
CHAPTER TWO

A HISTORICAL BASIS FOR AFFIRMATIVE ACTION IN SOUTH AFRICA

2.1 Introduction

To understand a country's present situation there is a need to look at that country's past, since much of what has happened in the past forms the basis for action taken in the present. SA was a country that was ruled under a political system called apartheid. Apartheid was based on the policy of the segregation of races through legislation. Racial discrimination was one of the defining features of apartheid in South Africa and had been entrenched in a range of statutory provisions for many decades. This is important as successive governments of SA used legislation to inhibit the economic advancement of blacks. This chapter will look at how blacks access to jobs and to economic resources was severely restricted through these laws and regulations.

This chapter will further explore the history of legislation that condoned discrimination of persons in apartheid-SA. It will provide a background to the reasons for anti-discrimination legislation in SA and why voluntary actions alone will not suffice to eliminate discrimination. The reason for doing so is to show that discrimination and segregationist policies were mandated by government and therefore it is vital that the post-apartheid government of SA become actively involved in eliminating discrimination. It will be shown that the many years of apartheid marginalised blacks not only from political power but from economic participation as well and reliance on labour-market voluntarism to bridge this gap will not suffice.

While cases of racial discrimination occur in other parts of the world, it was the systematic, official and legal character of apartheid which made SA unique. It will be shown how black South Africans were restricted in their access to jobs and to economic resources. Apartheid sought to regulate human relations along racial lines. This has adversely affected all spheres of political, economic, social and cultural life in SA. It is this history that continues to militate against blacks at the workplace and other spheres of life.¹

¹ Section 1 of the Constitution of the Republic of South Africa, 1996 Act 108 of 1996 (The South African Constitution).

2.2 South Africa — An Overview

SA is emerging from a period in which the lack of freedom, human dignity, discrimination and inequalities were the antithesis of a democratic country.² The apartheid social and legal system has had a devastating effect on the social, economic, political and cultural life of black³ South Africans.⁴ Apartheid is an Afrikaans word and meaning ‘separation’ or ‘aparthood’. In English it has become known as a deliberate system of racial discrimination exercised by a privileged white minority group against the black majority, such as existed in the Republic of South Africa between 1948 and 1990.⁵ Apartheid was reinforced when successive governments of SA used legislation to inhibit the economic, social and political advancement of blacks.⁶ Black South Africans were therefore restricted in their access to jobs and to economic resources.

SA’s past has been described as that of “a deeply divided society characterised by strife, conflict, untold suffering and injustice” and which “generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge”.⁷ Keeping in mind that from the outset apartheid SA attempted to maintain a colonial heritage of racial discrimination a discussion of how such heritage was inherited follows.⁸

² Goldstone R In the Shadow of a Time Bomb The Sunday Times (1995, March, 15) at 25.

³ It is important to note that the term “black people” in South Africa is a generic term used to describe Africans, Coloureds and Indians. See The Employment Equity Act 55 of 1998 (EEA) section 1 of Chapter 1.

⁴ Thompson and Benjamin South African Labour Law (2002) Part CCI 1.

⁵ *Brink v Kitshoff* (1996) 4 SALJ 197 (CC) para 40.

⁶ Through for example, better education, health facilities, housing etc. and the passing of the Group Areas Act of 1950 and the Bantu Education Act of 1953. Further, the states allocations of budgets promoted the development of whites at the expense of blacks.

⁷ Preamble to the Constitution of the Republic of South Africa Act 200 of 1993 (The Interim Constitution).

⁸ *In re: Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC).

2.3 Historical Background

The discovery of diamonds and gold deposits in SA resulted in an invasion by the English and from the seventeenth century onwards SA was completely colonised by the Dutch and English.⁹ The British government, attracted by the prospect of mineral wealth, annexed the diamond fields. These mineral discoveries had a radical impact on every sphere of society. Importantly, labour was required on a massive scale.¹⁰

Four mines were developed, and the town of Kimberley was established. This town became the largest urban society in the interior of Southern Africa in the 1870's and the 1880's. In response to the expansion of internal markets, Africans participated actively in the new industrial economy.¹¹ African farmers in British Basutoland¹², the Cape and Natal also greatly expanded their production of foodstuffs to meet rising demand throughout Southern Africa. Out of this development a relatively prosperous peasantry emerged. They supplied the new towns of the interior as well as the coastal ports. The growth of Kimberley and other towns also provided new economic opportunities for coloureds, many of whom were skilled tradesmen, and for Indians, who, once they had completed their contracts on the sugar plantations, established shops selling goods to African customers.¹³

For the white authorities, however, the chief consideration was ensuring a labour supply and undermining black competition on the land.¹⁴ Mine-owners sought to undercut the bargaining strength of the Africans on whom they depended for labour.¹⁵ In 1872 the British colonial administration was persuaded by Kimberley's white claims-holders to introduce a pass law. This law which was the foundation of the twentieth-century South African pass

⁹ Thompson L A History of South Africa 3 ed (2001) at 12 (Thompson 3ed).

¹⁰ Theal G M History of South Africa — The Republics and Natives Territories from 1854 to 1872 (1889) (Theal 1889).

¹¹ Coleman M (ed) A Crime Against Humanity — Analysing the Repression of the Apartheid State (1998) (Coleman).

¹² The British protectorate established in Lesotho.

¹³ Fage J D and Oliver R (ed) The Cambridge History of Africa (1975) V(1).

¹⁴ Houghton B H History of South Africa and the Boer-British War — Blood and Gold In Africa (1900).

