

SUMMARY

(b)(i) THE APPLICATION OF AFFIRMATIVE ACTION IN EMPLOYMENT LAW WITH SPECIFIC REFERENCE TO THE BENEFICIARIES: A COMPARATIVE STUDY

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(vi) SUMMARY

South African affirmative action law in the workplace is in its infancy. Yet some concepts in this context have already proven to be unclear or in need of interpretation, or are lacking.

This thesis focuses on the beneficiaries of affirmative action in employment law. The Employment Equity Act (EEA) creates 'designated groups' (black people, women and people with disabilities) as the beneficiaries of affirmative action. It lays down two requirements for beneficiaries of affirmative action which are investigated: (a) beneficiaries must be from the designated groups – in this regard, the question that arises is whether, having been categorised as disadvantaged, persons are presumed to be de facto disadvantaged and entitled to benefit from affirmative action, or whether further evidence of actual past disadvantage is required; and (b) beneficiaries must be 'suitably qualified'. In addition, citizenship as a third requirement for beneficiaries of affirmative action has been mooted in case law. This is evaluated against modern interpretation theory, the Constitution and discrimination law.

Against the background of a comparative investigation of the position in the US and Canada, and under international law, specific findings and recommendations are made in respect of South African affirmative action law. These relate to the interpretation of the concept 'disadvantage', to a pragmatic and contextualised approach to the notion 'degrees of disadvantage', to the recognition of the concept 'multiple disadvantage', to the clarification of the meaning and application of the concept 'suitably qualified' in a code of good practice, and to a policy decision by government to ensure that affirmative action measures apply mainly to South African citizens who otherwise qualify to benefit.

To this end, certain amendments to the EEA, its regulations and codes of good practice are proposed with the aim of ensuring that affirmative action measures in fact benefit those intended by the EEA.

Some projections are made to indicate the way forward for affirmative action in South Africa.

KEY TERMS: actual past disadvantage; affirmative action; beneficiaries; categorisation; citizenship; deficiencies of categorisation; degrees of disadvantage; designated groups; dignity; disadvantage; equality of opportunity; formal equality; membership of a group; merit; multiple disadvantage; substantive equality; suitably qualified.