
CHAPTER 4

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1 INTRODUCTION

The purpose of this chapter is fivefold: (a) to track the interpretation of the concept 'disadvantage' by the courts under the EEA in order to establish whether actual past discrimination is required to benefit from affirmative action or whether group membership will suffice (with such exercise being carried out against the background of the various notions of equality¹); (b) to evaluate the notion of degrees of disadvantage; (c) to point out the deficiencies of categorisation as a methodology; (d) to establish the reasons for and the meaning of the concept 'suitably qualified' as used in the EEA; and (e) to establish whether a person must be a South African citizen to benefit from affirmative action.

2 BENEFICIARIES OF AFFIRMATIVE ACTION

2.1 Disadvantage

2.1.1 Introduction

As pointed out above, neither the Constitution nor the EEA (or any of the preceding investigations) is clear as to whether personal, actual disadvantage is required for a person to benefit from affirmative action.² However, when viewed against the background of substantive equality as embraced by the Constitution, and on the basis of academic opinion, the meaning of this concept in the constitutional context has been clarified – it is submitted correctly – to relate to membership of a group.³ The same debate has continued in the context of the EEA and is recorded below.

1 See chapter 2 pars 3.1.2; 3.1.3; 3.1.4 above.

2 See chapter 3 pars 3.5.1.3(a) 3.5.2.3(c)(ii) above.

3 See chapter 3 par 3.5.1.4(a) above.

2.1.2 Academic opinion

During the early debate on the EEA there was some support for the view that personal disadvantage is a prerequisite for benefiting from affirmative action.⁴ Soon, however, this changed and support for group membership was observed. For example, Rycroft⁵ notes that the EEA assumes that all people from the designated groups are disadvantaged. An alternative understanding is that, as it is difficult to calculate degrees of disadvantage, it is better to focus on the broad social purpose of the EEA – representivity – regardless of whether a person in a designated group comes from a wealthy background and has received the best education.⁶ Also, it is an unnecessary and wasteful exercise to prove historical discrimination, for this exacerbates conflict and division.⁷ It focuses on the wrongs of the past rather than the hopes of the future and promotes an unhealthy social ethic – the endeavour to prove that one is a victim – which should not be the focus of an affirmative action enquiry.⁸

‘The aim should *not* be for individuals or groups to have to prove victim status but rather to promote the social objective of *reasonably fair and equitable representation of all social groups within all categories*

4 See Brassey 1 134; Brassey 2 1361-3. See also Van Wyk Thesis 50-1 who supports an ‘individual-based socio-economic’ model of affirmative action which will provide benefits for actual victims suffering from general societal discrimination without identifying an actual perpetrator. The author holds that: (a) race and gender should be seen as presumptive indicia of unfair discrimination for the purpose of easy identification, but not as by themselves establishing conclusive proof of discrimination; (b) indicators of socioeconomic deprivation combined with the presence of indirect indicia of deprivation are sufficient to qualify a black person as being entitled to the benefits of affirmative action; and (c) the actual material circumstances of the individual, irrespective of group membership, must therefore be considered. He views the group as a ‘handy indicator’ of possible discrimination rather than as a ‘direct measure’ of actual discrimination. This approach for South Africa is not supported for the reasons set out below in par *Evaluation of disadvantage*.

5 ‘Obstacles to Employment Equity’ 1423-6.

6 *Ibid.*

7 *Op cit* 1425, referring to Chris Albertyn.

8 *Ibid.* See also *Durban City Council (Electricity Department) v SAMWU (Durban City Council)* (1995) 4 ARB 6.9.23 (unreported) where the arbitrator opined that it would be impossible to implement affirmative action if each and every applicant had to be subjected to a test as to whether he or she as an individual had been disadvantaged by past practices.

of employment in the private and public sectors. That involves a different orientation: not towards proof of victimization, but rather to proof of ability to perform the work (or at least of potential to do so within a reasonable period of time – with appropriate training, assessment on the job, mentoring, evaluation procedures, etc, if necessary) (own emphasis).

These views are supported by Dupper,⁹ who holds that individual disadvantage as a requirement to benefit from affirmative action does not accord with the notion of substantive equality that underpins South Africa's legislative provisions on affirmative action. This is also supported by Du Toit.¹⁰ He supports the notion of group experience as the touchstone for affirmative action and argues that this is suggested by the wording of the EEA. He comments that the proposition that blacks should be deemed not to have suffered disadvantage unless they can prove the contrary appears to be fundamentally misplaced.¹¹

'South Africa's past policy of apartheid has been branded as a "crime against humanity" and its devastating effect on black communities has been documented so *amply* as to require *no* additional proof' (own emphasis).

Du Toit submits that disadvantage should be presumed in favour of blacks, with rebuttal possible on relatively narrow grounds only, such as in the case of a black South African born and educated outside South Africa who at no stage suffered disadvantage of the kind that the Constitution and the EEA set out to undo.¹² He argues that similar presumptions should apply to women and people with disabilities, in that they should not be required to prove facts which are not really in dispute.¹³

This approach however brings the element of personal disadvantage back into the

9 Dupper 1 286.

10 'When does Affirmative Action become Unfair Discrimination' 13.

11 *Ibid.*

12 *Ibid.*

13 *Op cit* 14.

picture. It is doubted whether rebuttal even on this basis should be allowed if one considers the real-life stories of those who fled apartheid South Africa, received their education and earned their living abroad, and raised their children there. These people suffered disadvantage in many ways. It is believed that they should be entitled to benefit from affirmative action, even if they were outside the country for a period of time. Although at first blush this argument may seem rather emotional, it is sound, realistic and in line with the notion of substantive equality.¹⁴ In a country such as South Africa, with its history of wide-ranging apartheid and patriarchy, this is appropriate: a majority needs to be affirmed and this must be done in a practical way and without delay.

Some key cases relating to the interpretation of the issue of disadvantage will now be discussed.¹⁵

2.1.3 Case law

2.1.3.1 Actual past disadvantage

(a) *George case*

The issue of disadvantage was discussed in *George*,¹⁶ which was the first case on affirmative action in employment law to reach the (then) Industrial Court. It was held that the question as to who the beneficiaries of affirmative action should be was 'intimately connected' with the purpose of affirmative action. The purpose of affirmative action was seen to be a

14 See McGregor 2 812.

15 Throughout, the facts of cases will be set out briefly, but only where they add to a better understanding of the issue under discussion. Generally, affirmative action cases were brought before the court by relatively highly qualified white males complaining of not being appointed or promoted to high-status jobs.

16 (1996) 17 ILJ 571 (IC), decided in terms of the unfair labour practice definition under the Labour Relations Act 28 of 1956 and the interim Constitution.

'means' of ensuring that the previously disadvantaged were assisted in overcoming their disadvantages so that society could be normalised.¹⁷ The focus therefore had to be on the disadvantaged, which, in the South African context, was coupled with race and gender.¹⁸ It was accepted, however, that, within a racial group that had suffered discrimination, there might be, and were indeed, persons who had enjoyed opportunities and who had not been disadvantaged to the extent of their fellow human beings.¹⁹ The court thus recognised the notion of 'degrees of disadvantage'.²⁰ Landman P (as he then was) stated that 'affirmative action in a South African context is not primarily intended for their benefit'.²¹ It was accepted that an employer who applied affirmative action by preferring, in the case of a transfer or promotion, a candidate who had 'personally been historically' unfairly discriminated against, in contrast to a candidate who had not suffered such deprivation, was not guilty of committing an unfair labour practice.²²

As a result of this case, it was stated that, even though the court accepted the substantive notion of equality, disadvantage was seen as being measured by *individual* experience and to be attached to individuals and not to groups of people.²³ It was therefore uncertain whether this finding would be upheld – if the notion of substantive equality was favoured, the Industrial's Court requirement of proof of personal disadvantage was not likely to be sustained.²⁴ It was also remarked that, although the court's considerations were realistic, the test with regard to the acceptability of a particular affirmative appointment had been made very complex.²⁵

17 At 593H-I.

18 At 593I.

19 At 592A; 593I-J.

20 See par 2.1.3.3 below.

21 At 592A.

22 At 594D.

23 Van Niekerk 'Affirmative Action' 2-3.

24 *Op cit* 9-10.

