

INHERENT REQUIREMENTS OF THE JOB AS A DEFENCE TO A
CLAIM OF UNFAIR DISCRIMINATION: COMPARISON BETWEEN
SOUTH AFRICA AND UNITED STATES OF AMERICA

By

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LLM

A mini-dissertation submitted in partial fulfillment of the requirement for the degree of Masters in Labour Law (LLMLAB) in the School of law, Faculty of Management Sciences and Law, University of Limpopo.

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August 2010

DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo for the degree of Masters of Labour Law (LLMLAB) has not previously been submitted by me for a degree at this or any other university, that it is my own work in design and execution, and that all material contained therein has been duly acknowledged.

Name: Nthuse Norman Lebepe

Signature.....

Date.....

ACRONYMS

ANC- African National Congress

BFOR- Bona Fide Occupational Requirement

BFOQ- Bona Fide Occupational Qualification

CCMA- Commission for Conciliation Mediation and Arbitration

CEE- Commission of Employment Equity

DG- Director-General of Labour

DOL - Department of Labour.

EEA- Employment Equity Act

EEOC- Equal Employment Opportunity Commission

ICMEE – Independent Commission for Monitoring, Evaluation and Enforcement.

ILO-International Labour Organization

LRA- Labour Relation Act

LAC- Labour Appeal Court

LC- Labour Court

NEDLAC-National Economic, Development and Labour Council

NGO-Non-Governmental Organization

PEPUDA- Promotion of Equality and Prevention of Unfair Discrimination Act

RSA- Republic of South Africa

SAA- South African Airways

SAPS- South African Police Service

UI- University of Idaho

UK- United Kingdom

USA- United States of America

FOREWORD

My million thanks goes to **God** for having granted me the life and the opportunity for doing this work. I cannot forget all the people who supported and encouraged me in carrying on with the research during trying times when I contemplated throwing the towel.

I give my special thanks to my supervisor **Mr. M.C. Lebea** for his strict supervision and for encouraging me to go on with my research, I say May the almighty God give you more life and success in what ever you do. To the mother of my child **Lerato Portia Sengani**, I say thanks for your support and the confidence you have shown in me during this work. To the little ones **Tumi** and **Aaron** I say this one (**LLM**) is for you. To my mother **Sewela Rakgogo** I say thanks for bringing me in to this world of challenges and mentoring me up until now, we have gone a long way, let's continue working together you have an **LLB**.

Lastly I pass my thanks to all my family members for bringing me up in the manner they have. I believe that children are creatures of their parents and may God be with you all.

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August 2010

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CHAPTER ONE

1. INTRODUCTION

1.1 BACKGROUND

Prior to the discovery of gold and diamonds in South Africa the economy could by and large be described as agrarian, with the main economic activity being agriculture. The relationship between employer and domestic workers was governed by various Acts.¹ At that time the employment relationship was regarded as being a “Master and Servant” relationship.

When gold and diamonds were discovered, mining activity in South Africa rapidly increased. The blooming mining industry brought with it an influx of labour and workers to the mines. The first South African trade union was ‘The Carpenters and Joiners ‘which was established in 1881 to protect the interests of skilled foreign workers, working on the mines. As the mining industry developed, the differences in political power between whites and blacks became entrenched as trade unions catering largely for white workers, mobilized increasingly on the basis of race.

1.2 DISCRIMINATION LAWS BEFORE 1993

1.2.1 Mines and Workers Act ²

In 1911 the mines and workers Act was passed which reserved various types of work for white workers only. This era was very turbulent and a number of strikes with the aim of securing the position of white workers on the mines took place. After the general strike of 1914, martial law was declared and trade union leaders were deported from South Africa. The “Labour Peace” which ensured was short lived as the circumstances of the

¹ Master and Servants Act 15 of 1856, Black Administration Act and many more Acts

² Act of 1911

mines worsened due to the economic depression, a large foreign debt and the rising costs of living. The mines responded by restructuring. This led to a number of white workers being retrenched, which led to the abolition of the ratio between skilled white workers and unskilled black workers on the mines. This led to the 1922 strike, one of the watershed moments in South African Labour history. The result of this strike was the passing of the Industrial Conciliation Act.

1.2.2 Industrial Conciliation Act³

This Act was the direct forefather of the Industrial Conciliation Act of 1956, which was later, renamed the Labour Relation Act⁴. In terms of the first Industrial Act, trade unions representing white workers were accorded recognition, while a separate system for Black workers were created, Blacks and White workers were not belonging to the same trade unions.

1.2.3 Bantu Administration Act⁵

In terms of section 3 of the said Act, a Bantu, ⁶people or tribe shall not be responsible for the personal obligations of its chief; nor shall a tribe or the ground occupied by a tribe be bound in any way whatever by any contract entered into or any liability incurred by a chief unless it has been approved by the minister after having adopted by a majority of the adult male members of the tribe present of a public meeting convened for the purpose of considering such contract or liability. The section of this Act indicates the manner in which black people were discriminated and rendered useless in the society more in particular women.

In 1948, the National Party came into power, which saw the birth of Afrikaner Nationalism. In 1950, the Suppression of Communism Act was passed.

³ Act of 1922

⁴ Act of 1956

⁵ Act 38 of 1927

⁶ Black people were referred as Bantus under apartheid regime.

1.2.4 Suppression of Communism Act⁷

The Act led to the large-scale repression of union-activists. The 1950's was a turbulent time in the political history of South Africa. This turbulence led to the amendment of the 1956 industrial conciliation Act also, in order to ensure tougher controls over black workers.

1.3 THE INFLUENCE OF INTERNATIONAL AGREEMENT (CONVENTIONS/TREATIES) TO RSA EMPLOYMENT LAW BEFORE 1993

The International Labour Organisation Conventions more in particular Convention No 111⁸, indicated that “discrimination must be abolished at the workplace”. The ILO, having been convened at Geneva by the Governing Body of the International Labour Offices in its forty-second session⁹, to decide upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation.

This was the fourth item on the agenda of the session to determine the proposals which will take the form of an international convention, and consider the Declaration of Philadelphia, which Affirms that “all human beings, irrespective of race creed or sex, have the right to pursue both their marital well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”. It was considered further that discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights; therefore there is a need for change at the workplace.

Article 1 of the said Convention defines discrimination as follows: (1)” Discrimination includes:

⁷ Act of 1950

⁸ Convention Concerning Discrimination in respect of Employment and Occupation 1958

⁹ On 4th of June 1958

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

The convention also made its recommendation on how member state should apply the proposal of the ILO on Discrimination in respect of Employment and Occupation.¹⁰ This development by the ILO, created pressure to South Africa, after the recommendations made by ILO, there were some signs of change; even though South Africa was not a member state, it was force to change some of its discriminatory laws at the workplace.

1.4 DISCRIMINATION LAWS AND THE CONSTITUTION¹¹

The Wiehan Commission of Inquiry was established in 1979 to investigate the labour situation in South Africa. The resultant report of the commission went on to change the face of South African labour relations and labour law. The most consequential recommendation made by the commission was the extension of freedom of association to cover all persons, irrespective of race or sex. The result was that trade unions representing black workers were now able to make use of the machinery of the Labour Relations Act¹².

¹⁰ *Recommendation No.111 of ILO Recommendation.*

¹¹ The interim constitution of 1993 and the final constitution of 1996

¹² Act of 1956

The period between 1991- 1994 was the birth of the new democratic South Africa. In 1994, the interim Constitution, Act 200 of 1993, came into effect. The Act totally changed the constitutional basis of the South African legal system and it became clear that the Labour Relations Act of 1956 was not in line with the new constitutional order.

The Department of Labour appointed a Ministerial Legal Task Team to draft new labour legislation and the Labour Relations Act 66 of 1995 was born and came into effect on 11 November 1996. The Act¹³ heralded a new era in South African labour law.

1.5 RSA CONSTITUTION

The constitution of South Africa, Act 108 of 1996 was adopted on 10 May 1996 and came into effect on 4 February 1997. The Constitution is the supreme law of the land, binding on all organs of state at all levels of government. South Africa is a State founded on the principles of a constitutional democracy.

The 1996 Constitution is the successor of the earlier interim Constitution, Act 200 of 1993, which was brought into effect on 27 April 1994, following the first democratic elections in South Africa. The interim Constitution was the product of months of negotiations and effectively secured the demise of the ten year old tri-cameral constitutional system and the apartheid regime, which flowed from it.

1.6 LABOUR RIGHTS IN THE CONSTITUTION

The constitution contains a Bill of Rights, Chapter Two, which enshrines the rights of all South Africans. The following clauses deal with the rights to equality and labour rights: Section 9(1): provide that “Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms.

¹³ Act 66 of 1995

To promote the achievement of equality, legislation and other measures designed
To protect or advance persons, or categories of persons, disadvantaged by
Unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone
On one or more grounds, including race, gender, sex, pregnancy, marital status,
Ethnic or social origin, colour, sexual orientation, age, disability, religion,
Conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on
One or more grounds in terms of subsection (3).
National legislation must be enacted to prevent or prohibit unfair
Discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3)
Is unfair unless it is established that the discrimination is fair.”

Section 18: provide for freedom of association (this rights is also one of the important
Labour rights)

Section 23: provide for Labour Relations rights.

- “Everyone has the right to fair labour practices;
- Every worker has the right to form and join a trade union and to
Participate in the union’s activities;
- Every worker has the right to strike
- Every employer has the right to form and join an employer’s organisation
And to participate in the activities of the organisation; and
- Every trade union, employer’ organisation and employer has the right to
Engage in collective bargaining”.

1.7 PROBLEM STATEMENT

The Republic of South Africa became a democratic country in 1994 when ANC won the general election and formed the national government. Prior to 1994 most black South Africans were subjected to injustices of the apartheid regime particularly racial discrimination. The most important thing to do now is to redress the injustices of the past especially at the work place.

