measures and progress made in advancing the implementation of affirmative action in the workplace.

2.5 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

[149] EEA (note 28 above) at section 34.
[150] EEA (note 28 above) at section 36.
[151] EEA (note 28 above) at section 42.
[152] EEA (note 28 above) at section 42(a).
[153] EEA (note 28 above) at section 42(b), (c).
[154] EEA (note 28 above) at section 42(d), (e).

The purpose of PEPUDA is to give effect to section 9, read with item 23(1) of Schedule 6 of the Constitution, to prohibit and prevent unfair discrimination, promote equality, and eliminate unfair discrimination.[155] The Act recognises the need for the elimination of apartheid's social and economic inequalities and the progress made to restructure and transform the society. The Act encourages the advancement of social groups, communities, and historically disadvantaged individuals, who have been robbed of resources and dignity, and who continue to suffer the repercussions, by special legal and other measures.[156]

Other than giving effect to section 9 and the spirit of the Constitution specifically the promotion of equality, non-sexism and non-racialism ideals, the protection of human dignity and the prevention of discrimination and the prohibition of hate speech based on ethnicity, gender, religion, or race.[157] The objects of the Act were to include provisions for measures to assist in the elimination of prejudice and hate speech,[158] establish methods for determining when discrimination is unjust and provide remedies for persons whose right had been infringed,[159] provisions for the initiatives to educate and create public awareness about the need of supporting equality and fighting discrimination and hate speech[160] and set measures to advance disadvantaged persons.[161]

Section 6 of PEPUDA is consistent with sections 9(3) and (4) of the Constitution, they both provide that nobody, including the government, can discriminate unfairly against anyone.[162] No one may treat another person unfairly based on race and gender, including denying them access to

[155] PEPUDA (note 40 above).
[156] PEPUDA (note 40 above) preamble.
[157] PEPUDA (note 40 above) at section 2(a), (b).
[158] PEPUDA (note 40 above) at section 2(c).
[159] PEPUDA (note 40 above) at section 2(d) and (f).
[160] PEPUDA (note 40 above) at section 2(e).
[161] PEPUDA (note 40 above) at section 2(g).
[162] PEPUDA (note 40 above) at section 6; Constitution (note 25 above) at section 9(3), (4).

opportunities, such as services or contractual opportunities to render services for payment, or failing to take reasonable steps to meet their needs,[163] discrimination based on pregnancy[164] and the sexual division of labour that has resulted in structural inequity in women's access to opportunities.[165]

No one may unfairly discriminate against anyone on the basis of disability. No person may deny or remove any supporting facilities required for the person's functioning in society, violating the South African Bureau of Standards' code of practice or regulations governing environmental accessibility.[166] Failure to eliminate barriers that unfairly limit or restrict equal opportunities for people with disabilities, or to take reasonable steps to accommodate their needs.[167]

No one may share information that intends to discriminate against any person,[168] nor publishes, spread, promote, or convey comments against anybody based on one or more of the banned grounds to harm, hurt or promote hatred.[169] If the complainant establishes a prima facie case of discrimination, then the burden of proof is on the respondent, he needs to prove that there was no discrimination. If discrimination did take place, he needs to show that the discrimination was fair.[170]

Taking actions to safeguard or advance persons or categories of persons disadvantaged by unfair discrimination, or members of such groups or categories of persons, is not unfair discrimination.[171] When deciding whether or not the respondent has established that the discrimination is fair, firstly the

[163] PEPUDA (note 40 above) at section 7(e), 8(h).
[164] PEPUDA (note 40 above) at section 8(f).
[165] PEPUDA (note 40 above) at section 8(i).
[166] PEPUDA (note 40 above) at section 9(a), (b).
[167] PEPUDA (note 40 above) at section 9(c).
[168] PEPUDA (note 40 above) at section 12.
[169] PEPUDA (note 40 above) at section 10(1).
[170] PEPUDA (note 40 above) at section 13(1), (2).
[171] PEPUDA (note 40 above) at section 14(1).

context, secondly the elements contained in section 14(3)[172] which are as follows:

> "Whether the discrimination impairs or is likely to impair human dignity,
> the impact or likely impact of the discrimination on the complainant,
> the position of the complainant in society and whether he or she suffers from the patterns of disadvantaged or belong to the group that suffers from such patterns of disadvantage,
> the nature and extent of the discrimination,
> whether the discrimination is systematic in nature,
> whether the discrimination has a legitimate purpose,
> whether and to what extent the discrimination achieves its purpose,
> whether there are less restrictive and less disadvantageous means to achieve the purpose,
> whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or accommodate diversity."[173]

Lastly, whether the discrimination is reasonable since it is based on objectively determinable factors that are inherent to the activity in question, must all be taken into consideration.[174]

Everyone, including the state, has the responsibility and duty to promote equality. It is also the responsibility of the state to achieve it.[175] According to the Act:

> "The state must, where necessary with the assistance of the relevant constitutional institutions develop an awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality; take reasonable measures to develop and implement programmes in order to promote equality; and where necessary or appropriate, develop action plans to address any unfair discrimination, hate speech or harassment; enact further legislation that seeks to promote equality and to establish a legislative framework in line with the objectives of this Act. The state must also develop codes of practice to promote equality."[176]

2.6 Broad-Based Economic Empowerment Act 53 of 2003

The Broad-Based Economic Empowerment Act (thereafter 'Act 53 of 2003)[177] was enacted to address the inequalities suffered by black people during apartheid. Under the Act, black people are Africans, Coloureds, and

[172] PEPUDA (note 40 above) at section 14(2)(a), (b).
[173] PEPUDA (note 40 above) at section 14(3).
[174] PEPUDA (note 40 above) at section 14(2)(c).
[175] PEPUDA (note 40 above) at section 24(1), (2).
[176] PEPUDA (note 40 above) at section 25(1).
[177] Act 53 of 2003.

Indians.[178] The Act aimed to create a legislative framework for black economic empowerment, promote section 9 of the Constitution and increase black people's broad and effective involvement in the economy.[179] One of the Act's objectives is to change the racial composition of ownership and management structures, as well as the skilled occupations of current and new enterprises, significantly.[180]

2.7 Public Service Regulation 2001

According to this regulation, an executing authority must be developed and implement an affirmative action program that includes a policy statement outlining the department's affirmative action commitment and how it will be executed, time-bound and annual statistics on the appointment, numeric targets for achieving representativeness, annual statistics on the appointment, promotion and training of historically disadvantaged people in each grade of each occupational category and a plan.[181] Affirmative action will be utilized to speed up the formation of a representative and equitable public sector, as well as to provide practical assistance to people who have previously been disadvantaged by unfair discrimination, allowing them to reach their full potential.[182]

2.8 The Green Paper: Department of Public Service and Administration

Equality is one of the founding principles of our country as enshrined in terms of section 9 of the Constitution, it addresses the past inequalities suffered by South Africa. Affirmative action has materialized the value of equality in the workplace. It is used to link the gap between past injustices and a democratic future.[183] Equality has both formal and substantive equality. Formal equality,

[178] Section 1 of the Broad-Based Black Empowerment Act 53 of 2003.
[179] Ibid preamble.
[180] BBBEA (note 175 above) at section 2(b).
[181] Reg D.2 in the GN R1 of 5 January 2001.
[182] Ibid at reg A. see also reg i Gen Not 564 in GG 18800 of 23 April 1998.
[183] Reg 1 Gen Not 851 in GG 18034 of 31 May 1997.

according to the general notice, entails the repeal of laws that lead to discrimination and segregation, while substantive equality demands the recognition and elimination of the actual social and economic factors that cause inequality in individuals' and groups' lives.[184] Looking at the past injustices, to achieve equality, there is a need to provide the disadvantaged with a programme to arrange their individual advantage based on an examination and rehabilitation of those constraints that prevents access and enjoyment of equality.[185]

The principle of equal opportunities is a tool used to eradicate unfairness and discrimination in the workplace.[186] The question of whether or not an act is discriminatory is important since it does not always imply true bias against the person concerned. Rather, it is compared to how others are treated. When others are given benefits that the victim is denied, discrimination may be considered to occur, even if the victim is not prejudiced.[187]

Affirmative action is a strategy for achieving employment fairness by correcting inequities in organisational culture, employee composition, service delivery, and human resource management practices.[188]

2.9 Conclusion

Affirmative action and the programs related to it were not created to discriminate against anyone or reverse the discrimination that occurred during apartheid, but they are there to ensure that qualified people from designated groups have equal opportunities in the workplace.[189] Serious

---

[184] Ibid.
[185] Ibid.
[186] Ibid at reg 3.2.
[187] *Public Servants Association (PSA) obo Karriem v South African Police Service (SAPS) and Another 2007* (4) BLLR 308 (LC) para 10.
[188] Reg 3.3 Gen Not 851 in GG 18034 of 31 May 1997.
[189] Mywage.co.za, 'All the Information You Need to Know About Affirmative Action and Labour Laws including Affirmative Action and Employment, Affirmative Action and Equal Pay, Non-discrimination' (date unknown) < https://mywage.co.za/decent-work/fair-treatment/affirmative-action > accessed 04 August 2021

actions are taken to eliminate our society's caste-like character and to enable persons historically disadvantaged to break through into previously barred territory enhance equality and are not unjust.[190]

Despite efforts to eliminate prejudice in the modern workplace, evidence of negative consequences for the formerly disadvantaged, particularly women, persists.[191] Inequalities and prejudice are still firmly established in social structures, practices, and attitudes.[192]

Most employers in practice do not comply with affirmative action as a result of the stigma around it. People believe that affirmative action is the reversal of past discrimination in its literal form. However, this is not true, the reversal of the past injustices would mean the past injustices done to blacks being done to whites for a period equal to theirs (the eye for an eye theory). Looking at the laws governing affirmative action, affirmative action is a way to make amends. A penalty should be attached to the employer who refuses to comply with measures put in place because multiple, overlapping and mutually reinforcing violations of constitutional rights can arise from the same incident.[193]

Affirmative action does not require that people should be hired because of their race. Inherent requirements overpower affirmative action. Affirmative action requires that where all parties have the necessary qualifications for the job in question, the previously disadvantaged should be preferred. Previously disadvantaged people will not be placed in the positions they are not qualified for in the name of affirmative action.

---

[190] *Minister of Finance and others v Van Heerden* 2004 (6) SA 121 (CC) para 152.
[191] Lindeman (note 56 above) 435.
[192] PEPUDA (note 40` above) preamble.
[193] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 114.

According to Mushariwa, the purpose of affirmative action should be to tear down both visible and invisible barriers to achieving equality in the workplace and to do so in a way that properly recognises and protects the constitutional ideals of equality, human dignity, and freedom.[194]

[194] Mushariwa M, 'UNISA v Reynhardt (2010) 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?' (2012) 66 *Potchefstroom Electronic Law Journal* 5.

CHAPTER THREE: JUDICAL JURISPRUDENCE

3.1 Introduction

As stated in the preceding chapter, South Africans, particularly Black people, during apartheid were exposed to injustices and discrimination, prompting the government to enact laws and guidelines to address the past injustices. Affirmative action is one of the remedies of past discrimination. Our legal system is heavily influenced by the judiciary. The court contributes to the interpretation of the laws enacted and fills in the gaps in our legal framework.

The purpose of this chapter is to bring past precedents in terms of case law on issues relating to affirmative action in the workplace and give new insight on how to use those decisions and enhance our legal system.