25 Grogan 1 8.

A few further cases touched on the notion of disadvantage, but did not really clarify or take the issue any further.²⁶

2.1.3.2 Group membership

(a) *Auf der Heyde* case

The decision in *Auf der Heyde*²⁷ was in complete contrast to that in the case of *George* supra. In this instance, Jammy AJ contended that, whilst there was case authority (without mentioning any, but presumably referring to the *George* case) that beneficiaries must show that they had actually been disadvantaged to qualify for affirmative action, academic opinion was that the term ‘disadvantaged’ must not be so narrowly interpreted as to require that *each* potential beneficiary must show that he or she was *actually* disadvantaged.²⁸ In this case, the applicant (a white male on a fixed-term contract) had not been appointed to a permanent post while two other black male colleagues in a similar situation (Chibale (a non-citizen) and Naidoo (a South African citizen)) had indeed been appointed permanently. The applicant alleged, amongst other things, that the University had applied its Equal Opportunity Employment Policy unfairly and selectively.

The judge did not specifically address the notion of substantive equality, but relied on Kentridge’s²⁹ argument that beneficiaries of affirmative action should be ‘members of groups that “have been disadvantaged by general societal discrimination, whether direct or indirect”’.

26 See, for example, *Public Servants Association No 1* (1997) 18 ILJ 241 (T); *Public Servants Association* (LC) 25 July 1997 case no J174/97 (unreported); *Public Servants Association & others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA).

27 (2000) 8 BLLR 877 (LC), decided in terms of the residual unfair labour practice definition of the 1995 LRA and the final Constitution.

28 At 894A-B.

29 At 894B (Kentridge ‘Equality’ 14-39) (see chapter 3 par 3.5.1.4(a) above).

The court found:³⁰

‘There is *no basis* upon which Dr Chibale can qualify as a member of such a group or, in that context, upon which, directly or indirectly, he can be *deemed, actually or potentially, to have been disadvantaged by general societal discrimination*. He cannot therefore ... legitimately be said to fall within the category of persons to whom the policy in question is directed and, in that context, the affirmative action which the policy embraces is *inapplicable* to him’ (own emphasis).

This finding, although not fully canvassed, appears to be in line with the EEA and the well-considered views of academics as discussed above.

(b) *Stoman case*

Subsequently, *Stoman*³¹ clarified the issue of disadvantage fully. This was an (unsuccessful) review application to set aside a decision by the South African Police Service (SAPS) not to promote Stoman (the applicant), a captain, to the rank of superintendent and not to appoint him to the post of commander of the Narcotics Bureau (in which he had been acting for approximately a year). Instead, one Sethlare (the fourth respondent) was appointed to the post. This appointment was made despite the applicant having obtained the highest score of all candidates in the tests conducted during the selection process and despite the fact that he had been shortlisted and had been recommended by the evaluating committee for appointment to the position.³²

The applicant *inter alia* argued that he had been unfairly discriminated against, contrary to the provisions of section 9(3) of the Constitution, in that he was the best qualified and most appropriate candidate for the position. He alleged that Sethlare had been appointed only because he was black, whereas he himself was white. The respondents contended that the

30 At 894C.

31 (2002) 23 ILJ 1020 (T).

32 At 1028H-F.

applicant's allegations of unfair discrimination were totally unfounded and unreasonable. It was argued that, although the applicant had been found suitable and had initially been recommended for the post, the SAPS was obliged to give effect to its affirmative action policy in the context of the EEA.³³ Reference was made to various circulars, letters and an interim equity plan (which was not in effect at the time when the recommendations were made, but which had been used as a guideline).³⁴ It was also contended that, although the applicant had been recommended by the evaluating committee, only the national commissioner had the authority to make final appointments.³⁵ It transpired that, after the recommendations had been considered by the national commissioner, he was of the opinion that representivity had not been addressed adequately. He had therefore requested that the recommendations be reconsidered in order to improve representivity.³⁶ Thereafter, Sethlare was recommended for the post, as he was found to be the 'most suitable' black candidate for the post.³⁷

Crucial to the court's interpretation of the concept of disadvantage was of course its understanding of the notion of substantive equality. The court accepted the notion of substantive equality as recognised by the Constitution and as sanctioned by the Constitutional Court.³⁸ Moreover, it held that equality involved 'more than mere non-discrimination'³⁹ and that, when a society had emerged from a long history of discrimination that had taken place individually, systemically and systematically, it could not be assumed that people were on an equal footing and that measures distinguishing between them amounted to unfair discrimination.⁴⁰

33 At 1026C-D; 1027C.

34 At 1024A; 1024F-1025C; 1025H-I; 1026D-I.

35 At 1024A.

36 At 1024H.

37 At 1024I-J.

38 At 1029B-H.

39 At 1029C.

40 At 1029D.

But, the applicant had submitted that there was no proof that Sethlare had, as an individual, actually been previously disadvantaged by unfair discrimination. In fact, it was argued that, because he already held a relatively high rank in the police service, he could not be regarded as such a person. The court described this view as fraught with logical difficulties and stated that it posed a rather academic question.⁴¹ It held that the intention of the legislature with the constitutional recognition of measures designed to protect and advance previously disadvantaged persons, or categories of persons, could not have been to make such measures dependent on the individual circumstances of each particular case.⁴² The court held that the emphasis was certainly on the group, or category of people, of which the particular individual happened to be a member, or, put negatively, of which a specific person such as the present applicant was not a member.⁴³ In the present instance, the group in question – blacks – had been disadvantaged by unfair discrimination. It was accordingly concluded as follows:⁴⁴

‘The aim is not to reward the fourth respondent [Sethlare] as an *individual*, but to *advance the category of persons to which he belongs and to achieve substantive equality in the SAPS* [South African Police Service] 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*’ (own emphasis).

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- 41 At 1035C-D. The difficulties were illustrated as follows: ‘What would the case be if it is accepted, for example, that South African black people, and women, have been disadvantaged by unfair discrimination, but a particular applicant for a job grew up in London where she received an outstanding education of a high standard? What would the situation be if the applicant is a black woman who grew up in another African country and who was not subject to South African apartheid policies and practices? Would it make any difference if the last-mentioned fictitious candidate was also subjected to discriminatory practices because of the colonial history of that country?’.
- 42 At 1035D-E. The court also touched on the related issue of degrees of disadvantage raised in *Motala & another v University of Natal (Motala)* (1995) 3 BCLR 374 (D) (discussed in par 2.1.3.3(b)(i) below).
- 43 At 1035H.
- 44 At 1035H-J. It is noteworthy that the court followed almost exactly the wording of *Canadian National Railway* [1987] 1 SCR 1114, 40 DLR (4th) 193 at 213 (see chapter 3 par 3.5.1.4(a) above; chapter 6 par 3.5.4.2(b)(i) below).

This finding appears to be in line with the notion of substantive equality as embraced by the Constitution and academic opinion.