¹⁵ Wilson F Labour in the South African Gold Mines — 1911-1969 (1972).

laws, required all “servants” to be in possession of passes that stated whether the holders were legally entitled to work in the city; whether or not they had completed their contractual obligations; and whether they could leave the city. The aim of this law was to limit the mobility of migrant workers, who frequently changed employers or left the diamond fields in a constant (and usually successful) attempt to bargain for higher wages. Other restrictive laws were passed following the promulgation of this pass law.¹⁶

The European settlers therefore, dominated the indigenous population through political control and the control of land and wealth.¹⁷ By the end of the nineteenth century, SA had been completely colonised by the British. When the Europeans, led by the Dutch colonists, arrived in SA, they drove many of the native Africans from their home thereby creating a divided SA. This division was among racial lines and SA then became divided between the Dutch colonists, known as the Afrikaners, and the natives. They introduced racially discriminatory legislation to force Khoi-khoi and other so-called “free” blacks to work for as little as possible.

Further, the Hottentot Code of 1809 required that all Khoi-khoi and other free blacks carry passes stating where they lived and who their employers were.¹⁸ Persons without such passes could be forced into employment by white masters. In 1886 the “closed compounds”, which were fenced and guarded institutions in which all black diamond mine workers had to live in for the duration of their labour contracts, was formed.¹⁹ These close compounds were replicated at the gold mines.²⁰ The preservation of communal areas²¹ had the effect of

¹⁶ These included the establishment of special courts to process pass law offenders as rapidly as possible (the basis of segregated courts in the twentieth century), the laying out of special ‘locations’ or ghettos in Kimberley where urban blacks had to live (the basis of municipal segregation practices).

¹⁷ Wilson M and Thompson L (ed) *History of South Africa to 1870* (1982) (Wilson and Thompson).

¹⁸ The British government, acting largely at the behest of the missionaries and their supporters in Britain in the 1820s, abolished the Hottentot Code. Specifically, Ordinance 50 of 1828 stated that “no Khoi-Khoi or free black had to carry a pass or could be forced to enter a labour contract”.

¹⁹ The close compounds were first developed on the diamond fields as a means of migrant labour control.

²⁰ The South African Yearbook History — Humankind at its earliest origins in Africa 2000/01, The Early Inhabitants (2001) GCIS (The South African Yearbook).

lowering wages by denying Africans rights within the urban areas and keeping their families and dependents on subsistence plots in the reserves.²² Africans could be denied basic rights if the fiction could be maintained that they did not belong in ‘white SA’ but to ‘tribal societies’ from which they came to service the ‘white man’s needs’.²³ This set of assumptions and policies represented the origins of a segregationist ideology, and later apartheid.

The institutionalisation of such discriminatory practices marked a major turnabout in the British administration of law. The previous official policy that all people irrespective of colour be treated equally, while still accepted in legal theory, was now largely ignored in judicial practice. SA’s first industrial city thus developed into a community in which discrimination became entrenched in the economic and social order, not because of racial antipathies formed on the frontier, but because of the desire for cheap labour.²⁴

A power struggle now existed between the Boers and the British. Due to these tensions between the Europeans and the Boers, the Anglo-Boer War resulted.

(2.3.1) The Anglo-Boer War 1899 — 1902

During the time of the Boer War many black farmers were in a position to meet the demand for produce, or to avail themselves of employment opportunities at good wages. They therefore benefited from the War²⁵ but these benefits were not to last for very long. The signing of the Treaty of Vereeniging, that ended the Boer War, left the issue of rights for Africans, to be decided by a future self-governing (white) authority.²⁶ After the signing of

²¹ Coloured Persons Communal Reserves Act 3 of 1961.

²² Hamilton C *Terrific Majesty — The Powers of Shaka Zulu and the Limits of Historical Intervention* (1998).

²³ Coleman *op cit* 11 at 25.

²⁴ The South African Yearbook *op cit* 20.

²⁵ Welsh F *History of South Africa* (1998) at 9 (Welsh).

²⁶ Thompson L A *History of South Africa* (1995) at 15 (Thompson).
If there was a moment when future official treatment of Black Africans was relatively uncertain, it was immediately after the Boer War. Although the British colonials had discriminated against blacks, they did promise them enfranchisement and other reforms if they won the war and gained control of all of South Africa. Based on these promises the blacks supported the British in the war against the Afrikaners but promises made were never realised.

the Treaty the priority to the succeeding government was to re-establish white control over the land and force the Africans back to wage labour.²⁷ Britain implemented a decision to give power to the Boers, from 1906-1907, by granting constitutions which gave Afrikaners political control of both the ex-Republics.

So, even though the Boers lost the Anglo-Boer war, they were granted powers so as to ensure that the British still retained considerable influence in southern Africa. This was largely at the expense of Africans, who were excluded from political power and forced to give back much of the land that was retaken from Boers during the war years.

(2.3.2) World War II²⁸

The outbreak of WW II in 1939 had a profound effect on SA both economically and socially. While gold continued to be the most important industry, providing two-thirds of SA's revenues and three-quarters of its export earnings, manufacturing grew enormously to meet wartime demands. Between 1939 and 1945, the number of people employed in manufacturing, many of them African women, rose by approximately sixty-percent. Urbanisation also increased rapidly. By 1946 there were more Africans in SA's towns and cities than there were whites. Many of these blacks lived in squatter communities established on the outskirts of major cities such as Cape Town and Johannesburg.²⁹ Such developments, although necessary for war production, contradicted the segregationist ideology that blacks should live in their rural locations and not become permanent urban residents. More unsettling still to the segregationists was the development of new black organisations that demanded official recognition of their existence and better treatment of their members.

Urban black workers, demanding higher wages and better working conditions, also formed their own trade unions and engaged in a rash of strikes throughout the early 1940's. By 1946

²⁷ As reported by the South African Government Information Services in *The Yearbook — The Anglo-Boer/ South African War (October 1899 - May 1902) and its aftermath* (2004) at <http://www.gcis.gov.za/docs/publications/yearbook/history.pdf> last visited 05/28/04. Also see Davenport T R H and Saunders C *South Africa — A Modern History* (2000) 5ed (Davenport and Saunders).