3.2 *Du Preez v Minister of Justice and Constitutional Development & others*[195]

The High Court in *Du Preez v Minister of Justice and Constitutional Development*[196] remarked that the committee's shortlisting formula effectively created an impenetrable barrier for the complainant, thus making it impossible for him to be appointed as the Regional Court Magistrate in Port Elizabeth. In terms of this formula, Black females with minimum employment requirements were granted automatic and absolute preference.[197]

The formula had the effect of stifling the complainant's desire to grow in his chosen profession while also denying him the perks of increased prestige and income that come with it. As a result, both the extent and nature of the discrimination were substantial. The more harmful the discrimination is to be affected party's interests, the more probable it is to be unfair. The

[195] 2006 (8) BLLR 767 (SE).
[196] Ibid.
[197] *Du Preez v Minister of Justice and Constitutional Development & others* 2006 (8) BLLR 767 (SE) para 41.

discrimination was systematic in nature, even though it was embedded into a departmental policy.[198]

The complainant alleged that the Commission unfairly discriminated against him based on race and gender while shortlisting candidates.[199] The respondent answered the allegations and asserted that the Department is committed to upholding the Equality Act's principles and values at all times. The court's attention is drawn to the respondent's public obligation to uphold the Constitution's principles.[200]

The respondents are not required to establish and implement an employment equity plan since they are not subject to the Employment Equity Act. Nonetheless, one would expect them to lead by example and have a detailed and thorough affirmative action plan available to all interested parties.[201]

Erasmus J held that the complainant was indeed discriminated against and the respondents failed to prove that the discrimination was fair.[202] The criteria used to shortlist candidates was set aside and the respondents were ordered to re-advertise the positions for Regional Court Magistrate, Port Elizabeth.[203]

According to Murphy AJ in the case of *Alexandre v Provincial Administration of the Western Cape Department of Health,*[204] the reliance on a race for the appointment of an individual does not amount to unfair discrimination if it is entirely consistent with implementing affirmative action measures consistent with the purpose of the Employment Equity Act, and thus in compliance with section 6(2)(a).[205]

---

[198] Ibid at para 42.
[199] Du Preez (note 197 above) at para 7.
[200] Du Preez (note 197 above) at para 9.
[201] Du Preez (note 197 above) at para 43.
[202] Du Preez (note 197 above) at para 44.
[203] Du Preez (note 197 above) at para 45.
[204] 2005 (6) BLLR 539 (LC).
[205] *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 (6) BLLR 539 (LC) para 41.

However, in the Du Preez case, Erasmus J clarified that the interpretation of the provisions of affirmative action that completely excludes the non-designated group fails to meet the constitutional standards of justice and proportionality as stipulated in section 9 of the Constitution.

3.3 *Dudley v City of Cape Town and Another*[206]

In this case, the applicant claimed that the city's criteria for selecting a candidate for the position were used in a way that resulted in unambiguous discrimination against her, alternatively, they represented a prejudice in favour of white men and/or men and against black people or women.[207] The applicant alleged that the decision of the city breached the city's obligation to implement affirmative action measures[208], its constitutional obligation[209] and it constituted unfair labour practice.[210]

One of the respondent's exceptions to the ground outlined by the applicant was that an employer's failure to take affirmative action by to favour or advantage a member of a designated group for who applied for a job could not be considered unfair discrimination under the Employment Equity Act's section 6(1) and (2).[211]

On appeal Zondo JP considered that the first respondent's exception that it is not competent to bring court proceedings to enforce a designated employer's affirmative action until the monitoring and enforcement proceedings have been exhausted.[212] In the Labour Court, the applicant was given an opportunity to reconsider her approach to the litigation. In the

[206] 2004 ZALC 1;2008 (29) ILJ 2685 (LAC).
[207] *Dudley v City of Cape Town and Another* 2004 ZALC 1 para 23.
[208] Ibid at para 26.
[209] Dudley (note 207 above) at para 29.
[210] Dudley (note 207 above) at para 30.
[211] *Dudley v City of Cape Town and Another* 2008 (29) ILJ 2685 (LAC) para 12; Dudley (note 207 above) at para 34.
[212] Ibid at para 14; Dudley (note 204 above) at para 36.

Labour Court, Tip AJ held that affirmative action is not an individual right.[213] The right to not be unfairly discriminated against is a fundamental condition of the inherent right to dignity enshrined in section 10 of the Constitution. If an employer fails to promote equality through affirmative action, it is fair to say that the employer has violated an employee's right not to be unfairly discriminated against if he or she falls within one of the designated groups.[214]

3.4 *Director-General of the Department of Labour v Jinghua Garments (Pty) Ltd*[215]

The respondent of the case was a designated employer in terms of section 1 of the EEA. The respondent had 280 employees.[216] To address the effects of discrimination, the Act aims to eliminate unjust discrimination and ensure the implementation of employment fairness in the workplace. To do this, the Act imposes certain obligations on the designated employer, in this case being the respondent.

The respondent failed to comply with these obligations.[217] Sangoni AJ admitted the violations of sections 16, 19, 20, 21 and 23 of the Act.[218] The schedule requires that maximum fines be imposed. The dispute then revolves around whether the fine of R500,000.00 is for each violation of the provisions of the Act or the violation of a compliance order.[219]

Sangoni AJ cited the case of *Christian v Colliers Properties*,[220] in which the court was obliged to consider damages under section 50 of the Act and accepted its obligations to make an award that would deter the respondent and future offenders. The fine should have a punitive and preventative

[213] Dudley (note 207 above) at para 83.
[214] Dudley (note 207 above) at para 76.
[215] 2006 ZALC 100.
[216] *Director-General of the Department of Labour v Jinghua (Pty) Ltd* 2006 ZALC 100 para 2.
[217] Ibid at para 3.
[218] Jinghua (note 216 above) at para 15.
[219] Jinghua (note 216 above) at para 17.
[220] 2005 ZALC 56.

element to guarantee compliance with the Act. The same logic was applied in this case.[221]

Sangoni AJ makes it clear that the fines for the violations of the Act are calculated based on the offence of failing to comply with a compliance order rather than each infraction of the Act.

3.5 *Harmse v City of Cape Town*[222]

The applicant filed a statement of claim stating that the respondent's refusal to shortlist him for any of the three positions for which he had sought was based on racial, political and/or other arbitrary reasons.[223] He further claimed that the respondent had treated him unfairly by neglecting to affect specific Employment Equity Act provisions.[224] The respondent objected to the statement of claim because it was ambiguous and humiliating and lacked the requisite averments to support the action.[225] The merits of this case compelled a look at the connection between affirmative action and unfair discrimination, especially given the Constitution's guarantee to substantive equality.[226]

Equality is a fundamental human right in the Constitution. equality encompasses the enjoyment of all rights and freedoms in their entirety and on an equal basis. The Constitution embraces and promotes the concept of substantive equality.[227] The Harmse ruling prompted a heated controversy. According to the court, the Employment Equity Act establishes a right to affirmative action.[228] Waglay J was satisfied that the Employment Equity Act establishes a right to affirmative action but left open the question of whether

[221] Jinghua (note 216 above) at para 22.
[222] 2003 (6) BLLR 557 (LC).
[223] *Harmse v City of Cape Town* 2003 (6) BLLR 557 (LC) para 1.
[224] Ibid at para 3.
[225] Harmse (note 223 above) at para 4.
[226] Harmse (note 223 above) at para 45.
[227] Harmse (note 223 above) at para 45; Constitution (note 25 above) at section 9.
[228] Harmse (note 223 above) at para 48.

the position would be the same under an employer's Employment Equity Act mandated employment equality plan.[229] This does not answer the question of whether a designated employer's failure to establish and/or implement an employment equity plan can be considered unfair discrimination under the Act's sections 6(1) and 6(2).[230]

The court in Harmse held that inquiring whether affirmative action is a requirement for eliminating discrimination was not appropriate if we were concerned with substantive equality. However, it was proposed that the answer should stay no because it confounds measures and values. Neither the elimination of unfair discrimination nor affirmative action is a risk. Equality is the value on the line and affirmative action is not only a defence mechanism.[231]

Members of both the designated group and the non-designated groups have the right not to be unfairly discriminated against. Both the prohibition of workplace discrimination and the requirement to take affirmative action are merely instruments or procedures for achieving equality.[232] If an employer fails to promote equality through affirmative action, it is reasonable to conclude that the employer has infringed on an employee's right not to be unfairly discriminated against because they belonged to a designated group. Similarly, if an employer discriminates against a non-designated group employee by selecting an employee from a designated group who is not suitably competent as defined in section 20(3) to (5) of the EEA, the employer has breached the employee's right to be treated fairly.[233]

[229] Harmse (note 223 above) at para 49.
[230] Harmse (note 223 above) at para 43.
[231] Harmse (note 223 above) at para 46.
[232] Harmse (note 223 above) at para 47.
[233] Harmse (note 223 above) at para 47.

While affirmative action is typically used to defend an employer, who discriminates against a member of a non-designated group, it can also be used to establish an unfair discrimination claim for an employee.[234]

3.6 *Gordon v Department of Health, KwaZulu-Natal*[235]

The respondent advertised a post and both a white male (the appellant) and a black male who were the employees of the respondent at the time applied. The appellant worked for the respondent longer than the other candidate and he occupied the position he applied for.[236] The appellant was found suitable and satisfied all five agreed criteria and he was recommended by the respondent. The commission did not accept the respondent's recommendation, the respondent then appointed the other candidate.[237]

The appellant instituted proceedings in the Labour Court alleging that he was unfairly discriminated against.[238] The court stated that the failure to appoint him did not constitute unfair discrimination.[239] The question before the court was whether the appointment of a black candidate was an affirmative action appointment.[240] The respondent did not have a policy thus failing to substantiate that the black candidate's appointment was made as a result of affirmative action.[241]

The respondent failed to provide evidence that his conduct was not unfair according to the Supreme Court of Appeal. The respondent had no affirmative action plan or policy in place when he appointed the black candidate. The court then held that the Labour Court incorrectly concluded that the respondent did not need to have a plan before hiring the black male

[234] Harmse (note 223 above) at para 47.
[235] 2009 (1) All SA 39 (SCA).
[236] *Gordon v Department of Health, KwaZulu-Natal* 2009 (1) All SA 39 (SCA) para 2.
[237] Ibid at para 3.
[238] Gordon (note 236 above) at para 4.
[239] Gordon (note 236 above) at para 5.
[240] Gordon (note 236 above) at para 14.
[241] Gordon (note 236 above) at para 24.

candidate. Failure to appoint the appellant constituted unfair discrimination.[242]

Employers are required to follow the legislative framework barring discrimination based on sex or race if they do not have an equality plan. Without an equitable policy, affirmative action appointment is arbitrary and haphazard. It is not, in itself, an affirmative action measure.