Evaluation of disadvantage

It is submitted that, against the background of substantive equality, the court in *Auf der Heyde supra* and *Stoman supra* correctly interpreted the concept 'disadvantage' as a notion not relating to actual past disadvantage but to a group-based approach in terms of which members of the designated groups are assumed to be disadvantaged, even though a particular member might only be relatively disadvantaged.⁴⁵ This interpretation is correct in terms of the notion of substantive equality, embraced by the Constitution and the EEA, and academic opinion. Moreover, actual past disadvantage, as a requirement for benefiting from affirmative action measures, cannot be inferred from the EEA. In essence then, as actual past discrimination is not required, a standard for proving past discrimination has consequently not been an issue.⁴⁶

2.1.3.3 *Degrees of disadvantage*

(a) Introduction

The EEA does not contain the notion of degrees of disadvantage, and thus no hierarchy

45 See, however, Carpenter 'Equality and Non-discrimination' 184 who holds that this interpretation might prove to be a bone of contention as time goes by and more people enjoy the benefits of equality from birth (see chapter 7 par 2.1.3 below for a recommendation in this regard).

46 Although not an issue in South Africa at the moment, evidence of past disadvantage may become relevant at a later stage when large numbers of blacks, women and the disabled have in fact benefited under affirmative action (see chapter 7 par 2.1.3 below for a recommendation in this regard).

of designated groups exists.⁴⁷ Instead, the Act advocates 'equitable representation' in occupational categories and levels in the work force of a designated employer to determine the appointment (or promotion) of members of different designated groups on the basis of affirmative action.⁴⁸

(b) Case law

(i) Motala case

Motala,⁴⁹ a case unrelated to the workplace, established the notion of degrees of disadvantage. In this instance, an Indian student with an excellent academic record was refused admission to medical school in favour of an African student. The court was satisfied that the respondent's affirmative action policy relating to its selection of first-year medical students complied with section 8(3)(a) of the interim Constitution. It held that the degree of disadvantage to which African pupils were subjected by the previous four-tier education system (for whites, blacks, Indians and coloureds) was 'significantly greater' than that suffered by their Indian counterparts and so established the notion of degrees of disadvantage.⁵⁰ A selection system that compensated for such discrepancy did not, the court held, run counter to section 8(1) and (2) of the interim Constitution.⁵¹

47 Although in s 54(1)(a) fn 8 of the EEA it is provided that a code of good practice may provide guidelines for the prioritisation of certain designated groups.

48 See ss 2(b); 15(1) of the EEA.

49 (1995) 3 BCLR 374 (D).

50 At 383C-D. See De Waal, Currie & Erasmus *Bill of Rights Handbook* 225 who hold that 'it is perfectly legitimate ... to apply affirmative action measures in proportion to the degree of disadvantage suffered in the past'. The authors believe that when the effect of a programme is to disadvantage, on the basis of race, people who, previously, were also victims of discrimination, the court ought to focus on whether the programme is reasonable and carefully constructed to achieve equality. The court failed to do so in *Motala* – it accepted that the programme was valid simply because Africans had been 'more disadvantaged' than Indians.

51 At 383D.

143 The application of affirmative action in employment law with specific reference to the beneficiaries: A comparative study

(ii) *Stoman case*

Similarly, in *Stoman supra*,⁵² the court touched on the issue of degrees of disadvantage. It accepted that African people had been severely discriminated against under apartheid, as had other non-white race groups, although not necessarily to the same extent.⁵³ It also accepted that the detailed circumstances of individual members of any group might differ.⁵⁴ Whereas some individuals might have had access to relatively better educational and other facilities, others might have been unfortunate enough to have been subjected to the worst possible discriminatory practices that had occurred during a certain era. The court maintained that it would be 'impossible' to make such distinctions in practice.⁵⁵ Also, the court held that it would have made very little sense to say that, as the appointee, Sethlare, had already been promoted to a relatively high rank, he was not disadvantaged.⁵⁶

(iii) *Fourie case*

In *Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another*⁵⁷ (*Fourie*), the applicant (a white female inspector in the SAPS) was refused promotion to the post of captain. A black male colleague (Moseri) was appointed instead. The police station in question had no black officers and the quota of white females in terms of the employment equity plan had in fact been exceeded. The court accepted that white women had been discriminated against under apartheid, but not to the same extent as black people, and,

52 (2002) 23 ILJ 1020 (T) (see par 2.1.3.2(b) above).

53 At 1035F.

54 *Ibid.*

55 At 1035F-G.

56 At 1035G-H.

57 (2004) 25 ILJ 17716 (LC).

in particular, African people.⁵⁸ It held that white women had access to better educational and other facilities. The judge accepted the view in *Stoman* supra that the aim was not to punish the applicant as an individual, but to diminish the over-representation her group had been enjoying as a result of previous unfair discrimination.⁵⁹ It was emphasised that note should be taken of the history of South Africa, of the imbalances of the past, of the purpose of the EEA, of the fact that the apartheid system had been designed to protect white people, and of the fact that African people had suffered the 'brunt' of discrimination.⁶⁰ The matter could thus not be considered in a 'vacuum'.⁶¹ The court accepted that Moseri was a 'suitable' person.⁶² In addition, it held that the appointment advanced representivity at the particular police station and that such appointment was rational, justifiable and fair.⁶³

Evaluation of degrees of disadvantage

In the light of the above, it seems that any abstract ranking of different forms of disadvantage in order to establish an order of preference for the designated groups is neither advisable nor necessary in practice.⁶⁴ It has been mooted that an assessment of the relative importance of different individual or collective profiles of disadvantage in a particular employment context is relevant.⁶⁵ In this regard, in a particular work force, some groups may prove to have been more disadvantaged or under-represented than others, and special preference that is given to them may be justified. Such preference will then be based on 'need'

58 At 1735H.

59 At 1735H-1736A. The wording is again similar to that used in the *Canadian National Railway* case (see chapter 3 par 3.5.1.4(a); fn 44 above).

60 At 1736A-B.

61 At 1736B.

62 At 1736G.

63 At 1736G; 1737C.

64 Pretorius 'Affirmative Action' 24.

65 *Ibid.*

and not on any arbitrary rank order in respect of the groups.⁶⁶ An appropriate contextualised approach is therefore necessary. In terms of this approach, the nature of the position, the demographic profile of a particular department or section in a workplace, and the qualifications and work experience of the candidates should all be relevant in deciding whom to appoint.

It thus seems that the approach of degrees of disadvantage is not likely to find large-scale application with regard to affirmative action in the employment context. This is to be welcomed, as problems with this approach are that: (a) it may be difficult to measure the extent of discrimination that any person has suffered;⁶⁷ (b) race discrimination and gender discrimination are different in nature,⁶⁸ and (c) it may be difficult to prove degrees of disadvantage and, requiring a party to do so, could unnecessarily complicate a case.⁶⁹ A specific recommendation for a contextualised approach will be made below.⁷⁰

2.1.4 Deficiencies of categorisation

Some deficiencies of categorisation as utilised by the EEA have been pointed out in the literature. First, the categories are over-inclusive in that the categorisation assumes that all people from the designated groups are disadvantaged – people who have not been disadvantaged may therefore benefit under affirmative action.⁷¹ The EEA also does not recognise that members of the designated groups were not equally affected and disadvantaged by apartheid and patriarchy. For example, the group, ‘women’, is made up of black and white women, rich and poor women, urban and rural women, and mothers and those

66 *Ibid.*

67 See Rycroft ‘Obstacles to Employment Equity’ 1426.

68 *Ibid.*

69 See McGregor 2 817-8.

70 See chapter 7 par 2.2.3 below.

71 Rycroft ‘Obstacles to Employment Equity’ 1423-6; Du Toit ‘When does Affirmative Action become Unfair Discrimination’ 14; Dupper 1 286.

who do not have children.⁷² Moreover, the position of white, middle-class women is qualitatively different from that of poor, black rural woman.⁷³ In other words, it is not recognised that, within the designated groups, people may have been differently affected.