Both interim and final constitutions have expressly outlawed unfair discrimination. However the two enactments¹⁴ recognize that under certain circumstances discrimination can be fair. One of those instances is where discrimination is done based on the inherent requirements of the job. Therefore is however a risk that persons who intend to discriminate against others, particularly at the workplace will seek to justify the discrimination on basis of inherent requirements of the job.

The purpose of this research is to:-

- (i) Determine the meaning of inherent requirement of a job
- (ii) Determine the scope therefore in South Africa labour law
- (iii) Analyse case law in which our courts dealt with the defences relating to the principle of inherent requirement of a job.
- (iv) Lastly to compare the approach in South African law with the approach in United State of America on this aspect and make appropriate recommendations.

¹⁴ Interim and final constitutions

1.8 HYPOTHESIS

The hypothesis, as suggested in the title is that the inherent requirement of the job in South Africa must not be abused by employers to justify unfair discrimination at the workplace in a wrong way.¹⁵

1.9 OBJECTIVES OF THE STUDY

1. To evaluate the grounds used by the employers on “inherent requirement of a job” as defense to unfair discrimination
2. To outline the concept “inherent requirement of the job” as it relate to some of the grounds the employers can raise as defenses to justify their decision to appoint or not to appoint.
3. To set out the role in which Commission for Employment Equity and Commission on Gender Equity should apply in dealing with the principle¹⁶.
4. To distinguish between Affimative action and the priciple of inherent requirement of a job.¹⁷
5. To give a comperative study between USA and RSA on the use of “inherent requirement of a job” and its operation.
6. To set a guide on how should the principle used specifically in RSA, because for a discrimination to be fair it must be in line with the constitution,more especially section 36 of RSA constitution Act 108 of 1996.

¹⁵ See below chapter three.

¹⁶ See below chapter three

¹⁷ See below chapter three.

1.10. RATIONALE

This study illustrates the need for a proper monitoring system the Commission for Employment Equity should have in knowing the process used by different employers in making their appointments. It will give guidelines on how the public and private employers should uphold the principles of Labour Relations Act, the Constitution, PEPUDA and EEA in making their appointment. The challenge today is that the principle of inherent requirement of the job is being abused by most of the employers in justifying their unfair discrimination when making appointment.

The Commission for Employment Equity working together with Commission on Gender Equality and DOL¹⁸ has a reciprocal duty to make sure that, employers in making their appointments do not unfairly discriminate on the basis of colour and gender, and raise the “inherent requirement of a job” as a defence. The CEE must have the report on a monthly basis on the procedures used by employers in making their appointments. This paper sets out guidelines to be used by both CEE and Department of Labour in monitoring the system used by employers in making their appointment. It also contains some comparison with USA on the principle of inherent requirement of a job. The paper also suggests an independent commission to deal with monitoring, evaluation and enforcement, on employer to make sure that they clearly use both principles.

1.11 RESEARCH DESIGN

This paper gives an overview on how the rights of job applicants and employers can be protected. Secondly, this paper creates a platform for the job applicants who feel that they

¹⁸ Department of labour

have been unfairly discriminated against on the basis of inherent requirement of the job to raise their concerns within the prescribed forums.

Thirdly it compares the importance of Affirmative Action and the inherent requirement of the job on one hand and the concept of “inherent requirement of the job in USA and RSA perspective on the other

1.12 RESEARCH METHODOLOGY

The main method used in this study is library research. Primary and secondary sources of law such as legislation, textbooks, Journal articles, Cases, News paper reports, the internet and interviews were also used for analyses on the research topic¹⁹.

1.13 ORGANISATION OF CHAPTERS

Chapter one gives a general overview of the study.

Chapter two deals with prohibition of unfair discrimination and legislation prohibiting it. References is given from statutes and institutions created by those statutes. Chapter three deals with justification of unfair discrimination, the chapter evaluate the all grounds of justification: general defence, affirmative action and inherent requirement of a job.

Chapter four is a comparative study; focus is on United States of America regarding the principle of inherent requirement of a job and affirmative action as defences to unfair discrimination. Chapter five is conclusion and recommendations, the recommendations are based on what has being outlined on above mentioned chapters.

¹⁹ See references at the back of this research

CHAPTER TWO

2. PROHIBITION OF UNFAIR DISCRIMINATION RSA PERSPECTIVE

2.1 LEGISLATION PROHIBITING UNFAIR DISCRIMINATION

2.1.1 Republic of South Africa final Constitution

Our Constitution provide for the right to equality for all in terms of section 9.

In terms of subsection (3) “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex. Pregnancy, marital status, ethnic, or social origin, colour, sexual orientations, age. Disability, religion, conscience, belief, culture, language, and birth.”

In terms of section 9 (4) “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prevent or prohibit unfair discrimination.”

Subsection (5) of the said section provide that; “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

2.1.1 Employment Equity Act²⁰

In terms of section 2 of this Act its purpose is to achieve equity in the workplace by

- “promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

²⁰ Act 55 of 1998

- implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”

Sections 5 of the Act provide that: Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Section 6 of the same Act provide for the following:

- “No person may unfairly discriminate, directly or indirectly, against an Employee, in any employment policy or practice, on one or more grounds, Including race, gender, sex, pregnancy, marital status, family responsibility, Ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- It is not unfair to discrimination to:-
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.”

2.1.2 Labour Relations Act²¹

In terms of section 1 of this Act provide that: the purpose of this Act is “to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objective of this Act”²²

In terms of part B Code of Good Practice, any discrimination for it to be fair has to be justifiably. A specific reference is also made to discrimination relating to HIV status, that discrimination based on HIV status will be regarded as unfair.

²¹ Act 66 of 1995

²² Section 1 (a)-(c) LRA

Chapter VIII of LRA provide for unfair dismissal and unfair labour practice. Section 185 of the said Act provides that: - “every employee has a right not to be unfairly dismissed; and subject to unfair labour practice.” The Act indicates to us that unfair dismissal and unfair labour practice are not promoted by our employment legislations, this include also unfair discrimination.

2.1.3 Basic Conditions of Employment Act²³

According to the provisions of this Act, provide for the regulations of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation. Chapter nine and ten of this Act provide for the role in which the CEE has to do in case of any contravention of this Act this also include unfair discrimination.

2.1.4 Promotion of Equality and Prevention of Unfair Discrimination Act²⁴

In terms of Chapter 2 of this Act unfair discrimination has to be eliminated in all forms. Section 6 of the Act deals with prevention and general prohibition of unfair discrimination, the section went further:-

- “Neither the state nor any person may unfairly discriminate against any e
- Section 7 provide for prohibition of unfair discrimination on ground of race
- Section 8 provide for prohibition of unfair discrimination on ground of gender
- Section 9 provide for prohibition of unfair discrimination on ground of disability”

Chapter 3 of the same Act deal with the burden of proof and determination of fairness or unfairness.

²³ Act 75 of 1997

²⁴ Act 4 of 2000

2.2 INSTITUTIONS CREATED TO DEAL WITH UNFAIR DISCRIMINATION AT THE WORKPLACE.

2.2.1 COMMISSION FOR EMPLOYMENT EQUITY

The EEA²⁵ specifically section 28 provide for the establishment of the CEE.²⁶ The Act also provide for its role and responsibilities together with the Department of Labour.

2.2.2 COMPOSITION OF THE COMMISSION FOR EMPLOYMENT EQUITY

The Commission for Employment Equity consists of a chairperson and eight other members appointed by the Minister to hold office on a part-time basis. The members are nominated by the respective stakeholders in NEDLAC and must include two people nominated by organized labour, two people nominated by organized business, two people nominated by the state and two people nominated by the organizations representing community and development interests in NEDLAC.²⁷

In terms of the provision of the above mentioned Act, the Chairperson and each member of the Commission²⁸ “(a) must have expertise relevant to the functions contemplated in section 30²⁹

- (b) Must act impartially when performing any function of the Commission
- (c) May not engage in any activity that may undermine the Integrity of the commission
- (d) Must not participate in forming communicating any advice On any matter in respect of which they have a direct financial Interest or any other conflict of interest.”

²⁵ Employment Equity Act

²⁶ Commission for Employment Equity

²⁷ Chapter IV section 29 of Employment Equity Act

²⁸ Section 29 (4)

²⁹ See below on the functions of the CEE.

These indicate to us that members of the commission should uphold a certain standard of dignity guided by the kind of work they do in the society.

2.2.3 FUNCTION OF THE CEE

- To advise the Minister on codes of good practice, regulations made by the Minister and policy and any other matter concerning the Act;
- To make awards, recognizing the achievements of employers in furthering the purpose of this Act;
- To research and report to the Minister on any matter relating to the application of this Act, including appropriate and well- research norms and benchmarks for the setting of numerical goals in various sectors and perform any other prescribed function ; and
- To submit an annual report to the Minister.

In performing its functions the CEE may call for written representations from members of the public and hold public hearings where members of the public can make oral representations.³⁰

2.2.4 MONITORING ,EVALUATION AND ENFORCEMENT

In terms of chapter v of the EEA employees, trade unions, labour inspectors and the Director-General all play an important role in monitoring compliance with the Act. Minister also must keep a register of designated employers that have submitted their employment equity reports. This register is a public document. Any employee or trade union representatives may bring an alleged contravention of this Act to the attention of

³⁰ References can be made to section 32 of EEA

another employee, an employer, a trade union, a workplace forum, and labour inspector, the Director- General or the CEE.