²⁸ 1931-1945.

²⁹ Bickford Smith Vivian *South African Urban History, Racial Segregation and the 'Unique' Case of Cape Town* (1995) *Journal of Southern African Studies* V(21) No. 1 at 63-78.

the Council of Non-European Trade Unions (CNETU), formed in 1941, claimed 158,000 members organised in 119 unions. The most important of these new trade unions was the African Mineworkers Union (AMWU), which by 1944 claimed a membership of 25,000. In 1946 AMWU struck for higher wages in the gold mines and succeeded in getting 60,000 men to stop work. The strike was crushed by police actions that left twelve dead, but it demonstrated the potential strength of organized black workers in challenging the cheap labour system.

Segregation and apartheid was a response to Africans' increasing participation in the country's economic life and their assertion of political rights. The principles of segregationist thinking were laid down in a 1905 report by the South African Native Affairs Commission, and evolved in response to economic, social and political pressures.³⁰ Further WWII saw two political leaders fighting for the control of the South African government.³¹ During 1907 and 1908, the former Boer Republics were granted self-government but, crucially, with a whites-only franchise.³² Negotiations held in 1908 and in 1909 produced a constitution. So in 1910,³³ the British parliament passed the Act of Union that brought British and Afrikaner colonies together under the same government.³⁴ This 1910 Constitution was based on three fundamental principles.

Firstly, SA would adopt the Westminster style of government and would become a unitary state in which political power would be won by a simple majority and in which parliament would be sovereign. Secondly, the question of voting rights for blacks would be left up to

³⁰ Readers Digest Illustrated History of South Africa (1989) at 316.

³¹ Jan Smuts, an Afrikaner and a leader of the United Party, supported the British and the Allies, but Malan and his supporters, supported the Germans. See Thompson 3ed *op cit* 9.

³² Davenport and Saunders *op cit* 27 at 25.

³³ The South African Act of Union, which was passed by the British House of Commons in 1909 and ratified by the South African Parliament on May 31, 1910, the anniversary date of the Treaty of Vereeniging signed in 1902 after the Anglo-Boer War, was based on a colour bar clause that precluded all blacks from being eligible to become Members of Parliament. See The South African Yearbook *op cit* 20.

³⁴ A National Convention drew up a constitution and the four colonies became an independent dominion called the Union of South Africa on 31 May 1910. See The South African Yearbook *op cit* 20.

each of the four self-governing colonies to decide for itself (the Cape and Natal based their franchise on a property qualification; the Orange River Colony and the Transvaal denied all blacks the vote); and thirdly, both English and Dutch would be official languages.

The Union's constitution kept all political power in the hands of whites and thus in the hands of the NP.³⁵ Initially, the aim of apartheid was to maintain a white domination while extending racial separation.³⁶ The constitution also provided for future incorporation of the British-governed territories of Southern Rhodesia, Bechuanaland (present-day Botswana), Basutoland (present-day Lesotho), and Swaziland into the union.

In 1914, Afrikaner's found themselves uncompetitive in the labour market as white workers demanded higher wages than those paid to blacks.³⁷ As mine owners tried to cut costs by using lower wage black labour in semi-skilled jobs, white labour became increasingly aggressive.³⁸ In 1924, a pact government under Barry Hertzog, comprising Afrikaner nationalists and representatives of immigrant labour, ousted the Smuts regime.³⁹ The pact was based on a common suspicion of the dominance of mining capital, and a determination to protect the interests of white labour by intensifying discrimination against blacks.⁴⁰ The commitment to white-labour policies in government employment such as the railways and postal service was intensified and the job colour bar was reinforced.⁴¹ In 1939 Malan and Hertzog shaped the Herenigde National Party (HNP).⁴²

³⁵ Thompson *op cit* 26 at 16.

³⁶ Welsh *op cit* 25 at 5.

³⁷ Houghton D H and Jennifer D Source Material on the South African Economy, 1860-1970 (1972-73) at 3.

³⁸ Davidson B South Africa and Apartheid (2000) (Davidson).

³⁹ Theal G McCall History of South Africa since September 1975 (1908) (Theal 1908).

⁴⁰ Beck B Roger The History of South Africa (2000).

⁴¹ United Nations Report of the United Nations Commission on the Racial Situation in the Union of South Africa (1952) at 139 (UN Report).

⁴² Thompson 1995 *op cit* 26 at 4.

(2.3.3) *Apartheid: 1948 — 1989*

Going into the South African election of 1948, Smuts governing United Party based their political platform on a report of the Native Laws Commission from the Fagan Commission, a committee assigned to investigate the racial divisions of SA.⁴³ The Commission argued that, due to the migration of Africans⁴⁴ to the cities and the lack of African reserves, complete segregation was impossible.⁴⁵ Although it did not recommend social or political integration, the Commission suggested that African labour should be stabilised in the cities, where the needs of industrial and commercial operations were greatest.

The HNP's platform, based on a report by Paul Sauer, argued the contrary. They believed that only total separation of the races would prevent a move toward equality and the eventual overwhelming of the white society by blacks. The HNP stated that Africans should be viewed as only temporary dwellers in the cities and should be forced periodically to return to the countryside to meet the labour needs of farmers. The HNP won the elections and was renamed The National Party (NP). Once in power, Malan and the NP began to embed apartheid in SA's legal system. They did this by providing a legal basis for preferential treatment of whites and the NP was therefore able to secure its power for future elections.