Secondly, sub-groups within a designated group display degrees of disadvantage.⁷⁴ In this regard, it has been held that Indian and coloured people have been less disadvantaged than blacks in South Africa.⁷⁵ The various sub-groups (Africans, coloureds and Indians as part of the group, 'black people') constituting the category, 'black people', may therefore 'mask' differences between one another.⁷⁶ Also, it has been stated that, in practice, affirmative action has focused on blacks at the expense of coloureds and Indians.⁷⁷ It has been explained that such 'hierarchies of oppression' occur where targeted groups compete with one another for resources.⁷⁸

Related causes for concern have been expressed: (a) that jobs are subtly reserved by black managers for comrades in the struggle against apartheid; and (b) that it is common practice to recruit blacks into senior positions to secure government or parastatal contracts.⁷⁹ In this regard, it has been stated that a black 'managerial aristocracy' is emerging in South Africa at the expense of a large number of other blacks who are (still) unskilled, unorganised and unemployed.⁸⁰ It has been argued that affirmative action that is based on race in order to benefit blacks as a group, and which does not distinguish between relatively privileged blacks

72 Albery & Goldblatt 'Jurisprudence of Equality' 253.

73 *Ibid.*

74 Bacchi *Affirmative Action* 28; Banton *Discrimination* 78.

75 See *Motala* (1995) 3 BCLR 374 (D) at 383C; *Stoman* (2002) 23 ILJ 1020 (T) at 1035F.

76 Andrews 'Affirmative Action' 52; 61 fn 17.

77 Thomas 'Employment Equity' 250. It is submitted that the last two groups might (possibly) end up constituting minorities.

78 See chapter 1 par 2.2.3 above.

79 Thomas 'Employment Equity' 249-50.

80 See Adam 'Affirmative Action' 239; Rapport "'Wen-wen"-ooreenkomste is moontlik vir Uitdagings' 2 February 2003.

and those who are truly disadvantaged, in fact detracts from focusing on those most in need, particularly in a society in which they constitute the majority.⁸¹ Moreover, affirmative action that focuses on race facilitates the acquisition of wealth by an already privileged section of the black population, because it does not seek to eliminate, or even reduce, class distinctions.⁸² This argument is, however, neutralised by proponents of race-based affirmative action who concede that, while not all blacks will benefit from such a policy, facilitating the opportunity for 'some' enhances the standing of 'all' in the group.⁸³

Thirdly, no links exist between the various targeted groups. Cumulative discrimination is thus not recognised. In this regard, it has been argued: (a) that there is a need to understand that complex forms of disadvantage based on race, gender and geographic location form 'distinct categories' of disadvantage which cannot be reduced to the sum of their parts; and (b) that the intersectional nature of disadvantage creates different and multiple forms of inequality which cannot be understood simply by reference to one of the grounds, such as gender.⁸⁴ Black women generally, and African women in particular, have been shown to be the most disadvantaged members of South African society.⁸⁵ It is noteworthy that, in the early days of the debate on affirmative action, it was proposed that African and/or black women should be targeted as a special category under affirmative action programmes. This has, however, not materialised.

Recently, it was reported that the poor representation of black females among the total representation of blacks and the total representation of females in the workplace suggested

81 Adam 'Affirmative Action' 249. With regard to the question whether only the 'better qualified' blacks and women will obtain jobs at the expense of the lesser qualified and the more needy, it is too early to draw substantive conclusions (South Africa has been implementing affirmative action for only six years). It is nevertheless submitted that this might be the case because it is a logical consequence that the former will be employed first in the process of affirmative action.

82 *Op cit* 247.

83 *Ibid* (see also chapter 1 par 2.2.3 above).

84 *Ibid* (see also chapter 1 pars 2.2.2; 2.2.3 above).

85 Albertyn & Goldblatt 'Jurisprudence of Equality' 253 (see also chapter 3 pars 3.4.4; 3.5.2.1 above).

that inadequate attention was being paid to their compounded disadvantage.⁸⁶ It was reported that African female representation, in particular, had dropped drastically at the professionally qualified and middle management level,⁸⁷ and that their representation at top management level was unacceptably low.⁸⁸ It was suggested that the position of African females, with only 2 percent in top management positions, required drastic intervention.⁸⁹ More aggressive and innovative strategies aimed at recruiting, developing, advancing and retaining African female workers were advocated.⁹⁰ It appears that categorisation should be fine-tuned to ensure that multiple-disadvantaged people are in fact reached.

Fourthly, the categories of beneficiaries of affirmative action are under-inclusive. In this regard, much has recently been written on the poor whites and young whites in South Africa.⁹¹

Fifthly, commentators have argued that factors other than group membership should determine the beneficiaries of affirmative action. Brassey poses the question as to whether poverty should not be tackled directly.⁹² During the early debate on the EEA, he argued that the true beneficiaries of the EEA would be the already over-represented, black middle class and not the poor, and that this amounted to a re-racialisation of laws and the consequential

86 Commission for Employment Equity Annual Report 2002-2003 viii; 59.

87 *Ibid.* This was held to be an area in which employers should be creating a 'critical mass' to provide a pool from which to draw disadvantaged people for appointment into senior and top management positions.

88 *Op cit* 59.

89 *Ibid.*

90 *Ibid.*

91 See, for example, Rapport "'Wen-wen"-ooreenkomste is moontlik vir Uitdagings' 2 February 2003; Rapport 'Beskerming gevra vir Wit Werknemers' 1 June 2003; Rapport 'Afrikaanse Aksie teen Regstel-aksie' 11 January 2004; Rapport 'Los Jonges uit in Regstel-aksie' 5 September 2004; Beeld 'Solidariteit belig Invloed op Jonges van Regstel-aksie' 21 December 2004. It was mooted that young whites joining the labour force for the first time should not be affected by affirmative action.

92 Brassey 2 1365. Faundez *Affirmative Action* 35, however, holds that, if the factor of poverty is taken into account, it may be costly for the administration of a programme, and the number of protected groups may exceed manageable numbers. It was suggested that, in this situation, government might rather abandon affirmative action programmes and, instead, introduce significant income-redistribution programmes.

renunciation of the non-racial society towards which the new South Africa was then just beginning to move.⁹³ Similarly, Adam moots that 'class' would be a better criterion for affirmative action, since South African society is so polarised in terms of race.⁹⁴ He argues that South Africa might be the only country where the demands for restitution stemming from a racist society could be met through an inclusive emphasis on household income.⁹⁵ Because, he argues, affirmative action is a corrective process of limited duration and not an end in itself, restoring equality of opportunity rather than legislating outcomes would seem the most feasible and just form of redress for everybody.⁹⁶ Adam argues strongly that income-based qualifications for affirmative action programmes would provide a more valid and legitimate criterion for achieving greater equality, because socioeconomic factors such as household income or personal or family wealth could then be the decisive reason for preferential treatment.⁹⁷ As with progressive taxation systems the world over, people could, the author argues, be differentially treated when allocating scarce resources such as employment opportunities, provided that they have acquired more or less the same formal qualifications. Such a system would enable blacks to become the major beneficiaries of affirmative action while including members of other racial groups who also need assistance.⁹⁸ It may thus be preferable to define 'disadvantaged' groups sufficiently broadly to allow the courts to formulate socioeconomic yardsticks to aid those discriminated against in the past, rather than identifying

93 *Ibid.* At best, the author holds, the EEA will take South Africa down the road to multiracialism; at worst, to the sort of social oppression that made apartheid so infamous. Note, again, that, during the constitutional debate, it was argued that race as a qualifier for affirmative action was not advisable (see chapter 3 par 3.4.1 above).