2.2.5 LABOUR INSPECTORS

Inspectors have wide powers to ensure compliance with the Act. The powers include the right to:

- Enter any workplace, question any person and inspect documents, books in an attempt to established whether the employer is complying with the provisions of the Act;
- Request a written undertaking from an employer to comply with certain matters; and
- Issue compliance orders.³¹

A labour inspector must obtain a written undertaking from an employer to with the provisions of the Act within a specified period if he or she has reasonable grounds to believe that the employer has failed to consult with employees, conduct an analysis, prepare and implement an implement an employment equity plan, submit and publish an employment equity report, prepare a successive employment equity plan, assign responsibility to one or more senior managers or inform its employees or to keep records.³² It must be noted that labour inspector may issue a compliance order to an employer if the latter has refused to give a written undertaking when requested to do so or has failed to comply with such an undertaking³³

2.2.6 THE DIRECTOR –GENERAL

³¹ Section 35 of EEA read inline with section 65and 66 of the Basic Condition of Employment Act 75 of 1997

³² Section 36 of EEA

³³ Section 37 of EEA

The functions of the Director-General broadly fall into two categories, namely to assess compliance with the Act and to review such compliance.³⁴

- The Director- General must determine whether a designated employer has made reasonable efforts to implement an equity plan, assess the progress of the plan, appraise the elimination of barriers which adversely affect people from designated groups and assess the employer's compliance with affirmative action measures together with the principle of inherent requirement of a job, that no any of the designated employer use the above mentioned principles for justifying unfair discrimination which is not justifiable in nature.
- To take into account the progress made by other employers operating under comparable circumstances within the same sector must also be considered. In this regard the Director-General must take into account the following factors to make sure that both affirmative action and inherent requirement of a job are well applied without compromising each other.

The Director- General, Commission for Employment Equity and Labour Inspectors has to monitor and evaluate the appointment made by designated employers. These will assist in dealing away with designated employers who misuse both principle of inherent requirement of a job and affirmative action to justify their unfair discrimination at the workplace there are compliance orders which must be imposed to designated employers.

2.2.7 COMPLIANCE ORDERS

If a designated employer refuses to give a written undertaking to the Inspector, or fails to comply with the undertaking; the Labour Inspector may issue a compliance order.³⁵ The compliance order must indicate the name of the employer, which provisions of the EEA

³⁴ Section 41-43 of EEA

³⁵ Section 37 (1) EEA

have not been complied with, steps to be taken by the employer and the period within which those steps must be taken within which those steps must be taken and the maximum fine that may be imposed for non-compliance.³⁶ The maximum fines range from R500-000 for the first contravention to R900-000 for the fifth contravention or further contravention.³⁷ A copy of the compliance order must be served on the employer.³⁸

A designated employer may object to a compliance order by making written representations to the Director-General of Labour within 21 days after receiving that order.³⁹ After considering the designated employer's representations the Director-General may confirm, vary or cancel any part of the order and served a copy of the order on such employer.⁴⁰ A designated employer who receives such an order may appeal against that order to the Labour court.⁴¹ If the employer fails to comply with the compliance order, or does not appeal against the order, the Director-General of Labour may apply to the Labour court to have it made an order of the Labour court.⁴²

2.2.8 APPEALS AGAINST COMPLIANCE ORDER

An employer may lodge an appeal with the Labour court against a compliance order of the Director-General.⁴³ The appeal must be lodged within 21 days after receiving the order.⁴⁴ An appeal from the Labour court to the Labour Appeal court is also possible.

³⁶ Section 37 (2) EEA

³⁷ See sch 1 of the EEA

³⁸ Section 37 (3) EEA

³⁹ Section 39 (1) EEA

⁴⁰ Section 39 (3)-(4) EEA

⁴¹ Section 39 (5) EEA

⁴² Section 39 (6) EEA

⁴³ Section 40 (1) EEA

⁴⁴ Ibid

2.2.9 ASSESSMENT OF COMPLIANCE

An order to determine whether a designated employer is implementing employment equity, the Director-General or any other body or person evaluating an employer's compliance with the EEA, all of the following factors must be taken into account:⁴⁵

- (i) the extent to which people from designated groups are equitably represented in all occupational categories and levels in the relevant employer's workforce in relation to:
 - (a) the demographic profile of the economically active population, both nationally and regionally;⁴⁶
 - (b) the availability of suitably qualified people from the designated groups from which the employer may be expected to appoint or promote employees;
 - (c) economic and financial factors relevant to the sector in which the employer runs its business;
 - (d) the present and anticipated economic and financial circumstances of the employer;
 - (e) the number of vacancies available in the employer's enterprise as well as the employer's labour turnover;
- (ii) the progress made by other employers, in the same sector and under Similar circumstances, in implementing Employment Equity;
- (ii) reasonable efforts made by the employer to implement Employment Equity;
- (iv) the extent to which the employer has made progress with eliminating Employment barriers that adversely affect designated employees; and
- (v) Any other prescribed factor.

⁴⁵ Section 42 EEA.

⁴⁶ Government Gazette 20626 GN R1360,23 November 1999, contains information on demographic profile of the population.

2.2.10 REVIEWS BY DIRECTOR-GENERAL

The Director-General of Labour may conduct a review to determine whether an employer is complying with the provisions of the EEA.⁴⁷

In order to conduct such reviews, the Director-General is vested with wide powers. The Director-General may request an employer's current analysis of its employment practices, its employment equity plan and any other relevant records, documents or information this include any appointment made under inherent requirement of a job or under affirmative action. Thereafter the Director-General will hold meetings with employers and trade unions about the matter.⁴⁸

2.2.11 RECOMMENDATIONS BY THE DIRECTOR-GENERAL

Emanating from the above mentioned reviews, the Director-General may:⁴⁹

- (i) approve the employer's employment equity plan; or
- (ii) Make recommendations, in writing, regarding steps which the employer must take to improve or change the plan as well as a time frame within which this must be done.

If an employer fails to comply with the recommendations of the Director-General, the latter may refer the matter to the Labour Court.⁵⁰

It has been indicated that most of the employer's in South Africa are not complying with the recommendation from Department of Labour through its Director-General. These is some of the reasons we still have lot of crisis at the workplace emanating from unfair discriminations and unfair labour practices promoted by those employers who don't want

⁴⁷ Section 43 (1) EEA.

⁴⁸ Section 43 (2) EEA.

⁴⁹ Section 44. in *Ampofo v Member of the Executive Council for Education, Arts, Culture, Sports, Recreation: Northern provincial 2001 ILJ 1975 (J)* the High Court ruled that the Labour court has exclusive jurisdiction to hear labour matters which have been given full expression in statute, such as EEA.

⁵⁰ Section 45 EEA.

to comply with orders given to them by the Department of Labour. The question that I ask myself each and every day is, does the Department of Labour through its DG and Labour Inspectors do enough in holding those employer's who do not comply with its orders accountable? The answers I get is that they are not doing enough. Then second question is if they are not doing enough in protecting the rights of employees,⁵¹ what does the Commission for Employment Equity do in this regard? Which question still remains unanswered even to date.

2.2.12 POWERS OF THE LABOUR COURT.

The Labour Court may make any appropriate order, including the following:⁵²

- (i) An order that a compliance order be made an order of the court as well as hearing appeals against a compliance order of the Director-General;
- (ii) An order that the CCMA should conduct an investigation and submit a report to court;
- (iii) an order awarding compensation for damages compensation;
- (iv) an order for the compliance with any provisions of the EEA or recommendations made by the Director –General;
- (v) Imposition of a fine.

2.2.13 ORDERS FOR UNFAIR DISCRIMINATION

Where the court finds that an employer discriminated unfairly against an employee, the court may make the following orders:⁵³

⁵¹ The word employee include old employees and job applicant

⁵² Section 50 (1) EEA

⁵³ Section 50 (2) EEA

- (i) payment of compensation by the employer to that employee;
- (ii) payment of damages by the employer to that employee;
- (iii) an order directing the employer to take steps to prevent the same unfair discrimination or employment practice from occurring in future in respect of other employees;
- (iv) order the employer to comply with the provisions of Chapter III of the EEA as if the employer were designated; and
- (v) Order the removal of the employer's name from the register of designated employers.

2.2.14 PROTECTION OF EMPLOYEE RIGHTS

No person may discriminate against, threaten or prejudice an employee because the employee exercises any of his/her rights in terms of the EEA.⁵⁴ No person may furthermore favor an employee in exchange for the employee not exercising any right.⁵⁵ The term "employee" here includes former employees and applicants.⁵⁶ Any dispute about such matters may be referred to the CCMA.⁵⁷ If the CCMA does not succeed in its attempts to reconcile the parties concerned, then the dispute is referred to the Labour Court or, with the consent of the parties concerned, to arbitration.⁵⁸

This is done solely to protect the rights of employees against unfair discrimination at the workplace. In looking whether our people affected by unfair discrimination at the workplace are able to use the above mentioned forums to raise their concerns, it is still a challenge to our people more in particular those who are found at the disadvantaged communities (rural areas, working at the farms). Lack of information and education is also one of the contributory factors.

⁵⁴ Section 51 (2) and (2) EEA

⁵⁵ Section 51 (3) EEA

⁵⁶ Section 51 (5) EEA

⁵⁷ Section 51 (1)

⁵⁸ Section 52 (3) see also the book by:

2.3 COMMISSION FOR GENDER AND EQUALITY

Commission on Gender Equality is established in terms of Commission on Gender Equality Act,⁵⁹ its establishment is a promotion of section 119 of the Constitution.

2.3.1 Composition of the Commission

It consists of a chairperson and no fewer than seven and no more than eleven members, who shall:-

- (a) have a record of commitment to the promotion of gender equality;
- (b) be persons with applicable knowledge or experience with regard to matters connected with the objects of the Commission.

2.3.2 Powers and functions of Commission

In order to achieve its object referred to in section 119 (3) of the constitution, the commission:

- “Shall monitor and evaluate policies and practices of
- Organ of state at any level;
- Statutory bodies or functionaries;
- Public bodies and authorities; and
- Private business, enterprises and institutions; in
- Order to promote gender equality and may make any recommendations that the commission deems necessary;
- The commission shall also develop, conduct or manage information programmes, and
- Educational programme;
- To foster public understanding of matters pertaining to the promotion of gender equality and the role and activities of the commission;

⁵⁹ Act 39 of 1996

- The commission shall evaluate;
- Any Act of parliament
- Any system of personal and family law or custom;
- Any system of indigenous law, customs or practices.”