3.7 *Ethekweni Municipality v Nadesan and Others*[243]

The appellant decided not to appoint Nadesans's (Indian male) to the vacant post on the basis that there were too many Indians in the occupational level.[244] Nadesan complained regarding affirmative action measures.[245] At the time, the appellant had an employment equity plan in place. The Indian males, Indian females and African males were more, and the White males, White females and African females were underrepresented.[246]

The court found that a practical test for the legality of restitutionary measures adopted under the EEA can be developed.[247] When deciding on an unjust discrimination claim, the adjudicator must ensure that the judgment was sensible. The next step is to evaluate the circumstances that could make a rational decision unfair. The difference between internal and external elements is conceptually preferred since it is impossible to establish a precise boundary between rationality and justice. The distinction is easier to apply and is similar to the contrast between rationality and justice.[248] Internal criteria include the equity plan's validity and scope, as well as it is internal

[242] Gordon (note 236 above) at para 28.
[243] 2021 (42) ILJ 1480 (LC).
[244] *Ethekweni Municipality v Nadesan and Others* 2021 (42) ILJ 1480 (LC) para 2.
[245] Ibid at para 2.
[246] Nadesan (note 244 above) at para 7.
[247] Nadesan (note 244 above) at para 34.
[248] Nadesan (note 244 above) at para 35.

logic, rationality and EEA compliance, as well as the factual correctness of the data used by the judgment.[249]

The adjudicator should then consider whether there is any countervailing evidence that, despite the logical implementation of the equity measure, shows that the external harm to impacted parties is larger than the reparation provided to designated groups.[250]

According to the accepted evidence, the appellant lacked an occupational pipeline of African female employees from which they could be selected. It would have been pointless to re-advertise the position again to attain their equitable representation knowing there were no acceptable applications from this under-represented group. The appellant's irrational response would not have arisen if the advertising had been withdrawn entirely. A sensible approach to its conundrum would be to focus on building a layer of appointable individuals from underrepresented groups.[251]

3.8 *Minister of Finance v van Heerden*[252]

The case at hand deals with important constitutional issues of unfair discrimination, equality and restitutionary measures.[253] The constitutional challenge is based on two points. The first is that the Fund's relevant policies violate the Constitution's equality requirements being unfairly discriminating. The second premise is that the Fund is a nullity in any case since it was not properly formed under section 190A of the interim Constitution or section 219 of the Constitution. The equality claim is opposed on the grounds that the Fund's rule distinction is not unreasonably discriminatory because it is a

[249] Nadesan (note 244 above) at para 36.
[250] Nadesan (note 244 above) at para 37.
[251] Nadesan (note 244 above) at para 40.
[252] 2004 (6) SA 121 (CC).
[253] *Minister of Finance v van Heerden* at para 1.

carefully constrained affirmative action measure authorised under our Constitution's equality requirements.[254]

In comparison to new parliamentarians who are either below or above 49 years old and do not receive CPF pension benefits, the predetermined five-year differential employer contributions program unfairly favours him and other category C members who receive CPF pensions.[255] The High Court found that the challenged provisions are discriminatory in nature because, for five years, lower favoured class members received lower pensions. It also considered the distinction to be prima facie unfair because it is arbitrary because no rationale is given for it and it is based on race and political affiliation overlapping grounds.[256]

Measures that comply with section 9(2) are not presumed to be presumptively unfair. Remedial measures are a substantial and composite part of the equality protection provided by section 9 and the Constitution as a whole. The achievement of equality is a fundamental goal. The differentiation aimed at protecting or advancing those who have been harmed by discrimination is justified, as long as the measures meet the internal standard established by section 9(2).[257]

The court makes it clear that the proper scope of the equality right must be decided in light of our history and the Constitution's core values.[258] Some members of society will unavoidably suffer as a result of the transformational measures, notably those from historically privileged groups. Our society's long-term goal is to become a non-racist, non-sexist society in which everyone is recognised and treated as a human being with equal worth and dignity. The acknowledgement that we live in a diverse society made up of

[254] Ibid at para 2.
[255] van Heerden (note 253 above) at para 11.
[256] van Heerden (note 253 above) at para 12.
[257] van Heerden (note 253 above) at para 32.
[258] van Heerden (note 253 above) at para 26.

people of all races, languages, religions, and genders is at the core of the main vision.[259]

Thus, a measure must neither constitute an abuse of authority nor cause such significant and excessive harm to those who are left out of its that it jeopardizes our constitutional goal in the long run.[260] The court set aside the order that declared the provisions of the Political Office-Bearers Pension Fund to be unconstitutional and invalid.[261]

3.9 *National Education, Health and Allied Workers Union and Another v Office of the Premier: Province of the Eastern Cape and Another*[262]

In this case, the applicants alleged that the second respondent's appointment, rather than the second applicant's resulted in unfair discrimination against him in violation of the EEA.[263] The applicant requested the court to declare:

> "the non-appointment of the second applicant to the position of Senior Manager: Legal Support to be an unfair labour practice under section 186(2)(a) of the Labour Relations Act, the preference of a female candidate over the applicant, without a signed Employment Equity Plan, as an unfair discrimination and is in contravention of section 6 of the EEA and the appointment of the second applicant to the position of Senior Manager: Legal Support Services on the same terms and conditions applicable thereto on the date of the advertisement."[264]

The respondent has the right to conduct targeted recruiting in the appointment and selection of its workers, which the applicant does not content. His argument is that if the respondent has started the recruitment process through advertising, targeted recruitment can only be used after that

[259] van Heerden (note 253 above) at para 44.
[260] van Heerden (note 253 above) at para 44.
[261] van Heerden (note 253 above) at para 66.
[262] 2011 (32) ILJ 1696 (LC).
[263] *National Education, Health and Allied Workers Union and Another v Office of the Premier: Province of the Eastern Cape and Another* 2011 (32) ILJ 1696 (LC) para 1.
[264] Ibid at para 1.

process is complete and no suitable candidates have been found or by stopping the process if the objective of finding a candidate who would address is not being met among those who have applied.[265]

The recruiting process is not unjust when an employer's affirmative action policy is flexible, reasonable, and goal-directed, and allows for the targeted recruitment to remedy gender or rational disparities.

3.10 *Reynhardt v University of South Africa*[266] and *University of South Africa v Reynhardt*[267]

In the current case the applicant alleged that the respondent, his former employer, discriminated against him on the ground of race by failing to appoint him to a position, for which he was the most qualified candidate, instead, the respondent appointed a less qualified and suitable candidate.[268] The respondent's employment equity policy and guidelines were mostly in line with the intended norms, values and objective of the Constitution and EEA. It was a noble and practical activity intended at lowering and eventually eliminating, harmful racial and gender disparities in the respondent's academic and administrative management structures.[269]

The respondent argued that the Coloured person's appointment was made in accordance with its employment equity policy, which was an affirmative action plan sanctioned by the EEA. The applicant claimed that the respondent's equality strategy and plan, the ratio of White and Black Deanship positions had already met its target at the time the applicant was interviewed for the position.[270] When the applicant was questioned why he thought he was unfairly discriminated against, the applicant responded that

[265] NEHAWU (note 263 above) at para 22.
[266] 2008 (29) ILJ 725 (LC).
[267] 2010 (31) ILJ 2368 (LAC).
[268] *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 1.
[269] Ibid at para 121.
[270] Reynhardt (note 268 above) at para 6.

the majority of the selection committee considered him appointable, and he did not see how the council could overturn the selection committee's findings.[271]

The manner in which the respondent, through its officials, implemented the policy and guidelines was, however, crucial.[272] The Labour Court found the respondent's treatment towards the applicant not only racially discriminatory but also humiliating, especially since the applicant was a very senior and experienced employee of the applicant's level and calibre. The applicant was acknowledged as having served the respondent for 35 years with dignity, dedication, diligence, and distinction. The applicant was treated in an unjust and indecent manner.[273]

The Labour Court declared that the non-appointment of the applicant amounted to unfair discrimination on the basis of gender. The court ordered the respondent to compensate the applicant with a 12 months' salary.[274] The University of South Africa appealed the matter, and the Labour Court of Appeal maintained the decision of the Labour Court and dismissed the matter.[275] The current case indicates that if an affirmative action policy states that once equality targets have been met, merits would be the main factor for the appointment, continuing to use gender or race as a criterion for appointment will be unjust discrimination.

3.11 *Van Dyk v Kouga Municipality*[276]

In 2009 the applicant applied for the position of platoon officer in the fire department of Kouga Municipality (the respondent). When the applicant was not assigned the position, he claimed that he was unfairly discriminated

[271] Reynhardt (note 268 above) at para 50.
[272] Reynhardt (note 268 above) at para 121.
[273] Reynhardt (note 268 above) at para 138.
[274] Reynhardt (note 268 above) at para 145.
[275] *University of South Africa v Reynhardt* 2010 (31) ILJ 2368 (LAC) para 37.
[276] 2012 (9) BLLR 952 (LC).

against based on sex or race.[277] The applicant discovered that he was among the three individuals who had been selected for interviews. Ms Rossouw, a Coloured woman who was employed by the respondent was one of the candidates. A graduate certificate from the South African Fire Services Institute was one of the prerequisites for the advertised post. The applicant was the only person who had the certificate during the interviews.[278]

The respondent explained that the rules of section 20(3) of the EEA should be taken into account when the recruitment and selection process is conducted, as stated in the respondent's Recruitment Selection and Retention Policy of June 2008.[279] According to the EEA a person may be adequately qualified for a job based on any one or a combination of formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job.[280]

The respondent's justification for short-listing Ms Rossouw was that, despite the fact that she lacked the graduate certificate qualification required for the job, she had the ability to learn the skills required within a reasonable time. According to Baartman Ms Rossouw has received a graduate certificate since she was appointed.[281]

The inquiry was made purely on the overall score achieved by the three candidates. Ms Rossouw was recommended for appointment, not because of affirmative action but because she was the best candidate. The applicant reasoned that since she had been working in the fire department for several years without obtaining the certificate qualification, there was no reason to

[277] *Van Dyk v Kouga Municipality* 2012 (9) BLLR 952 (LC) para 1.
[278] Ibid at para 4.
[279] Van Dyk (note 277 above) at para 13.
[280] EEA (note 28 above) at section 20(3).
[281] Van Dyk (note 277 above) at para 14.

assume that she would do so within a reasonable time if she was appointed.[282]

Following the rules of section 20(3)(b), (c) and (d) of the EEA meant that the selectors preparing the shortlist needed to be satisfied that the candidates had to acquire the ability to execute the job, which did not always mean obtaining a formal qualification.[283] Ms Rossouw would not have been appointed if she was not shortlisted. Ms Rossouw was shortlisted on the basis of her ability to obtain the minimum qualification. In the lack of any legal requirement that she have a graduation degree in order to do the platoon officer's position, the reason for her short-listing in terms of the criteria under section 20(3)(b), (c) and (d) of the EEA was legitimate.[284]

The matter at hand, failing to appoint the best applicant will not be regarded as unfair if shortlisting is based on the presumption that the person appointed in the designated group has the ability to achieve the minimum qualification within a reasonable period.

3.12 *Willemse v Patelia NO and Others*[285]

The applicant (a white male with a disability) applied for the position of Biodiversity Director. The selection committee recommended him taking into account the government's affirmative action policy.[286] Despite the other candidates being regarded as non-appointable,[287] the acting director of the Department of Environmental Affairs and Tourism failed to appoint the applicant, citing that his appointment is representative of the country's demographics.[288] The arbitrator held that no unfair labour practice had occurred. The determination was based on the fact that when the position

[282] Van Dyk (note 277 above) at para 15.
[283] Van Dyk (note 277 above) at para 16.
[284] Van Dyk (note 277 above) at para 20.
[285] 2007 (2) BLLR 164 (LC).
[286] *Willemse v Patelia NO and Others* 2007 (2) BLLR 164 (LC) para 1.
[287] Ibid at para 5.
[288] Willemse (note 286 above) at para 8.

was re-advertised a month later, the applicant did not apply. The fact that the applicant failed to re-apply for the position is irrelevant.[289]

According to section 11 of the EEA an employee must first prove that discrimination exists, then the onus shifts to the employer. The employer needs to demonstrate that the discrimination was lawful and fair.[290] The applicant, in this case, was able to prove that he was denied the appointment because he was white and decided to re-advertise the position for the sake of affirmative action.[291] The arbitrator neglected to evaluate whether the decision was fair and overlooked the applicant's disability's significance in the Department of Environmental Affairs and Tourism's promotion agreement.[292] The Department of Environmental Affairs and Tourism had failed to prove that the discrimination against the applicant was fair.[293] As a result, the court found that the refusal to promote the applicant amounted to unfair labour practice and the Department of Environmental Affairs and Tourism was ordered to pay compensation.[294]

Affirmative action policies should not be used arbitrarily or unfairly. Employers should take into account variables such as skills and efficiency, rather than only considering the previous disadvantage. Failure to take disability into account could make the appointment unfair.