94 Adam 'Affirmative Action' 247.

95 *Op cit* 245.

96 *Ibid.*

97 *Op cit* 248. Assisting all to overcome their social and educational handicaps, regardless of race, would, the author holds, also pre-empt the suspicion that merit is sacrificed because of racial representation.

98 *Ibid.* In essence, the author believes that interventions which try to treat all citizens equally would result in: (a) South African society not becoming polarised through a destructive competition solely on the basis of race; and (b) would be more acceptable to all segments of the population.

beneficiaries on the basis of race.⁹⁹ In addition, the criterion of poverty, although difficult to ascertain and measure precisely, will have to be taken into account. An emphasis on socioeconomic background and potential would also help to prevent only the better-off in the designated groups receiving the benefits of affirmative action.¹⁰⁰

2.2 The concepts 'suitably qualified' and 'merit'

2.2.1 Introduction

It was pointed out above that separate education under apartheid, with little money, inferior qualifications, little secondary education, under-resourced teaching conditions, and language requirements, led to many blacks not being able to compete for jobs on the basis of individual merit.¹⁰¹

It was seen that, historically, discrimination occurred *within* the labour market (as a result of discrimination in hiring, training and promotion, and as a result of unnecessary hindrances perpetuated by the ways in which work and training were organised), as well as *outside* the labour market (through, for example, unequal education and training).¹⁰² In the workplace, policies of job reservation for whites and the little (if any) training offered to employed blacks and females put them at a skills-based disadvantage.¹⁰³ In addition, as was seen above, managerial positions were given to white males (without the prerequisite qualifications) in both the private and the public sectors, with blacks and other non-whites under-represented in top positions. The public service in particular displayed great

99 *Ibid.*

100 *Op cit* 248-9.

101 See chapter 3 par 3.4.4 above.

102 *Ibid.*

103 See chapter 3 pars 3.4.4; 3.5.2.1.

discrepancies with regard to male-female ratios and disabled people.¹⁰⁴

Recognising this, the Explanatory Memorandum to the Employment Equity Bill stated the aim of affirmative action as follows:

'The primary aims of affirmative action must be to redress the imbalances by apartheid. We are not ... asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor ... is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards: the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination, are at last given their due. ... affirmative action must be rooted in principles of justice and equality' (own emphasis).

This statement indicates, at the very least, that there was no intention to do away with qualifications totally, that 'unqualified' people could not benefit under affirmative action, and that tokenism was rejected. The Employment Equity Bill however neglected to give further pointers in respect of the merit principle generally in relation to affirmative action.

2.2.2 Legislation

After the Employment Equity Bill was debated by business, labour and government at the National Economic, Development and Labour Council (hereafter NEDLAC), the scope of affirmative action was narrowed down to 'suitably qualified' people from the designated groups.¹⁰⁵ Standards were thus not totally disregarded and a business rationale was

104 See chapter 3 fn 261 above.

105 See ss 15(1); (15)(2)(d); 20(2)(c); 20(3) of the EEA. The definition of a 'suitably qualified' person was apparently one of the most contentious issues raised during the parliamentary debates when discussing the Employment Equity Bill. Labour supported a loose definition which would place the obligation on an employer to train employees, while business mooted a narrower definition which

preserved. It does, however, appear that the concept 'suitably qualified' may imply reduced standards. In this regard, it was held in *Stoman supra*¹⁰⁶ that the requirement of *rationality* remained and that the appointment of people who were *wholly unqualified, or less than suitably qualified, or incapable*, in responsible positions could not be justified (own emphasis). Nevertheless, it has been held that the EEA rejects tokenism.¹⁰⁷

It is submitted that the concept 'suitably qualified' accommodates the lack of educational and experiential levels, as well as the capacity of the groups that have to be

emphasised the ability to perform the job (Bhoola 'Commentary' CC1-B-16 fn 75). It is interesting to note that the definition in the Bill was changed to include prior learning in the final Act (s 61 of the Employment Equity Bill). Also, while 'ability' was included in the Employment Equity Bill, the concept 'capacity to acquire' was added later on. Business equated this with 'potential'. It did not accept potential as a basis for recruiting permanent staff and giving it equal status to 'ability'. It pointed out that it was practically impossible to determine whether a person would at some time in the future acquire the ability to do the job. This would in turn result in an obligation to employ people who were not in fact suitably qualified (in contravention to what was agreed at NEDLAC). Business accepted the concept 'potential' only in the context of appointing trainees or cadets. It further argued that 'ability to do the job' did not mean that a person would be the 'best' for the job. This implied that employers would then not only be unable to appoint the best person for the job, but might also have to appoint people whose ability to perform a particular job was, at best, suspect. This, it was argued, would have a negative effect on productivity and would add to employer costs. It would consequently discourage investment and employment (Submissions by Business South Africa to the Parliamentary Portfolio Committee). It was also argued that the effect of the changed wording was to discount and supersede the requirements of formal qualification, prior learning or relevant experience in favour of the capacity to acquire the ability to do the job (which was substantially in breach of the NEDLAC agreement) (*ibid*).

106 (2002) 23 ILJ 1020 (T) at 1034B-D. See Grogan 2 16 who argues that *Stoman* seems to imply that the skills, experience or qualification gap must be 'considerable' before an appointment of a less qualified or experienced black candidate will become 'irrational'. See also *Public Servants Association* (1997) 18 ILJ 241 (T) where jobs at the state attorney's offices were to be filled by females with less qualifications and experience than their white male colleagues. The court viewed merit as central to the debate as to who should have been appointed. The constitutional requirement of representivity (which the respondents relied heavily on) could not be favoured at the cost of an 'efficient' public service, which was also a constitutional requirement. The court mooted a very limited vision that efficiency need not be sacrificed when promoting a broadly representative public administration in the instance where blacks are preferred to whites, but *only* in appointments and promotions where all candidates have broadly the same qualifications and merits, and on a properly controlled and rational basis. This view was, however, subsequently broadened in *Stoman* (2002) 23 ILJ 1020 (T) and *Coetzer* (2003) 24 ILJ 163 (LC). See McGregor 4 for a discussion of these cases. The relationship between affirmative action and the constitutional requirement of efficiency for the public service has been substantially addressed in these cases, but falls beyond the scope of this study.

107 Bhoola 'Commentary' CC1-B-16.

affirmed. Particular provision was thus made to cater for this deficiency. It is further submitted that the adoption of this concept makes sense in the South African context of affirmative action where a shortage of skills, qualifications and experience caused by apartheid's educational and workplace practices has resulted in an insufficient number of 'properly' qualified people in the designated groups to fill jobs under affirmative action.

In essence, then, the use of the 'suitably qualified' concept in effect 'modified' the individual 'merit proper' principle. But, merit remained relevant in this altered way.¹⁰⁸

The EEA lays down relevant considerations for establishing whether a person is in fact 'suitably qualified'. These include four factors:¹⁰⁹

- '(a) formal qualifications;
- (b) prior learning;
- (c) relevant experience; or
- (d) the capacity to acquire, within a reasonable time, the ability to do the job.'

