
CHAPTER SIX
THE REGULATION OF AFFIRMATIVE ACTION AND
DISCRIMINATION IN SA

6.1 Anti-Discrimination Legislation in SA

Even though SA is now governed by a new democratic order historical workplace inequalities still need to be addressed.¹ Not only compelled to redress inequalities by the Constitution,² the South African government was motivated by the ILO to enact laws that would prohibit discrimination and promote the economic advancement of the majority.³ Therefore, in an effort to narrow the gap between previously advantaged and disadvantaged individuals, the government of SA has passed a series of employment laws mandating, amongst other things, affirmative action.⁴ By doing so the South African government was seeking to ensure that all employers are being compelled to take positive steps to redress disadvantage and inequality.⁵

To redress the issues that have created these imbalances in the workplace, one of the more relevant Acts for the purposes of this thesis is the EEA.⁶ There are however other legislation that sought to address inequalities in the workplace. One such legislation was the LRA.⁷

¹ Thomas A and Robertshaw D Achieving Employment Equity — A guide to effective strategies (1999) at para 1 of the Foreword.

² Section 9(5) of the Constitution of the Republic of South Africa Act 108 of 1996 (The South African Constitution).

³ The International Labour Organisation Discrimination (Employment and Occupation) Convention (1958) No. 111 (ILO).

⁴ These laws include the Labour Relations Act 66 of 1995 (The LRA), the Skills Development Act 97 of 1998 (The SDA) and the Basic Conditions of Employment Act 75 of 1997 (The BCEA).

⁵ COSATU Submission on the Green Paper on A Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service (1997) (COSATU).

⁶ Other legislation that was implemented includes the LRA, The SDA and the BCEA. As we are focusing on affirmative action in the workplace the most relevant piece of legislation is the EEA.

⁷ The LRA 66 of 1995.

(6.1.1) The Labour Relations Act

Until the promulgation of the LRA, there were no provisions which prevented an employer from refusing to appoint someone on the basis of, for e.g., gender, race or trade union membership.⁸ An applicant for work had no standing to declare a dispute with an employer, even though they may have been the victim of unfair discrimination.⁹ Looking at the history of discrimination in SA, employees themselves did not fair any better. In fact, some legislative provisions specifically permitted discrimination in employment.¹⁰

The Commission of Inquiry into Labour Legislation (The Wiehahn Commission), established in the aftermath of the strike wave of the early 1970's, argued that blacks should be allowed to register trade unions and to have them recognised as part of the official conciliation process.¹¹ The Wiehahn Commission also recommended the elimination of statutory job reservations. The Wiehahn Commission recommended the incorporation of anti-discrimination principles into South African legislation by stating that —

“The Commission cannot avoid the conclusion that in due course discrimination in the field of labour on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be outlawed and criminalised in South Africa’s labour dispensation.”¹²

Legislation incorporating these recommendations was passed in 1979 and resulted in a huge growth in African trade unionism in the early 1980's.

The LRA contains a number of provisions that specifically prohibits discriminatory treatment of employees and applicants for work. Section 187(1)(f) states that the dismissal of an employee is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, either directly or indirectly, on one or more of a number

⁸ Rycroft and Jordaan A Guide to South African Labour Law (1992) at 38.

⁹ Thompson & Benjamin South African Labour Law (2002) V(1) No.43 Part CC1 at CC1-5 (Thompson and Benjamin).

¹⁰ For example The Wage Act 5 of 1957. See Chapter Two for a more detailed explanation of some of the discriminatory legislation in apartheid-SA.

¹¹ Wiehahn N E The Complete Wiehahn Report (1982) (The Wiehahn Report).

¹² The Wiehahn Report at 3.9.2 and 3.9.3.

of non-exhaustive prohibited grounds. The dismissal may however be fair if the reason for the dismissal is based on an inherent requirement of the job or if the employee has reached the normal or agreed to retirement age for persons employed in that capacity.¹³

The purpose of the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace. It is noteworthy that in the LRA affirmative action is seen as the only fair discriminatory practice. Organisations could therefore use affirmative action as a means to rectify imbalances in the workplace that resulted from past discrimination.

SA is unique in that it does not deal with the prohibition of unfair discrimination in only one piece of anti-discrimination legislation. It has dealt with this issue in the EEA and The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)¹⁴ as well.

(6.1.2) The Promotion of Equality and Prevention of Unfair Discrimination Act

PEPUDA gives effect to section 9 of the Constitution by providing for —

- the equal enjoyment of all rights and freedoms by every person;
- the promotion of equality;
- the values of non-racialism and non-sexism contained in section 1 of the Constitution;
- the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; and
- the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution.

The purpose of PEPUDA is to prevent and prohibit unfair discrimination, harassment, and hate speech. Persons who do not fall within the scope of the EEA can bring a claim of unfair discrimination under PEPUDA. So for example, independent contractors who fall outside the scope of the EEA can be liable or sued under PEPUDA. The legislation does not merely apply in the workplace, but also applies to the state and all of the individuals living within it.

¹³ Section 187(2)(a) and 11 of the LRA.

¹⁴ The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 enacted in February 2000 (PEPUDA).

The scope of legal standing established by PEPUDA is extremely broad, so that any person can bring a claim of discrimination to the courts in the public interest, even if they are not directly affected themselves.

Further, PEPUDA defines only four acceptable defences against a claim of discrimination, viz., that the discrimination was not of the type specifically ruled out by the law; that it was “reasonable and justifiable”; that it was part of an affirmative action programme; or that it was justified due to the specific demands of a particular task. To adjudicate all claims, PEPUDA has established a system of “equality courts” with appointees from the human rights field.

PEPUDA is intended to be a key legislative tool to respect, promote and fulfil the equality right. It provides for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment and to provide remedies for victims of unfair discrimination. It seeks to translate the equality right into practical rules. In fact PEPUDA is considerably more explicit than the EEA on the content of the core concepts of discrimination law. For example, PEPUDA contains a definition of discrimination¹⁵ and harassment¹⁶. Significantly, PEPUDA is a codification of the constitutional courts jurisprudence on discrimination.¹⁷ Therefore PEPUDA will have to be taken into account when the EEA is interpreted by the Courts.

(6.1.3) The Basic Conditions of Employment Act

The BCEA regulates conditions in the workplace. The aim of the BCEA is to eradicate unfair labour practices. The purpose of the BCEA is to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution; by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the ILO; and to provide for matters connected therewith.

¹⁵ See section 1(1)(viii) of PEPUDA.

¹⁶ See section 1(1)(xiii) of PEPUDA.

¹⁷ The Constitutional Courts Approach to Discrimination will be analysed in Part IV of this thesis.

(6.1.4) *The Skills Development Act*

The aim of this act is to provide an institutional framework to device and implement the national and workplace training strategies. The purpose is to develop and improve the skills of employees and to integrate those strategies within the national qualifications framework. The SDA is not generally targeted at women although one of the stated purposes of the Act is “to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education”. The SDA also applies to employment services which assist prescribed categories of persons to —

- enter special education and training programmes;
- find employment;
- start income-generating projects; and,
- participate in special employment programmes.¹⁸

The prescribed categories are, *inter alia*, women, including rural women.

(6.1.5) *The Employment Equity Act*

It is the type of discriminatory legislation in SA’s recent past that provides the justification for the implementation of the EEA. This Act seeks to bring to an end decades of inequalities that are a result of both apartheid policies and societal prejudices and stereotypes. The EEA will seek to ensure that the people of SA enjoy equality of opportunities in employment that were hitherto denied to them.

This sweeping law directs all employers, public and private, to eliminate unfair discrimination in the workplace, and requires businesses with fifty or more employees and/or annual revenues exceeding certain threshold levels to implement affirmative action programmes aimed at blacks, women, and the disabled. Employers who do not comply with the EEA may be subject to fines. The EEA, which came into effect in various stages during the year 2000, impacts directly on recruitment practices and the composition of the workforce.

¹⁸ Section 23(2)(d) of the SDA.

The EEA goes further and mandates that “suitably qualified” members of disadvantaged groups must be “equitably represented” at all levels of a company. “Preferential treatment” and “numerical goals” may be used to achieve this goal, but the use of quotas is not allowed. Employers are also required to consult with unions and report to the Department of Labour (DOL) on its progress. Businesses failing to comply with the law are subject to fines. The EEA requires designated employers to compile and implement an employment equity plan aimed at promoting equal opportunities and affirmative action, while eliminating unfair discrimination.

The main purpose of this Act is to provide for employment equity through measures like affirmative action which will redress the imbalances of the past. The EEA sets out to achieve equity by promoting the constitutional right to equality as well as the exercising of true democracy.

These labour laws, along with a few others, form the core of the most progressive civil rights and affirmative action policies in SA. Their most striking feature is their apparent invulnerability to the kinds of constitutional challenges that have derailed affirmative action programmes in the USA. The South African Constitution itself recognises that in a deeply unequal society, certain forms of “fair discrimination” will be necessary to establish equality.

6.2 Constitutional Provisions

(6.2.1) A Constitutional Basis for the EEA

The Constitution embodies a number of broad fundamental human rights in Chapter Two which may not be encroached upon by legislative measures introduced by government.¹⁹ The South African Constitution establishes a new democratic order based on “human dignity, the achievement of equality and the advancement of human rights and freedoms”.²⁰ Chapter Two of the Bill of Rights States that —

¹⁹ See section 9 of the South African Constitution.

²⁰ Chapter Two of the Bill of Rights in the South African Constitution.

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”²¹

To promote the achievement of equality the Constitution allows for the promulgation of legislative and other measures to protect or advance persons disadvantaged by unfair discrimination.²² It is this provision in the Constitution which gives authenticity to the EEA.

(6.2.2) The Constitution and Equality

Section 9(1) guarantees that “everyone is equal before the law and has the right to equal protection and benefit of the law”. As was stated in the case of *The President of the RSA and another v Hugo*²³ —

“The South African Constitution is primarily and emphatically an egalitarian Constitution. The Supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and its organising principle.”²⁴

This means that the constitutional commitment to equality emerges directly from the inequality and injustices of the past. The chapter on the history of affirmative action above shows that the policies of segregation and apartheid under white rule saw the systematic discrimination, exclusion and dispossession of black people in all aspects of social, political and economic life. This is the root of the deep social and economic disparities that exist in SA today.²⁵ Section 9 of the Bill of Rights is a detailed equality rights provision encompassing equality before the law and equal protection of the law, freedom from unfair discrimination, positive measures to advance equality and the promise of the equal enjoyment

²¹ Section 7(1) of the South African Constitution.

²² Section 9(2) of the South African Constitution.

²³ *The President of the RSA and another v Hugo* (1997) 4 SA (CC).

²⁴ As was stated by Judge Kriegler in *The President of the RSA and Another v Hugo* judgment *supra* at para 74.

²⁵ Albertyn C *et al* (ed) Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (2001).

of all other rights and freedoms.²⁶ It establishes a commitment to the transformation of the South African society, in particular to the achievement of substantive equality.

Jennifer Nedelsky suggests that —

“The question of equality [to be captured in the constitutional rights] is the meaning of equal moral worth *given* the reality that in almost every conceivable concrete way we are not equal, but vastly different, vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different inequalities.”²⁷

To address these inequalities at least two forms of action are required by the Constitution. Firstly; the eradication of barriers and obstacles that unfairly discriminate on the basis of race, gender, class, and other grounds of inequality and secondly; the development of positive measures that promote the equality of all groups and enhance the full participation of all persons in society. The equality right provides the constitutional framework for this in its protection against unfair discrimination.²⁸

(6.2.3) The Constitution and Affirmative Action

The South African Constitution makes provision for affirmative action measures. Section 9(2) of the Constitution states that —

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

²⁶ Section 9 of the South African Constitution states that —
Everyone is equal before the law and has the right to equal protection and benefit of the law.
Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
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.
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. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

²⁷ Nedelsky J *Reconceiving Rights as Relationships* (1993) at 1.