Racial segregation and the supremacy of whites were traditionally accepted in SA prior to 1948. However in the general election of 1948 Malan officially included the policy of apartheid in the Afrikaner Nationalist party platform for the first time.⁴⁶ Apartheid therefore formally began with the 1948 election. The purpose of apartheid was the separation of races:

⁴³ UNESCO Africa under Colonial Domination 1880-1935 (1985) V(VII) at 60 (UNESCO)

⁴⁴ Between 1939 and 1945 South African urbanisation grew, and by 1946 there were more black Africans than whites in the cities of South Africa. See UNESCO *op cit* 43.

⁴⁵ UNESCO *op cit* 43 at 65. The HNP argued the opposite, that only a total segregation of the races would prevent eventual movements for equality and the subversion of white society by blacks. The HNP also stated that natives should be viewed as temporary residents in the cities and should occasionally be relocated back to rural areas. The HNP's segregationist platform, known as Apartheid, was successful, and Malan defeated Smuts and the United Party.

⁴⁶ In South Africa's first post-war election of 1948, the conservative Afrikaner-dominated National Party under Dr. DF Malan defeated the ruling United Party of General JC Smuts in a surprise result and wins parliamentary elections and gains control of the South African government. The party under new Premier Dr. DF Malan, began taking steps toward implementing apartheid (apartness), the national policy of racial separation. See UNESCO *op cit* 43 at 70.

not only of whites from non-whites but also of non-whites from each other. The NP believed that a definite policy of separation between the white races and the non-white racial groups together with the application of the policy of separation, was the only basis on which the character and future of each race could be protected and safeguarded.⁴⁷

With the enactment of the apartheid laws in 1948, racial discrimination was further institutionalised. Race laws touched every aspect of social life and this included a prohibition on marriages between non-whites and whites,⁴⁸ and also the sanctioning of “white-only” jobs. In the National Party’s Colour Policy the NP reaffirmed the purity of the white race by stating that —

“.....on the other hand there is the policy of separation (*apartheid*) which has grown from the experience of established European population of the country, and which is based on the Christian principles of Justice and reasonableness. Its aim is the maintenance and protection of the European population of the country as a pure white race, the maintenance and protection of the indigenous racial groups as separate communities, with prospects of developing into self-supporting communities within their own areas, and the stimulation of national pride, self-respect, and mutual respect among the various races of the country. We can act in only, one of two directions. Either we must follow the course of equality — which must eventually mean national suicide for the white race — or we must take the course of separation (*apartheid*) through which the character and the future of every race will be protected and safeguarded with full opportunities for development and self-maintenance in their own ideas, without the interests of one clashing with the interests of the other, and without one regarding the development of the other as undermining or a threat to himself. The party therefore undertakes to protect the white race properly and effectively against any policy, doctrine or attack which might undermine or threaten its continued existence. At the same time the party rejects any policy of oppression and exploitation of the non-Europeans by the Europeans as being in conflict with the Christian basis of our national life and irreconcilable with our policy....”⁴⁹

⁴⁷ UN Report *op cit* 41 at 139-40.

⁴⁸ See for example The Prohibition of Mixed Marriages Act 55 of 1949 and The Immorality Amendment Act 21 of 1950; amended in 1957 (Act 23).

⁴⁹ The National Party’s Colour Policy Statement by the National Party of South Africa (1948, March 29).

The NP used its control of the government to fulfil Afrikaner ethnic goals as well as white racial goals. Apartheid turned into a systematic programme of social engineering.⁵⁰ In most respects, apartheid was a continuation, in a more systematic form, of the segregationist policies of previous governments. A new concern for racial purity was apparent in laws prohibiting interracial sex and in provisions requiring every South African to be assigned to one racial category or another.⁵¹ For the first time the coloured people, who had always been subject to informal discrimination, were brought within the ambit of discriminatory laws.⁵² In the mid 1950's, the government overrode an entrenched clause in the 1910 Constitution so as to be able to remove coloured voters from the common voters' roll.⁵³ It also enforced residential segregation, expropriating homes where necessary and policing forced removals into coloured "group areas".⁵⁴

Until the 1940's, SA's race policies had not been entirely out of step with those to be found in the colonial world. However by the 1950's, during the period of decolonisation and anti-racism sentiments around the globe, SA was opposed to world opinion on the questions of human rights.⁵⁵ Their policy of apartheid, which they termed "separate development",

⁵⁰ Thompson L History of South Africa New Haven (1990) (Thompson 1990).

⁵¹ The Population and Registration Act No. 30 of 1950.

⁵² Separate Representation of Voters Act No 46 of 1951. See Davenport and Saunders *op cit* 27.

⁵³ The Natives Representation Act of 1936.

⁵⁴ According to the National Party's Colour Policy of 1948 —
"The present unhealthy system which allows coloureds in the Cape to be registered on the same voters' roll as Europeans and to vote for the same candidate as Europeans will be abolished and the coloureds will be represented in the House of Assembly by three European representatives.

These Coloured representatives will be elected by a Coloured representative council. They will not vote on —

(1) Votes on confidence in the Government.

(2) A declaration of war, and

(3) A change in the political rights of non-Europeans.

The Coloured community will be represented in the Cape Provincial Council by three Europeans elected by the Coloured representative council. A Coloured representative council will be established in the Cape Province consisting of representatives elected by the Coloured community, divided into constituencies with the present franchise qualifications, the head of the Department of Coloured Affairs and representatives nominated by the Government. In their own areas the Coloured community will have their own councils with their own public services which will be managed by themselves within the framework of the existing councils with higher authority." For more information see the UN Report *op cit* 41 at 140.

⁵⁵ Coleman *op cit* 11.

divided the African population into artificial ethnic nations, each with its own “homeland” and the prospect of independence.⁵⁶

The National Party’s apartheid policy was therefore based on the idea that SA comprised of a number of nations and that each nation should be allowed to develop within its own associations and tribal affiliations and within its own homeland. Africans were to be vested with civil and political rights that were to be exercised within these homelands. In terms of this theory they would thus have no claim to any civil or political rights within the rest of ‘white SA’. The purpose of creating independent homelands was to facilitate the process of denationalisation. All persons who were remotely linked to these homelands were denied their South African citizenship and, had imposed upon them the citizenship of the independent homeland.