CHAPTER THREE

3 JUSTIFICATION OF UNFAIR DISCRIMINATION

3.1 GENERAL DEFENCES

A claim of unfair discrimination may be defended by demonstrating that the conduct complained of does not fall within the terms of sections 6⁶⁰. A number of defenses are available to employers facing actions for alleged unfair discrimination. The first line of defence open to the employer is to persuade the court or arbitrator that the act or omission did not amount to discrimination at all. For example the Labour Court has suggested that a claim of unfair discrimination arises only when two or more similarly situated employees are treated differently. So different pay levels for different employees are not in themselves sufficient to prove discrimination.⁶¹ It was also held that similarly, differentiation between employees on the basis of productivity does not necessarily amount to discrimination.⁶²

The second possible defence arises when the discriminatory act complained of was perpetrated by an employee. Section 60 of the EEA obliges employers to consult 'all relevant parties' if an act of discrimination is brought to the employer's attention. If the employer fails to take such steps, the employee's contravention will be attributed to the employer. However, the Act expressly provides that the employer is not liable for the conduct of the employee if the employer can prove that it did 'all that was reasonably practicable' to ensure that the employee would not contravene the Act. This appears to be a form of vicarious liability. The test prescribed by the EEA is less strict than that which applies in vicarious liability cases.⁶³

⁶⁰ See above note 24

⁶¹ See *Transport & General Workers Union & another v Bayete Security Holdings (199) 20 ILJ*

⁶² *Mthembu & others v Claude Neon Lights (1992) 13 ILJ 422 (LC)*

⁶³ See *Grobler v Naspers Bpk en 'n ander (2004) 25 ILJ 439 (C) and the appeal against that judgment, Media 24 Ltd & another v Grobler (2005) 26 ILJ 1007 (SCA)*

The first case in which the liability of an employer for discrimination perpetrated by an employee was tested under the EEA was *Ntsabo v Real Security CC*.⁶⁴ In that case, Ms Ntsabo was harassed and sexually assaulted by her supervisor. She complained to management, who responded by transferring her to another site, which involved doing night work. The court held that this and earlier actions by management, who responded by transferring her to another site, which involved doing night work. The court held that this and earlier actions by management did not constitute reasonable steps to stop the discrimination, and awarded Ms Ntsabo substantial damages for medical expenses and in juria and pain and suffering. Ms Ntsabo was also awarded compensation for constructive dismissal.

The third line of defence open to employers is to prove that, even if the act or omission did amount to discrimination, it was not unfair. Discrimination is presumed unfair until the contrary is proved. The EEA provides two grounds by which this presumption can be rebutted. Section 6(2) reads:

It is not unfair discrimination to-

- (a) Take affirmative action measures consistent with the purpose of this Act; or
- (b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

3.2 AFFIRMATIVE ACTION

We need to know that the Employment Equity Act requires all designated employers⁶⁵ to implement affirmative action measures in order to achieve employment equity for people from designated groups,⁶⁶ in the case of *Breunan v Rehnquist*⁶⁷. The subtopic is based on the distinction between inherent requirement of a job and affirmative action; we also outlined the possibility of another principle overlapping the other. Let us go back to what

⁶⁴ (2003) 24 ILJ 2341 (LC)

⁶⁵ All employers with more than 50 employees, or which have annual turnovers equal to or above the annual turnovers for small business of their class (see section 1 EEA)

⁶⁶ See note 40 above.

⁶⁷ It was held that Affirmative action “is 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.”

we said earlier that in terms of section 6 (2) of the Employment Equity Act it will not be unfair to discrimination to take affirmative action measures consistent with the purpose of the Act⁶⁸.

One challenge that we are facing today in South Africa with discrimination based on affirmative action is that the Act⁶⁹ provides little guidance on the legal standards for affirmative action. Therefore the court will have to play a very crucial role in applying and interpreting the principle. The popular question which we as Labour academics come across more especially on this aspects of affirmative action, is that sometimes it is very difficult for analyst to analyze this principle fairly because sometimes you find a situation were by the same principle used by other employers for wrong purposes that turned to violation of section 9 of the constitution.⁷⁰ For the past years our courts have never succeeded in bringing about a stable resolution of the debate on the relationship of affirmative action, inherent requirement of a job and equality.

The other question is who has to proof the importance of affirmative action. The burden of proof rest with the employer that specific affirmative action measure in question is in fact designated to protect and advance those disadvantaged by unfair discrimination in order to promote their full and equal enjoyment of all rights and freedoms. It must be noted that, given the fact that affirmative action is an imprecise generic term encompassing many different types of policies and practices with seeming divergent objectives, it is necessary to determine which affirmative action practices and policies have the constitutionality required objective. The principle of affirmative action must give benefits to designated employee and the benefits must be proportional to the goal of achieving equality. The granting of extravagant benefits that disproportionately enhance the positions of members of formally disadvantaged groups at the expense of others could conceivably go beyond the goals of the EEA.

⁶⁸ See page 25 above.

⁶⁹ Employment Equity Act

⁷⁰ Equality Clause.

Inherent requirement of a job goes together with efficiency. The complex and dynamic question we ask ourselves on these two principles namely: inherent requirement of a job and affirmative action is, can these principles be clearly distinguished? In *Storman v Minister of Safety & Security & Others*⁷¹, the case was decided under the final constitution, the court also look at the findings in the *public servants association* case that affirmative action cannot justify the appointment of an applicant who is incapable of doing the work attached to the post. However, the court was not prepared to accept that affirmative action can therefore be applied only in cases where applicants from previously disadvantaged groups have qualification and attributes broadly comparable to those of better qualified or more experienced white males. The court indicated that such a restriction would frustrate the goal of equality. Even though the court tried to clarify the comparability of this two principle, the question still remain, to what extent is these two principles differ, or should we not separate them, these questions still need to be answered by our courts and academics in analyzing the above mentioned principles. Let us look another decision made by our courts with regard to efficiency and affirmative action

in *Coetzee & others v Minister of Safety & Security & another*.⁷², the applicants were highly trained and experienced inspectors in the bomb squad of the SAPS. Because they were white males, they could apply only for certain posts open to ‘none designated’ posts. Their applications from members of designated groups. Before **Coetzee**, there was no precedent for how should a court handle situations in which an employer turns down qualified and suitable personnel from non-designated groups when there was no competition at all from members of the designated groups. The labour court was at task to decide the said issue guided by the Employment Equity Act. This was a difficult task since apart from a fleeting reference to the promotion of economic development and the efficiency of the workforce in its preamble, the EEA does not expressly deal with how

⁷¹ (2002) 23 ILJ 1020 (T)

⁷² (2003) 24 ILJ 163 (LC)

efficiency (goes together with inherent requirement of a job) must be reconciled with representivity when employers strive to promote latter goal. Nor does that Act indicate how much weight is to be accorded the two goals when they clash, therefore the court sought guidance from the constitution. The question now was whether the SAPS's efforts to promote representivity in the explosives unit were rationally balanced with efforts to maintain and enhance efficiency. The problem in Coetzee case was that SAPS based its defenses solely on its claim that it had conformed to the representivity requirement of the EEA.

The other question was how far the skills, experience or qualification gap must be extended before the appointment of a less qualified or experienced black candidate becomes irrational and impeachable. The court also noted in *Coetzee* that, affirmative action appointment is not necessary unfair merely because the candidates is from the previously advantaged group.” The court also indicated that efficiency and representativity, or equality should not be viewed as separate comparing or even opposing aims. They are linked and often interdependent. To allow equality or affirmative action to play a role only where candidates otherwise have the same qualification and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a history of unfair discrimination.

The advancement of equality is integral part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less then suitably qualified, or incapable in responsible positions cannot be justified”. In a nut-shell this phrase by the court clearly indicates that the inherent requirement of a job in some instance can't be compromised for the sake of affirmative action. The court clearly indicate that efficiency in public administration is also paramount important, but this must be done in accordance

with the purpose of EEA, LRA, and the constitution. For example you can look at the case of *Du Preez v Minister of Justice & Constitutional Development & Others*⁷³

The most important thing which we should take into consideration when dealing with both principles is that, when employers appoint based on the said principles; they must not abuse them for their own benefits. They should be applied for efficiency in the administration of a particular business or for redressing injustices of the past, contrary to what has been done by the employer in *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*.⁷⁴ In the case of *Public Servants Association*, it was held that a broadly representative public service, as envisaged by the interim constitution, could not be promoted at the expense of an efficient administration. Judge also said that the definition of an “efficient” public administration might to a certain extent be subject to interpretation, but held that this could not mean that efficiency might be sacrificed by promoting a broadly representative public administration. It was also held that public service required a kind of expertise to manage the country everyday administration, earlier I indicated that efficiency goes together with inherent requirement of a job, which means this two aspects need not to be sacrificed when promoting a broadly representative public administration on a properly controlled and rational basis if for example, blacks were, preferred (in appointments and promotion) to whites, where all had broadly the same qualifications and merits.

In *Stoman* case, it was argued that “proper plans must be drawn up and implemented to honour constitutional ideals of striving towards substantial equality. Mere random and

⁷³ (2006) 27 ILJ 1811 (SE), in casu the position of regional magistrate was advertised and requirement for members of designated group was LLB and for non-designated group members was LLM. The complainant was more qualified with regard to experience as compared to appointed two black females who only had less than two years experience as district magistrate. The complainant was successful and the court ordered the post to be readvertised, reason being that for a position of a regional court presiding officer you need to have lot of experience to do the job.

⁷⁴ (2000) 21 ILJ 1119 (LC), the court also observed that an employer also owed it to other previously disadvantaged candidates to ensure that appointments were made from the best among them, not to prefer based on their personal interest living what is inherent requirement of that particular job.

haphazard discrimination would achieve very little and might be counterproductive” one of the Judges also agreed that “ruling that the demand for representativity (which goes together with affirmative action) could not justify appointing a candidate inappropriately qualified and incapable of doing the job.” These clearly indicate that efficiency and inherent requirement of a job are essential towards smooth running of the business and they should not unfairly compromised.