²⁸ In this regard see section 9(3) and (4) of the South African Constitution and the provision for positive measure section 9(2) as stated in note 14 above.

To give effect to these constitutional rights the EEA was passed.²⁹ This piece of legislation is the key affirmative action legislation in SA. Although the Act was passed in 1998, it only came into effect at the end of 1999.

6.3 Application of the EEA

The purpose of the EEA is to promote the constitutional right of equality, to eliminate unfair discrimination in employment, to ensure the implementation of employment equity, to redress the effects of discrimination and to achieve a diverse workforce broadly representative of our people.³⁰ It also seeks to promote economic development and efficiency in the workforce. This requirement gives effect to the obligations of the Republic as a member of the ILO.³¹

In fact, according to the Department of Justice website —

“The purpose of the Act is to achieve equity in the workplace, by a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.”³²

Looking at the purposes of the EEA, one needs to understand to whom this obligation falls upon. One also needs to look at who must not discriminate and who must not be discriminated against. The following paragraphs look at specific provisions and obligations under the EEA. A brief discussion of discrimination and the various forms of discrimination will then be given as discrimination and affirmative action are inextricably linked.

²⁹ All references to the EEA in this thesis is to The Employment Equity Act 55 of 1998.

³⁰ Chapter 2 of the EEA.

³¹ Taken from the Preamble to the EEA. Also see Charlton and Van Niekerk Affirming Action Beyond 1994 (1994) at 1.

³² At the website of <http://www.doj.gov.za> last visited 31/05/05.

(6.3.1) Scope of the EEA

(6.3.1.1) Designated Employers

The EEA applies to both the private and the public sectors. Chapter II of the EEA applies to all employers.³³ whilst Chapter III applies only to designated employers.³⁴ Designated employers must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.³⁵

Chapter II states that all employers must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.³⁶ Chapter III, which contain the affirmative action provisions of the Act apply only to designated employers.³⁷ Employers of fifty or more workers, or with an annual turnover set out in Schedule 4 of the Act are required to draw up an employment equity plan which outlines the company's commitment to equity over the next five years. The employment equity plan is to be submitted to the Employment Equity Commission (EEC) on a yearly basis.³⁸ Further, a collective agreement can also provide that a given employer is a designated employer for the purposes of the Act. The public sector is also covered except for security and defence services.

³³ See Chapter 1 of the EEA regarding definitions.

³⁴ *Ibid.*

³⁵ Section 13(1) of the EEA.
Designated groups include — Black people, women, people with disabilities. According to Section 1 of the EEA “Black people” are defined to include Africans, Coloured’s and Indians.

³⁶ See section 5 of the EEA.

³⁷ Section 12 of Chapter III of the EEA.
Further section 1 of the Employment Equity Act states that a designated employer is defined as —

- an employer employing 50 or more employees;
- an employer employing fewer than 50 employees, but who has a total annual turnover equal to or above the applicable annual turnover of a small business under Schedule 4 of the Act;
- a municipality;
- an organ of the State (excluding local government, the Defence Force, the Intelligence Agency and the Secret Service); and
- an employer bound by a collective agreement in terms of section 23.

³⁸ A body created by the Act.

However, under section 14 of the EEA, other employers may voluntarily agree to comply with Chapter III as if they were designated employers. Also the LC may direct any employer, even if they do not fall within the definition of a “designated employer”, to comply with Chapter III as if they were. In addition, schemes to avoid the application of Chapter III by taking a measure to avoid becoming a designated employer are prohibited by section 61(2).

The EEA provisions apply to employees only and protects “an employee” against unfair discrimination.³⁹ Employees are protected against the whole range of discriminatory policies and practices of an employer. The EEA also applies to applicants for employment.⁴⁰ Here however, an applicant for employment is, by definition, only protected against unfair discrimination in the employer’s decision about whom to appoint. The problem arises though as to when an applicant becomes an employee.⁴¹

(6.3.1.2) Temporary Employment Services

Further, the incidence of different forms of work amongst women workers is an important issue. The application of section 57 of the EEA to temporary employment services is therefore significant. It deems the clients of the temporary employment service to be the employer if employment with the client is of indefinite duration or for a period of three months or longer. In addition, if a temporary employment service, on the express or implied instructions of a client, commits an act of unfair discrimination, both the temporary employment service and the client are jointly and severally liable. So, employees in the service of temporary employment services are covered under the EEA and are deemed to be employed by the client.

(6.3.1.3) Independent Contractors

Independent contractors are not covered by the provisions of the EEA as they are not considered to be employees. However, PEPUDA will now cover independent contractors.

³⁹ See section 1 of the EEA.

⁴⁰ See section 9 of Chapter II of the EEA.

⁴¹ See *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) at 10-14; (1999) BLLR 862 (LC) at 865D-866A. Here the Court stated that an applicant becomes an employee only when work is actually performed in terms of the agreement or, at least, when performance is tendered and refused.

So independent contractors can now rely directly on PEPUDA instead of the Constitution for relief against discriminatory practices. The matter will therefore be referred to the Equality courts⁴² instead of the High Court and the CC.

(6.3.1.4) Other Groups

Further, the EEA excludes the National Defence Force, National Intelligence Agency or the South African secret service from its scope of cover.⁴³ These employees may also now bring unfair discrimination claims under PEPUDA.

(6.3.2) The Beneficiaries of Affirmative Action

The Act is intended to redress the employment disadvantages of black people, women and those with disabilities (“designated groups”). A designated employer is required to implement affirmative action measures for designated groups in order to achieve employment equity.

The affirmative action provisions of the EEA set out below only apply to “designated groups”. Under section 13 of the EEA, “designated employers” must undertake the affirmative action measures set out in section 15 —

“Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”⁴⁴

Therefore the intended beneficiaries of affirmative action in SA are Black people, women and people with disabilities.⁴⁵

6.4 The Regulation of Unfair Discrimination by the EEA

It must be borne in mind that affirmative action can only be looked at against the background of discrimination.

⁴² Established in terms of PEPUDA.

⁴³ See section 4(3) of the EEA.

⁴⁴ Section 15(1) of the EEA.

⁴⁵ Section 13(1) of the EEA.

Looking at section 6 of the EEA relating to the prohibition of unfair discrimination it prohibits unfair discrimination in the following terms —

“6(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any 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 should be noted that the above grounds that are prohibited with regard to discrimination is not an exhaustive list and any other arbitrary ground may be declared discriminatory.⁴⁶ The prohibitive or arbitrary grounds listed in section 6(1) of the EEA mirror those listed in section 9(3) of the Constitution.⁴⁷ Unfair discrimination has not been defined or established by the EEA.⁴⁸ The EEA does however prohibit both direct and indirect unfair discrimination. Part IV discusses in great detail the regulation of direct and indirect discrimination and therefore will not be dealt with here.

Looking at the EEA it contains only a basic structure on the prohibition of unfair discrimination. It is therefore left to the courts to give content to and to develop discrimination law. This Chapter and Part IV of this thesis will look at how the courts have developed the law surrounding unfair discrimination.

The Constitution has recognised the effects of past discriminatory practices and that unfair discrimination and the disparities found in the labour market cannot be remedied by simply eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.⁴⁹ This simultaneous existence of the prohibition

⁴⁶ In this regard see the case of *Larbi-Odam & Others v Member of Executive Council for Education (North West Province) & Another* (1998) 1 SA 745 (CC) where the CC held that citizenship was an arbitrary ground for discrimination.

⁴⁷ Except for the following three grounds which include ‘family responsibility’, ‘HIV status’ and ‘political opinion’.

⁴⁸ See Part IV of this thesis which discusses the Constitutional Dimensions of affirmative action for the courts approach to unfair discrimination claims.

⁴⁹ COSATU Explanatory Memorandum on the Employment Equity Bill (1997, December 1) (Explanatory Memorandum).

of unfair discrimination and the commitment to positive measures in the form of affirmative action is a demonstration of the objective towards achieving substantive equality.

Affirmative action measures are defined broadly and include measures to; identify and eliminate employment barriers, including unfair discrimination; create diversity in the workplace based on equal dignity and respect of all people; and make “reasonable accommodation” for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer. The measures can be designed to ensure the equitable representation of suitably qualified⁵⁰ people from designated groups in all occupational categories and levels, and the training and development of people from designated groups.

They can include preferential treatment and numerical goals, but can not include quotas. Also, nothing in section 15 requires the establishment of absolute barriers to people who are not from designated groups. Note that the phrase “reasonable accommodation” is defined in section 1 as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”.

Examples of discriminatory practices are numerous. Listed below are the more common types of discrimination that are found in workplaces.

6.5 Barriers to Employment Equity

The basic assumption underlying affirmative action is the removal of discrimination. The removal of discrimination, as underlined by the equal employment opportunity strategy and the EEA has a bearing on employment practices.⁵¹ The removal of discrimination would include removing obstacles or barriers necessary for the advancement of designated groups. A barrier exists where a policy, practice or an aspect of work environment limits the

⁵⁰ In terms of section 20(5) of the EEA an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.

⁵¹ Section 5 and 6 of the EEA.

opportunities of employees because they are from designated groups.⁵² Discrimination in section 6(1) takes place in terms of an employment policy or practice.⁵³

Barriers to the employment and/or advancement of women in the workplace have been found to include inadequate child care facilities, “glass ceilings”, unequal pay and sexual harassment. Sexual harassment has been viewed with particular concern and has been expressly included in the definition of unfair discrimination. It is also the subject of a dedicated Code of Good Practice promulgated in terms of the LRA.

If one looks at similar provisions in the US, Title VI regulations have barred utilisation of criteria and methods of administration which have “the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.”⁵⁴ This universal regulatory language incorporates a disparate impact standard into Title VI.⁵⁵ This has the effect of bringing seemingly innocuous discrimination under the spotlight and making such discrimination unfair if it has the effect of differentiating on one or more of the grounds listed above..

(6.5.1) Harassment

Harassment on any of the prohibitive grounds that are listed has, for the first time been expressly identified in legislation as a form of unfair discrimination. In SA section 6(1) of the EEA prohibits harassment of existing employees and job applicants in the following terms —

“Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

⁵² Section 7.3 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans Schedule to the EEA (The Code of Good Practice).

⁵³ *Ibid.*

⁵⁴ CFR 65 Fed. Reg. 50121at 50123.

⁵⁵ *Lau v Nichols* (1974) 414 US 563 at 568.

Although the prohibited grounds of harassment include those that are listed in section 6(2) of the EEA, harassment on the basis of sex is particularly prevalent in the workplace.⁵⁶

Even though the EEA prohibits harassment and states that it is a form of unfair discrimination it does not expressly define harassment.⁵⁷ It is left once again to the courts to deal with what constitutes harassment. To assist in defining this practice the Labour Relations Code of Good Practice on the Handling of Sexual Harassment Cases⁵⁸ was published and defines sexual harassment.⁵⁹ The Act treats harassment as a form of unfair discrimination and as such employers are obliged to take steps to eliminate and prohibit harassment in the workplace. South African legislation, as opposed to the Indian and American legislatures, bars all forms of sexual harassment.