(2.3.4) The Consolidation of White Power

(2.3.4.1) Legal Restrictions — An Overview

Racial discrimination had been one of the defining features of apartheid in SA and had been entrenched in a range of statutory provisions for many decades. Several pieces of legislation marked the establishment of the Union of SA as a state in which racial discrimination received official sanction. In the area of employment the most telling legislative measures designed to afford racial privileges were those laying the basis for the policy of job reservation. Over the years, the government introduced a series of repressive laws. It is beyond the scope of this thesis to list all the discriminatory laws that were passed against black people. However some are worth mentioning because of their contribution to the inequality which presently burdens the South African society. Some of those laws are discussed below.

Repressive legislation like the Industrial Conciliation Act⁵⁷ was passed as affirmative action for whites against cheaper black labour.⁵⁸ This was followed by legislation providing for job

⁵⁶ Davidson *op cit* 38.

⁵⁷ The Industrial Conciliation Act of 1924.

⁵⁸ Sonn F *Afrikaner Nationalism and Black Advancement as Two Sides of the Same Coin* (1993) at 35 (Sonn).

reservations. This gave control of entry to the trades of white unions.⁵⁹ The Native Building Workers Act prohibited blacks from doing skilled construction in white urban areas.⁶⁰ In 1937 the government employed approximately 10 000 Europeans on types of works previously done by natives. The Public Works Department employed the policy of hiring only Europeans in the Orange Free State, Natal and Transvaal.⁶¹

Two legislative pillars of apartheid; the Natives Land Act (and its amendment in 1936)⁶² and the Group Areas Act limited African economic and business activities in both rural and urban areas.⁶³ These acts were repealed in 1991, but few blacks could yet afford to move into formerly white areas without financial assistance. Numerous other laws and regulations had restricted black economic activities and employment.

(i) The Industrial Conciliation Act⁶⁴ and the Mines and Works Act⁶⁵

Section 77 of the Industrial Conciliation Act⁶⁶ and section 12 of the Mines and Works Act,⁶⁷ included systematic policies favouring white over black workers. These policies were first developed by the coalition government of the NP and the Labour Party (The Pact Government) during the 1920's. These policies were specifically designed to uplift the newly urbanized poor whites at the expense of the black workers, by employing large numbers of unskilled and semi-skilled whites in state and para-statal corporations.⁶⁸ Statutory closed shops had also functioned to preserve a range of crafts for white workers and to impede the development of more representative trade unions.⁶⁹

⁵⁹ The Apprenticeship Act 37 of 1944.

⁶⁰ The Native Building Workers Act 27 of 1951.

⁶¹ Van der Horst S T Native Labour in South Africa 1942.

⁶² Natives Land Act 27 of 1913.

⁶³ Group Areas Act 41 of 1950.

⁶⁴ The Industrial Conciliation Act of 1924.

⁶⁵ The Mines and Works Act of 1911.

⁶⁶ The Industrial Conciliation Act of 1924 was later repealed by Act 94 of 1979.

⁶⁸ Adams C Affirmative action in a Democratic South Africa (1993) at 22 (Adams).

⁶⁹ A closed shop agreement requires or compels all employees to be members of an agreed trade union. See Basson A C *et al* Essential Labour Law: Collective Labour Law (2002) V(3) at 70.

The Industrial Conciliation Act enabled the minister of labour to reserve categories of work for members of specified racial groups.⁷⁰ In effect, if the minister felt that white workers were being pressured by “unfair competition” from blacks, he could re-categorize jobs for whites only and increase their rates of pay. The list of discriminatory instruments in labour law is a long one and well documented elsewhere,⁷¹ however it can be stated with certainty that the law had been deliberately abused to achieve the goals of apartheid.

(ii) The Wage Act⁷² and the Public Services Act⁷³

Sex discrimination in employment had also been rooted in legislative measures. The Wage Act⁷⁴ permitted differentiation between categories of employees on the grounds of sex and race, and laid the basis for discriminatory wage determinations.⁷⁵ The ambiguous terms of the Public Services Act also allowed for discriminatory outcomes on the basis of sex.⁷⁶

(iii) The Native Labour Regulation Act⁷⁷

The Native Labour Regulation Act further discriminated against blacks in employment. The Act specifically prohibited strikes by African Workers.⁷⁸ It also limited skilled jobs in mining to whites only. It entrenched those laws that were to be found in the Mines and Works Act.⁷⁹

⁷⁰ The Industrial Conciliation Act 28 of 1956.

⁷² The Wage Act 44 of 1937.

⁷³ The Public Services Act 111 of 1984.

⁷⁴ It was subsequently called The Wage Act 45 of 1957.

⁷⁵ Murray Women and Night Work (1984) ILJ 47 and also see Louw Sex Discrimination and the Labour Relations Act (1990) 2 SAMLJ 164 (Louw). These discriminatory provisions were purged by the Wage Amendment Act 48 of 1981.

⁷⁶ Louw *op cit* 75 at 165.

⁷⁷ The Native Labour Regulations Act 15 of 1911.

⁷⁸ International Labour Office International Labour Conference Special Report of the Director-General on the Application of the Declaration Concerning the policy of “apartheid” of the Republic of South Africa (1965-1988) (International Labour Office’s Special Report).

⁷⁹ Davidson *op cit* 38.