3.13 Barnard Principle

In the case of *Solidarity obo Barnard and Another v South African Police Services,*[295] Mrs. Barnard claimed unfair discrimination. Her allegations were based on the fact that on two occasions she was denied promotion because

[289] Willemse (note 286 above) at para 24.
[290] EEA (note 28 above) at section 11.
[291] Willemse (note 286 above) at para 17.
[292] Willemse (note 286 above) at para 24.
[293] Willemse (note 286 above) at para 91.
[294] Willemse (note 286 above) at para 93.
[295] 2010 (31) ILJ 742 (LC).

she is white.[296] The EEA and an equity employment strategy must be administered equally and must take into account constitutional rights to equality as well as operational efficiency. Applying numerical goals to an equality plan without taking into account other elements, including the circumstances of those affected, is excessively inflexible.[297]

In this case, it was noted that the adoption of employment equity policies will have a negative impact on individuals from non-designated groups. Employment equity plans, on the other hand, should be implemented with proper attention for not only the individual's right to equality but also the dignity of those who would be affected.[298] The amount of discrimination that employment equity programs can engage in against other people is restricted by law.[299] Mrs. Barnard's non-appointment amounted to unfair discrimination, according to Pretorius AJ, and it contradicted the provisions of the EEA.[300] Pretorius AJ ordered that she be promoted.[301]

On appeal, the Labour Appeal Court held that the core argument is that the court erred in finding that restitutionary measures had to give way to Mrs Barnard's right to equality and dignity.[302] The court also said that the Labour Court failed to understand and appreciate that affirmative action by its very nature is discriminatory and was intended to give preferential treatment to people from designated groups and the Labour Court used individual rights to equality and dignity to trump the principle of affirmative action.[303] It was

[296] *Solidarity obo Barnard and Another v South African Police Services* 2010 (31) ILJ 742 (LC) para 1.
[297] Ibid at para 25.1.
[298] Barnard (note 296 above) at para 25.2.
[299] Barnard (note 296 above) at para 25.3.
[300] Barnard (note 296 above) at para 43.7.
[301] Barnard (note 296 above) at para 44.
[302] *South African Police Services v Solidarity obo Barnard* 2013 (34) ILJ 590 (LAC) para 17.
[303] Ibid at para 17.

also argued that the Labour Court failed to appreciate the SAPS's employment equity plan.[304]

By ruling that the execution of employment equity-oriented measures was subject to an individual's right to equality and dignity, the Labour Court misinterpreted the intent of the measures. Mrs Barnard was aware that black candidates were being targeted for the position for which she applied.[305] The Labour Appeal Court then set aside the decision of the Labour Court.[306]

The matter was then taken to the Supreme Court of Appeal and it was indicated that it was never claimed and could not be claimed, that numerical targets and representativity are absolute grounds for appointment in light of the statutory background, policy documents and the employment equity plan.[307] Adopting such a mindset would convert numerical targets into quotas, which are illegal under the EEA. The presiding officer was of the view that the Labour Appeal Court made a mistake by seeing the employment equity plan as an absolute legal impediment to Mrs Barnard's appointment.[308] While the focus is on employment fairness, the employment equity plan's foreword makes it plain that no employment policy or practice will be established as an absolute barrier to the appointment of suitably qualified individuals from non-designated groups.[309]

The Supreme Court of Appeal indicated that the Labour Appeal Court erred in believing that it was up to the National Commissioner to determine whether a vacancy would impede service delivery. This conclusion in the view of the presiding officer cannot be reached without a closer examination of the

[304] Barnard (note 302 above) at para 18.
[305] Barnard (note 302 above) at para 47.
[306] Barnard (note 302 above) at para 49.
[307] *Solidarity obo Barnard v South African Police Services* 2014 (35) ILJ 416 (SCA) para 68.
[308] Ibid at para 68.
[309] Barnard (note 307 above) at para 68.

relevant constitutional, statutory provisions and the circumstances.[310] The court was of the view that Mrs Barnard was discriminated against thus the court set aside the decision of the Labour Appeal Court.[311] The EEA prohibits the mechanical application of targets, it is necessary to provide a solid justification for not hiring the only suitable applicant from the non-designated group.

The Barnard principle refers to a ruling by the Constitutional Court in *South African Police Services v Solidarity obo Barnard,*[312] which stated that an employer could refuse to promote a white woman because her demographic group was already over-represented at the occupational level question.[313] The Constitutional Court held that the National Commissioner aimed to promote representivity and equity in the Police Service by not nominating Mrs Barnard and reserving the position for black officers. This is in line with its employment equity plan and the EEA's purpose. As a result, the decision of the National Commissioner cannot be construed as discriminatory or unfair.[314] Affirmative action is not unfair if it fulfils the constitutional standard in section 9(2). This does not diminish the court's ability to examine whether the remedy is a valid restitution measure.[315] The appeal against the decision of the Supreme Court of Appeal was upheld.

In the case of *Solidarity and Others v Department of Correctional Services and Others*[316] the court found that the Barnard principle also applies to the designated groups that are beneficiaries of affirmative action. The Barnard principle is not limited to only white candidates.[317]

---

[310] Barnard (note 307 above) at para 74.
[311] Barnard (note 307 above) at para 81.
[312] 2014 (35) ILJ 2981 (CC).
[313] *South African Police Services v Solidarity obo Barnard* 2014 (35) ILJ 2981 (CC) para 183.
[314] Ibid at para 227.
[315] Barnard (note 313 above) at para 37.
[316] 2016 (37) ILJ 1995.
[317] *Solidarity and Others v Department of Correctional Services and Others* 2016 (37) ILJ 1995 para 40.

3.14 The effect of Covid-19 on affirmative action

The economic impact of the Covid-19 pandemic has been and continues to be severe as it is bringing numerous uncertainties within the public and private sectors. Most businesses were underwhelmed by the pandemic pressure and they opted to retrench employees.[318] The most important requirement for retrenchment is consultation. Section 189 of the LRA provides that the employer must consult with the relevant parties to try and reach an agreement on the matters relating to retrenchment.[319] According to section 189(7) of the LRA:

> "the employer must select the employees to be dismissed according to the selection criteria-
> a. that have been agreed to by the consulting parties or
> b. if no criteria have been agreed, criteria that are fair and objective."[320]

In the case of *Maritz v Calibre Clinical and Others*[321] the court found that when employees are being retrenched the employers must apply the highest degree of fairness.[322]

A criterion to be used should not directly or indirectly encroach on any of the rights in the Bill of Rights. The last in first out (LIFO) principle is generally acknowledged to be a fair and objective criterion. -However, the LIFO criterion could lead to a claim of unfair dismissal on the grounds of age.[323] The retrenchment process that only affects affirmative action appointments will amount to indirect discrimination.

In the case of *Thekiso v IBM South Africa (Pty) Ltd*[324] the legal problem was whether the employer is compelled under the EEA and LRA to apply affirmative action considerations when deciding whom to retrench[325] and

---

[318] Reynolds Attorneys, 'Retrenchments and Selection Criteria: Some Considerations' (04 May 2020) < https://www.reynoldsattorneys.co.za/retrenchments-and-selection-criteria-some-considerations/ > accessed 10 November 2021
[319] LRA (note 22 above) at section 189(1), (2).
[320] LRA (note 22 above) at section 189(7).
[321] 2010 (31) ILJ 1436 (LC).
[322] *Maritz v Calibre Clinical and Others* 2010 (31) ILJ 1436 (LC) para 30.
[323] Reynolds Attorneys (note 318 above).
[324] 2007 (3) BLLR 253 (LC).
[325] *Thekiso v IBM South Africa (Pty) Ltd* 2007 (3) BLLR 253 (LC) para 33.

whether the employer's omission, as well as the retrenchment of an employee from a designated group, amounts to unfair dismissal.[326] The plaintiff alleged that prior to her retrenchment there was inadequate consultation. The respondent had met its consultation responsibilities in accordance with section 189(2) of the LRA.[327]

The plaintiff did not object to the timing of the consultation at any stage throughout the consultation or prior to her retrenchment and the was no evidence to show that she had been prejudiced.[328] The applicant submitted that the employer was required to retain the applicant over the white male employee under section 15(2)(d)(ii) of the EEA, read with section 20(3) of the EEA if the applicant had the potential to acquire the skill for the advertised position within a reasonable time.[329] Mr McLean said during the consultation process and while filing the position, he did not consider affirmative action measures. It was stated that section 15(2)(a)(i) of the EEA, coupled with section 189(2)(a)(i), 189(3)(b) and 189(3)(d) of the LRA, required the respondent to consider its affirmative action duties while making retrenchment decision, favouring the applicant's retention.[330]

The court disagreed with the plaintiff's view, the court held that the EEA's provisions do not create an individual right to affirmative action.[331] An employer has no legal need to give preference to suitably qualified employees from the designated group when considering retrenchment.[332] However, if the employment equity strategy that lists transformation by affirmative action as a selection criterion in the case of a proposed retrenchment, the situation may be different.[333]

---

[326] Ibid at para 1.
[327] Thekiso (note 325 above) at para 36.
[328] Thekiso (note 325 above) at para 38.
[329] Thekiso (note 325 above) at para 43.
[330] Thekiso (note 325 above) at para 43.
[331] Thekiso (note 325 above) at para 44.
[332] Thekiso (note 325 above) at para 46.
[333] Reynolds Attorneys (note 318 above).

This would still be scrutinized, and it would have to be demonstrated that failure to consider transformation would have a negative impact on specific targets in the employment equity plan.[334] Any transformation criterion would also have to be balanced against the prohibitions on unfair discrimination of the Constitution and EEA as well as section 15(4) of the EEA, which requires a designated employer to make any choice on an employment policy or practice that will create an absolute barrier to the prospective or continued employment or development of people who are not from designated groups.[335]

3.15 Conclusion

The issue of affirmative action in the workplace has been dealt with for years. While there are legislations put in place to guide against discrimination and promote affirmative action. It becomes easier for us to understand the principles of the legislation when applied in real-life situations. When looking at the past cases it is clear that the EEA and the Barnard principle both strive to create broadly representative workplaces, although the Barnard principle may limit the EEA's implementation.

Statistics from a variety of sources suggest that the EEA is not only ineffective, but White people continue to dominate senior executive positions. This is problematic because people from designated groups are denied appointments owing to a lack of proper representation, reducing their prospects of being given an equal chance. Even if the demographic criterion no longer has the same binding force as it once did, it cannot be ignored, and the Barnard principle can be applied across the board to the extent that an employer relies on it.

[334] Reynolds Attorneys (note 318 above).
[335] Reynolds Attorneys (note 318 above).

The principle of affirmative action is with flaws and complications; however, the above case laws have paved the way on some issues when dealing with affirmative action and that will assist in addressing future problems.