The leading case thus far with regard to sexual harassment is the *Reddy* case.⁶⁰ The appellant in this case argued that the complainant was a willing participant to his hugs and kisses but the court found that the dismissal was fair and stated that "...any unwanted sexual behaviour or comment which had a negative effect on the recipient constitutes sexual harassment". It could therefore be argued that the court applied a subjective test when determining whether his conduct was welcome. The court held that any unwanted sexual behaviour or comment that has a negative effect is sexual harassment. It has also been held that it is fair to dismiss an employee who has committed sexual harassment for a sustained period. However, the

⁵⁶ Basson A C The Regulation Of Unfair Discrimination by the Employment Equity Act 55 of 1998 (1999) SAMLJ V(II) No. 2 at 240-249.

⁵⁷ See section 6(3) of the EEA.

⁵⁸ As promulgated in The Government Gazette 19049 Government Notice 1367 (1998, 17 July).

⁵⁹ The Code of Good Practice on the Handling of Sexual Harassment Cases defines sexual harassment as —
(1).....unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.
(2) Sexual attention becomes sexual harassment if —
(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
(b) The recipient has made it clear that the behaviour considered offensive; and/or
(c) The perpetrator should have known that the behaviour is regarded as unacceptable.

⁶⁰ *Reddy v the University of Natal* (1998) LAC at http://www.ilo.org/public/english/employment/gems/eoo/law/south/cl_all.html last visited 03/05/04.

South African courts have battled with the appropriate test that it should use when assessing whether or not a complainant has been sexually harassed.

To date, there is no clarity in South African law in relation to whether “unwanted sexual conduct” should be determined with reference primarily to the subjective experience of the complainant or on a more objective basis. In considering whether there has been unwanted conduct of a sexual nature the overall impact of the conduct of the harasser on the complainant should be considered in the light of the strong constitutional commitment to redressing systemic inequality.

As South African legislation regarding unfair discrimination is fairly new in SA, SA would do well to heed developments surrounding this issue in the USA as they have grappled with this issue for a longer time than SA. In the USA the United States Equal Employment Opportunity Commission (EEOC) as well as the courts have declared that sexual harassment violates section 703 of Title VII.⁶¹ The EEOC’s Guidelines⁶² define two kinds of sexual harassment; *quid pro quo* and hostile environment.⁶³ Chapter Seven will look in more detail at the US courts approach to sexual harassment.

Basically, with regard to sexual harassment, Title VII is designed to encourage creation of anti-harassment policies and effective grievances mechanisms.⁶⁴ In American employment law, it is any unwelcome sexual advance or conduct on the job, having the effect of making the workplace intimidating, hostile or offensive. Sexual harassment is considered a form of illegal discrimination. To be considered sexual harassment, the harassment must impact upon individuals of a specific sex in a discriminatory manner.

Title VII’s prohibitions against sex discrimination fall into two broad categories, sexual harassment and discrimination based on sex.

⁶¹ *Meritor Savings Bank v Vinson* (1986) 477 U S 57 at 64.

⁶² EEOC’s Guidelines on Discrimination Because of Sex 29 CFR §1604.11(a) (Discrimination Because of Sex).

⁶³ Discrimination Because of Sex *op cit* 62 at § 1604.11(a)(2) and (3).

⁶⁴ *Kolstad v American Dental Association* (1999) 527 US 526.

- (i) Sexual harassment includes practices ranging from direct requests for sexual favours to workplace conditions that create a hostile environment for persons of either gender including same sex harassment. The “hostile environment” standard also applies to harassment on the basis of race, colour, national origin, religion, age, and disability.
- (ii) Discrimination based on sex includes being unfairly treated or differently treated as compared to members of the opposite sex in such matters as hiring, firing, and includes terms and conditions of employment. It also requires that pregnancy, childbirth, and related medical conditions be treated in the same way as other temporary illnesses or conditions.

In SA because there are so many listed grounds in the Constitution and the EEA it is fairly easy to identify a behaviour as constituting sexual harassment or not. In the US the CRA lists only race, religion, colour, sex and national origin as prohibited grounds for discrimination and therefore what conduct is sexual harassment is more difficult to ascertain. In the US, the argument that sexual orientation discrimination constitutes sex discrimination has been unsuccessful.⁶⁵ However harassment on the basis of race is prohibited under Title VII. It is illegal to harass someone because of his or her race. The prohibitions are generally the same as those for other forms of harassment. Racial slurs or conduct that denigrates someone’s race is harassment that can create a hostile work environment. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a “tangible employment action,” such as hiring, firing, promotion, or demotion.

(6.5.2) Medical and HIV Testing

The EEA identifies medical testing as a form of discrimination.⁶⁶ The medical testing of an employee is prohibited unless legislation permits or requires it or it is justifiable in the light of medical facts, employment conditions; social policy, the fair distribution of employee

⁶⁵ Dupper Ockert and Garbers Christoph Employment Discrimination — A Commentary in Thompson and Benjamin *op cit* 9 at CC1-68.

⁶⁶ Medical testing as defined in the Act includes —
“any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition”. See section 1 of the EEA.

benefits or the inherent requirements of a job.⁶⁷ The rationale for medical testing prohibition in the EEA is based on the recognition that pre-employment medical testing has often been conducted by employers in order to exclude certain person's from employment. In terms of the EEA, testing of an employee to determine the employee's HIV status is prohibited unless such testing is determined to be justifiable by the LC in terms of section 50(4)⁶⁸ of the EEA or if it is taken voluntarily.⁶⁹

Looking at the position in India, unlike SA, India has no legislation that prevents discrimination against persons living with HIV or Aids. However, the National AIDS Control Organization (NACO) has developed a Voluntary Counselling and Testing policy (VCT) that states that “no individual should be made to undergo mandatory testing for HIV” and that “no mandatory testing should be imposed as a precondition for employment or for provision of health care facilities during employment”.⁷⁰ India's armed forces are however exempt from this condition. NACO has also developed guidelines for VCT centres, which deal with consent and confidentiality issues.⁷¹

However, many Indians are tested for HIV without their consent or knowledge. It has been reported that over ninety-five percent of patients listed for surgical procedures are involuntarily tested for HIV. The consequence of such action is that for those who test

⁶⁷ Section 7 (1) of the EEA.

⁶⁸ Section 50 (4) of the EEA relating to the Powers of the LC (in relation to testing) states — (4).....If the Labour Court declares that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in circumstances, including imposing conditions relating to —

- (a) the provision of counselling;
- (b) the maintenance of confidentiality;
- (c) the period during which the authorisation of any testing applies; and
- (d) the category or categories of jobs or employees in respect of which the authorisation for testing applies.

It should be noted that the prohibition applies to both employees and job applicants (Section 9).

⁶⁹ See the Department of Labour's Code of Good Practice — Key Aspects of HIV/AIDS and Employment (2004).

⁷⁰ NACO National AIDS Prevention and Control Policy — 5.6 — HIV Testing Guidelines (2003) at www.naco.nic.in/nacp/ctrlpol.html last visited 28/04/05.

⁷¹ NACO Voluntary Testing and Counselling Centre Guidelines (2003) at www.naco.nic.in/nacp/program/prog9.html last visited 28/04/05.

positive, their treatment or surgery is cancelled.⁷² Another issue for anyone undergoing an HIV test is that his or her test will in most instances be neither anonymous nor confidential.⁷³ Some Government officials (including. legislators in Goa and Andhra Pradesh) have even voiced their support of mandatory premarital testing for HIV and are proposing related legislation.⁷⁴ However, to date there has been no such legislature implemented.

As can be seen, without effective legislation in place, persons living with HIV or AIDS are subjected to a great deal of unfair discrimination. It is for these very reasons that South African law recognises that discrimination based on a persons HIV status is considered to be unfair discrimination.

In the USA testing for AIDS and HIV-related conditions may be justified under the Rehabilitation Act⁷⁵ when the risk of AIDS or HIV-related infection poses a threat to the health and safety of employees in particular work environments or to the successful performance of particular jobs.⁷⁶

(6.5.3) Psychological Testing

Psychological testing and similar assessments of employees and job applicants may be used under limited circumstances.⁷⁷ In the US, the subject of psychological testing and other tests

⁷² Malavade J A B *et al* Ethical and legal issues in HIV/AIDS counselling and testing (2002).

⁷³ Solomon S & Ganesh A K HIV in India (July-August 2002) International AIDS Society-USA V(10) No.3.

⁷⁴ Lawyers Collective HIV/AIDS Unit Mandatory pre-marital testing (2002, December 15) Newsletter at http://www.lawyerscollective.org/lc_hiv aids/publications/newsletters/newsletters_15.htm?Menu=1 last visited 10/05/04.

⁷⁵ 29 USCA §§791 *et seq.*

⁷⁶ As to medical examinations and inquiries under the Rehabilitation Act of 1973, generally, see §393.

⁷⁷ Section 8 of the EE states that such testing is prohibited unless the test or assessment being used —
(a) has been scientifically shown to be valid and reliable;
(b) can be applied fairly to all employees; and
(c) is not biased against any employee or group.
Also see the case of *Ntai and Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC).

have been the subject of intensive debate.⁷⁸ The US experience highlights problems with the use of selection tests and clarifies the burden that rests on an employer to counter evidence of substantial disparate impact.⁷⁹ Section 8 of the EEA similarly places the burden on employers to show that the test or assessment is valid, reliable, fair and not biased.

6.6 The Regulation of Affirmative Action in the EEA

The affirmative action provisions of the Act set out below only apply to “designated groups” which includes women. Under section 13 “designated employers” must undertake the affirmative action measures set out in section 15 —

“Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”⁸⁰

Affirmative action measures are defined broadly and include measures to —

- (i) identify and eliminate employment barriers, including unfair discrimination;
- (ii) create diversity in the workplace based on equal dignity and respect of all people; and
- (iii) make “reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.

These measures must be designed to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels, and the training and development of people from designated groups. They can include preferential treatment and numerical goals, but cannot include quotas.

Also, nothing in section 15 requires the establishment of absolute barriers to people who are not from designated groups. Note that the phrase “reasonable accommodation” is defined in section 1 as “any modification or adjustment to a job or to the working environment that will

⁷⁸ *Griggs v Duke Power Company* (1971) 401 US 424.

⁷⁹ *Albermarle Paper Co. v Moody* (1975) 422 US 405.

⁸⁰ Section 15(1) of the EEA.

enable a person from a designated group to have access to or participate or advance in employment”.

In formulating affirmative action measures, employers are required to undertake consultation and attempt to reach agreement with employees.⁸¹ In addition, under section 19, employers must conduct an analysis of employment policies, practices, procedures and the working environment, which identifies employment barriers for people from designated groups, and determines the representation of people from designated groups in various occupational categories. Details of the requirements of the analysis are prescribed in the regulations.

The affirmative action provisions contained in Chapter III of the EEA apply only to designated employers. Furthermore, such employers are only bound with regard to employees from designated groups. People from designated groups include black people, women, and people with disabilities. Black people are defined to include Africans, Coloureds and Indians.⁸² The following discussion relates to the specific requirements with regard to affirmative action measures that an employer can take in terms of the EEA.

(6.6.1) Duties of a Designated Employer⁸³

A designated employer must implement affirmative action measures for designated groups to achieve employment equity. In order to implement affirmative action measures, a designated employer must, consult with employees;⁸⁴ conduct an analysis;⁸⁵ prepare an employment equity plan and report to the Director-General on progress made in implementing its employment equity plan.⁸⁶

⁸¹ See section 16 of the EEA.

⁸² Taken from the definitions section of the EEA.

⁸³ Section 13 of the EEA.

⁸⁴ Designated employers cannot implement affirmative action in its workplace unilaterally. In terms of section 16(1) the employer must consult with various people in order to reach consensus on matters in section 17 of the EEA.

⁸⁵ A workforce analysis is also drawn up by designated employers in the US and is commonly called availability analysis.

⁸⁶ Section 17 of the EEA.
Also see the decision in *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994) 15 ILJ 1247 (A) for the meaning of consultation.