Let us take this debate further by looking to one of the critical discussion held by one of our outstanding academics in the field of labour law *Martha Fetherolf Loutfi*⁷⁵; she indicated how efficiency may trump representivity where the public service concerned is critical to the South African community. It was noted that the constitutional requirement of efficiency applies of course, only to the public sector. By contrast, an affirmative action appointment or promotion in the private sector need not comply with this requirement or be concerned with the balance between representivity and efficiency. In my view it will be very dangerous and irrelevant to say efficiency is important only in private sectors. Let us look what transpired in the case of *Woolworth v Whitehead*⁷⁶ challenged the decision of the employer not to employ her on a basis of pregnancy, she was pregnant and to the employer it is the inherent requirement of a job for the employee to be at the work continuously uninterrupted. It was also held that the money she was getting also speaks volume about her uninterrupted period at work. Acting judge president Zondo, held that “the real reason why she was not employed and that the company had not made an appointment yet and that they had found a better candidate”. Judge Wills⁷⁷ gave the term “inherent job requirement” a wide meaning and held that the employers requirement for “uninterrupted job continuity” was justified in this instance as she was appointed in a highly paid position that required constant

⁷⁵ *Women, gender and work; what is equality and how do we get there? (2001) A 455*

⁷⁶ 2000 ILJ 571 (LAC)

⁷⁷ At 589-603F

attention to the details of the job. Judge Conradile followed the strict approach and held that the employer's actions amounted to unfair discrimination⁷⁸.

It is important to take into consideration the following facts as indicated by **John Grogan**⁷⁹ that market demands do not create legal obligations, and the law does not seek to control poor business decisions. But I submitted that the material prosperity of any society depends on efficiency; efficiency will therefore always be relevant. The private sector will, however, be held to the requirement that the affirmative action measures must be 'adequate' to protect and advance persons disadvantaged by unfair discrimination.

This clearly indicates to us that employers at both private and public sector will also be held to the requirement of equity. In this sense, employers will have to be careful not to appoint or promote under qualified people; otherwise better qualified people who are overlooked in such a process can establish a prima facie case of unfair discrimination on the basis of race or gender. **Marie McGregor**⁸⁰, she outlined the importance of the two principle, efficiency and representivity, she said "I do not read *Public Servants Association* to separate representivity from efficiency," she also went further to so say "I agree with the view in *Stoman*⁸¹'s case, that the concepts should neither be separated from nor be placed in opposition to each other. It seems that efficiency; when its meaning is being determined should be considered in relation to 'representivity'. But even the meaning of 'representivity' is not clear, because it has not been dealt with adequately in the constitution, the EEA and case law.

⁷⁸ At 581G- 589B. from this it is apparent that the meaning and scope of the term "inherent requirement" are still unclear in the South African Labour Law

⁷⁹ Injustice in justice: white male rights affirmed,"(1997) 4 Employment Law 70 at 72)

⁸⁰ Marie McGregor, Affirmative action and (efficiency) in the public service, How to strike a balance between representivity and efficiency?Juta Business Law volume 11 part 1

⁸¹ See note 61 above

3.3 IS AFFIRMATIVE ACTION A RIGHT?

The issue of whether affirmative action is a right has been vigorously debated in labour laws during the last couple of years. In the case of *Cupido v GlaxoSmithKline SA (pty) Ltd*⁸², It was held that the Employment Equity Act ⁸³does not provide for a right to affirmative action. It was also indicated that chapter II and III need not to be confused because their purpose are not the same. The court in its findings held that affirmative action is not a right but means to an end. This decision is highly challenge by many authors of labour law books. In her article **Marie McGragor**⁸⁴ said “A contravention of section 20 (5) did not give rise to a claim in terms of chapter II and did not bring about an individual right to affirmative action. So there was no right of direct access to Labour Court in respect of any such claim.” What this article trying to explain is that because there is no right to affirmative action, therefore the victims of affirmative action can’t go directly to Labour Court seeking for a relief.

This might sound as an attack to members of the designated group. When taking the debate further you will ask yourself what the constitution says about the principle of affirmative action. Section 9 of the constitution provide that all people are equal before the law irrespective of colour ,gender, religion and many more grounds contained in the constitution.

It is promoted by the said constitution that equality need not to be applied in a blanket manner, which means to accord all people equal rights particularly at the workplace as a designated employer you need to strategically see how to redress the injustices of the past by applying one of the bill of rights. Therefore the employer will need to apply principle like affirmative action when making appointment. By so doing employers will be promoting constitutional imperatives. The issue of whether affirmative action is a right or

⁸² (2005) 26 ILJ 868 (LC),

⁸³ See note 8 above

⁸⁴ No right to affirmative action,Juta Business Law volume 14 part 1

a means to an end is still reserving dividing attention by most of the authors of labour laws.⁸⁵ In my opinion and being legally correct a right is some thing you have and if breached you can challenge that based on the fact that is your right to have that kind of a right, in a nut-shell you can simple say that,” a right to have a right” therefore affirmative action is a right.

One of the most interesting things under discrimination is the issue of age and the aspects of inherent requirement of a job.

3.4 INHERENT REQUIREMENTS OF THE JOB

The phrase ‘inherent requirement of a job’ contains two important words that together determine its meaning. The word ‘inherent’ is usually taken to mean a permanent and essential quality or attitude (of something, in this case a job, while the word requirement ‘carries with it an element of compulsion).From this can be inferred that only essential job duties should be taken into account and that if the requirement is not met, the job can not be done.

One interesting question in this regard relates to the freedom afforded employers in designing jobs to determine the ‘inherent requirements of a job’. In South Africa, the *Whitehead Woolworths*, as decided from the Labour Court, the employer failed to justify that in discriminating a pregnant woman was justifiable in terms of inherent requirement of a job the case went further on appeal because it is believed that the LC followed a narrow interpretation. The employer successfully raised that it is the inherent requirement of a job that there must be continuation and availability of an employee to do the work

⁸⁵ See chapter four of this paper(recommendations and conclusion) on challenges the implementation of Employment Equity Act is facing at the workplace

for a period of at least twelve months. It must be proved that getting a job done within a prescribed period could well be an inherent job requirement, but, to succeed on this ground, a party relying thereon must satisfy the court that time was of the essence.

What is crucial when one speaks of the inherent job requirement is that the requirement must be so inherent that if not met an applicant will simply not qualify for the post. In a nut-shell simply means that the concept implies the indispensable attribute must be job related. The concept is more used in South African workplace by most of the employers in justifying their decision to discriminate based on various reasons. Therefore is upon our courts to apply a strict interpretation of the concept so that it should be allowed in very limited circumstances, it also bears repeating that any legislatively formulated justification of discrimination constitutes a limitation on the constitutionally entrenched right to equality. This of course militates against an expansive reading of the phrase ‘an inherent requirement of a job’ as indicated in the case of *Professional Teachers & Another v Minister of Education and Others*⁸⁶ and *CWIU v Johnson & Johnson (Pty) Ltd*⁸⁷ a judge of the Labour Court remarked: “Quite frankly I have serious difficulty in thinking what job exists under the sun which can be said to inherently require a worker to be a male or female in order to perform”. Despite these remarks, it has to be said that the meaning of “an inherent requirement of a job” still has to be addressed in substances by South African courts.

An inherent requirement exists where the nature of the work requires that a person must have specific arbitrary characteristics.⁸⁸ Consequently, where an employer does not employ persons with poor vision as pilots, or paralysed job applicants as rescue workers, this discrimination against people with disabilities is not unfair. However this does not mean that persons with poor vision will be unsuitable for all type of work⁸⁹. In

⁸⁶ 1995 16 ILJ 1048 (IC)

⁸⁷ 1997 (9) BLLR 1186 (LC)

⁸⁸ In some other jurisdiction these are referred to as: “Genuine Occupation requirement /qualifications”

⁸⁹ This requirement must be related to the specific type of work and a general exclusion of a particular group from all posts will not be justifiable.

*Whitehead v Woolworths*⁹⁰ the employer contended that discrimination against a pregnant woman was justified because it was an inherent requirement of the particular job. Any distinction based on the inherent requirement of a job will not be regarded as discrimination. Generally speaking fair discrimination requires that the criteria used to differentiate must be relevant to the business objectives of the organization and must be effective in achieving these. A good example of the constitutional court approach to unfair discrimination under the equality provision in the constitution is provided by in *Hoffman v S.A Airways*⁹¹. In this case, Hoffman applied to South African Airways (SAA) for employment as a cabin attendant. He went through the different stages for selection and, along with eleven other applicants, was found to be a suitable candidate. This decision, however, had to be followed by a pre- employment medical examination, which included a blood test for HIV/AIDs. The blood test showed that Hoffman was HIV- positive and, consequently, the decision was taken not to employ him. Hoffman challenged this decision in the High court, where the court found infavour to SAA in accepting the following:

- Its flight crew had to be fit for world –wide duty;
- The flight crew had to be inoculated against yellow fever, but people who are HIV-positive can react negatively to this and are not permitted to be inoculated.
- This meant that Hoffman could contract yellow fever and pass it on to passengers;
- HIV-positive members of the flight crew could contract opportunistic diseases and would not be able to perform the emergency and safety procedures required of Cabin attendants;
- Other airlines had a similar policy and rejection of the policy would affect SAA’s competitiveness; and

The public perception of SAA would be undermined if the employment practices of SAA did not promote the health and safety of passenger.