CHAPTER FOUR: COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND UNITED STATES OF AMERICA

4.1 Introduction

The preceding chapter demonstrated how the South African courts are still grappling with how to interpret affirmative action. Affirmative action is not a problem in South Africa only. Individual rights, restitutionary objectives and discriminatory practices have all caused conflict in the USA. The USA was chosen because it has a comparable history of prior racial prejudice as South Africa and has dealt with affirmative action before.[336]

In comparison to South Africa, the USA is more evolved and developed. Since the USA used affirmative action long before South Africa started dealing with the concept, useful insight and logic can be gleaned from its decisions. The USA is in a better position to interpret affirmative action, considering the fact that constitutionalism began in the USA.[337]

The aim of this chapter is to draw attention to the USA legislation and the judiciary's interpretation of affirmative action. This chapter will aid South Africa in creating its regulations and improving its interpretation of affirmative action, potentially allowing our legal system to work more effectively. This chapter will also help us grasp the covid-19 pandemic's impact on affirmative action.

4.2 Historical background

In the US, racial discrimination and segregation were sanctioned by the government. The USA issued laws requiring racial segregation in the everyday life throughout the slavery era and the reconstruction era following

[336] McGregor M, 'Actual Past Discrimination or Group Membership as a Requirement to Benefit from Affirmative Action: A Comparison Between South Africa and American Case Law' (2004) 29(3) *Journal for Juridical Science* 122,123.
[337] History.com Editors, 'Constitution' (27 October 2009) < https://www.history.com/topics/united-states-constitution/constitution > accessed 22 December 2021; Bazezew Maru, 'Constitutionalism' (2009) 3 *Mizan Law Review* 358,360.

the Civil War.[338] De jure segregation was accompanied by regulations prohibiting the employment of people of a certain race in all but the most menial jobs. The economic disparity between races was exacerbated by segregation in hiring practices.[339] Through the process of affirmative action, the USA has taken the chance to reform its prejudices and is on its way to removing years of racism, segregation, and unfair discrimination.[340]

Affirmative action measures began before several civil rights statutes were enacted in the 1950s and 1960s. However, these attempts were ineffective until it became evident that anti-discrimination laws alone would not be enough to end long-standing prejudice tendencies.[341] Since the first black people arrived in the Northern American colonies in 1619, economic discrimination has been a part of race relations in the US.[342]

During the term of President Kennedy, Kennedy issued Executive Order.[343] Section 201 of the order provided that:

> "The President's Committee on Equal Employment Opportunity established by this order is directed immediately to scrutinise and study employment practices of the Government of the United States and to consider and recommend additional affirmative steps which should be taken by executive departments and agencies to realise more fully the national policy of non-discrimination within the executive branch of the Government."[344]

In 1963 Kennedy enacted another Executive Order[345] to supplement his first order. The order stated that the USA government policy to encourage the eradication of discrimination based on race, religion, colour, or national origin in employment on Federally funded projects through affirmative action. The purpose is to make employment opportunities equally available to all qualified people.[346]

---

[338] Deane Tameshnie, 'An Historical Overview of Affirmative Action in the United States of America' (2009) 15-2 *Fundamina* 75.
[339] Ibid at 75.
[340] Deane (note 338 above) 75.
[341] Deane (note 338 above) 76,77.
[342] Deane (note 338 above) 77.
[343] Executive Order 10925.
[344] Ibid at section 201.
[345] Executive Order 11114.
[346] Ibid at preamble.

In the early 1970s the USA Commission on Civil Rights (1975), the USA General Accounting Office (1975), and the House and Senate Committees on Labour and Public Welfare were all determined that affirmative action was ineffective, blaming insufficient enforcement and reluctance to implement sanctions.[347] After 1973, affirmative action enforcement became more aggressive, as seen by the rising incidence of debarment and back-pay awards. Furthermore, in 1978 the contract compliance agencies were reformed as the Office of Federal Contract Compliance Programs.[348]

The decline in black employment advancement in the 1980s affirmative action programs implies that either affirmative action during the 1970s resulted in discrimination against white people or that continuing treatment is needed to reverse the after-effects of generations of discrimination, or that the preference for discrimination against black people persists and is resilient.[349] The government anti-discriminatory campaign revolves around Title VII of the Civil Rights Act of 1964, which made employment discrimination unlawful. Damages have been awarded in Title VII cases, which made employers concerned.[350]

During the term of President Reagan, Reagan reduced funding for the Equal Employment Opportunity Commission and the Justice Department's civil rights division in retaliation for affirmative action policies. Reagan was of the view that the government was encouraging reverse discrimination, thus the regulations around affirmative action should be relaxed in order to achieve equality.[351]

---

[347] Leonard Jonathan S, 'The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment' (1990) 4 *Journal of Economic Perspectives* 47,49.
[348] Ibid at 50.
[349] Leonard (note 347 above) 59.
[350] Leonard (note 347 above) 59.
[351] Anon, 'Affirmative Action' (2021) < https://www.u-s-history.com/pages/h1970.html > accessed 26 December 2021.

President Obama has spoken out against affirmative action. His stance on this subject is nuanced, but it is based on a thorough awareness of the current state of racial politics in the US, the nation's needs in terms of redistributive policies, and the challenges encountered by African Americans and other minorities.[352]

The diverse view of different Presidents and their supporting arguments have left various parts of the USA with a different attitude towards affirmative action. The history of USA discrimination and affirmative action is similar to that of South Africa.

4.3 Statutory framework

The statutory provision of affirmative action in the USA contributes to the position the USA has on affirmative action. A comparison between the regulations of the USA and South Africa will indicate the misshapes in our laws and shed light on improving our affirmative action regulations.

No state may enact or implement any law that restricts the privileges or immunities of USA Citizens or deny any person within its jurisdiction equal protection under the law, according to section 1 of the fourteenth amendment of the Constitution.[353] Section 5 continues to indicate that the requirements of the Fourteenth Amendment shall be enforced by Congress by appropriate legislation.[354]

According to the Supreme Court in the case of *Ex Parte Virgina*[355]if not prohibited, any legislation that is appropriate and that tends to enforce

[352] Stephan Lea, 'The Evolution of Political Multiculturalism in the United States: Barack Obama, Affirmative Action, and the Affordable Care Act' in Ludwig S (ed), *American Multiculturalism in Context: Views from at Home and Abroad* (Cambridge Scholars Publishing UK 2017) 450.
[353] Section 1 of the Fourteenth Amendment of the Constitution of the United States.
[354] Ibid at section 5.
[355] 100 US 339 (1879).

compliance with the prohibitions they contain and that secures the enjoyment of equality must be brought within the domain of congressional power.[356] Conservative justices have been fighting affirmative action for the past four decades, claiming that the fourteenth amendment is colour-blind and prohibits the use of race to promote equality.[357]

The views of Americans differ when it comes to the interpretation of the Constitution. Some believe that affirmative action and quotas are in direct contradiction with the Constitution and that one cannot rectify discrimination with more discrimination.[358] While others believe that the Constitution recognises the different colours, sex, and gender. For the mere fact that the fourteenth, fifteenth and sixteenth amendment was enacted specifically to deal with the issues of different colour, sex, and gender.[359]

The USA Constitution does not provide enough information on how to deal with discrimination or affirmative action. A proper interpretation of the Constitution can be drawn from its case law. The South African Constitution provides guidance on matters relating to discrimination, equality, and affirmative action.

The Executive Order 10925's preamble states that discrimination based on race, religion, colour, or national origin is against USA constitutional values and objectives.[360] The USA government has a clear and affirmative commitment to promote and ensure equal opportunity for all competent

[356] Ex Parte Virgina at 346.
[357] Gans David H, 'Constitution's History Supports Affirmative Action' (02 June 2013) < https://www.theusconstitution.org/news/constitutions-history-supports-affirmative-action/ > accessed 28 December 2021.
[358] American Enterprise Institution, 'Affirmative Action and the Constitution (1985)' (06 January 2019) < https://www.bing.com/videos/search?q=the+USA+Constitution+and+affirmative+action&docid=608040955540157494&mid=F741BA31D17C98F3E859F741BA31D17C98F3E859&view=detail&FORM=VIRE > accessed 28 December 2021.
[359] Ibid.
[360] Preamble of the Executive Order 10925.

individuals employed or seeking employment with the Federal Government regardless of race, religion, colour, or national origin.[361] The executive branch of the government has a policy of encouraging equal opportunity for all eligible people inside the government through positive initiatives.[362]

Section 703 of the Title VII of the Civil Rights Act[363] provides that an employer's who discriminate against an individual or fails to hire or discharge any individual because of the individual, race, religion, or national origin shall amount to unlawful employment practice.[364] Segregating employees or applicants in any way that would deprive any individual of any right or privilege also amounts to discrimination.[365]

The statute also prohibits employment agencies,[366] labour organisations,[367] training programs,[368] businesses or enterprises,[369] members of the communist party,[370] national security,[371] seniority or merit system,[372] and many others from discriminating against any individual on the bases of gender, race, religion, and national origin. The statute also prohibits the publication or advertisement of notices that indicate a prohibited preference, limitation, or discrimination.[373]

Section 705 provides for the creation of the Equal Employment Opportunity Commission.[374] The commission has the power to prevent any unlawful

[361] Ibid.
[362] Executive Order (note 356 above).
[363] Act of 1964.
[364] Section 703(a)(1) of the Title VII of the Civil Rights Act of 1964.
[365] Ibid at section 703(a)(2).
[366] CRA (note 363 above) at section 703(b).
[367] CRA (note 363 above) at section 703(c).
[368] CRA (note 363 above) at section 703(d).
[369] CRA (note 363 above) at section 703(e).
[370] CRA (note 363 above) at section 703(f).
[371] CRA (note 363 above) at section 703(g).
[372] CRA (note 363 above) at section 703(h).
[373] CRA (note 363 above) at section 704(b).
[374] CRA (note 363 above) at section 705.

employment practices.[375] Affirmative action is permitted under the Act as a means of addressing previous discrimination. While the primary goal of this Act is to ban employment discrimination, it also empowers courts to intervene when an employer engages in an illegal employment practice.[376]

Affirmative action regulations are based on Executive Order 11246.[377] Since the directive is related to the view of affirmative action as emphasising numerical standards with respect to the hiring of minorities and women.[378] This regulation is enforced by the Office of Federal Contract Compliance Programs.[379] It is the policy of the USA government to provide equal opportunity in federal employment to all qualified individuals, to prohibit employment discrimination based on race, religion, colour, or national origin.[380]

In addition, as part of the early enforcement of Executive Order 11246, the Department of Labour enacted the Philadelphia Plan, which attempted to enhance minority representation in construction and is seen as a predecessor of federal contractors' numerical goals and timelines duties.[381] The Philadelphia Plan was later revised.

Through a constructive, continuous program in each executive department and agency, the USA government has an obligation to promote the realisation of equal employment opportunity.[382] The directive also compels

[375] CRA (note 363 above) at section 706(a).
[376] Holzer Harry and Neumark David, 'Assessing Affirmative Action' (Working Paper National Bureau of Economic Research 1999) 4.
[377] FACF, 'Executive Order 11246 Affirmative Action' (2022) < https://www.affirmativeactionconsulting.com/executive-order-11246-affirmative-action/ > accessed 01 January 2022.
[378] Holzer (note 376 above) 3.
[379] FACF (note 377 above).
[380] Ibid.
[381] Holzer (note 376 above) 3.
[382] FACF (note 377 above).

government contractors to take affirmative action to guarantee that all areas of their employment are treated equally.[383]

In 1967 President Lyndon B. Johnson enacted Executive Order 11375, amending Executive Order, Relating to Equal Employment Opportunity. The amended order also caters for sex; therefore, no person may be discriminated against based on sex.[384]

The statutory provisions which changed over time laid a foundation for every person who lives within the borders of the US, on how to deal with discrimination and the affirmative action policies.