None of these factors is defined in the EEA. When determining whether a person is suitably qualified for a job, the employer must however review *all* these factors and must determine whether a person has the ability to do the job as a result of *any one* of the factors, or *any combination* of them.¹¹⁰ The concept seems to be a fluid, flexible concept – more so than the merit proper principle where the 'best' candidate gets the job. In making a determination, the employer may not unfairly discriminate against a person *solely* on the ground of that person's lack of relevant experience.¹¹¹

108 This was confirmed in *SALSTAFF obo Strydom and SPOORNET* (2002) 23 ILJ 1125 (ARB) where it was held that, in view of the fact that it was the company's evidence that 'competence' was the main criterion in considering a candidate, it followed that affirmative action did not replace competency. It followed, then, that all candidates who were competent – or, in the spirit of the EEA, who were 'suitable' – should be afforded an opportunity to promote themselves and be considered for the job (at 1129D-E). See also *Fourie* (2002) 23 ILJ 1117 (ARB).

109 Section 20(3)(a)-(d) of the EEA.

110 Section 20(3); (20)(4)(a); 20(4)(b) of the EEA.

111 Section 20(5) of the EEA.

The first three factors, namely formal qualifications, prior learning and relevant experience, seem fairly straightforward. However, the second and third factors may present problems, in that the concepts are not exact and absolute. A determination in terms of any one, or a combination, of the factors listed will probably imply, for example, that an applicant with no formal qualifications, but with prior learning, may be found to have ability, and vice versa. An applicant with no prior learning, but with relevant experience, may be found to have ability, and so on. An applicant with no relevant experience may not be unfairly discriminated against. Relevant experience therefore carries particular weight. This is understandable when considered against the background of a general lack of work experience on the part of members of the designated groups. All the factors must, however, be considered.

The factor 'ability' is more problematic. It is not stipulated how this should be measured and determined. In addition, it is not clear what 'reasonable time' means in this context. It is submitted that it would most likely require an objective assessment based on the facts of each case.

It is important to note that no mention is made of *testing* in regard to determining the concept 'suitably qualified', or in the broader context of chapter III of the EEA, which deals with affirmative action. Testing is addressed in chapter II in the context of the prohibition of unfair discrimination.¹¹² It is allowed only if the test or assessment has been scientifically shown to be reliable and valid, can be applied fairly to all employees, and is not biased against any employee or group.¹¹³ The rationale for this is that the institutionalised discrimination at all levels of society denied blacks equal access to occupational opportunities for many decades.¹¹⁴

Tests may enable an employer to evaluate attributes and abilities not easily tested during an interview. They assist in the selection process, because they measure aptitudes

112 See ss 7; 8 which deal with medical and psychological testing respectively.

113 Sections 8(a); 8(b); 8(c).

114 Basson 'Pre-employment Testing' 333.

required for learning skills. Thus, they can predict whether an applicant is likely to perform certain duties successfully, can evaluate achieved competence to perform certain tasks by measuring occupational knowledge, skills and abilities, and provide an objective basis for comparing applicants that is not influenced by personal appearance, interview bias or past friendship.¹¹⁵ Although the EEA does not indicate that section 8 may be utilised in assessing ability in the affirmative action context, it is assumed for purposes of this study that employers may utilise such tests to establish the 'ability' of a candidate.

2.2.3 Regulations and codes

The regulations to the EEA and the Code of Good Practice: Preparation and Implementation of Employment Equity Plans provide guidelines for employers in implementing the EEA and affirmative action measures. The Code, which must be taken into account when interpreting the EEA,¹¹⁶ rejects tokenism. It states that a conscious effort should be made to avoid all forms of tokenism – members of designated groups should be appointed in positions so that they are able to participate meaningfully in corporate decision making.¹¹⁷ Nothing further is explicitly provided in the Code or the regulations regarding the concepts 'suitably qualified' and 'ability'.

115 *Op cit* 332 fn 172.

116 See s 3(c) of the EEA.

117 Section 8(3) of the Code.

2.2.4 Case law

2.2.4.1 Introduction

A few cases have dealt with the role of qualifications and merit, but mostly in passing and in a limited way. Nevertheless, some pointers have been established. In the cases discussed below, various important issues relating to affirmative action were discussed, but the focus here is confined to aspects relating to qualifications, experience, and/or merit generally.

2.2.4.2 The best qualified in the designated group should get the job

(a) *IMAWU case*

In *IMAWU*,¹¹⁸ Masengana was one of three applicants (two white males and himself, a black male) shortlisted for the job of town treasurer. He scored the lowest of all the applicants (and the lowest of two other black applicants initially involved in the process) in a test targeted to establish the knowledge, experience, merit and potential ability of the candidates. He lacked the necessary experience in local government that the other candidates had. The full council decided that affirmative action should be the only criterion and Masengana was appointed.¹¹⁹ The applicant brought a review application, *inter alia* on the ground that Masengana did not possess the necessary experience in local government to qualify for the appointment. Also, it was contended that the council had not applied its mind properly and had appointed Masengana simply because he was black. It was further argued that merit and other requirements had thus been ignored.

118 (2000) 21 ILJ 1119 (LC).

119 As provided for at that stage in schedule 8, item 2(2)(b) of the 1995 LRA.

Besides the fact that there was no affirmative action plan in place, the court pointed out that the council had failed to disclose what *other criteria* had been considered when it had decided to appoint Masengana. In addition, there was no indication whether *merit, qualifications or the potential to develop* had played any role.¹²⁰ The Labour Court accepted that the majority of candidates previously disadvantaged by unfair discrimination would lack the necessary experience.¹²¹ Therefore, where affirmative action was a consideration, experience would remain relevant, but would not be determinative.¹²² The overriding requirement in such cases would be the 'potential to develop and perform'. This, inevitably, would also not make merit determinative, though it would remain relevant. For affirmative action to succeed and help achieve the desired objective, merit and experience were relevant in so far as the applicants previously disadvantaged in their own group were concerned. This was for the simple reason that, if the playing field were levelled, that is, if all groups were considered, candidates from groups that had previously been disadvantaged would always come second, especially when one considered experience. Candidates who had previously been advantaged invariably possessed the necessary experience which candidates from groups that had previously been disadvantaged would not normally possess. In view of this, the court held, it would be prudent in the case of affirmative action appointments to consider qualifications and the potential to develop as being crucial.¹²³ Successful candidates from previously disadvantaged groups should be the best from those groups.¹²⁴ The appointment of Masengana as town treasurer was accordingly set aside.¹²⁵

120 At 1128J-1129A.

121 At 1129A.

122 At 1129A-B.

123 At 1129C-D.

124 At 1129A-E. See Dupper 1 290 who suggests that, as these comments were specifically made about situations in which members of one designated group competed with one another, they would not necessarily cover those situations where members from different designated groups were competing for appointment and promotion. He also points out that, as the comments were not central to the arguments in the case, they may have little or no value as precedent.

125 At 1129C.

(b) *Samuels case*

*Samuels & SA Police Service*¹²⁶ did not follow the approach in *IMAWU supra*. The arbitrator held that the employer could fairly promote a candidate whose score was not the highest, or appoint one candidate in preference to another where both belonged to the designated groups, provided that the employer had applied its mind.¹²⁷ This case involved the relative merit of three shortlisted candidates, all belonging to the designated group, 'black'. The applicant (a black male with the highest score) succeeded with his claim of an unfair labour practice for not being promoted (a black female was promoted instead). The arbitrator advocated that an objective scale be used during interviews when allocating scores to candidates, with the order in which such scale was tabulated being the employer's prerogative.¹²⁸ On this basis, an employer would be able to fairly justify its choice of candidate between classes of people falling within designated groups.¹²⁹

(c) *Thomas case*

In *Thomas*,¹³⁰ a coloured man contested the fact that he had not been promoted to assistant director of the Employment Equity Directorate of the Department of Labour. The applicant was one of four shortlisted candidates who had scored the highest on a list of standard questions. The arbitrator agreed with the department that it was not bound to appoint the person with the highest score.¹³¹ Instead, an Indian woman had been promoted because

126 (2003) 24 ILJ 1189 (BCA).