(iv) The Natives Land Act⁸⁰ and the Bantu Authorities Act⁸¹

Under the prime ministership of Hendrik Verwoerd, apartheid developed into a policy known as “separate development”. Here each of the nine African (Bantu) groups was to become a nation with its own homeland, or Bantustan. The Natives Land Act did this by reducing all Africans in white owned rural area to tenant or wage labourers.⁸² It also made provision for the establishment of “native reserves” or the Bantu Homelands. The Natives Land Act prohibited Africans from buying or leasing land outside the reserves from people who weren’t Africans.⁸³

The theory behind the concept of separate development was that blacks would be allowed to exercise their normal political, economic and social rights, but only in the areas reserved for them. The emphasis in this policy of separate development was based on political and territorial separation.⁸⁴ According to the ILO’s Report on Apartheid, the Government of SA sought to present “separate development as a policy which provides a means of removing discrimination through a process of separate evolution of the constituent people of SA”.⁸⁵

(v) The Native Urban Areas Act⁸⁶

The Native Urban Areas Act facilitated the subordination and exploitation of Africans.⁸⁷ An amendment to the Act in 1930 permitted the removal of excess females and this was one of an accumulation of pass laws.⁸⁸

⁸⁰ The Natives Land Act 27 of 1913.

⁸¹ The Bantu Authorities Act 68 of 1951.

⁸² Section 1 of the Natives Land Act 27 of 1913.

⁸³ Section 2 of the Natives Land Act 27 of 1913.

⁸⁴ The International Labour Office’s Special Report *op cit* 78.

⁸⁵ *Ibid* the International Labour Office’s Special Report States that —
(d) “Separate development” was seen as a policy limiting the opportunity of development of the individual, whose place in the transitional society was to be determined by his race.

⁸⁶ The Native Urban Areas Act of 1923.

⁸⁷ It gave cities the right to designate and control urban “locations” for Africans.

⁸⁸ The Natives Laws Amendment Act of 1952.

(vi) Bantu Building Workers Act⁸⁹

This Act allowed black people to be trained as artisans in the building trade, something previously reserved for whites only, but they had to work within an area designated for blacks. It also made it a criminal offence for a black person to perform any skilled work in urban areas except in those sections designated for black occupation.

(vii) Native Labour (Settlement of Disputes) Act⁹⁰

This Act prohibited strike action by blacks.

(viii) Bantu Education Act⁹¹

The Bantu Education Act established a Black Education Department in the Department of Native Affairs which would compile a curriculum that suited the “nature and requirements of the black people”. The author of the legislation, Dr Verwoerd, stated that its aim was to prevent Africans receiving an education that would lead them to aspire to positions they wouldn’t be allowed to hold in society.⁹² Instead Africans were to receive an education designed to provide them with skills to serve their own people in the homelands or to work in labouring jobs under whites. The end result was a society where inequality is one of the defining characteristics. This is reflected in all the key elements which impact on the quality of life such as illiteracy and education, wealth and poverty and others.⁹³

In summary, apartheid laws affected peoples most fundamental rights and freedoms.⁹⁴ These laws established obvious inequality before the law⁹⁵ These are just some of the more than

⁸⁹ Bantu Building Workers Act 27 of 1951.

⁹⁰ Native Labour (Settlement of Disputes) Act of 1953.

⁹¹ Bantu Education Act 47 of 1953.

⁹² UNESCO *op cit* 43.

⁹³ Bundy C Development and Inequality in Historical Perspective in R Schrire (ed) *Wealth or Poverty Critical Choices for South Africa* (1992) at 25.

⁹⁴ These included political rights, freedom of movement and residence, property rights, freedom to work and to practice occupations, freedom of marriage and other family rights.

⁹⁵ UN Report *op cit* 41.

350 apartheid laws that were passed to entrench both racial inferiority and racial superiority.⁹⁶ In these and other ways, the foundations of apartheid were laid by existing and successive governments.

(2.3.5) State Machinery and Apartheid

The pressure for government to promote Afrikaner business ownership came with the first act of the Reddingsdaadbond of the 1940's.⁹⁷ The Asiatic Act⁹⁸ was passed to restrict Indian trading in the Transvaal, so the main focus of the Reddingsdaadbond was what it termed the "Indian question". In 1943, what became known as the Pegging Act was passed⁹⁹ and had the effect of curtailing Indian business in favour of whites.¹⁰⁰ In this significant shift the Broederbond played a very important role. It would seem that "the growth of State capitalism in SA since 1948 has also been the growth of Afrikaner capitalism".¹⁰¹ It is argued that the rise of the Afrikaner in the private sector was directly attributable to the control of the Afrikaner over the State.¹⁰²

(2.3.6) Computers and Labour

Central to the ambitions of the oppressive minority government was the use of enabling technology such as computer hardware and software. It could therefore be argued that computer technology enabled the government to organise and enforce such a system of segregation and control. The computer fostered the concentration of administrative power in

⁹⁶ Other laws included for example The Natives Resettlement Act 19 of 1954; The Group Areas Development Act 69 of 1955; The Natives (Prohibition of Interdicts) Act 64 of 1956 etc.

⁹⁷ Adams *op cit* 68.

⁹⁸ The Asiatic Act 28 of 1939.

⁹⁹ The Pegging Act of 1943 was amended in 1946.

¹⁰⁰ There seems to be a direct link between the possession of political power and socio-economic upliftment. In 1952 approximately eighty percent of the employees of the South African Railways and Harbours and sixty-eight percent of the employees of the Post Office were Afrikaners. In 1952 there were approximately twenty-two public corporations. See for instance O'Meara D *Analysing Afrikaner Nationalism — The Christian National Assault On White Trade Unionism in South Africa — 1932-1936* (1975).

¹⁰¹ Sonn *op cit* 58 at 7 para 6.