4.4 Jurisprudence

One of the historical cases in the USA in the case of *Regents of the University of California v Bakke*.[385] Due to the school's racial quota system, Bakke's application was turned down.[386] Bakke filed a lawsuit against the school, alleging that the school's racially based quota system was illegal and in violation of CRA of 1964.[387] The court used the strict scrutiny, arguing that the Equal Protection Clause requires the government to demonstrate a persuasive interest with restricted means to act solely on the basis of race.[388] The court said that the University's admission procedures that used race as the only standard for admission violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act.[389]

In the case of *Fire-fighters Local Union No. 1784 v Stotts*,[390] Stotts filed a class-action lawsuit against the fire department and certain city officials,

---

[383] FACF (note 377 above).
[384] Section 101 of the Executive Order 11375.
[385] 438 US 265 (1978).
[386] *Regents of the University of California v Bakke* 438 US 265 (1978) 266.
[387] Ibid at 277.
[388] Bakke (note 386 above) 357.
[389] Bakke (note 386 above) 412.
[390] 467 US 561 (1984).

alleging that they were violating Title VII of the Civil Rights Act of 1964 by making hiring and promotion decisions based on race. People who had experienced similar injustices banded together to form the action.[391] When the city announced that projected budget deficits necessitated layoffs,[392] the District Court issued a preliminary injunction prohibiting the department from using its seniority system to determine who would be laid off since the proposed layoffs would be racially discriminatory, and the seniority system was not an authentic one.[393]

Following that, an amended layoff plan was presented and authorized, with layoffs being carried out in accordance with the court's ruling. When the usually applicable seniority system would have called for the dismissal of black employees with less seniority, with employees with more seniority were laid off.[394] The court of appeal upheld the district court's decision, finding that, while the district court was incorrect in concluding that the seniority system was not legitimate, it had acted appropriately in amending the consent decree.[395]

In the case of *Griggs v Duke Power Co.*,[396] the Supreme Court has adopted an effective and powerful tool shown to be critical in the struggle to eliminate arbitrary and artificial impediments to equal employment opportunities for all people, regardless of race.[397]

The Duke Power Company (company) has a history of discriminating against African Americans. After the Civil Rights Act was enacted the company stopped explicitly restricting African Americans to the labour department and

[391] *Fire-fighters Local No. 1784 v Stotts* 467 US 561 (1984) para 2.
[392] Ibid at para 5.
[393] Stotts (note 391 above) at para 6 and 7.
[394] Stotts (note 391 above) at para 7.
[395] Stotts (note 391 above) at para 8.
[396] 401 U.S. 424 (1971).
[397] *Griggs v Duke Power Co*. 401 US 424 (1971) para 1; LDF Defend Educate Empower, 'Economic Justice Case: Griggs v Duke Power' (2021) < https://www.naacpldf.org/case-issue/griggs-v-duke-power-co/ > accessed 03 January 2022.

announced new requirements for hiring, promotion, and transfers.[398] The company now requires high school graduation or scores on standardised IQ tests equal to those of the average high school graduate to work in positions outside of the labour department. The new requirements were not an improvement, they only reinforced the company's discriminatory policies prior to the Act being enacted.[399]

Despite the fact that African Americans were disqualified at a much higher rate than white people due to the testing and credential criteria, the company never proved that they accurately tested competence to do the occupations in question.[400]

The Court of Appeals ruled against the company. The court held that the Act does not only prohibit overt discrimination, but it also prohibits actions that appear to be fair on the face of it but are discriminatory in effect.[401] It was said that for the practice to not be prohibited the company has to show that the requirements are in the company's interest and the employees have to possess such for them to be able to perform the job. The company was unable to do so, thus, making its conduct unlawful.[402]

In the case of *Adarand Constructors v Pena*,[403] Adarand claims that the Federal Government's practice of providing financial incentives to general contractors on government projects to hire subcontractors controlled by disadvantaged individuals and in particular, the government's use of race-based presumptions in identifying such individuals, violates the Fifth Amendment's Equal Protection Clause.[404]

---

[398] Ibid at 427.
[399] Griggs (note 397 above) at 428.
[400] Griggs (note 397 above) at 428.
[401] Griggs (note 397 above) at 428.
[402] Griggs (note 397 above) at 429; LDF Defend Educate Empower (note 393 above).
[403] 515 US 200 (1995).
[404] *Adarand Constructors v Pena* 515 US 200 (1995) para 13.

Justice Scalia noted that all governmental actors must apply strict scrutiny to racial classifications but held that the government can never have a compelling interest in discriminating on the basis of race to compensate for past racial discrimination in the opposite direction.[405]

Adarand's claim was dismissed by the Court of Appeals. However, it is believed that the courts should apply a different standard of review to cases similar to this than the one used by the Court of Appeals. As a result, the Court of Appeal's decision was reversed and remanded the case for further consideration.[406]

In the case of *Steelworkers v Weber*,[407] the United Steelworkers of America (USWA) and Kaiser Aluminum Chemical Corp. (KACC) entered into a collective bargaining agreement that covers 15 KACC plants. The deal included an affirmative action plan called for reserving 50 percent of slots in in-plant craft training programs for black employees until the ratio of black craft workers in a plant matched the percentage of blacks in the local labour force.[408]

Seven black and six white craft trainees were chosen from the plant's production, with the most senior black trainee having less seniority than numerous white production workers whose bids for entrance were denied.[409] Following that, Weber, a white production worker, filed this class action in Federal District Court, alleging that respondent and other similarly situated white employees had been discriminated against as a result of the affirmative action program, which resulted in junior black employees receiving training

[405] Ibid at para 8.
[406] Pena (note 404 above) at para 13.
[407] 443 US 193 (1979).
[408] *Steelworkers v Weber* 443 US 193 (1979) 197.
[409] Ibid at 199.

in preference to senior white employees, in violation of the provisions of Title VII of the Civil Rights Act that make it unlawful discriminate.[410]

The District Court found that the affirmative action plan was in violation of the Act and issued injunctive relief to the plaintiff class.[411] The Court of Appeals upheld the decision, ruling that all employment favours based on race, including those that are ancillary to legitimate affirmative action plans, violated the Act's prohibition on racial discrimination in the workplace.[412]

In the case of *Ricci v DeStefano*,[413] written tests were employed as part of the city's procedure to fill vacant managerial posts, with the exams accounting for 60 percent of a candidate's overall evaluation. According to city officials, the pass rate for black candidates was almost half of that of white candidates.[414]

No black applicant who applied in 2003 could have been promoted according to the assessment rules. Due to the general disparity in the impact of these findings on employment, the New Haven Civil Service Board decided not to certify any of the applicants who applied in 2003.[415] Frank Ricci and other firefighters who had passed the exam and would have been promoted if they had been certified challenged the department claiming that their rights under the Title of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment had been violated.[416]

The Supreme Court ruled in Ricci's favour, finding that an employer must be able to prove that it will be exposed to disparate-impact liability before

[410] Weber (note 408 above) at 199 and 200.
[411] Weber (note 408 above) at 200.
[412] Weber (note 408 above) at 200.
[413] 557 US 557 (2009).
[414] Supreme Court of the United States, 'Ricci ET AL v DeStefano ET AL' (October 2008) < https://www.supremecourt.gov/opinions/08pdf/07-1428.pdf > accessed 04 January 2022.
[415] Ibid.
[416] Supreme Court of the US (note 414 above).

engaging in deliberate discrimination in order to avoid disparate-impact liability.[417] Since the exams were job-related, consistent with business necessity, and there was no evidence that an equally valid less-discriminatory alternative was available, the court found that the city had failed to do so in discarding exam results that would have resulted in no black candidates in the fire department being promoted to managerial positions.[418]

After Michigan voters enacted the Michigan Civil Rights Initiative, which altered the state constitution to prohibit affirmative action in public employment and education, the case of *Schuette v Coal. Defend Affirmative Action, Integration & Immigration Rights*,[419] emerged. Justice Kennedy delivered a majority decision in which he and the other two Justices agreed that the ban on affirmative action was constitutional. According to Justice Kennedy, the judiciary has no jurisdiction under the USA Constitution to overturn Michigan legislation that delegates this policy's decision to the voters.[420]

What can be deduced from the above case law and cases in chapter two are that South Africa and the USA have very different ways of doing things; thus, in the case of Bakke, it is believed that affirmative action is an individual right, whereas, in the case of Dudley, it was said that affirmative action is not an individual right, because when an employer fails to promote equality through affirmative action, the employer violates the employee's right not to be unfairly discriminated if he belongs to one of the designated groups.

When the judiciary in the USA interpret the statutory provisions, they interpret them in a way that minimises and eliminate discrimination. Thus, creating a

[417] Supreme Court of the US (note 414 above).
[418] Supreme Court of the US (note 414 above).
[419] 572 US 291 (2014).
[420] Bensur Gabriella and Brokamp Jennifer, 'Schuette v Coalition to Defend Affirmative Action' (11 September 2013) < https://www.law.cornell.edu/supct/cert/12-682 > accessed 5 January 2022.

chance to equal opportunities for every citizen of the US. When it comes to the judiciary of South Africa, they interpret the statutory provision in that they justify the positive discrimination and redress the past discrimination at all costs. This is seen in the case of Barnard where a post was left vacant because the suitable candidate was not from the required designated group. The USA is concerned with finding a suitable candidate for the position whilst South Africa is concerned with following the affirmative action measures in which certain employers indirectly avoid them.

South Africa still uses seniority when appointing candidates which is one of the reasons discriminations persist. Despite the fact that we have laws prohibiting discrimination, certain employers, such as employers in the cases of Griggs, designed work requirements that some groups will be unable to meet, making it appear as if there is no prejudice on the face of it.

4.5 How affirmative action is applied in the United States of America

The strict scrutiny test is used in the USA to apply affirmative action. The strict scrutiny test is a type of judicial review used by courts to examine whether or not laws are constitutional.[421] The Equal Protection Clause of the Fourteenth Amendment underpins the strict standard of judicial review. This approach has been used by the USA courts to policies or laws that infringe on the rights protected by the USA Constitution.[422]

When applying the strict scrutiny test race-conscious governmental policy must undergo stringent scrutiny to withstand equal protection evaluation. This necessitates that the state's employment of racial tactics accomplishes

[421] Cornell Law School, 'Strict Scrutiny' (date unknown) < https://www.law.cornell.edu/wex/strict_scrutiny -:~:text=Strict%20scrutiny%20is%20the%20highest%20standard%20of%20review,often%20be%20invoked%20in%20an%20equal%20protection%20claim. > accessed 06 January 2022.