There were experts witnesses to testify the degree of his disease whether it was so dangerous as proclaimed by SAA. Based on the experts evidence it was apparent that SAA acted unfairly in deciding not to employ Hoffman; but the last determination was

⁹⁰ 1999 20 ILJ 2133

⁹¹ 2002 21 ILJ 2357 (CC)

resting with the constitutional court to decide whether Hoffman's constitutional rights were infringed. In considering whether Hoffman's constitutional rights had been infringed, the court accepted HIV-status as an unlisted ground of discrimination for purpose of section 9⁹² and listed in section 6 (1) of the EEA and had the following to say about the question whether the discrimination was unfair:

“ The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim. The appellant is living with HIV. People who are living with HIV constitute a minority; society has responded to their plight with intense prejudice. They have been stigmatized and marginalized. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in return has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society.⁹³ Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudice and stereotypes against HIV positive people still persist.

In view of the prevailing prejudice against HIV positive people, any discrimination against them can be interpreted as a fresh instance of stigmatization and considered to be an assault on their dignity. The impact of discrimination on HIV-positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living as result of some of the inherent requirement of a job which is not justifiable in accordance with the meaning of the principle, it is for this

⁹² RSA constitution Act 108 of 1996

⁹³ Hoffman's judgment at 2370-1

reason we should look the right interpretation of this principle and give a special protection to the above mentioned group of people.

After the court has followed a correct interpretation of the meaning of the principle of inherent requirement of a job and notwithstanding the importance of an employers legitimate commercial interests and the safety of passengers; the court arrived at a decision that the discrimination was unfair. It was held that, that kind of discrimination was detrimental to Hoffman's dignity and the facts provided no basis for excluding all HIV- positive persons from employment⁹⁴. The context of and circumstances in which an employer will have to consider in making a fair and justifiable ground to apply the principle of inherent requirement of a job in making appointment are dealt in length by O.C Dupper and his learned colleague on Essential Employment Discrimination law hand book⁹⁵. The Employment Equity Act provision follows the wording of the International Labour Organisation's Discrimination Employment and Occupation Convention No III of 1958⁹⁶. It was also held that in order to prevent practices grounded in racial, sexual or other stereotypes to undermine the statutory provision of discrimination, courts and tribunals stress the fact the inherent job requirement defence ought to be construed narrowly.⁹⁷

The EEA does not restrict the application of the ground of discrimination or in relation to any particular employment practice. It is therefore at least theoretically possible to raise this defence in relation to any one or a combination of the prohibited grounds of discrimination mentioned in section 6 of the Act, and in respect of any particular

⁹⁴ Section 9 (3) of the RSA constitution of 1996

⁹⁵ Chapter 4 page 70 first paragraph" what is illustrated in the case of Hoffman is that the purpose of the discrimination may in certain circumstances outweigh the interests of the complainant. This simply mean that fairness in the context of discrimination cannot be reduced to a fixed set of predetermined rules

⁹⁶ Naidu " the inherent requirement of a job defence-lessons from abroad" (1988) South African mercantile Law Journal 173;Haskin The " inherent requirement of the particular job" as a ground for discrimination in employment ;LLM dissertation UNISA 1997 (2)

⁹⁷ Thomas on 265-266 and also Tooney on 45.

employment policy or practice.⁹⁸ As a practical matter, however, the actual applicability of the defence will depend on the interplay between the specific ground and the practice in question. It is therefore reasonable to assume, for instance, that age may sometimes be an inherent job requirement necessitating termination of employment but gender or race probably never or in the most unusual circumstance only.⁹⁹ Although the Employment Equity Act thus allows a more flexible and principled approach in the application of the defence, it is submitted that in practice its operation will not differ much from the situation in countries that have incorporated explicit limits on its use.

The following cases also give us a clear understanding of what is inherent requirement of a job:

- (i) ***Dlamini & others v Green Four Security***¹⁰⁰, the case defines what inherent requirement of a job means: it describes it as follows: “existing in something, as a permanent attribute or quality; forming an element, especially an essential element, something, intrinsic, essential” and as an “indispensable attribute” which “must relate in an inescapable way to the performing of the job”
- (ii) ***Woolworths (pty) Ltd v Whitehead***¹⁰¹, this is a controversial decision of LAC as already discussed above. This case was dealing with the dismissal of a pregnant employee, the reason being the unavailability of the employee, which would lead to a discontinuity of employment, as an inherent requirement of a job. In this case the LAC held that continuity of employment was found to be an inherent requirement of a job.

The decision taught us a lesson that ground to justify unfair discrimination has to be well monitored because we don't have to rely on the precedent always; some of the court decisions are wrongly decided. Therefore the Department of Labour through its Director-

⁹⁸ *South African Airways v SA Railways and Harbors workers union (1997) (6) ARB 6.12*, for a case where the withholding of a benefit, namely a facilitation allowance, was justified in terms of the inherent requirement of a job defence.

⁹⁹ *Rand Proprietary Mines Ltd v UPUSA (1997) 1 BLLR 10 (LAC)*

¹⁰⁰ 2006 JOL 17853 (LC)

¹⁰¹ See note 18

General, Labour Inspectors and Commission for Employment Equity has to actively act in protecting those employees whom their rights have been infringed.

(iii) ***Hoffman v SAA***¹⁰², as indicated above, being HIV/AIDS negative is not an Inherent requirement of a job of cabin attendant in the national airline.

(iv) ***Independent Municipal & Allied Workers Union v City of Cape Town***¹⁰³

The court held that not dependent on insulin is not an inherent requirement of a job for a fire fighter in a municipality.

¹⁰³ 2005 26 ILJ 1404 (LC)

CHAPTER FOUR

4. USA PERSPECTIVE ON THE PRINCIPLE OF INHERENT REQUIREMENTS OF THE JOB AS A DEFENCE TO UNFAIR DISCRIMINATION

4.1 COMPERATIVE BACKGROUND

The provisions of both EEA and LRA follow the wording of the International Labour Organisations Discrimination (Employment and Occupation) Convention No 111 of 1958. The European Community's Equal Treatment Directive¹⁰⁴ state that: "This directive shall be without prejudice to the right of the member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the content in which they are carried out, the sex of the worker constitutes a determining factor."

Title VII of the American Civil Rights Act 1964 declares that it shall not be an unlawful practice for an employer to hire and employ employees on the basis of religion, sex; or national origin in those certain instances where religion, sex or national origin is a "bona fide occupational qualification" reasonably necessary to the normal operation of that particular business or enterprise. The section does not make provision for race or colour to qualify as an occupational requirement, but racial classification have been justified by a judicially applied "business necessity" defense similar to the "bona fide occupational qualification".¹⁰⁵The Age Discrimination in Employment Act 1967 has similar defenses.¹⁰⁶ The Americans with Disability Act 1990 provides that it may be a defense to a charge of discrimination that an alleged application of qualification standards, tests or selection criteria that screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and

¹⁰⁴ Directive 76 /207(1976)OLJ 39/40,art 2 (2)

¹⁰⁵ See *Miller v Texas State Board of Barber Examiners* 615 f2d 650 and also *Parson v Kaiser Aluminum and Chemical corp.* 727 f2d 473 (5th cir 1984)

¹⁰⁶ Pub L90- 202;29 USC 623 (f) provides that it shall not be unlawful for an employer, employment agency or labour organisation to take any action otherwise prohibited under the Act where age is a (BFOQ) reasonably necessary to the normal operation of the particular business.

such performance cannot be accomplished by reasonable accommodation. This is different with South African Employment Law approach on people living with disability and inherent requirement of a job, in relation with people living with disabilities the principle was adopted by our courts in *CWIU v Jonson & Jonson*¹⁰⁷ the court also indicated that the principle of inherent requirement of a job in South Africa has to be addressed in substance to avoid the abuse of the concept.

Despite these remarks, it has to be said that the meaning of “an inherent requirement of a job” still has to be addressed in substances by South African courts. As mentioned earlier, our courts could, in this process, learn a lot from foreign jurisdictions, notably the US and the UK. Any distinction based on the inherent requirement of a job will not be regarded as discrimination. Generally speaking fair discrimination requires that the criteria used to differentiate must be relevant to the business objectives of the organisation and must be effective in achieving these.

4.2 AN INHERENT REQUIREMENTS OF THE JOB AND ITS DEFENCES TO UNFAIR DISCRIMINATION.

4.2.1 CAN RACE AND COLOUR BE AN INHERENT REQUIREMENTS OF THE JOB, USA AND RSA PERSPECTIVE

The USA legislations on race and color more in particular the express wording of section 703(e)¹⁰⁸; can never be an inherent requirement. This is in contrast to the position in South Africa, where on face of it, neither the EEA nor the LRA limits the use of the defense of ‘an inherent requirement of a job’ to certain specific discrimination grounds. It is important to note, however, that the particular ground of discrimination involved (race, sex, disability, age and many more) would profoundly influence the latitude afforded employers in using the defense. It must be noted that the more grounds to justify unfair discrimination, is the more we give the employers chance to create unnecessary reasons

¹⁰⁷ 1997 (9) BLLR 1186 (LC)

¹⁰⁸ Title vii of the Civil Rights Act of 1964 (USA)

to justify their discrimination under the use of the principle of inherent requirement of a job of a particular business. In other hand it must be understood that to redress the injustices of the past, we have to give protection to the rights of people living with disability and members of the designated groups.¹⁰⁹In USA race and color can't be a 'Bona fide Occupational Qualification.

4.2.2 ABILITY TO DO THE JOB, DISCRIMINATION ON THE BASIS OF DISABILITY AND HIV/AIDS STATUS.

The courts in the USA have held that the term "Bona fide Occupational Qualification"¹¹⁰only apply to qualifications that affect an employee's ability to do a particular job and relates to essential job duties. In South Africa EEA is the only labour legislation which expressly prohibits unfair discrimination based on HIV status. Other grounds prohibited under the EEA are the same as those under section 9 of the constitution¹¹¹. In one of the decided cases in USA, *Daiz v Pan American World Airways INC*,¹¹² the court rejected the employer's argument that "it could only employ women as flight attendants on the ground that this served the legitimate business objectives of 'providing reassurance to anxious passengers, giving courteous personalised service and, in general, making flights as pleasurable as possible'.¹¹³For comparison you can also see the case of *Whitehead v Woolworths*¹¹⁴, concerning a pregnant woman who argued that she has been unfairly discriminated against based on her been pregnant, when the employer raised continually availability to do the work as an inherent requirement of a job.