(6.6.2) The Consultation Requirement

In section 189 of the LRA, the employer is required to consult.⁸⁷ The consultation requirement is an important process to the eventual goal of equity in the workplace and, therefore, the employer should consult in good faith and not simply go through the process or motions, thereby making a charade of the consultation process.

(6.6.3) The Requirement for Conducting an Analysis

Section 19 of the EEA states that a “designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment”.⁸⁸ The analysis of policies and development of a workforce profile are not only legal requirements, but are required in order to draft an effective employment equity plan.

(6.6.4) The Types of Information to Collect

As stated above, designated employers are required to collect and analyse information concerning their employment policies, procedures, practices and the working environment in order to identify employment barriers that affect people from designated groups.⁸⁹ In order to rid a work environment of unfair discrimination, employers will need to identify the forms of discrimination that operate, and then to formulate ways of eliminating them.

(6.6.5) The Workforce Profile

The workforce profile section should contain a breakdown of the overall workforce by category and level, as well as a breakdown of the level of representation of members of

⁸⁷ Basson A C *et al* Essential Labour Law (1999) V(1).

⁸⁸ Section 19(1) of the EEA.

⁸⁹ In terms of the EEA a “policy” or “practice” is defined in such a way as to encompass a wide range of policies and practice which includes but is not limited to —

- recruitment procedures, advertising and selection criteria;
- appointments and the appointment process;
- remuneration; employment benefits and terms and conditions of employment;
- the working environment and facilities;
- training and development; job assignments;
- promotion; transfer; demotion;
- disciplinary measures other than dismissal; and
- dismissal.

designated groups by category and level.⁹⁰

(6.6.6) Preparing the Employment Equity Plan

Employment equity plans under section 20 are an additional requirement of affirmative action. The main features of these plans are that they must, amongst others, —

- (i) achieve reasonable progress towards employment equity;
- (ii) state the objectives to be achieved for each year, those managers responsible for the implementation of the plan, and the affirmative action measures to be implemented;
- (iii) set numerical goals to achieve the equitable representation in occupational category and level in the workforce and a timetable within which this is to be achieved, and the strategies intended to achieve those goals;
- (iv) set a timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- (v) have set procedures to monitor and evaluate implementation of the plan and to resolve any dispute about the plan; and
- (vi) the plan may not cover a period shorter than one year or longer than five.

Therefore, one of the cornerstones of the regulation of affirmative action in the EEA, is the prescribed employment equity plan.⁹¹ The plan reflects the critical link between the current workforce profile and possible barriers in employment policies and procedures, and the implementation of remedial steps to ultimately result in employment equity in the workplace.⁹² The purpose of the plan is to set out practical steps that a designated employer will take in order to achieve reasonable progress towards employment equity in the workplace, i.e. eliminating unfair discrimination, removing barriers and to correct under representation of employees from designated groups.⁹³ Such a plan must therefore be thorough and drafted in terms of section 20(2).

⁹⁰ Section 19(2) of the EEA.

⁹¹ The employment equity plan reflects a designated employer's employment equity implementation programme.

⁹² The Code of Good Practice *op cit* 52.

⁹³ Section 20 (1) of the EEA.

The following discussion expands on the requirements for a proper and effective employment equity plan. It must include —

(i) The objectives to be achieved for each year of the plan.

In this part of the employment equity plan the employer must commit itself to specific undertakings to be completed within fixed time-frames.⁹⁴

(ii) The prescribed affirmative action measures to be implemented.

The next section of the plan is to be devoted to affirmative action measures. Section 15 (1) defines affirmative action measures as “measures designed to ensure that suitably qualified people from designated groups have equal opportunities and are equitably represented across all occupational categories and levels in the workforce of a designated employer”.⁹⁵ The affirmative action measures are therefore not designed to ensure the advancement of unqualified persons.⁹⁶

When looking at whether a candidate is suitably qualified for a position, the employer must not only look at their formal qualifications or their relevant experience, but they should also give consideration to whether or not the person has prior learning and the capacity to acquire, within a reasonable time, the ability to do the job.⁹⁷ Due to the wider meaning of the terms “suitably qualified” employers are obliged to review all factors and then determine whether in terms of any one factor or a combination of factors, such person has the ability to do the job.⁹⁸

Under the EEA, such measures are required to include measures as mentioned in section 15(2) of the EEA. Employers are thus required to re-examine their employment policies and practices such as recruitment, selection and promotion policies and practices which have all

⁹⁴ The Code of Good Practice *op cit* 52 at section 8.5.

⁹⁵ Section 15(1) of the EEA limits such redressing to suitably qualified people from designated groups. In other words, disadvantaged people from the designated groups will not automatically be given opportunities in the workplace.

⁹⁶ The Explanatory Memorandum *op cit* 49.

⁹⁷ Section 20(3) of the EEA.

⁹⁸ Section 20(4) of the EEA.

negatively affected people from designated groups.⁹⁹ These employment equity measures are to be tested for both direct and indirect discrimination. In the US too, a disparate impact analysis may be carried out by an employer as part of his affirmative action programme or by an equal opportunity specialist from the OFCCP as part of a compliance review. Disparate impact analysis is similar to indirect discrimination in SA.¹⁰⁰

In terms of section 15(2)(c), the EEA makes provision for the reasonable accommodation of people from designated groups.¹⁰¹ According to section 15(2)(d) employers should institute measures to promote representativeness across its workforce so that it reflects the demographics of the national population. Section 15(3) read with sections 15(2)(d)(i) and (ii) requires that people from designated groups must be given preferential treatment and that employers must set and strive to achieve its numerical goals accordingly. Unlike the situation in India, quotas are expressly excluded.¹⁰² The exclusion of quotas eases the pressure somewhat on employers since they can set their own numerical goals and are therefore not constrained to achieve externally set numerical goals.

Section 15(4) states that an employer must not take any decision concerning an employment policy or practice that make it impossible for the prospective or continued employment or advancement of people who are not from the designated groups. This section saves the EEA from constitutional attack by those who do not belong to designated groups. However, in *Public Servants Association of South Africa & Another v Minister of Justice & Others* it was held that white men cannot be excluded from employment because of affirmative action.¹⁰³

⁹⁹ In terms of section 15 (2)(b) of the EEA diversity employers must promote diversity in their workplace. Here employers are required or asked to recognise that individuals and groups are different from one another and should therefore promote tolerance amongst its employees. This should be done by making employees “diversity sensitive” in respect of beliefs, traditions, languages etc.

¹⁰⁰ See the case of *Griggs v Duke Power Co.* (1971) 401 US 424.

¹⁰¹ Section 1 of the EEA defines reasonable accommodation to mean any modification or adjustment to a job or to the working environment that will enable a person from the designated group to have access to or to participate or advance in employment.

¹⁰² Section 15(3) of the EEA.

¹⁰³ The purpose of the Act therefore is that, it is not so much about positive discrimination against those who have been previously advantaged, but about the positive upliftment of disadvantage people thereby levelling the playing field in the workplace.

- (iii) Where under-representation of people from designated groups has been identified by the analysis, the numerical goals¹⁰⁴ to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals.

The Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans, suggests that numerical goals should be developed for the appointment and promotion of people from designated groups.¹⁰⁵

- (iv) The timetable for each year of the plan for the achievement of goals and objectives other than numerical goals for example training programmes.

Disadvantages in training, education and experience are important in relation to equality in employment for women. Subsection 20(3) of the Act is significant in relation to women's recruitment and promotion as it states that suitability for a job depends, amongst other things on, the "*capacity to acquire, within a reasonable time, the ability to do the job*". Also, in making decisions on job suitability an employer may not unfairly discriminate against a person solely on the grounds of lack of relevant experience.

- (v) The duration of the plan, which may not be shorter than one year or longer than five years.

Each employment plan must reflect the affirmative action measures to be taken for a period of not more than five years. Should an employer not reach his goals within that time period, he is then required to draw up another plan for a period of not more than five years. This process will continue until such time that the employers affirmative action goals has been achieved and this would include equal representation of employers in all categories and levels of that particular workforce. In the US, goals and timetables are best seen as part of the overall affirmative action process rather than as specific procedures. They provide the incentive to action and a measure of the degree of the success.

¹⁰⁴ The Act states that section 42(a) dealing with Assessment and Compliance are relevant to the setting of numerical goals in each organisation.

¹⁰⁵ Hock Claire Understanding Employment Equity (2000) at 88.

- (vi) The procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity.¹⁰⁶
- (vii) The internal procedures to resolve any dispute about the interpretation or implementation of the plan.
- (viii) The person's in the workforce, including senior managers, responsible for monitoring and implementing the plan.¹⁰⁷

(6.6.7) Reporting

Section 21 governs the submission of the employer's report to the Director-General.¹⁰⁸ Under section 21 designated employers must submit reports at designated intervals (generally annually) to the DOL. These reports are public documents and, under section 22, are summarised in the employers' annual financial report (or tabled in Parliament in the case of government departments). There are also record keeping requirements imposed by section 26 of the EEA. Under section 24 of the EEA, designated employers must assign one or more senior managers to take responsibility for monitoring and implementing their employment equity plan. Under section 25 of the EEA, all employers must display notices to inform employees about the provisions of the Act. In addition, employment equity plans, reports, compliance orders, arbitration awards and orders of the LC concerning the Act must be made available to employees.

Chapter V provides for enforcement of the Act by labour inspectors¹⁰⁹ through a system of undertakings to comply¹¹⁰ and compliance orders¹¹¹ enforced by the LC. Of particular

¹⁰⁶ The Code of Good Practice *op cit* 52 at section 9.

¹⁰⁷ This section must be read with section 24 of the EEA, which requires that responsibility for implementation and monitoring of the plan, as assigned during the planning phase, should be confirmed and noted.

¹⁰⁸ Sections 21(1) and (2) of the EEA.

¹⁰⁹ See section 35 of the EEA.

¹¹⁰ See section 36 of the EEA.

¹¹¹ See section 37 of the EEA.

interest are the guidelines to be used in assessing compliance with the Act found in section 42 of the EEA which include the following factors —

- (a) the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category;
- (b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector; and
- (c) the reasonable efforts made by the employer to implement its employment equity plan and to eliminate employment barriers that adversely affect people from designated groups.

(6.6.8) Compliance with the Act

Section 42 serves to gauge whether employment equity is being implemented in the workplace in accordance with the Act and is therefore a very important section. In the US, Title VII of the CRA establishes the EEOC to enforce and administer the provisions of that statute regulating equal employment.¹¹²

Employment patterns were patterned in ways that demonstrated white men's privilege. A 1998 survey of 455 South African firms indicated that white males constituted eighty-nine percent of senior South African management. Black males comprise six percent of senior management and the remaining five percent of senior managers are either coloured or Indian. This contrasts starkly to the demographic reality of SA. Women make up fifty-two percent of the population, blacks are seventy percent of the population, whites are eleven percent, coloureds represent nine percent while Indians or Asians are the smallest group at three percent.¹¹³ The importance of the EEA therefore, cannot be understated. It has forced both the private and public sectors to deal with transformation issues.

¹¹² EEOC Affirmative Action Guidelines, 29 CFR §1608.1(a).

¹¹³ Msimang Sisonke Affirmative Action in the New South Africa — The Politics of Representation, Law and Equity (2001) Women In Action No. 2 (Msimang).