[422] The Free Dictionary by Farlex, 'Strict Scrutiny' (date unknown) < https://legal-dictionary.thefreedictionary.com/Strict+Scrutiny+Test > accessed 06 January 2022.

a persuasive state interest and be narrowly circumscribed to do so. To apply rigorous scrutiny, we must first comprehend its reasoning.[423]

The procedure is comparable to that used in South Africa. The importance of redressing social and economic inequalities has been extensively acknowledged in both countries' courts. What is debatable is how such an objective should be achieved. Thus, the second criteria focus on how the goal will be met. The purpose is to ensure that non-designated group members are not excessively burdened by racial favouritism.[424] This is shown in the limitation provision, section 36 of the Constitution, which states that when limiting a right, the least restrictive methods should be used.[425]

Affirmative action in the USA is governed by a legal framework that emphasises nominal equality over substantive equality. Individual rights must be sacrificed in order for the goals of the government to be met. The US's approach has a significant adverse impact on the government's restitutionary and integrative objectives.[426] Since affirmative action has continuously had an adverse effect on an individual, it has led to it being banned in numerous states in the US. The possibility of jeopardising any race-conscious efforts to reduce socioeconomic inequality is the core cause for the ineffectiveness of affirmative action in the US.[427]

4.6 Covid-19's impact on United States of America affirmative action

Affirmative action is racially biased. Covid-19 affected all people regardless of their races, thus making it hard to enforce affirmative action while all racial

[423] Anderson ES, 'Integration, Affirmative Action, and Strict Scrutiny' (2002) 77 *New York University Law Review* 1195,1228.
[424] Mhungu Valentine, 'Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed Its Welcome?' (LLM-dissertation University of KwaZulu Natal 2013) 47.
[425] Constitution (note 25 above) at section 36.
[426] Mhungu (note 424 above) 45,46.
[427] Ibid at 46.

groups suffered during the pandemic. During the period of Covid-19, both public and private institutions attempted to aid all persons in need, regardless of race.[428] Covid-19 is having an extremely unequal effect across socioeconomic levels, with vulnerable people facing greater employment loss.[429]

Between March and June of 2020, moreover 40 million adults in the USA filed unemployment claims, while over 20 million jobs were lost during the same period. Many businesses changed to remote work or closed, temporarily or permanently.[430] The Covid-19 pandemic has highlighted not only salary disparities in the USA, but also significant disparities in access to respectable work. While a large portion of the USA workforce has the ability to work safely from home, this privilege is not available to all employees, many of whom are already vulnerable to economic and structural inequalities in the USA and have a history of workplace marginalisation and discrimination.[431]

The Office of Federal Contract Compliance Programs (OFCCP) of the USA Department of Labour is in charge of overseeing and enforcing federal contractors' affirmative action requirements.[432] The office of the OFCCP declared at the start of the Covid-19 pandemic that some federal contracts

[428] Feingold Jonathan, 'POV: Covid-19 Makes the Case for Affirmative Action' (1 June 2020) < https://www.bu.edu/articles/2020/covid-19-makes-affirmative-action-critical/ > accessed 11 January 2022.
[429] Bluedorn John, Caselli Francesca and Hansen NJ, 'Gender and Employment in the Covid-19 Recession: Evidence on "She-cessions"' (Working Paper IMF 2021).
[430] Altman Claire E, Dondero Molly and Heflin Colleen M, 'Current and Future Food Insufficiency During Covid-19: Examining Disparities by Race/ Ethnicity and Recent Work Loss' (2021)
[431] Kantamneni Neeta, 'The Impact of the Covid-19 Pandemic on Marginalized Populations in the United States: A Research Agenda' (2020) 119 *Journal of Vocational Behavior* 1,4.
[432] Adams Mark H, 'Covid-19 Pandemic Not a Time to Neglect Your Affirmative Action Plan' (2020) 15 < https://www.natlawreview.com/article/covid-19-pandemic-not-time-to-neglect-your-affirmative-action-plan > accessed 15 January 2022.

for covid-19 related initiatives would be exempt from the standard federal contractor affirmative action duties.[433]

Three new directions were issued by the OFCCP to improve compliance evaluations and enforcement accountability and efficiency.[434] The new directives include instructions to compliance officers to closely monitor the status of contractors' compliance efforts during audits, the issuance of Show Cause Notices and referral to the Solicitor of Labour for enforcement in denial of access cases and the establishment of a mediation program to resolve contested matters before the issuance of a Show Cause Notices or referral to the Solicitor of Labour for enforcement.[435]

Individuals are chosen at random for audit and get an audit scheduling letter; they have only 30 days to reply, and extensions are no longer given for basic affirmative action plan data under OFCCP's current audit process. Employers must be prepared to deal with any eventuality.[436]

4.7 Lesson to be learned from the United State of America

When comparing the legal provisions of the USA and South Africa, it may be determined that their motives and purposes are similar. What differs is the judiciary's implementation and interpretation of the statutory provisions. The judiciary's judgments can be used to gain valuable lessons. The USA has taken the opportunity to fix its prejudices through affirmative action and is on its way to eradicating years of racism, segregation and unfair discrimination.

The USA laws are applied in such a way that all competent people have equal access to employment opportunities. Due to the grasp of the current condition of race politics in the USA and the nation's needs in terms of the

[433] Ibid.
[434] Adams (note 432 above).
[435] Adams (note 432 above).
[436] Adams (note 432 above).

redistributive policies and the challenges encountered by the African Americans, former President Obama was against affirmative action.

The CRA's principal objective is to prohibit workplace discrimination, but it also gives courts the authority to intervene when an employer engages in improper employment practices. The 11246 Order requires government contractors to take affirmative action to ensure that they are treated equitably in all aspects of their work. A preliminary injunction was issued by one of the US's District Courts, forbidding the department from utilising its seniority system to determine who would be laid off. The CRA outlaws not just overt discrimination but also behaviours that appear to be fair on the surface but are unfair in practice.

The courts interpret statutory provisions in such a way that discrimination is minimised or eliminated. As a result, every citizen in the USA will have the opportunity to participate in equal opportunities. The strict scrutiny test is used to apply affirmative action in the US. When using the strict scrutiny test, race-conscious government policies must be scrutinised closely in order to pass the equal protection test. In the US, affirmative action is guided under a system that promotes notional equality. Individual liberties are compromised in order for the government to achieve its purposes. Even during Covid-19, the OFCCP guarantees that companies and employees follow Covid-19 regulations without jeopardizing anyone's health, safety, and employment.

4.8 Conclusion

Based on the abovementioned discussion, it may be concluded that the USA affirmative action system has similar traits to the affirmative action system of South Africa. Affirmative action is a tactic for combating racial dominance that might otherwise go uncontested. It is a response to racial imbalances that arise from apartheid and racial segregation, it is not meant to cause discrimination of any kind. In both countries, affirmative action has never

achieved a level of success that necessitates the eradication of discrimination. Individual rights and the government's goal of redressing societal injustices are odd. Even though the USA has developed the scrutiny test that assists the application of affirmative action, discrimination in the workplace persists. This is the main reason it is believed that affirmative action is ineffective. The USA courts appear to have embraced an equal opportunity approach to equality. The goal of affirmative action programs under the contract compliance program is to provide equal employment opportunities by institutionalising the contractor's commitment to equality in all aspects, according to OFCCP regulations.

CHAPTER FIVE: RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

The purpose of the final chapter is to indicate the necessity of this paper and provide recommendations on the issue of affirmative action in the workplace. Affirmative action regulations have been in place for over forty years, minorities and women continue to confront impediments when seeking employment. Discrimination and misconceptions regarding minorities and women's skills have continued to the present day.[437] Alternatively, it is said that affirmative action leads individuals that are less qualified and perform poorly in the job.[438] The Covid-19 pandemic continues to be a source of stress in the people's lives, with the potential for long-term negative impacts that persist even after the pandemic has passed. During the pandemic, people, mostly black people have suffered from job losses and other socio-economic disadvantages. This will compound to cause major health, financial and educational disadvantages that will need to be addressed.[439]

5.2 Recommendations

Affirmative action does not benefit every person. Affirmative action beneficiaries can be individuals or groups of individuals who have been unfairly discriminated against. It is thereby suggested that individuals who suffered severely in the past be part of the beneficiaries of affirmative action regardless of their race or sex. As it might relieve some racial tension.

The path forward should include measures that do not repeat the issues that led to the process of affirmative action. The most common criticism concerning affirmative action is that it focuses on the outcome rather than the institutions that cause the problem. As it was indicated above an organisation needs to be formed in which its main purpose is to ensure that

[437] Holzer Harry J, 'The Economic Impact of Affirmative Action in the US' (2007) 14 *Swedish Economic Policy Review* 41,47.
[438] Holzer (note 437 above) 48.
[439] Claire (note 430 above) accessed 05 January 2022.

employers and employees are complying with the affirmative action measures. Failure will amount to suitable punishment.

The Department of Labour must assist in the establishment of an organisation to ensure that employers adhere to affirmative action measures. Employers must design and submit employment equality plans that include recruitment targets and strategies. The organisation will monitor whether or not the employers follow their employment equity plans.

Many people profit from being part of the designated group because of their race, even though they have never been discriminated against. Employers must consider a level of disadvantage. As a result, it is proposed that rules or criteria be developed to determine a person's level of disadvantage. This will include individuals from the non-designated group who have been prejudiced in the past. This does not suggest that employers should not rely on race, gender or disability when recruiting because according to section 6(2) of the EEA reliance on race, gender and disability does not amount to discrimination if it is consistent with the affirmative action measures.

The proposed solutions strive to achieve racial balance in the workplace. The measures are aimed at redressing inequalities.

5.3 Conclusion

Although black people have benefited significantly from affirmative action in the workplace, black representation in governing entities remains insignificant. The USA's and South Africa's affirmative action is fairly similar.[440] The most common criticism is that merit is diminished as a result of less qualified candidates and that affirmative action benefits do not reach

[440] Deshpande Ashwini, 'Affirmative Action in India and the United States' (World Development Reports 2006) 18.

the intended beneficiaries. The idea that merit is the only factor for hiring in the absence of affirmative action is inaccurate.

To eliminate discrimination and racial segregation, an active initiative like affirmative action is required. For the successful application of affirmative action, a strong political will become necessary.[441] An organisation dedicated to promoting affirmative action, enforcing the affirmative action regulations, and ensuring that all employers and employees adhere to all rules around affirmative action should be formed and regulated by one of the legislations. Affirmative action has helped minorities and women gain employment, despite poor targeting, the Constitution and EEA have played an even bigger effect.

Affirmative action measures were enacted to counter apartheid's disparities and prejudice. The impact of Covid-19 on all parts of our life, including affirmative action, was significant. Chapter two has demonstrated how our legislature assists in fighting discrimination against people from both the designated group and the non-designated group. Chapter three indicates how the courts interpret the legislation considering the facts and background of each case.

The comparison between the USA and South Africa has drawn attention to the fact that the USA courts are hesitant to go beyond their legal system. Affirmative action is not practised in all sections of the US. On the other hand, South African courts continue to be enriched by researching directions that are outside the South African boundaries.[442]

The mini dissertation suggests that affirmative action is partially effective because of the failure to adhere to the regulations by employers and

[441] Deshpande (note 440 above) 19.
[442] Deane (note 338 above) 91.

employees before the process even begins. The time for affirmative action to only apply to the designated group has to be minimised. In that affirmative action must be applied to all those who suffered a certain loss and need assistance.