¹⁰² Bunting B *The Rise of the Afrikaner Reich* (1969).

the hands of Africa's white elite.¹⁰³ The government used them for a wide range of applications, from military to scientific, and they are a vital part of the economy as a whole.¹⁰⁴

The computerised population register was SA's way of modernising and streamlining its pass and influx control system. The influx control system was used to channel workers into the labour force. Computers were also used for financial matters and registered blacks for the labour allocation system. The Department of Labour controlled the terms and conditions of work under apartheid.¹⁰⁵ Computers were also used in the Department of the Prime Minister, The South African Reserve Bank and also in SA's electrical utility and the Treasury Department. The South African Police made active use of the population registry. For example, in 1982 they examined 179 285 fingerprints stored in the population registry and made 13 024 positive identifications.¹⁰⁶ This in effect gave the police considerable power over political opposition.

As the primary developer of new technology, the US and the multi-national technology companies based in SA had a central role in providing these tools of repression. The first United Nations arms embargo on SA was passed in 1963, but it was not until 1977 that the embargo became mandatory. The embargo addressed shipments of traditional arms, but did not address the general technological backbone of arms development. Consequently, the South African government pursued a course of developing an indigenous arms industry with the support of multi-national corporations as well as countries such as Taiwan and Israel.

¹⁰³ Stanford University Students The Use of Computers to Support Oppression (2001, November 28) at <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.comp.html> last visited 03/28/02.
Also see NARMIC Machines that Make Apartheid Run The New York Times (1985, May 18) at 24.

¹⁰⁴ NARMIC US Computer Exports to South Africa and the Arms Embargo (1982) (NARMIC). Also see Conrad Thomas Military Exports to South Africa (September 1985).

¹⁰⁵ For example, no black worker could supervise a white worker, nor were black trade unions recognised, and most strikes were illegal. United Nations Unit on Apartheid, Notes and Documents (May 1973) No. 12/73 at 73.

¹⁰⁶ NARMIC *op cit* 104.

In response to these UN actions, the US government enacted laws and regulations designed to restrict the flow of resources to the South African military and police. However, due to the multi-purpose nature of computers these restrictive acts had little effect on the flow of computer technology. When the legal actions were backed up by public outcry and product boycotts, corporations “saw the light” and began to change their practices, or at least put them at an arms length.

The case of apartheid’s use of technology is unusual in several respects. Unlike many other ethical issues there is little debate about the practice of apartheid — as almost everyone considers it wrong and considers the support of it wrong. Since such a small minority of the population was striving to control so many people so completely, reliance on technology was high. Because the nature of the control went into so many aspects of life, many tools developed for innocuous purposes in democratic societies could be utilised for repression with little or no customisation.

Although the conditions in SA were unique, the lessons learned from studying the actions, motives and results are universally applicable since the essential topic is political and economic power and the use of technology to support it.¹⁰⁷

2.4 Repeal

(2.4.1) International Law and Apartheid

Internationally, SA became more and more isolated. Numerous conferences were held and the United Nations resolutions were passed condemning SA, including the World Conference against Racism in 1978 and 1983. An immense divestment movement started, pressuring investors to refuse to invest in South African companies or companies that do business with SA. Further, South African sports teams were barred from participation in international events, and South African culture and tourism were boycotted. These international movements, combined with internal troubles, persuaded the South African government that its hard-line policies were unreasonable.

¹⁰⁷ NARMIC *op cit* 104.

Apartheid in SA was condemned internationally as unjust and racist. In 1973 the General Assembly of the UN agreed on and passed the text of the International Convention on the Suppression and Punishment of the Crime of Apartheid. The immediate intention of the Convention was to provide a formal legal framework within which member states could apply sanctions to press the South African government to change its policies. However, the Convention was phrased in general terms, with the express intention of prohibiting any other state from adopting analogous policies. The Convention came into force in 1976.

Article II of the Convention defines apartheid as follows —

“For the purpose of the present Convention, the term “the crime of apartheid”.....as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them —

- (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person —
 - (i) By murder of members of a racial group or groups;
 - (ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
 - (iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;
- (b) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;
- (c) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

- (d) Any measures including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;
- (e) Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;
- (f) Persecution of organisations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

(2.4.2) Internal Changes

Due to these international pressures and internal issues SA attempted to change its policies regarding apartheid. Although the policy of apartheid was continued under then Prime Minister John Vorster, there was some relaxation of its laws¹⁰⁸ and this accelerated under his successor, PW Botha.¹⁰⁹ The Government embarked on a series of reforms.¹¹⁰ The Constitution of 1983 was passed.¹¹¹ The Constitution was reformed to allow coloured and Indian minorities limited participation in separate and subordinate Houses of Parliament. The 1983 Constitution created one Parliament with three racially divided houses.

The House of Assembly, representing the whites, was allocated 178 seats, the House of Representatives, representing the coloureds, was allocated 85 seats and the House of Delegates, representing the Indians, was allocated 45 seats.¹¹²

The Constitution of 1983 was premised on an “own affairs or general affairs dichotomy”. In respect of “own affairs”, each population group was to have autonomy in respect of matters falling exclusively within the own affairs of that population group. Matters of general affairs

¹⁰⁸ As a result of international pressures, many lesser apartheid laws — such as those banning interracial marriages and segregating facilities — were repealed or fell into disuse by 1990.

¹⁰⁹ In 1991 President De Klerk obtained the repeal of the remaining apartheid laws and called for the drafting of a new constitution.

¹¹⁰ An early example being the recognition of black trade unions to stabilise labour.

¹¹¹ The Republic of South Africa Constitution Act 110 of 1983 (The 1983 Constitution).

¹¹² See sections 41, 42 and 43 of the 1983 Constitution.

which affected the population as a whole had to be dealt with by all three houses. The constitution was drafted so as to ensure that the real power remained with the whites in the House of Assembly. Thus, in the event of a conflict amongst the houses, the bill had to be referred to the President's Council for a final decision. The majority party in the House of Assembly effectively controlled the composition of the President's Council which meant that the wishes of the majority party were translated into legislation, notwithstanding opposition by the other houses. This Constitution did not solve the problem of segregation amongst its people but reinforced such notions.