127 At 1195I-1196A.

128 At 1196C-F.

129 At 1196I.

130 (2001) 22 ILJ 306 (BCA).

131 At 311E-F.

she was also an excellent candidate, because their score difference was small, and because she displayed a fair knowledge of relevant issues. Also, the directorate that was responsible for implementing departmental policy designed to promote representivity and employment equity was itself under-representative at the time, as it comprised mainly African employees and no Indian, coloured, or disabled employees. The arbitrator further agreed that the department was entitled to differentiate between two candidates who were members of different designated groups when it applied affirmative action to 'improve representivity' in a part of the public service, since an under-representative directorate would have found it difficult to implement employment equity.¹³²

Evaluation of best qualified in designated group

It is submitted that the best candidate from members of the same designated group should generally be awarded the job. This should, however, not be followed sequaciously, as in the designated group, 'blacks', for example, different sexes and sub-groups are found. In this regard, it is submitted that the employment equity plan will indicate which particular candidate has to be appointed to a particular job, as it will show which specific sex or sub-group is under-represented in a specific group at a particular point in time.

2.2.4.3 Other related issues

The following cases illustrate various other issues relating to qualifications, test scores and merit generally.

(a) Management prerogative

132 At 312C-D.

In *Stolterfoht and SA Police Service*,¹³³ the arbitrator indicated his unwillingness to intervene with the decision of management. Here, the abilities of the successful candidates from designated groups who were selected in order to achieve representation were not questioned. What was questioned, however, was the fact that the candidates had not even applied for the posts. The arbitrator commented as follows:¹³⁴

‘The quest for representivity exacts anguish and disillusionment. It strikes at the cherished, though not necessarily absolute, values of high scores and experience. But something has to give to bolster a dispersion of talent, skills and racial congruity. To interfere with the merits of an appointment is to usurp the prerogative of management.’

This approach was supported in *Bosman/South African Police Service*¹³⁵ where it was held that it was not the arbitrator's function to ensure that employers choose the best from the most worthy candidates, but only to ensure that employers do not act unfairly in respect of the candidates.

Similarly, in *Gounden*¹³⁶ the arbitrator found that the exclusion of Indian males simply because they were over-represented in a particular sub-department – even from being considered for shortlisting – without it being stated as an ‘essential’ criterion in the advertisement, was unfairly discriminatory. Another case, *Kruger and SA Police Service*,¹³⁷

133 (2002) 23 ILJ 2160 (BCA).

134 At 2161F-G.

135 (2003) 12 CCMA 6.9.1 (unreported).

136 (2003) 12 SALGBC 6.9.8 case no EMD 050314 (unreported). The arbitrator held that the summary ruling out of Indian males based on a ‘private design’ (over and above a clear affirmative action policy) by one of the respondent’s employees to correct their excessive representation was wrong and an act of unfair discrimination. It was held that the proper place to take the over-representivity of Indian males into account was after sifting and perhaps even shortlisting during the interview process, and where it emerged that candidates were tied or were perhaps ranked very closely. Being a member of a group that was under-represented in the specific department or sub-department might then be an additional factor that could, arguably, legitimately be used to decide who got the job.

137 (2003) 24 ILJ 477 (BCA).

confirmed that, to invite applications for jobs that had been earmarked for a certain class of people, without indicating such restrictions, created reasonable expectations among other applicants (in this case, a white female who had been described as the best candidate). The conduct of the SAPS was found to be 'irrational to the extent that it ravages the precepts of fairness',¹³⁸ although the non-promotion of the applicant was found to be 'understandable' in the context of the employment equity profile.¹³⁹ A series of cases involving the SAPS followed,¹⁴⁰ all confirming that the presiding officer would not easily intervene in decisions if it were shown that management had applied its mind properly.

Evaluation of management prerogative

The courts have generally shown a reluctance to interfere with decisions by employers that are well considered, even if the applicant with the highest score does not get the job. The courts seem to be satisfied if there is evidence that the employer has not acted unfairly against any of the candidates.

(b) Difference in test scores must be relied on consistently

In *SAPU obo Siegelaar & others v SAPS*,¹⁴¹ it was pointed out that it cannot in some instances be argued that a difference of one point in test scores is marginal (where an African male with one point less than a white male is appointed), yet, in another instance, an African

138 At 479A.

139 At 478G.

140 See *DJGS Coetzee & SAPS* (2004) 13 SSSBC 6.9.5 (unreported) where the applicant alleged that his experience, training and qualifications were superior to the person appointed. The arbitrator found that his credentials had been properly considered, but that the appointee's qualifications better suited the position; *Captain MA Nontshe & SAPS* (2003) 12 SSSBC 6.9.17 (unreported) where the arbitrator found that the difference between the applicant, who alleged that he was better qualified than the successful candidate, and the successful candidate was not so vast as to warrant intervention.

141 WE 3963-01 (CCMA) 4 September 2002 (unreported).

male (with a substantially lower score than a coloured female) is appointed with no argument as to the difference in scores. Would there be any point in going through an evaluation process if scores were immaterial and if the decision to appoint or promote rested ultimately on affirmative action criteria? If the evaluation process was perceived to be a formality, if not a sham, it was bound to increase dissatisfaction amongst staff and generate disputes.¹⁴²

(c) Employer has to provide an opportunity to gain experience

In *SA Transport & Allied Workers Union and Metrorail Services*,¹⁴³ the arbitrator found that the company was responsible for the fact that the applicant was not suitably qualified, because it had failed to adhere to its own employment equity policy which required employees to be rotated in acting positions to enable previously disadvantaged individuals to gain experience. Since a certain white male had served in acting positions indefinitely, the applicant had effectively been prevented from gaining experience, and this had substantially prejudiced his application.¹⁴⁴

(d) Insistence on qualifications considered to be unfair where ability has already been established

The case of *POPCRU obo Baadjies/South African Police Service*¹⁴⁵ touched on the issue of merit. The applicant had been refused 'translation' from auxiliary officer to the rank of detective. He had worked as a detective for 11 years and had been commended for his services. However, he did not have a matriculation certificate. The commissioner held that the

142 At par 38.

143 (2002) 23 ILJ 2389 (ARB).

144 At 2395C.

145 (2002) 12 BALR 1332 (CCMA).

requirement of an educational qualification was fair if linked to a person's ability to perform a particular job, but that, where a person's ability had already been established, insistence on the possession of a qualification was unfair.¹⁴⁶

Evaluation of the concepts 'suitably qualified' and 'merit'

It is clear from the above that South Africa has embraced a 'modified' concept of merit. The concept has resulted from the current lack of skills and experience on the part of members of the designated groups, which, in turn, has resulted from apartheid educational policies and workplace practices. The concept 'suitably qualified' thus accommodates the educational and experiential levels, as well as the capacity of the groups which have to be affirmed. It was submitted that it makes sense that a modified concept of merit as used in the EEA is applied in the South African context of affirmative action. It would not have been practicable to have applied the merit proper principle owing to the backlog in skills, qualifications and experience of many members of the designated groups.