BIBLIOGRAPHY

Books

Nieuwenhuis J, 'Introducing qualitative research' in Maree K (ed), *First Steps in Research* (Van Schaik Pretoria 2020)

Stephan L, 'The Evolution of Political Multiculturalism in the United States: Barack Obama, Affirmative Action, and the Affordable Care Act' in Ludwig S (ed), *American Multiculturalism in Context: Views from at Home and Abroad* (Cambridge Scholars Publishing UK 2017)

Case law

Alexander v Provincial Administration of the Western Cape Department of Health 2005 (6) BLLR 539 (LC)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Christian v Colliers Properties 2005 ZALC 56

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

Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd 2007 (9) BLLR 845 (LC)

Director-General of the Department of Labour v Jinghua Garments (Pty) Ltd 2006 ZALC 100

Dudley v City of Cape Town and Another 2004 ZALC 1

Dudley v City of Cape Town and Another 2008 (29) ILJ 2685 (LAC)

Du Preez v Minister of Justice and Constitutional Development and others 2006 (27) ILJ 1811 (SE)

Ethekweni Municipality v Nadesan and Others 2021 (42) ILJ 1480 (LC)

Gordon v Department of Health, KwaZulu-Natal 2009 (1) All SA 39 (SCA)

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

Harmse v City of Cape Town 2003 (24) ILJ 1130 (LC)

Maritz v Calibre Clinical and Others 2010 (31) ILJ 1436 (LC)

Minister of Finance and Other v Van Heerden 2004 (6) SA 121 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

National Education, Health and Allied Workers Union and Another v Office of the Premier: Province of the Eastern Cape and Another 2011 (32) ILJ 1696 (LC)

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC)

Public Servants Association (PSA) obo Karriem v South African Police Services (SAPS) and Another 2007 (4) BLLR 308 (LC)

Reynhardt v University of South Africa 2008 (29) ILJ 725 (LC)

Solidarity obo Barnard and Another v South African Police Services 2010 (31) ILJ 742 (LC)

Solidarity obo Barnard v South African Police Services 2014 (35) ILJ 416 (SCA)

South African Police Services v Solidarity obo Barnard 2013 (34) ILJ 590 (LAC)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

Thekiso v IBM South Africa 2007 (3) BLLR 253 (LC)

University of South Africa v Reynhardt 2010 (31) ILJ 2368 (LAC)

Van Dyk v Kouga Municipality 2012 (9) BLLR 952 (LC)

Willemse v Patelia NO and Others 2007 (2) BLLR 164 (LC)

Woolworths (Pty) ltd v Whitehead 2000 ZALAC 4

Case law: United States of America

Adarand Constructors v Pena 515 US 200 (1995)

Ex Parte Virgina 100 US 339 (1879)

Fire-fighter Local Union No. 1784 v Stotts 467 US 561 (1984)

Griggs v Duke Power Co. 401 US 424 (1971)

Regents of University of California v Bakke 438 US 265 (1978)

Ricci v DeStefano 557 US 557 (2009)

Schuette v Coal. Defend Affirmative Action, Integration & Immigration Rights 572 US 291 2014

Steelworkers v Weber 443 US 193 (1979)

Government publication

GN R1441 in GG 632 of 13 November 1998

GN 1840 in GG 18481 of 1 December 1997

GN R1 of 5 January 2001

Gen Not 564 in GG 1880 of 23 April 1998

Gen Not 1345 in GG 23702 of 19 August 2002

Gen Not 1840 in GG 17303 of 1 July 1996

International instruments

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Council Directive 76/207/EEC of 9 February 1976

Discrimination (Employment and Occupation) Convention (1958)

International Convention on the Elimination of All forms of Racial Discrimination (1965)

Universal Declaration of Human Rights (1948)

Internet sources

American Enterprise Institution, 'Affirmative Action and the Constitution (1985)' (06 January 2019) < https://www.bing.com/videos/search?q=the+USA+Constitution+and+affirmative+action&docid=608040955540157494&mid=F741BA31D17C98F3E859F741BA31D17C98F3E859&view=detail&FORM=VIRE > accessed 28 December 2021

Anon, 'Affirmative Action' (2021) < https://www.u-s-history.com/pages/h1970.html > accessed 26 December 2021

Bensur G and Brokamp J, 'Schuette v. Coalition to Defend Affirmative Action' (11 September 2013) < https://www.law.cornell.edu/supct/cert/12-682 > accessed 05 January 2022

Constitutional Court of South Africa, 'The Bill of Rights' (date unknown) < https://www.concourt.org.za/index.php/constitution/your-rights/the-bill-of-rights > accessed 29 July 2021

Cornell Law School, 'Strict Scrutiny' (date unknown) < https://www.law.cornell.edu/wex/strict_scrutiny -:~:text=Strict%20scrutiny%20is%20the%20highest%20standard%20of%20

review,often%20be%20invoked%20in%20an%20equal%20protection%20claim. > accessed 06 January 2022

FACF, 'Executive Order 11246 Affirmative Action' (2022) < https://www.affirmativeactionconsulting.com/executive-order-11246-affirmative-action/ > accessed 01 January 2022

Gans DH, 'Constitution's history supports affirmative action' (02 June 2013) < https://www.theusconstitution.org/news/constitutions-history-supports-affirmative-action/ > accessed 28 December 2021

GilesFiles, 'Dare one suggest: Another Wiehahn Commission' (31 August 2012) < https://www.gilesfiles.co.za/another-wiehahn-commission/ > accessed 27 May 2021

History.com Editors, 'Constitution' (27 October 2009) < https://www.history.com/topics/united-states-constitution/constitution > accessed 22 December 2021

LDF Defend Educate Empower, 'Economic Justice Case: Griggs v Duke Power' (2021) < https://www.naacpldf.org/case-issue/griggs-v-duke-power-co/ > accessed 03 January 2022

Mywage.co.za, 'All the information you need to know about Affirmative Action and labour laws including affirmative action and employment, affirmative action and equal pay, non-discrimination' (date unknown) <

https://mywage.co.za/decent-work/fair-treatment/affirmative-action > accessed 04 August 2021

Feingold J, 'POV: Covid-19 Makes the Case for Affirmative Action' (1 June 2020) < https://www.bu.edu/articles/2020/covid-19-makes-affirmative-action-critical/ > accessed 11 January 2022

Reynolds Attorneys, 'Retrenchments and Selection Criteria: Some Considerations' (04 May 2020) <

https://www.reynoldsattorneys.co.za/retrenchments-and-selection-criteria-some-considerations/ > accessed 10 November 2021

SAFLII, 'South Africa: Industrial Court' (16 August 2018) < http://www.saflii.org/za/cases/ZAIC/ > accessed 27 May 2021

SAHO, 'Apartheid Legislation 1850s -1970s' (27 August 2019) < https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s > accessed 31 May 2021

Supreme Court of the United States, 'Ricci ET AL v DeStefano ET AL' (October 2008) < https://www.supremecourt.gov/opinions/08pdf/07-1428.pdf > accessed 04 January 2022

The Free Dictionary by Farlex, 'Strict Scrutiny' (date unknown) < https://legal-dictionary.thefreedictionary.com/Strict+Scrutiny+Test > accessed 06 January 2022

USLEGAL, 'History of Affirmative Action' (date unknown) < https://civilrights.uslegal.com/affirmative-action/history-of-affirmative-action/ > accessed 02 August 2021

Journal articles

Anderson ES, 'Integration, Affirmative Action, and Strict Scrutiny' (2002) 77 *Ney York University Law Review*

Appel RN, Gray AL and Loy N, 'Affirmative Action in the Workplace: Forty Years Later' (2005) 22 *Hofstra Labor & Employment Law Journal*

Archibong U and Adejumo O, 'Affirmative Action in South Africa: Are we Creating New Casualties?' (2013) 3(1) *Journal of Psychological Issues Organisational Culture*

Bazezew M, 'Constitutionalism' (2009) 3 *Mizan Law Review*

Crosby FJ, Iyer A and Sincharoen, ‘Understanding Affirmative Action’ (2006) *Annual Review of Psychology*

Deane T, ‘An Historical Overview of Affirmative Action in the United States of America’ (2009) 15-2 *Fundamina*

Holzer HJ, ‘The Economic Impact of Affirmative Action in the US’ (2007) 14 *Swedish Economic Policy Review*

Kantamneni N, ‘The Impact of the Covid-19 Pandemic on Marginalized Populations in the United States: A Research Agenda’ (2020) 119 *Journal of Vocational Behavior*

Leonard JS, ‘The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment’ (1990) 4 *Journal of Economic Perspectives*

Lindeman B, ‘Diversifying the Workplace: Affirmative Action in the Private Sector After 1991’ (1997) 42 *South Dakota Law Review*

Martin G and Durrheim K, ‘Racial Recruitment on Post-Apartheid in South Africa: Dilemmas of Private Recruitment Agencies’ (2006) 33 *Psychology in Society*

McGregor M, ‘Actual Past Discrimination or Group Membership as a Requirement to Benefit from Affirmative Action: A Comparison Between South African and American Case Law’ (2004) 29(3) *Journal for Juridical Science*

McGregor M, ‘A Legal Historical Perspective on Affirmative Action in South Africa’ (2006) 12-2 *Fundamina*

Mushariwa M, ‘*UNISA v Reynhardt* (2010) 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?’ (2012) 66 *Potchefstroom Electronic Law Journal*

Onsongo J, ‘Affirmative action, gender equity and university admissions-Kenya, Uganda and Tanzania’ (2009) 7 *London Review of Education*

Pretorius JL, ‘Legal evaluation of affirmative action in South Africa’ (2001) 26(3) *Journal for Juridical Science*

White RH, ‘Affirmative Action in the Workplace: The Significance of Grutter?’ (2003) 92 *Kentucky Law Journal*

Legislation

Basic Conditions of Employment Act 75 of 1997

Broad-Based Black Economic Empowerment Act 53 of 2003

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Group Area Act 41 of 1950

Industrial Conciliation Act 11 of 1924

Labour Relations Act 66 of 1995

Mines and Works Act 12 of 1911

Public Service Act 111 of 1984

Preferential Procurement Policy Framework Act 5 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Unemployment Insurance Act 30 of 1966

Unemployment Insurance Act 63 of 2001

Wages Act 15 of 1977

Legislation: United States of America

Constitution of the United States (1868)

Executive Order 10925- Establishing the President's Committee on Equal Employment Opportunity

Executive Order 11114- Extending the Authority of the President's Committee on Equal Employment Opportunity

Executive Order 11246- Equal Employment Opportunity

Executive Order 11375- Amending Executive Order No. 1124, Relating to Equal Employment Opportunity

Online journals

Adams MH, 'Covid-19 Pandemic Not a Time to Neglect Your Affirmative Action Plan' (2020) 15 *NLR* < https://www.natlawreview.com/article/covid-19-pandemic-not-time-to-neglect-your-affirmative-action-plan > accessed 15 January 2022

Claire EA, Molly D and Collen MH 'Current and future food insufficiency during Covid-19: Examining Disparities by Race/Ethnicity and Recent Work Loss' (2021) JREHD <https://link.springer.com/article/10.1007%2Fs40615-021-01116-2 > accessed 05 February 2022

Thesis and dissertation

Bluedorn J, Caselli F and Hansen NJ, 'Gender and Employment in the Covid-19 Recession: Evidence on "She-cessions"' (Working Paper IMF 2021)

Deshpande A, 'Affirmative Action in Indian and the United States' (World Development Report 2006)

Holzer H and Neumark D, ‘Assessing Affirmative Action’ (Working Paper National Bureau of Economic Research 1999)

Mhambi MH, ‘Employment Equity: The Implementation and Application of Affirmative Action in the Workplace’ (LLM-dissertation University of Pretoria 2014)

Mhungu V, ‘Positive Discrimination in South African Employment Law: Has Affirmative Action Overstayed Its Welcome?’ (LLM-dissertation University of KwaZulu Natal 2013)

Motona J, ‘Unfair Discrimination and Affirmative Action in the Workplace’ (LLM-dissertation Nelson Mandela Metropolitan University 2018)

Ncume AZ, ‘The Programmatic Enforcement of Affirmative Action’ (LLM-dissertation Nelson Mandela Metropolitan University 2015)