6.7 Affirmative action and the Suitably Qualified Candidate

Disadvantages in training, education and experience are important in relation to equality in employment for women and designated groups. Subsection 20(3) of the EEA is significant in relation to women's and designated groups recruitment and promotion as it states that suitability for a job depends, amongst other things on, the "capacity to acquire, within a reasonable time, the ability to do the job." Also, in making decisions on job suitability an employer may not unfairly discriminate against a person solely on the grounds of lack of relevant experience.¹¹⁴

However, whilst trade unions and traditionally leftist organisations have supported the EEA, civil society activists have raised a number of concerns about its ability to address the problems of severely disadvantaged groups of people. It has been argued that the EEA is aimed at an already privileged minority in SA, i.e., those who already have jobs in the formal sector and in companies with a significant turnover and large numbers of employees. While the career advancement of middle-class women and blacks is important, some have argued that there are more pressing problems, such as job creation, with which the Ministry of Labour should be more concerned with.¹¹⁵

The affirmative action policies contained in the EEA cannot and should not be implemented in isolation. If they operate without being fed by education policies that increase access to education and employment, there is a real risk that the EEA will simply empower an elite group of blacks and women, further entrenching growing class inequalities in SA. Legislation that has been promulgated to assist in this regard is the SDA which will facilitate the implementation of the EEA. This Act is important in attempting to overcome the legacy of apartheid and to build a better life for all in SA. The EEA, if properly implemented can help South Africans rid their workplaces of discrimination and encourage the development of fair and equitable employment policies and practices.

Affirmative action is not only specifically provided for in the various anti-discrimination legislation above, but also has constitutional backing. This becomes important when one is

¹¹⁴ *Harmse v City of Cape Town* (2003) JOL 11047 (LC) at 10.

¹¹⁵ *Msimang op cit* 113.

looking at whether or not affirmative action measures are constitutionally valid. Court interpretations of affirmative action programmes also become important in deciding the constitutionality of such programmes. It will be shown how a constitutional backing makes it more difficult for affirmative action to be struck down.

However, bearing in mind that these anti-discrimination legislation to an extent, trample on the rights of individuals from non-designated groups, it is important that affirmative action measures are carried out in a manner that is not arbitrary and without any merit.

6.8 Defences against Claims of Discrimination

Once a claim of unfair discrimination on any one or more of the prohibitive grounds is alleged, the onus is on the employer against whom the allegation is made to establish the fairness of the discrimination.¹¹⁶ The law sets out five grounds on which discrimination is generally allowed —

- (i) Discrimination based on the inherent requirement of a particular job;
- (ii) Discrimination based on affirmative action;
- (iii) Compulsory discrimination by law;
- (iv) Discrimination based on productivity; and
- (v) The general fairness defence.

However, the EEA provides that —

“[I]t 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.”¹¹⁷

These may be regarded as two statutory grounds for justifying what might otherwise amount to unfair discrimination.

¹¹⁶ Section 11 of the EEA and also see the case of *Ntai and Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC), where the court held that once the applicants proved that difference in salaries constitutes direct discrimination, the onus shifts to the employers to prove that such discrimination is nevertheless fair.

¹¹⁷ Section 6(2) of the EEA.

What follows is an examination and explanation of the scope and extent of the above defences.

(6.8.1) The Inherent Requirements of a Job

It is recognised at both the levels of foreign and international law that a claim of indirect unfair discrimination can be defended by the employer on the basis of an inherent requirement of the job.¹¹⁸ In SA employers may respond to an allegation of unfair discrimination by showing that the policy, rule or practice is justified on the basis of some characteristic or qualification that is necessary for the performance of the job.

For example, in *Collins v Volkskas Bank (Westonaria Branch)*, a division of Absa Bank Ltd,¹¹⁹ the Industrial Court¹²⁰ imported the American test developed in *Griggs v Duke Power Company*¹²¹ which required a valid commercial rationale for an employment practice to be held as an “inherent requirement” of a job. This test had been significantly criticised in both the USA and in the UK because its effect was to place commercial profitability and efficiency above the effect that the discriminatory impact had on the employees.

In the *Collins* case,¹²² the employer had refused the employee’s application for maternity leave in terms of a collective agreement stipulating that such leave would not be granted within two years of a previous period of maternity leave. The employer did not expressly rely on the inherent requirements of the applicant’s job, which did not yet exist as a statutory defence, but the court nevertheless considered whether its decision could be justified on this basis. It was found that commercial rationale justified a policy that placed some limitation on the amount of maternity leave granted to employees.

¹¹⁸ Naidu Melanie The ‘Inherent Job Requirement’ Defence — Lessons from Abroad (1998) SAMLJ 10 (Naidu).

¹¹⁹ *Collins v Volkskas Bank* (1994) 5 SALLR 34 (IC); (1994) 12 BLLR 73 (IC).

¹²⁰ The Industrial Courts are no longer called Industrial Courts but are now the Labour Courts of SA.

¹²¹ *Griggs v Duke Power Company* (1971) 401 US 424.

¹²² *Collins v Volkskas Bank* (1994) 12 BLLR 73 (IC). Although the Interim Constitution was not yet in force when the dispute arose, the case was decided with reference to the Interim Constitution and international law.

Dealing with the manner in which the policy had been applied, however, the court ruled as follows —

“Business necessity ... is the touchstone as to what constitutes acceptable discrimination in international codes and practice: Put in another way, I would submit that the question whether the dismissal of a female employee in a particular case arising within the meaning of section 8(2) revolves around considerations of business necessity or the operational requirements of the business. If her dismissal is justified by her employer’s operational requirements, in the sense that he cannot do without her during the period of her maternity leave, then although her dismissal would be discriminatory, at least indirectly, it would not amount to unfair discrimination within the meaning of section 8.”

On the facts, it was found that the branch where the applicant was employed could well have done without her services for three months and was, indeed, overstaffed. The defence of the “inherent requirements” of the job could therefore not be sustained as a justification for the applicant’s effective dismissal.

Since the *Collins* case the South African courts have rejected this overly flexible interpretation of “inherent requirement” in favour of a more strict interpretation. The strict interpretation excludes business operational reasons from consideration. It has therefore been argued that requirements which cannot be removed from the job in question, without dramatically altering the nature of the job, will be regarded as an inherent requirement under the strict interpretation.¹²³

In the *Association of Professional Teachers and Another v Minister of Education and Others* the Industrial Court held that a differentiation base on the inherent requirements of a job “should only be allowed in very limited circumstances and should be allowed where the decision to differentiate is based on subconscious (or a conscious) perception that one sex is superior to the other”.¹²⁴ A regulation denying married female teachers the same right to

¹²³ Naidu *op cit* 118 at 181.

¹²⁴ In *Association of Professional Teachers and Another v Minister of Education and Others* (1995) 16 ILJ 1048 (IC); (1995) 9 BLLR 29 (IC), the Industrial Court held that a differentiation base on the inherent requirements of a job “should only be allowed in very limited circumstances and should be allowed where the decision to differentiate is based on subconscious (or worse, a conscious) perception that one sex is superior to the other”. At 1081 (ILJ); 60 (BLLR). Also see *CWIU v Johnson & Johnson (Pty) Ltd* (1997) 9 BLLR 1186 (LC) at 1196I-J. The court states “Quite frankly I have serious difficulty in thinking what job

housing benefits as male or unmarried female teachers was found to be clearly unjustifiable on this or on any other ground.

The strict interpretation was accepted and applied in *Association of Professional Teachers & Another v Minister of Education & Others*¹²⁵ and subsequently in *Swart v Mr Video*.¹²⁶ Discrimination on at least three prohibited grounds was freely admitted to in the *Swart* case. In this matter the applicant had responded to an advertisement for a position as assistant in a video outlet which stipulated an age limit of 25 years and being 28 years old, was rejected. The employer's defence was that the stipulated age limit was in effect an inherent requirement of the job in that the other employees were young, compatibility among employees was important and an older person might be reluctant to accept instructions from a younger person. The arbitrator rejected this defence on the grounds that compatibility is not determined by age alone and that, as the applicant was apparently not averse to taking instructions from a younger person there was no reason for not employing her.

The employer went on to further claim that the fact that Ms. Swart was married and had children was an additional reason for not employing her. The arbitrator found that this constituted unfair discrimination on the basis of marital status and family responsibility and could not in any way be justified under the inherent requirements of a job defence.

In the *Whitehead v Woolworths*¹²⁷ case, the LC found that "an inherent requirement of the particular job" implies that the job must have "some indispensable attribute" which is "so inherent that if not met an applicant would simply not qualify for the post".¹²⁸ Uninterrupted job continuity, it was held, cannot be an inherent job requirement because it can never be guaranteed.¹²⁹

exists under the sun which can be said to inherently require a worker to be a male or female in order to perform".

¹²⁵ *Association of Professional Teachers & another v Minister of Education & Others* 1995 (16) ILJ 1048 (IC).

¹²⁶ *Swart v Mr Video* (1997) 2 BLLR 249 (CCMA).

¹²⁷ *Whitehead v Woolworths* (1998) 8 BLLR 862 (LC).

¹²⁸ *Ibid* at para 34-35.

¹²⁹ *Ibid* at para 122.

One of the few cases where the “inherent requirements” defence received positive consideration, if only indirectly, was in the case of *Lagadien v University of Cape Town*.¹³⁰ In this matter the applicant had applied for a position as coordinator of the university’s Disability Unit, a position she had filled for a time in an acting capacity. The advertisement stated that ability to work with the academic sector was an essential requirement and a tertiary qualification would be advantageous. The applicant was rejected on the grounds that a better-qualified candidate had been appointed and her lack of a tertiary qualification was singled out as a reason for her failure to be appointed. The issue which the court was ultimately called on to decide was whether the applicant had suffered unfair discrimination on the unlisted ground of lack of an academic qualification.

In this regard the court made the following finding —

“It was in this specific sector, involving the indispensable requirement of experience of the work described in an academic environment, that the applicant, the respondent contends, notwithstanding her undoubted strengths and attributes at other levels, fell short and was determined to be not appointable..... “That requirement, bolstered as would unarguably be the case by a level of tertiary education, was not an unfair one and constituted justifiable discrimination within the ambit of section 6(2)(b) of the Employment Equity Act 55 of 1998 (Schedule 2 of which repealed the residual unfair labour practice provisions of the Labour Relations Act 66 of 1995 upon which the applicant, in her pleadings, relies).”¹³¹

Given the finding that the applicant had been defeated on merit, however, it follows that “discrimination” was not established and that there was in fact no case for the respondent to answer. The above assertion provides further evidence on the approach that the courts may be expected to follow.

It should however be noted that this dispute arose prior to the promulgation of the EEA and therefore fell to be decided in terms of the equivalent provisions of the LRA that were applicable at the time. Therefore the finding of the court that the applicant’s “allegation” of unfair discrimination presented the employer with a case to answer would be incorrect in

¹³⁰ *Lagadien v University of Cape Town* (2001) 1 BLLR 76 (LC).

¹³¹ *Ibid* at para 18-19. It should however be noted that this dispute rose prior to the promulgation of the EEA and therefore fell to be decided in terms of the equivalent provisions of the LRA that were applicable at the time.

terms of the EEA. Looking at the applicable provisions of the EEA, the onus would have been on the applicant to prove both the fact of discrimination and its unfairness under the EEA.

The following cases have provided the courts with further guidelines as to what constitutes “an inherent requirement of a job”. The courts have held that the following circumstances will not, in themselves, be regarded as constituting or creating “inherent requirements of a job” —

- Commercial rationale (*Woolworths v Whitehead*;¹³² *Hoffman v South African Airways*)¹³³;
- Market advantage determined by (perceived) public prejudice (*Hoffman v South African Airways*)¹³⁴;
- Differential pay demands or expectations of different groups of employees (*Ntai & Others v South African Breweries Ltd*)¹³⁵; and
- A collective agreement or negotiated outcome providing for sex or other forms of discrimination (*Collins v Volkskas Bank; George v Western Cape Education Department and Another*;¹³⁶ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & Others*;¹³⁷ *Larbi-Odam v MEC for Education (North-West Province)*¹³⁸).