In 1986, the pass laws were scrapped. Secret discussions between those members and Nelson Mandela (member of the ANC),¹¹³ began in 1986. The ex-State President of SA, FW de Klerk, who came into power in 1989, recognised the urgent need to bring the black majority of South Africans into the political process, and most NP moderates agreed with him in principle. He then held secret talks with imprisoned ANC leader Nelson Mandela to begin preparations for this major policy shift. On February 2, 1990 he announced not only the impending release of Mandela, but also the unbanning of the ANC, the PAC, and the SACP, and the removal of restrictions on the UDF and other legal political organisations and all other anti-apartheid groups.

De Klerk also lifted the four-year-old media restrictions, and he invited former liberation fighters to join the government at the negotiating table to prepare for a new multiracial constitution. De Klerk pledged that his government would investigate alleged human rights abuses by the security forces. He also sought improved relations with the rest of Africa by proposing joint regional development planning with neighbouring states and by inviting other African leaders to increase trade with SA. Two weeks later Nelson Mandela was released from prison and he became the first democratically elected President of the RSA.

¹¹³ In 1912, the South African Native National Congress was formed in Bloemfontein and eventually became known as the African National Congress (ANC). Its goals were the elimination of restrictions based on colour and the enfranchisement of and parliamentary representation for blacks. In the early 1960's, following the protest in Sharpeville in which 69 protestors were killed by police and 180 injured, the ANC and the Pan-African Congress (PAC) were banned. Nelson Mandela and many other anti-apartheid leaders were convicted and imprisoned on charges of treason. The ANC and the PAC were forced underground and fought apartheid through guerrilla warfare and sabotage.

2.5 Post Apartheid — pre 1994

By then apartheid had already impoverished the South African society. By its segregationist measures such as job, tertiary institutional and economic reservations and by its deliberate policy of creating a hierarchy of races, it also impoverished the dignity of the South African people.¹¹⁴ Reparation measures have to directly address these imperfections if substantive equality is to be achieved.

In 1991, the Group Areas Act, Land Acts and the Population Registration Act, the last of the so-called “pillars of apartheid”, were abolished. After a long series of negotiations a new constitution was promulgated into law in December 1993 (The Interim Constitution). It provided a framework for governing for five years, while a new constitution, to be implemented by 1999, was drafted by the Constitutional Assembly. The final constitution had to comply with the principles embodied in the Interim Constitution, including a commitment to a multiparty democracy based on universal adult franchise, individual rights without discrimination, and separation of the powers of government.

SA held its first democratic election in April 1994 under this Interim Constitution. The Interim Constitution was committed to a new constitutional order premised upon an open and democratic government and the universal enjoyment of fundamental human rights.¹¹⁵ The new constitutional order has, at its core, a commitment to substantive equality and seeks to map out a vision for the nation based on this commitment. This vision reflects the need to remedy the ills of the past and to establish a less divided society in which a constitutional democracy can survive and flourish.

That commitment is expressed in the preamble to the Interim Constitution by an acknowledgement of the —

“.....need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality

¹¹⁴ *Soobramoney v Minister of Health* CCT 32/97 (1997, November 27); (1998) 1 SA 765 (CC).

¹¹⁵ *In re: Certification of the Constitution of the Republic of South Africa* (1996) 10 BCLR 1253 (CC).

between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.....”¹¹⁶

With this end in view the Interim Constitution provided that —

“.....a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”

The ANC — led government then embarked on a programme to promote the reconstruction and development of the country and its institutions.¹¹⁷ This called for the pursuit of democratisation and socio-economic changes. A significant milestone of democratisation during the five-year period of the Mandela presidency was the constitution making process. The ethos of democracy was reflected in the establishment of the National Economic Development and Labour Council and in the Presidential Job Summit.¹¹⁸ These brought government, businesses, organised labour and non-governmental development organisations together to confront the challenges of achieving growth and development for SA in a turbulent and globalising international economy.

As can be seen, the history of the South African labour system is a history of workplace struggle for most employees. It is a history of a struggle against inequalities, workplace discrimination, salary disparities, the recognition of employee rights etc. This history of SA has laid the foundation for a process of change in the workplace. It has been shown how successive governments of SA used legislation to inhibit the economic advancement of blacks. Further, blacks access to jobs and to economic resources were severely restricted through a series of laws and regulations.

¹¹⁶ The Interim Constitution.

¹¹⁷ The South African Constitution Act 108 of 1996 in its Preamble provides for a democratic society based on human dignity, equality and freedom.

¹¹⁸ See The NEDLAC Act 35 of 1994.

SA's history has shown how effectively laws, good or bad laws, can achieve its goals through proper and effective monitoring systems. Therefore it is not enough that various employment laws are promulgated. What is required is a serious commitment by both the government and private individuals to eliminate discrimination. Since government was so actively involved in legislating discrimination in the past it is important that they play a role in eliminating discrimination. However, after decades of segregationist policies it is not enough that legislation is implemented which outlaws unfair discrimination. What is needed is a concerted effort from both public and private sectors to ensure that discriminatory practices do not continue and there should be proper monitoring systems in place to ensure compliance with these various legislations.

This part of Chapter One has provided a background to the reasons for present anti-discrimination legislation in SA. Looking at the extent of the discriminatory practices in SA, the reliance on voluntary actions alone will not suffice to eliminate discrimination. Further, the fundamental reason for this chapter is to show that discrimination and segregationist policies were mandated by government and therefore it is vital that the post-apartheid government of SA become actively involved in eliminating discrimination. Part III of this thesis will look at the various laws that have been promulgated to eliminate discrimination in the workplace, and Part IV looks at the effectiveness of such legislation.