¹⁰⁹ Black, Colored, and Indians.

¹¹⁰ Similar to "inherent requirement of a job in RSA.

¹¹¹ See note 25 above

¹¹² 442 F2d 385 (1971)

¹¹³ 'Discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively' (at 388) of the said decision by USA court. it is further noted that although important, is the ability of female to perform the non-mechanical functions of a job more effectively than most men was 'tangential to the essence of the business involved', which was the safe transportation of passengers.

¹¹⁴ See above footnote 14 and 15

The discrimination based on HIV status is also one of the crucial aspects of employment law in South African labour laws. Firstly I would like to acknowledge the analysis of one of my learned friend, Abel Jeru Mbilinyi in his work on the challenges faced by people living with HIV/AIDS at the workplace.¹¹⁵ His argument was also embraced by the court in the case of *Hoffman*.¹¹⁶

4.2.3 OTHER GROUNDS THAT MAY LEAD TO INHERENT REQUIREMENTS OF THE JOB

(i) SAFETY CONCERNS MAY GIVE RISE TO A BFOQ

It is provided that safety concerns are indispensable to a particular business, may form the basis of a Bona fide Occupational Qualification defence against charges of discrimination. In one decided cases in USA the issue of safety concerns leading to BFOQ, was dealt with. In casu of *UWA v Johnson Controls*¹¹⁷, the employer¹¹⁸ excluded pregnant women or women capable of having children from jobs that exposed them to lead. This exclusion based as on safety considerations and was found not to constitute a BFOQ. It was held that the “foetus” is neither the customer nor the third party and it can’t be a fair discrimination. The court held further that the safety exception is primarily concerned with the safety of third parties example was given to (airline passengers, bus passengers or inmates of a prison), but not with the safety of the excluded employee him or herself. By so doing the US court held that the matter of safety of employee is not the concern of the employer but the employee him or herself to decide.

¹¹⁵ Chapter two of his work, he clearly indicated that” it is generally difficult to see types of employment that would specifically require employee to be HIV negative. People living with HIV infection during the first two phases normally show no signs of illness and can perform their jobs without any problem. It is therefore not reasonable and unfair to exclude such persons from employment solely on the basis of their HIV status. In the same manner it may be difficult to see what types of jobs would be given to HIV negative persons as affirmative action measures. However, in the last phase of AIDS, employees with HIV may fail to meet specific requirement of a job due to opportunistic diseases which affect their capacity to work. In such cases they should be treated as any other employee who is incapable of performing his work due to illness or other in capabilities.

¹¹⁶ See above chapter two footnote 17

¹¹⁷ 499 US 187 (1991)

¹¹⁸ A manufacture of batteries

In South Africa the position is different, more in particular with the protection of pregnant women, the Basic Condition of Employment Act.¹¹⁹ According to the provision of this Act, “no employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to health or the health of the child”,¹²⁰ the provision of this Act must be read inline with the provision of Occupational Health & Safety Act¹²¹ with regard to safety of employee at the workplace. Our legislation is not clear on whether safety concerns may give rise to inherent requirement of a job.¹²²

(ii) THIRD-PARTY PREFERENCES

Courts have consistently held that preferences of third parties, such as customers or co-workers, for workers of a particular gender, race, religion, etc, do not necessarily satisfy the test for inherent requirement of a job.¹²³ Such preferences may be unrelated to inherent job functions or reflect unacceptable forms of prejudice or stereotyped assumptions. One of the known examples of the former instance is the case of *Daiz v Pan American World Airways Inc*¹²⁴. The airline justified its policy of appointing only women as in-flight cabin attendants because of the belief that they are better suited than men at “providing reassurance to anxious passengers, giving courteous personalised service and, in general, making flights as pleasurable as possible within the limitations imposed by aircraft operations”. The court found in favour of the excluded male complainant, because ministering to the psychological needs of passengers was tangential to the airline’s primary function of safety transporting passengers.

¹¹⁹ Act 75 of 1997

¹²⁰ Section 26 of Act 75 of 1997

¹²¹ Act 85 of 1998

¹²² See *IMATU v City of Cape Town (2005) 14 LC 6.12.2*

¹²³ Equal Employment Opportunity Commission re 29 CFR 1604.2(a)(1)(iii), stating that the commission will find that the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers, except where it is necessary for the purpose of authenticity or genuineness, does not warrant the application to the Bona Fide Occupational Qualification exception.

¹²⁴ See note 43

LRA requires an evaluation that is multi-dimensional.¹²⁵ An evaluation of fairness, within the context of the LRA, requires that, at the very least, the situation is looked at from both the employer and the employee's perspective. Policy consideration plays a role in dealing with matters relating to unfair discrimination. In *Woolworth* case the court held that "there may be features in the nature of the issue which call for restraint by a court in coming to a conclusion that a particular act of discrimination is unfair".

Our people deserve better and they must not be taken for granted by the employer, especially at the farms. Labour laws are designed to help employees who suffer injustices from their employer who exploit them for their own gains. In dealing with the protection of the rights of workers I have also learned from other countries in USA on how best to deal with unfair discrimination at the workplace.

4.3 USA PERSPECTIVE ON MONITORING AND EVALUATION OF UNFAIR DISCRIMINATION PRACTICES AT THE WORKPLACE

The following commissions play a very crucial role in dealing away with unfair discrimination in USA:

- (a) the productivity commission
- (b) Anti-Discrimination commission Queensland
- (c) Human Rights and Equal Opportunity Commissions and other commissions adhering to the ILO policies on abolishing unfair discrimination at the workplace.

It was also indicated by the University of Idaho on its Affirmative action program.¹²⁶ In their program the University of Idaho indicated that it is "committed to equal opportunity for all persons in employment and in all educational services of the institution."

The UI¹²⁷ has also established the following Affirmative action program to preclude any form of discrimination on the basis of sex, race, color, national, origin, age, disability, or

¹²⁵ See the following cases: *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and others* 1996 (4) SA 577 (A) at 593G-H; *Dube and others v Nasionale Sweisware (pty) Ltd* 1998 (3) SA 956.

¹²⁶ University of Idaho Affirmative Action program July 1, 2005 – June 30, 2006.

¹²⁷ University of Idaho

status as a Vietnam era Veteran. The UI also went further to illustrate the contents of the program this include:

- (a) Statement of intent on Equal opportunity
- (b) Statement of policy on Equal Employment, and Educational opportunity, Affirmative Action and inherent requirement of a job
- (c) Principle of Equal Employment Opportunity and Affirmative Action.
- (d) Non- Dilution of standards
- (e) Statement of Responsibility.

The following Acts were also acknowledged by UI in dealing away with unfair discrimination at the workplace:

- (a) Civil Rights Act of 1964;¹²⁸
- (b) Educational Amendments Act of 1972;¹²⁹
- (c) Rehabilitation Act of 1973;¹³⁰
- (d) Readjustment Assistance Act of 1974;¹³¹
- (e) The Pregnancy Act of 1975;
- (f) Age Discrimination Act of 1975;
- (g) Age Discrimination in Employment Act Amendments of 1978;
- (h) The American with Disabilities Act of 1990;
- (i) The Civil Rights Act of 1991.
- (j) The Equal Employment Opportunity Act of 1972

The UI also indicated that it is also its policy to “refrain from employment discrimination as required by the various federal and state enactments but to take positive Affirmative action to realize full equal employment opportunity for women, ethnic groups, persons with disabilities, and Vietnam-era Veterans and increase substantially the number of women and ethnic-group members in positions were traditionally they have not been employed”.

¹²⁸ Title vi and VII

¹²⁹ Title IX

¹³⁰ Section 503 and 504 of the Act

¹³¹ The Vietnam Era Veteran’s

It is more interesting to see the manner in which UI dealt with the principle of inherent requirement of a job. On its non- dilution of standards they indicated that “nothing in this policy requires the employer to eliminate or dilute standards that are necessary to the successful performance of its business or essential services of the company in this case of UI it will be Educational and research functions. The Affirmative Action concept does not require that the employer (UI) employ or promote any person who is less qualified than another person with whom he or she is competing for a particular position or promotion”. This is a clear indication that affirmative action can’t be implemented in a manner that will undermine the principle of inherent requirement of a job.

They went further to say the concept¹³² does require, however, that any standards or criteria that have had the effect of excluding women, minorities, or persons with disabilities be eliminated, unless the employer can demonstrate that such criteria are conditions of successful performance in the particular position involved.¹³³

¹³² Affirmative Action

¹³³ Inherent requirement of a job

CHAPTER FIVE

5. CONCLUSIONS AND RECOMMENDATIONS

As discussed in chapter two, three and four, the principle of inherent requirement of a job is under a serious threat from many employers more in particular public sector. Employers are using the principle to achieve their own agendas, when looking to section 6 (2) of the Employment Equity Act , inherent requirement of a job is one of the ground the employer can use justifying his/her decision to appoint or not to appoint a particular employee, the said Act went further to say even Affirmative Action can be used by the employer in justifying his/her decision to discriminate that employee.¹³⁴

The EEA has expressly given employers two defences against allegations of unfair discrimination. However, the question has been posed whether the Act does not insinuate a further defence, one based on principles of general fairness. In other words, affirmative action and an inherent requirement of a job are not exhaustive instances of fair discrimination: a residual general fairness defence is available to an employer where the circumstances will not support any of the listed defences. It therefore necessary for us to have mechanisms in place on how best can we monitor this wide power given to employer in making their appointment and promotions at the workplace.