Further, it is apparent when looking at the various judgments what an “inherent requirement of a job” is.

- It is analogous to “business necessity” and/or must be dictated by operational requirements (*Collins v Volkskas*);

¹³² *Whitehead v Woolworths* (1998) 8 BLLR 862 (LC).

¹³³ *Hoffman v South African Airways* (2000) 12 BLLR 1365 (CC) at par 34.

¹³⁴ Customer preferences are not an inherent requirement of a job.

¹³⁵ *Ntai & Others v South African Breweries Ltd* (2001) 2 BLLR 186 (LC).

¹³⁶ *Western Cape Education Department and Another* (1996) 2 BLLR 166 (IC).

¹³⁷ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC) at 1449.

¹³⁸ *Larbi-Odam v MEC for Education (North-West Province)* (1998) 1 SA 745 (CC).

- It must be so essential that, without it, an employee would be unable to do the job (*Whitehead v Woolworths*);
- Non-compliance with such requirement must result in more than mere inconvenience or limited disruption to the employer (*Woolworths v Whitehead*);
- There should be clear evidence of its existence. In the case of a job being advertised, for instance, the inherent requirements should appear from the advertisement (*Lagadien v University of Cape Town*).

It is apparent from the cases referred to above that even though there are guidelines on what an inherent requirement of a job is and what it is not, a comprehensive and efficient legal explanation of the meaning and extent of “the inherent requirements of a job” is yet to be decided upon. However, even though the concept of “inherent requirements of a job” is not clearly defined in South African labour legislation, it appears to have invoked a strict interpretation by the South African courts. The phrase however, still remains to be meaningfully addressed by the courts. The South African courts will pay due regard to the guidelines from foreign jurisdictions, particularly the USA. Some of the cases relating to how the American courts have dealt with “inherent requirements of a job” will be discussed in the next chapter.

Very briefly however, in the USA section 703(e) of Title VII of the CRA provides that it is a defence to charges of direct discrimination where “religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business”. Against the background of this section, it was left to the courts to give meaning to this section.¹³⁹ For example, in *Griggs v Duke Power Company*, the SC in the USA, held that an employer’s use of a high school completion requirement and general intelligence test violated Title VII, because neither requirement was shown to be demonstrably related to successful performance of the jobs for which the requirements were used.

Even though these provide some guidelines to the South African judiciary on how to handle “inherent requirements of a job” cases, it has been shown that there are relatively few cases involving the “inherent requirements of a job” to justify discrimination in the South African

¹³⁹ The EEOC of the US has also published guidelines in this regard. See *Discrimination Because of Sex op cit* 62 at 29 CFR Part 1604.

context.¹⁴⁰ Since there is so much of confusion regarding the unfair discrimination, one would have to look at how the CC has approached this issue to get some clarity. It is proposed to do just that in the next part of the thesis.

(6.8.2) Affirmative Action

Another statutory defence to a claim of unfair discrimination is that of affirmative action. The EEA sets out what measures constitute affirmative action measures. These measures are to be taken by employers to ensure that members of designated groups¹⁴¹ are adequately represented in the workforce and have equal opportunities to compete for and advance in jobs.¹⁴² Affirmative action measures include the “identification and elimination of barriers with an adverse impact on designated groups; the promotion of diversity; making reasonable accommodation for people from designated groups; retention, development and training of designated groups (including skills development); and preferential treatment and numerical goals to ensure equitable representation. This excludes quotas.”¹⁴³

Further, the EEA itself states that affirmative action measures must be measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities are equitably represented in all occupational categories and levels in the workplace of a designated employer. The Bill of Rights recognises that affirmative action measures can be designed as to promote the achievement of equality amongst persons or categories of persons disadvantaged by unfair discrimination.¹⁴⁴ In order to achieve this goal the barriers in the workplace which restrict employment and progression opportunities have to be eliminated.

(6.8.2.1) Affirmative Action — A Defence or a Right?

Affirmative action’s main aim is generally to ensure that the previously disadvantaged groups are fairly represented in the workforce of a particular employer. It must therefore be borne in

¹⁴⁰ See Chapter Seven on how the US courts approach this issue.

¹⁴¹ Designated groups refer to African, Coloured, Indian, women, and disabled people.

¹⁴² Msimang *op cit* 113.

¹⁴³ At the website of <http://www.labour.gov.za/> last visited 05/05/05.

¹⁴⁴ Section 9(2) of the South African Constitution.

mind that affirmative action is said to be a shield in the hands of an employer, and not a sword to be used by individuals.¹⁴⁵ This means that as a rule, an applicant for employment or promotion cannot rely on affirmative action in order to *compel* the employer to appoint or promote him. Affirmative action exists as a justification ground for employers against allegations of discrimination. The LC has now held that affirmative action can only be used as a defence to justify employers' decisions where members of non-designated groups are affected in relation to one or more of the designated groups.¹⁴⁶

In the case of *Dudley v City of Cape Town*¹⁴⁷ the applicant was a black woman whose application for a post within the first respondent was unsuccessful. The second respondent, a white male, was appointed to the post. In challenging the appointment, the applicant argued that it was a breach of the "affirmative action" provisions of the EEA. The first respondent successfully took an exception to the statement of case on the ground that "affirmative action" under the Act is not available to an individual employee for use as a sword in the prosecution of a claim based on affirmative action. The applicant alleged that failure to appoint her to the position of Director: City Health constituted unfair discrimination, an unfair labour practice, a breach of the "affirmative action" provisions of the EEA and a breach of the City's constitutional obligations, such as those created, amongst others, by sections 9(1) and 9(2) of the Constitution.

These allegations rested principally upon the alleged breach of the "affirmative action" provisions of the EEA. The City of Cape Town took an exception to the statement of case on various grounds but mainly on the ground that "affirmative action" under the EEA is not available to an individual employee for use as a sword in the prosecution of a claim based on "affirmative action". The LC upheld the exception holding, amongst other things, that the EEA does not establish an independent individual right to "affirmative action".¹⁴⁸

¹⁴⁵ *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330(LC) at 334A-E.

¹⁴⁶ *IMAWU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) at 1129B-D.

¹⁴⁷ *Dudley v City of Cape Town & Another* (2004) JOL 12699 (CC).

¹⁴⁸ Also see the case of *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1998) JOL 4249 (LC) at 6.

Affirmative action therefore acts as a justificatory ground for employers against allegations of discrimination. Further, the definition of the term “suitably qualified for a job” is not limited to employees and affirmative action measures alone. It will accordingly also apply to applicants for employment and in particular any claims for unfair discrimination. Significantly, in that sense also the EEA may represent a sword as it could form the beginning of a cause of action. An applicant for employment could possibly challenge the appointment of a member from the non-designated group on the basis that inadequate or insufficient consideration was given to determining whether the aggrieved applicant was in fact suitably qualified when the employer appointed the person from the designated group in the vacant position. Similarly this principle could be extended to selection criteria to be applied in the case of operational terminations.¹⁴⁹

In the *Harmse v City of Cape Town*¹⁵⁰ case, the court stated that if one were to have regard only to section 6 of the Act then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be used by an employer against claims that it has unfairly discriminated against an employee. However, from the reading of the Act it appears that affirmative action is more than just a “defence” or “shield” in the hands of an employer. Affirmative action should therefore not be restricted or limited to a role as a mere defence mechanism in the process of the elimination of unfair discrimination in a workplace.

The definition of affirmative action in section 15 is indicative of a role for affirmative action that goes beyond the tameness of its status as a defence mechanism only. Affirmative action measures include measures to “eliminate employment barriers”; to “further diversity” in the workplace; and to ensure “equitable representation”. In these respects affirmative action takes on more than just a defensive position. It includes pro-activeness on the part of the employer. The Act places an obligation on the employer to take measures to eliminate unfair discrimination in the workplace.¹⁵¹

¹⁴⁹ Section 15(2)(d)(ii) of the EEA.

¹⁵⁰ *Harmse v City of Cape Town* (2003) JOL 11047 (LC).

¹⁵¹ *Ibid* at 5-6. Also at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=446> last visited 31/31/35.

Therefore, affirmative action as a defence against discrimination can be used by employers even if they do not comply with Chapter 3 of the EEA. However, the affirmative action measures relied upon would still have to comply with the basic constitutionally valid requirements for affirmative action.¹⁵²

Further, affirmative action may only be used as a defence to justify an employers' decisions where members of non-designated groups are effected in relation to one or more of the designated groups. The courts have held that where differentiation between members of the designated group is at stake the issue must be decided on merit alone.¹⁵³

If employers raise affirmative action as a defence they are in fact admitting that they did discriminate either on sex, race or on some other ground. Such a declaration on the employers part may result in him being unsuccessful in litigation. For example, in the *Auf der Heyde* case, the court stated that in the face of the employers acknowledging discriminating on the basis of race; that it was also an employment equity decision not to employ him; and irrespective of his academic capabilities his race was the defining criteria, affirmative action was not held to be a valid defence.¹⁵⁴

(6.8.2.2) Affirmative Action and Efficiency

In the matter of *Stoman v Minister of Safety and Security & Others*¹⁵⁵ the applicant, a white employee sought to review the appointment of a black employee. The applicant had been short-listed and had scored the highest number of points in the interview process. He was recommended for the promotion but the black candidate, who was the most suitable candidate for the post amongst the black applicants, was appointed. The Minister denied that it had unfairly discriminated against the applicant and contended that in appointing the best black applicant, it had given effect to the employment equity plan drawn up in accordance with the EEA. Whilst the applicant contended that he was better qualified for the position than the

¹⁵² See for example *PSA & Others v Minister of Justice* (1997) 18 ILJ 241 (T); *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA).

¹⁵³ *IMAWU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) at 1129B-D.

¹⁵⁴ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC) at 1770H.

¹⁵⁵ *Stoman v Minister of Safety and Security & Others* (2002) 23 ILJ 1020 (T).

black employee, it was not contended by the applicant that the black employee was not qualified at all for the position. The applicant also argued that there was no proof that the black employee, as an individual, had been previously disadvantaged.

In evaluating the defence of affirmative action measures, the court has further embarked upon an enquiry to determine, whether the SAPS did indeed have an affirmative action policy.¹⁵⁶ Having been satisfied that the SAPS indeed had such policy, the court proceeded to examine whether there was a rational connection between the measures and the aim the SAPS policy was designed to achieve. It recognised that a policy or practice which is regarded as haphazard, random or overhasty could not constitute a policy in terms of the legislative provisions. In determining whether the policy passed the rationality test, the court evaluated the interaction between the concepts of efficiency and representivity when implementing an affirmative action measure. The court disapproved of the notion that representivity would only play a role in instances where competing candidates have broadly the same qualifications and merits.

The court held that —

“.....to allow considerations regarding representivity and affirmative action to play a role, only on this very limited level, would be too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality.”

The court further held that —

“Some tensions may in certain situations exist between ideals such as efficiency and representivity, and a balance then has to be struck. Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing aims. They are linked and often interdependent. To allow equality or affirmative action measures to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in this situation where society emerges from a history of unfair discrimination. The advancement of equality is inevitably part of the consideration of merits in such decisionmaking processes. The requirement of rationality remains, however, and the appointment of people who are

¹⁵⁶ *Ibid* at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=305> last visited 31/07/05.

Having acknowledged that measures to ensure representivity was constitutionally recognised and given effect to by the provisions of the EEA.

wholly unqualified, or less than suitably qualified or incapable, in responsible positions, cannot be justified.”¹⁵⁷

Looking at this case it would therefore seem that efficiency will accordingly only trump representivity in circumstances where the appointment of the representative candidate would be rationally justifiable on account of such persons’ qualifications, suitability or ability.

The court disposed of the argument that affirmative action measures were not designed to protect and advance only individuals of a designated group who were personally disadvantaged. The court went on to state the following about affirmative action —

“The emphasis is certainly on the group or category of persons, of which a particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual, but to advance a category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South African society. Similarly, the aim is not to punish or otherwise prejudice the applicant as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination.”¹⁵⁸

It would seem that the particular privileges or achievements of a person falling within the designated category should therefore not be taken into account when affirmative action measures are applied.

The impact of the concept of efficiency also received consideration in the matter of *Coetzer & Others v Minister of Safety and Security & Another*.¹⁵⁹ The applicants were inspectors in the explosive unit (the bomb squad) of the SAPS. The SAPS has a policy of advertising posts for its non-designated group or the designated group. If a post is advertised for the designated group only, then only persons belonging to the designated group may apply.

¹⁵⁷ *Stoman v Minister of Safety and Security & Others* (2002) 23 ILJ 1020 (T).

¹⁵⁸ *Ibid.* Also at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=305> last visited 07/08/05.

¹⁵⁹ *Coetzer & Others v Minister of Safety and Security & Another* (2003) 24 ILJ 163 LC. Also at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=305> last visited 31/07/05.

However, if a post is advertised for the non-designated group, both non-designated and designated employees may apply for such a position. The applicants challenged their non-appointment on the grounds of unfair discrimination when the SAPS refused to appoint them in posts reserved for the designated group.

The SAPS declined to process the applications even though it had not been able to fill a large number of posts reserved for the designated group in this particular brand of the SAPS. The applicants challenged this decision on the basis that the refusal to entertain their applications, constituted unfair discrimination. The SAPS relied on its employment equity plan which applied to all persons employed by the SAPS.

The court recognised that the application of the employment equity plan would constitute justification for the alleged unfair discrimination. The matter was, however, complicated by the approach of implementing affirmative action measures by the business unit. The business unit plans are then integrated into a consolidated employment equity plan for the entire service. No specific employment equity plan for the bomb squad existed and the court then had to consider whether the general employment equity plan of the SAPS justified racial discrimination and would in the absence of the bomb squad's own employment equity plan constitute a defence based on affirmative action measures.

The court held that it was necessary to examine the general employment equity plan with reference to the Constitution. Such approach would be in compliance with section 3 of the employment equity plan.¹⁶⁰ The court held that the requirement to interpret the employment equity plan in compliance with the Constitution related not only to the equality and affirmative action provisions but to all other provisions of the Constitution. The court held that "it was therefore necessary to examine the employment equity plan against the other goals and values determined for our society in terms of the Constitution". The Constitution provided that the SAPS is obliged to discharge its responsibilities effectively.¹⁶¹

¹⁶⁰ At <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=305> last visited 30/07/05.

Section 3 provides that the EEA must be interpreted in compliance with the Constitution so as to give effect to its (EEA) purpose, taking into account any irrelevant code of practice issued in terms of the Act (EEA) or any other employment law and in compliance with the international obligations of the Republic in particular those contained in ILO Convention III.

¹⁶¹ See Section 205(2) of the South African Constitution.

The court held that —

“The Constitution envisages a balance between the affirmative action imperative and imperatives, including, for the present purposes, the need for the police service ‘to discharge its responsibilities effectively’. The Constitution does not prescribe how the two imperatives ought to be balanced but the balance must be a rational one.”¹⁶²

The court then proceeded to distinguish the efficiency approach adopted in the *Stowman* case, on the basis that the latter dealt with claims of unfair discrimination in the context of the judicial review whilst it had to deal with an action in terms of section 6 of employment equity plan where affirmative action was raised as a justification for the discrimination. The court held that the employer, i.e. the State, also had to show that its affirmative action measures were in harmony with other constitutional provisions.

The court further held that, as the general employment equity plan did not specifically deal with the obligation resting on the SAPS, to discharge its responsibilities effectively, it undoubtedly ought to have been foremost in the minds of the drafters of the employment equity plan to ensure that the SAPS was able to maintain its effectiveness during the period of transition or transformation.

Whilst the absence of a specific affirmative action plan for a bomb squad did not exist, the court held that such a deficiency would not have been significant if the general employment equity plan made provision for addressing the dynamics and catered for specific needs and unique circumstances of specialised units, pending the completion of, or incorporation of such plans in the general employment equity plan. The court held that the failure to balance affirmative action measures and the discharge of its effectiveness imperative in the SAPS general employment equity plan was not rational. Accordingly, the SAPS’s failure to promote applicants could not be justified by the defence of compliance with its general employment equity plan.

Further, consideration was given to the issue of affirmative action measures. The court held that a designated employer may not place a blanket ban on the employment or promotion of

¹⁶² *Coetzer & Others v Minister of Safety and Security & Another* (2003) 24 ILJ 163 LC at para 25.

able-bodied white males in order to achieve the numerical goals set out in its employment equity plan.¹⁶³ The court stated that —

“An absolute value is an insurmountable obstacle. Whether a barrier is an insurmountable obstacle must be judged in the light of the purpose of the EEA and with respect to the non-designated group generally.”¹⁶⁴

This case shows the importance of doing a proper employment equity plan as opposed to achieving representativeness in a workforce without a proper plan being formulated in advance.

(6.8.2.3) Compliance with the Employment Equity Plan

In the matter of *SA Police Union obo Du Toit and SA Police Service*¹⁶⁵ the Commissioner had to decide whether the SAPS failure to appoint the best white candidate on the basis of affirmative action, constituted discrimination. The application arose from a failure to promote a white employee to a non-designated post and the appointment of a person from the designated category to the non-designated post on the basis of the SAPS wishing to advance its representivity in terms of its employment equity plan.

It was argued by the applicant that the criterion of representivity ought not to be relevant regarding an appointment to a position which is categorised as non-designated as it would negate the whole purpose and object of having such category. Such approach, it was argued, would present non-designated applicants facing double jeopardy as they would be excluded from applying, in effect, for both non-designated and designated positions. The Commissioner found that the SAPS had, on the facts, not applied the criteria laid down in its own employment equity plan fairly or correctly and accordingly held that the failure to promote the applicant amounted to unfair discrimination.

¹⁶³ *Coetzer & Others v Minister of Safety and Security & Another* (2003) 24 ILJ 163 LC at para 26.

¹⁶⁴ *Ibid* at para 27.

¹⁶⁵ *SA Police Union obo Du Toit and SA Police Service* (2003) 24 ILJ 878 (CCMA).

Further, in the *Public Servants Association v Minister of Justice*¹⁶⁶ case the HC of the Transvaal Provincial Division held that affirmative action measures cannot be haphazard or random action; the measures must be designed to achieve an intended purpose in a rational and adequate manner.

In another case, *PSA v Minister of Correctional Services*¹⁶⁷ the LC held that while the Constitution recognises that affirmative action measures are necessary in the process of achieving substantive equality, the measures must satisfy certain criteria. These criteria are as follows —

“Designed to achieve” — Essentially the measure’s means and ends must be sufficiently linked. Further, the measure must be applied having regard to the circumstances surrounding the implementation of the programme.

“Adequate protection and advancement” — This criterion would require the measures to advance and protect persons previously discriminated against to be sufficient and not overbroad. The criterion simply requires the “playing fields to be levelled”.

“Disadvantaged by unfair discrimination” — This criterion refers to the beneficiaries of the positive action. The sponsors of such action will have to establish that the beneficiaries are past victims of apartheid and that their present position is still one of inequality in relation to those privileged under apartheid.”

This case demonstrates that measures aimed at enhancing representivity must not be haphazard, random or amount to the overhasty application of an affirmative action measure. Such conduct would not be considered to be rational and justify discrimination.

However, in the *Gordon v Department of Health, KwaZulu-Natal*¹⁶⁸ after being turned down in favour of a less experienced black candidate with whom he had competed for a promotional post in the KwaZulu-Natal Department of Health; Gordon referred a dispute to the LC. He claimed he was the victim of unfair discrimination. One of the grounds for this claim was that at the time the dispute arose, his employer, the KwaZulu-Natal Department of

¹⁶⁶ *Public Servants Association v Minister of Justice* (1997) 18 ILJ 241 (T).

¹⁶⁷ *PSA v Minister of Correctional Services* (1997) 18 ILJ (LC).

¹⁶⁸ *Gordon v Department of Health, KwaZulu-Natal* (2004) 7 BLLR 708 (LC), (2004) JOL 12682 (LC).

Health, had not adopted an affirmative action plan. The other ground was that he was simply a better candidate because he had more experience than the black colleague who had been promoted. The department admitted that it had no affirmative action plan in late 1996, when it confirmed the disputed appointment.

However, the department claimed that the appointment of a black candidate to the post for which Mr. Gordon had been recommended by the selection committee was nevertheless fair because it was trying to correct the under-representation of black employees in the category into which the post fell.

The first question the court had to decide was whether the refusal to employ a suitably qualified and experienced white job applicant solely because he is white constitutes unfair discrimination merely because the employer has not formally adopted an affirmative action plan. Many cases have been dealt with regarding this issue. One such case that dealt with such an issue was the *Van Vuuren* case.¹⁶⁹ In the former case the presiding officer had ruled that the provincial commissioner of the department acted *ultra vires* by preferring a black male officer to an equally or better qualified white female officer, who had, like Gordon, been recommended by the selection committee.

The Industrial Court, the court *a quo* in the *Van Vuuren* case, held that without an affirmative action plan to justify taking the candidate's race into account, the department was bound by section 11(1)(b) of the Public Service Act of 1994, which provides that "only the qualifications, level of training, merit, efficiency and suitability are relevant when any appointment or promotion is considered".

The LAC held that all the commissioner had done was to anticipate an affirmative action policy that had already been negotiated and agreed upon with the unions. The court concluded that —

“[T]he Commissioner thus acted within his competence or powers when he made the decision. His evidence at the hearing discloses that he did not slavishly adhere to a fixed policy or principle in making his final decision but that, to the contrary, he gave careful consideration to the particular circumstances of the respondent, the demands for

¹⁶⁹ *Department of Correctional Services v Van Vuuren* (1999) 11 BLLR 1132 (LAC).

representivity in that particular post in the Eastern Cape and other relevant factors. That the outcome was to a certain extent dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants are more of a reflection on the remaining strangeness of our society, rather than an indication of arbitrariness on his part.”

The judgment in the *Van Vuuren* case confirmed that, even without an affirmative action plan, it was then permissible to take into account demographic considerations when making appointments or approving promotions in the public service. This case is important in another aspect in that the LAC has recognised that the affirmative action provision as summarised in the equality clause indicates an “almost symbiotic relationship”. In other words, affirmative action is not an exception to equality but it is a means of giving effect to equality. This reading of affirmative action indicates a clear acceptance in South African law that socio-economic inequality caused by apartheid is a reality in SA and that affirmative action is indeed one of the ways in which an attempt can be made to remedy this real or substantive inequality.

However, in the *Eskom* case¹⁷⁰ a private arbitrator ruled that in the absence of an affirmative action plan, Eskom had discriminated against the white woman, and could not raise affirmative action as a defence. On review, the LC held that, even if the arbitrator was wrong in this regard, the error was not so gross as to warrant interference. The Labour Court’s pronouncement in *Eskom* that all South Africans must know or ought to know that racial discrimination is unfair, unless the discrimination is justifiable or defensible as an affirmative action policy or practice, clearly supports the notion that employers can not simply label a policy “affirmative action” and expect it to be fair. The principles laid down in section 9(2) of the Constitution and item 2(2)(b) of the LRA and those criterion that were expanded upon in the *PSA v Minister of Correctional Services* decision must be observed.