In *South African Estates and Finance Corporation Ltd v Commissioner for Inland Revenue*¹³⁵, it was held that the following factors had to be looked in determining whether the discrimination is fair or unfair:

- (a) the impact of the discrimination on the complainant;
- (b) the position of the complainant in society;
- (c) the nature and extent of the discrimination;

¹³⁴ See chapter four on the definition of employee for this paper

¹³⁵ 1927 AD 230 at 236

- (d) whether the discrimination has a legitimate purpose and to what extent it achieves that purposes;
- (e) whether there are less disadvantageous means to achieve the purpose;
- (f) Whether and to what extent the respondent has taken reasonable steps to address the disadvantage caused by the discrimination, or to accommodate diversity.

Without accepting this as an exhaustive list, I think that it must be a matter of must that each and every employer have to take into consideration when dealing with appointment that requires the principle of inherent requirement of a job, and the requirement must be necessary and essential to the job.

Both the Constitution and Employment Equity Act qualify discrimination by the word “unfair” in order to distinguish between the pejorative and benign meanings of the word. This qualification makes it clear that it is not differentiation as such that is prohibited, but invidious differentiation. It is, therefore, not that it is not discrimination per se that should be eradicated, but unfair discrimination. Inherent requirement of a job and affirmative action yes do not constitute unfair discrimination but if abused to serve wrong purpose they can be regarded unfair.¹³⁶

In the USA the requirement of a high school diploma to qualify for employment at a particular company was held to be unfair as only 12% of blacks qualified compared to 34% of whites and the employer was unable to prove any justification for the required standard. This tells us that, as employers you can't just woke up and start putting requirement which is not necessary and essential to the work in question. However, where an employer can justify a link between qualifications and the job, it would not be unfair to prescribe certain qualifications.¹³⁷

¹³⁶ See Hoffman's case

¹³⁷ In *Lagadien v University of Cape Town*, the respondent was able to prove that the tertiary qualifications required by it were reasonably linked to the performance of the work attached to a particular position. The Labour Court accordingly held that the discrimination was fair.

In other countries like Canada, the BFOR¹³⁸ is a limitation that is imposed honestly, in good faith, and in the sincere belief that it is in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons. Furthermore, it must be objectively related to the performance of the job in that it is reasonably necessary to assume its efficient and economical performance without endangering the employee, his fellow workers and the general public.¹³⁹ It was also held that if a requirement code conflict with human rights law, the latter prevails thus a policy in Canada. This will be a benchmark to many countries who are members to ILO and UN. In *Dlamini*'s case the following "obiter dictum" were made that "inherent requirement of a job is not justified if it restricts a practice of religious beliefs that does not affect an employee's ability to perform his duties, nor jeopardize the safety of the public or other employees, nor cause undue hardship to the employer in a practical or economic sense. Notwithstanding the fact that this principle could attract different results, and important to note that there are limitation to in using this principle either by an employer or by the employee.

In South Africa you find a situation were by the inherent requirement of a job is overlooked in preference of affirmative action in a wrong way. This lead too many cases in our courts, challenging the appointment made based on affirmative action, reason being that the majority of employers are using it as a defence to justify their unfair discrimination. These also lead to compromising of efficiency which goes together with the principle of inherent requirement of a job, more in particular at the public sector. In terms of EEA both affirmative action and inherent requirement of a job were suppose to

¹³⁸ Bona fide occupational requirement in Canada Simillar with Inherent requirement of a job.

¹³⁹ *Canadian Supreme court in Ontario Human Rights Comm. v Etobicoke (1982) 3 CHRR D/781 (SCC) at 783).*

redress the injustices of the past in a proper manner, but to our surprise this two principles are turned to be very dangerous to the employees today.

A growing number of countries have moved away from a legal approach exclusively based on the imposition of a negative duty not to discriminate to a broader one encompassing a positive duty to prevent discrimination and promote equality. While an anti-discrimination model based on prohibiting discriminatory practices has proven successful in eliminating the most blatant forms of discrimination, such as direct pay discrimination, inherent requirement of a job and affirmative action it has encountered less success with the more subtle forms, such as occupational segregation. Moreover, its effectiveness in eliminating discrimination is heavily dependent on litigation and this prevents it from reaching those workers who are the most disadvantaged and vulnerable to discrimination. These workers tend not to make use of the law to have redress because of ignorance or fear of retaliation. It is accepted that an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms, but this must not be done in the exclusion of inherent requirement of a job. . It is recommended that employers should be prevented from promoting unfair discrimination towards advancement of their interest.

- Accordingly, proper implementation of the recommendation by Commission for Employment Equity is still a challenge due to lack of necessary skills from the Department of Labour officials. In terms of EEA the Department of Labour together with the CEE has the responsibility to monitor and evaluate the manner in which employers apply their employment practices, this include compliance with Employment Equity Plan by employers. Failure to conduct a proper public participation on employment crisis may have adverse effects on the purpose of the EEA. It is further recommended that the procedure of enforcing compliance as indicated in Chapter five need to be well monitored, and an Independent

Commission dealing with monitoring, evaluation and enforcement in the DOL is proposed to assist the CEE. This will assist the DOL to implement the recommendation to be made by the latter. The Independent Commission for Monitoring, Evaluation and Enforcement at the workplace, the ICMEE shall be composed of well experienced labour lawyers, academics, business leaders, members of NGOS and two DOL representatives. The commission will specifically deal with the implementation of the two principles (inherent requirement of a job and Affirmative Action) to monitor and evaluate the manner in which employers apply them in justifying their unfair discrimination. This can be possible with the assistance of the DOL. The establishment of the proposed commission will play a very crucial role in making sure that the rights of employees are protected against unfair discrimination justified by the employers based on the said principles. These will lead to the following:

- it will lead to more informed decision-making by employers
- it will inspire employees confidence in the decision-making process since it promotes fairness in making appointments and promotions
- it will lead to more transparency in the employment sector.
- It will create a guide line to the employer on how best to apply both principles¹⁴⁰ without infringing the rights of employees.

A further recommendation is that the government more in particular the DOL must provide necessary resources for the commission to operate. If the above mentioned recommendation are not taken into consideration, we will have a situation where by employer wrongly use the said principle for their own benefit. A typical example is Mexican people, where by the EEOC has warned employers to avoid swine flu discrimination. On the 11th May 2009 the EEOC published on its website a short comment titled “*Employment Discrimination and the 2009 H1N1 Flu Virus (Swine Flu).*” The EEOC suggests that employers should refrain from national origin discrimination against Mexicans.

¹⁴⁰ Inherent requirement of a job and Affirmative action

In other words, employers should refrain from making employment decisions based merely on the fact that an individual hails from Mexico. For example, refusing to hire individuals of Mexican origin because of a belief that Mexicans may be ill with swine flu, but because of nationality factor. This clearly shows us how bad the principle of inherent requirement of a job, can be easily abused by the employers. Therefore it is important to have educational programmes on place to assist both employees and employers to adhere to the provision of EEA and the Constitution more in particular section 9.

Currently in South Africa we have a problem were by the majority of employers use both inherent requirements of a job and Affirmative action to justify their wrongful discrimination. This has led to lot of criticism and opportunistic ideas by white society and some of black society. In one of the news paper (Pretoria News, 17.July.2009) F.W.de klerk and Tutu said the following: with regards to the manner in which those principle are wrongly applied. "Affirmative action behind social decay" 'Unbalanced" affirmative action has led to poor service delivery, especially in municipalities, and was a threat to the country's future stability, former president FW de Klerk has warned. De Klerk said private companies were not always honest with the government about the private discussions in boardrooms about affirmative action.

Tutu: "Race is not useful for anything". Affirmative action is working against South Africa, Trevor Tutu told a conference on the issue in Pretoria on Wednesday. Tutu, the son of Nobel laureate Archbishop Desmond Tutu, said affirmative action made young South Africans bitter and they then left the country to work somewhere taking their skills with them. "What do you call it, when my daughter gets a scholarship to study and her white counterpart could not get the scholarship, based on colour?" He said that 15 years into democracy South Africa could have created equal opportunities for all and that people should not be judged according to mistakes committed by their forefathers. Based on the above facts there is a lot to be done in South Africa to monitor the manner in

which both these ground of discrimination are applied by the employers more in particular the public sector.

On the 30th of August 2009 in City Press there were two articles dealing with the manner in which the Employment Equity plan is ignored by most employers. The articles also indicated the manner in which both DOL and EEC failed in monitoring the application of both principles.¹⁴¹ The first article state that “State targets employment equity defaulters with new proposals.”The Chairperson of the EEC and DG designated of Labour Department, has threatened non-compliers with prosecution for four years, but the law let him down as it lacked the bite to punish offenders. It seems as if the current Chairperson and Director of DOL is optimistic and concern about lack of monitoring and evaluation of many employers who do not comply with Employment Equity Plan in applying both principles, Affirmative action and inherent requirement of a job. In his utterances indicated that “employers that continued to exclude and marginalized blacks in their management structures would be hit where it hurt most the bottom line.”

He went further to say that if new proposal get approved by parliamentary committee on Labour, it will hit the Labour market by June next year 2010. To many of us we are still surprise as to how the DG going to implement what he is preaching, since he is the chairperson of EEC and GD for DOL. In terms of Employment Equity Act the EEC has to report to the DG of DOL, how possible that the DG can report to himself. These are some of the things that make the EEC to be dysfunctional; therefore the ICMEE at the workplace is needed.

The second article indicated that “Affirmative action is still just for most firms” it went further to that “according to the latest employment equity report released this week, white people have benefited handsomely from affirmative action.” These clearly indicate how

¹⁴¹ See note 131 and 132

toothless our government regulations and the inefficiency of the DOL, despite the noise he makes and enjoys each time this report is released but nothing has been done.

It is recommended that the manner in which Business ignored the application of the principle of affirmative action and the abuse of the principle of inherent requirements of a job, will lead to unfair discrimination. For the past 10 years of preaching the gospel, according to Minister of DOL we sit with 60% of all new appointments and promotions still going to white people; even where the notion of a lack of skills among black people has been proven to be false, because many of the employers turned to use principle of inherent requirement of a job to unfairly discriminate on the basis of colour.

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