However, without reference to the *Eskom* case, in *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,¹⁷¹ the court held that “for affirmative action to survive judicial scrutiny” there must be “a policy or programme through

¹⁷⁰ *Eskom v Hiemstra NO & Others* (1999) 10 BLLR 1041 (LC).

¹⁷¹ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC).

which affirmative action is to be effected”, and that policy must be “designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination”. The court gave the following reason for endorsing these requirements —

“These requirements ensure that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme.”

The court concluded that —

“In the absence of an affirmative action programme specifically designed in terms of the collective agreement any appointment on purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be tested. In a nutshell the appointment of Masenga cannot be justified on affirmative action grounds.”

In the case of *Coetzer & Others v Minister of Safety & Security & Another*¹⁷² the court found that the failure to promote specialised white male employees even though there were no “designated” candidates for the vacant posts for which they had applied violated the constitutional imperative to promote efficiency in the public service. The court also noted that there was no affirmative action plan for the unit concerned, but the judge indicated that he did not consider that deficiency decisive. More important was the fact that, by declining to promote the available and eminently qualified white male applicants, the SAPS had failed to discharge its constitutional obligation to promote efficiency.

In *Gordon*, it was argued that the absence of a plan was decisive. Although the matter came before the court in 2004, the dispute arose in 1996, while the Interim Constitution was still in force. The court therefore had to determine the question according to the provisions of that Constitution, as read with those of item 2(1) of Schedule 7 to the LRA, which had only just been promulgated at the time. The judge began by referring to the debate over the relationship between the “substantive” and “formal” approach to equality.

¹⁷² *Coetzer & Others v Minister of Safety & Security & Another* (2003) 2 BLLR 173 (LC).

Looking at the substantive approach to equality, people who have been disadvantaged in the past are not expected and cannot be expected to compete on an equal basis with those that were once the privileged in society. This is the reason for affirmative action as affirmative action is meant to assist those very people that were unfairly disadvantaged and hampered by virtue of their race, sex etc., to assist them in such a way so as to elevate them to the status they would have been in had it not been for the unfair discrimination. Affirmative action is designed to elevate them to a position where they are able to compete equally for legal rights.

Bearing in mind that the *Gordon* case was decided in terms of the Interim Constitution, the court observed, with reference to the provisions of the Interim Constitution, that the absence of an affirmative action plan cannot frustrate the objective of substantive equality. Furthermore —

“The existence or otherwise of such measures can also not change the essential content of the rights and protections in subsection (1) and (2). In other words, if there is no affirmative action plan, it cannot mean that a disadvantaged person can have no right to substantive equality in terms of section 8(1). Or that a privileged person will be unfairly discriminated against in terms of section 8(2) if substantive equality is afforded a disadvantaged person.”

The court held further that the earlier case law did not contradict this conclusion —

“The context in which the plans or policies were in issue in the above decisions of the Labour Court are (*sic*) distinguishable from this case. Nothing from the foregoing cases suggest that an affirmative action plan is a prerequisite for making an affirmative action appointment. It is not a prerequisite for giving effect to section 8(1). The applicant’s proposition is therefore not supported by the weight of judicial opinion. On the contrary, the learned justices of the Labour Court and Labour Appeal Court looked beyond the policies, plans or measures to consider other bases on which the appointments might [or might not] be justified.” But, more fundamentally, the court added that in any event, the legislation itself provides the standards and “measures” upon which employers are entitled to rely, even if the employer does not itself have an affirmative action plan.”

So even though it was held by the court that affirmative action is statutorily endorsed, and even if an employer has no affirmative action policy in place, the statutory intentions cannot be frustrated, it should be borne in mind that as the *Gordon* case was decided before the final Constitution and before any other cases, it would seem that an affirmative action plan will

only stand constitutional scrutiny if it is in done in conjunction with a properly implemented employment equity plan.

(6.8.2.4) Affirmative Action — Designated Groups Only

The matter of *Stulweni and SA Police Service (Western Cape Province)*¹⁷³ demonstrates that affirmative action measures are aimed at addressing the representivity of designated groups only. In this matter the applicant alleged that he ought to have been given preference on account of his religion. The applicant was of the Muslim faith and applied for a vacancy in the SAPS as a chaplain. He was unsuccessful and whilst some of the other successful applicants were from a designated group, all successful applicants were of the Christian faith. The arbitrator examined both the provisions of EEA and the SAPS's employment equity plan and noted that the plan only provided for affirmative action measures to be taken with regard to suitably qualified persons from designated groups. Designated groups included black people, women and people with disabilities.

In other words, the question of religion does not enter the definition of designated groups. Accordingly it would not be open to the employer to advance an applicant on the grounds of religion on the basis of an affirmative action measure. The commissioner further contended that the applicants' case was not aimed at looking for non-discrimination but positive discrimination (i.e., preferential treatment) on the ground of his faith. This, the arbitrator held, was not the aim of affirmative action measures as envisaged by the EEA. Affirmative action measures, as it presents itself in terms of the EEA, does not necessarily create rights for persons, but mainly presents designated employees with a duty and a defence.¹⁷⁴

It is interesting to note that most of the affirmative action cases arise in the public sector. This can be attributed to many factors. It may be attributed to the fact that employers in the private sector are better implementers of affirmative action measures as opposed to those employers in the public sector; or it could demonstrates that the public sector is more vigorous in applying affirmative action measures than the private sector. Experience shows that the latter is more true. However, the benefit to the private sector is that the principles

¹⁷³ *Stulweni and SA Police Service (Western Cape Province)* (2003) 24 ILJ 883.

¹⁷⁴ Du Toit *et al* Labour Relations Law, Comprehensive Guide (2003) at 563.

surrounding affirmative action measures are being extracted in these cases and provides clear guidelines for corporate SA on how to implement its affirmative action measures.

In short, affirmative action in SA has been recognised and accepted as a fair form of discrimination, which may be a complete defence to a claim of unfair discrimination based on race and/or gender. It is the employer seeking to uphold the affirmative action policy that must prove to the court that the discrimination alleged and presumed to be unfair is in fact fair. However, it is now settled law that any action that discriminates but is claimed that it is fair on the basis of it being affirmative action, must not be irrational, excessive or overboard and the beneficiaries of the action must be persons who were previously disadvantaged by unfair discrimination and who continue to suffer substantive inequality in relation to those who were privileged and benefited under the apartheid era. The judiciary is therefore entitled to investigate the constitutionality of any measure that purports to be an affirmative action measure.

The cases confirm further that affirmative action cannot be applied randomly or in a haphazard manner. Rather, the courts require careful and close consideration of each of the elements stated in the Constitution and in the EEA. A valid affirmative action policy will therefore be one that is designed to achieve the adequate protection and advancement of persons previously disadvantaged by unfair discrimination and the policy must simply be adequate.

(6.8.3) Fair and Compulsory Discrimination by Law

There are other laws that prohibit discrimination in the workplace for e.g., the BCEA. These laws do not allow the employer to employ children under the age of 15 years, or pregnant women four weeks before confinement and six weeks after birth.¹⁷⁵

(6.8.4) Discrimination Based on Productivity

It is also fair by law for the employer to discriminate on the basis of productivity (for instance when giving merit based increases). This would of course be dependent on the fairness of the criteria utilised for assessing performance and productivity.

¹⁷⁵ See for example the BCEA.

(6.8.5) *A General Fairness Defence*¹⁷⁶

One of the more important defences against unfair discrimination in the workplace is the general fairness defence. So in addition to the statutory grounds and apart from the above defences to claims of unfair discrimination a general fairness defence is also being established. The general fairness defence is considered to applicable defence based on fairness in situations where the two statutory exceptions do not apply.¹⁷⁷ This means that when one looks at the concept of “unfair” discrimination it implies that discrimination may be justified in certain circumstances. Further, the EEA expressly provides that discrimination is not unfair if it is for purposes of affirmative action or is the result of an “inherent requirement of a job”. Apart from the various defences discussed, a “general fairness” defence is being recognised whereby discrimination that would otherwise have been unfair may be justified if in terms of its objectives, nature and context it meets certain strict requirements of proportionality and/or fairness.¹⁷⁸ This defence amounts to seeking justification for discrimination based on the principles of equity or fairness.

The notion of a general fairness defence seems to be very broad, however the unfair discrimination provisions in item 2 of Schedule 7 of the LRA suggest a structure to the enquiry into fairness of the discrimination namely —

- (i) a general category of fairness — the general defence of fairness; and
- (ii) two specified categories of fairness — the exceptions of affirmative action in sub-item (2)(a) and the inherent requirements of the particular job in sub-item.¹⁷⁹

In the context of South African labour law, the principal basis for the argument is to be found in *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* where it was noted that, despite the prohibition of unfair discrimination —

¹⁷⁶ For more information see Dupper Ockert Justifying Unfair Discrimination: The Development of a “General Fairness Defence” in South African Labour Law (2001) *Acta Juridica* at 14-174 (Dupper).

¹⁷⁷ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC).

¹⁷⁸ Dupper *op cit* 176.

¹⁷⁹ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC) at 1448.

“[w]hat is less clear is where to draw the line between permissible and impermissible discrimination. The notion of permissible discrimination is in keeping with a substantive, rather than formal, approach to equality that permeates the Constitution and from which item 2(1)(a) draws its inspiration.”¹⁸⁰

Then, having noted that the employer relied on neither of the two statutory defences, i.e., affirmative action and “inherent requirements of a job”, Acting Justice Seady went on to hold as follows —

“Discrimination is unfair if it is reprehensible in terms of the society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.”¹⁸¹

Therefore despite the absence of these statutory defences, discrimination may nevertheless still be fair.¹⁸² Discrimination will be unfair if it is reprehensible in terms of society’s prevailing norms. It has however been argued that the fact that the general fairness defence may be left open to interpretation should not detract from the general proposition that defences that have the effect of limiting rather than advancing equality in the workplace should be strictly construed.¹⁸³ The reason for this is that there is a fear that a “general fairness defence” may have the effect of broadening the scope for discrimination.

Looking at the above cases to the defence of unfair discrimination, South African case law reflects considerable inconsistencies in the application of the existing rules laid down by the LRA and the EEA. It is clear that the impact of anti-discrimination law and the role of the courts in giving effect to it have been restrictive and inconsistent. However, this is not to underestimate the gains that have been made in some areas. These gains are however being overshadowed by the vast amount of discrimination that still persists in the South African

¹⁸⁰ *Ibid* at 1447.

¹⁸¹ *Ibid* at 1448.

¹⁸² *Leonard Dingler Employee Representative v Leonard Dingler (Pty) Ltd And Others* (1998) 19 ILJ 285 (LC) and the case of *Woolworths (Pty) Ltd v Whitehead* (2000) 12 BCLR 1340 (LAC).

¹⁸³ Catherine O’Regan *Equality at work and the limits of the law. Symmetry and individualism in anti-discrimination legislation* (1994) *Gender and the New South African Legal Order* No.64 at 77.

society. Taking into account these inconsistencies, the next part to this thesis will look at how the CC in SA has approached and developed the law relating to unfair discrimination.

The following chapter relates to those provisions regulating anti-discrimination in the US and how this is similar to the provisions of South African law. A basis will be set to show how the laws regarding affirmative action, equality and discrimination are formulated. In Part IV of this thesis I will look at the courts interpretation of such rights. Further, looking at the history to affirmative action in Part I affirmative action is necessary to level the playing fields in the working environment. How effective such measures are will be discussed in the next part of this thesis.