With regard to the meaning of the concept 'suitably qualified', it was seen that, though the EEA lays down four factors to establish whether a person is 'suitably qualified' – formal qualifications, prior learning, relevant experience, or the capacity to acquire, within a reasonable time, the ability to do the job – these are not defined and are somewhat unclear.¹⁴⁷ It was also seen that *all* factors must be reviewed when determining whether a person is suitably qualified, and that an employer may not unfairly discriminate against a person *solely* on the ground of that person's lack of relevant experience.¹⁴⁸

Case law has provided some pointers for interpreting the concept. One issue that has been clarified is that, where a number of people from the same designated group compete for a job, the best qualified in the group should be awarded the job.¹⁴⁹ It was, however,

146 At 262C-D.

147 See par 2.2.2 above.

148 *Ibid.*

149 See par 2.2.4.2 above.

submitted that, though this approach may generally be followed, a proper contextualised approach would be better.

The courts have also indicated that management prerogative will not easily be interfered with once appointments and promotions have been made, as long as it can be shown that management has applied its mind and has not acted unfairly against any of the candidates.¹⁵⁰ Another example is that an employer must provide an employee with an opportunity to gain experience,¹⁵¹ and, that, where a person's ability has already been established, the insistence on the possession of a qualification is unfair.¹⁵²

Specific recommendations designed to clarify the meaning of the concept 'suitably qualified' are made and substantiated below.¹⁵³

In conclusion, recent reports indicate that critical skills shortages exist among members of the designated groups in the labour force.¹⁵⁴ It is, however, realistic to expect that, owing to skills shortages in South Africa, 'suitably qualified' South African citizens may not be found for all jobs. Specific recommendations in this regard are also made below.¹⁵⁵

150 See par 2.2.4.3(a) above.

151 See par 2.2.4.3(c) above.

152 See par 2.2.4.3(d) above.

153 See chapter 7 par 3.3 below.

154 See, for example, Business Day 'Seeing Themselves as Others See Us' 18 May 2004 where business and union leaders expressed concern about the level of skills of the South African labour force; Business Day 'Skills Crisis' 1 March 2004 pointing to shortages of intermediate and low skills; Rapport 'Miljoene Rande vir Opleiding Help Nie' 20 February 2005 pointing to a serious shortage of skills despite millions of rand spent on training since 2000, and the fact that overseas workers will now be recruited to work on a temporary basis in South Africa while government continues with further skills programmes. The Commission for Employment Equity Annual Report 2002-2003 59 pointed out, in particular, that not enough skills development interventions are implemented at the middle level to accelerate the development of designated groups for purposes of promotion into senior and top positions.

155 See chapter 7 par 3.3 below.

2.3 Citizenship¹⁵⁶

2.3.1 Introduction

Neither the EEA nor the LRA explicitly require citizenship in order for a person to benefit from affirmative action. It was in fact the Labour Court that added the further criterion of 'citizenship' in respect of beneficiaries of affirmative action – that is, over and above being a 'suitably qualified' member of one of the designated groups.

2.3.2 *Auf der Heyde case*

In the case of *Auf der Heyde* supra,¹⁵⁷ it was successfully argued that the concept of affirmative action as envisaged by the Constitution and the 1995 LRA (and, one can argue, the EEA as well) was one that had been developed against the specific background of South Africa's discriminatory history.

In this case, the applicant (a white male on a fixed-term contract) was not appointed to a permanent post, while two other black male colleagues whose circumstances were similar – Chibale, a non-citizen or an alien/foreigner,¹⁵⁸ and Naidoo, a South African citizen – were actually appointed permanently. The applicant alleged, amongst other things, that the university had applied its Equal Opportunity Employment Policy unfairly and selectively. Although it was

156 The comments in this part must be seen against the background of globalisation, which increasingly disregards natural and regional boundaries, of large-scale immigration and of increasing recognition of human rights, all of which are causing the concept of, and status coupled with, citizenship to change from 'membership citizenship' and 'status citizenship' to a 'post-national citizenship'. The latter basically embraces the notion that all people are entitled to human rights in their capacity as human beings (Klaaren 'Non-citizens and Constitutional Equality' 296-7). Rights must therefore be protected and extended by the state to people, not on the basis of residence or nationality, but on the basis of their capacity as human beings (*op cit* 297).

157 (2000) 8 BLLR 877 (LC) (see also par 2.1.3.2(a) above).

158 These terms will be used interchangeably. The term 'citizens' refers to permanent inhabitants in the specific territory of the Republic, while aliens are not permanent inhabitants.

conceded that the policy was a factor in the appointment of the two black colleagues, the court found that this had not been the overriding consideration – the two were the best candidates for the job and had obtained their permanent appointments on merit.¹⁵⁹ Also, whilst race was a factor in their permanent appointment, the fact that the applicant was white and did not in these circumstances qualify for special consideration in terms of the policy, played no part in the decision not to extend his contract or appoint him permanently.¹⁶⁰

The Labour Court however found merit in the applicant's submission that the policy should, by its own definition, have applied only to previously disadvantaged South African citizens. It was argued as follows:¹⁶¹

'The legacy of discriminatory practices which it [the Equal Opportunity Employment Policy] is designed to address are those of "this country" and the policy is directed towards the development of the careers of blacks and women and "the pool of available *South African* talent". The imbalances which it seeks to address are ... *South African imbalances* ... and the concept of affirmative action envisaged by the *Constitution* and the [*Labour Relations*] *Act* is one developed against the background of *South Africa's discriminatory history*.

The only persons to whom it should *legitimately and fairly* be directed therefore, are persons *previously and directly disadvantaged* by unfair discrimination in the *South African context*. Such persons will constitute the group of "*target beneficiaries*" to whom the concept is directed and if it is to be fairly applied and implemented, will be confined to *South African blacks and South African women*. *Nationality is therefore an essential and legitimate limiting criterion*' (own emphasis).

Although no case authority could be found on the issue, the court accepted these arguments. The court basically relied on Kentridge and found that¹⁶²

159 At 891H-892A.

160 At 892A-B.

161 At 893F-H.

162 At 893I-894A ('Equality' 14-38). It seems that the court used the test for 'unlisted grounds', but without recognising it as such (see also chapter 3 par 3.5.1.3(a) above; par 2.3.4.2 below).

'... the legitimate beneficiaries of affirmative action are ... those who have been disadvantaged by measures which impair their fundamental dignity or adversely affect them in a comparably serious way'.

So, Chibale who was not a South African citizen, could not qualify as a member of a designated group, nor could he be deemed to have been disadvantaged actually or potentially and to fall into the category of people in whose favour the policy was directed.¹⁶³

The judgment is important if it is borne in mind that the South African community is made up of both citizens and aliens. Aliens are potentially to be found in all three of the designated groups, namely blacks, women and the disabled.

2.3.3 A matter of interpretation

2.3.3.1 Introduction

The *Auf der Heyde* case clearly pointed to a lacuna in legislation – the Constitution and the 1995 LRA¹⁶⁴ (which then regulated affirmative action in the workplace) – neither of which explicitly addressed the issue of citizenship as a criterion in order to benefit from affirmative action. *Auf der Heyde* will be analysed to determine whether the interpretation is plausible.

163 At 894C-D. The fact that the university had incorrectly, but in good faith, applied the policy did not constitute an unfair labour practice (at 891G-H). It was noted that the applicant's assumption that he – a South African citizen and qualified in every other respect – should have been appointed instead of Chibale, was incorrect, since he lacked certain qualifications. In the end, the Labour Court did not find an automatically unfair dismissal, nor direct or indirect discrimination in terms of the unfair labour practice definition, but rather a procedurally unfair dismissal on operational grounds (at 891G-H; 893C-D; 894H; 895D). On appeal, the issue of citizenship in order to benefit from affirmative action was argued again. The court assumed, however, that Chibale's appointment did not qualify as an affirmative action appointment in terms of the university's policy and did not decide the issue as such. Regarding Naidoo's appointment, the court held that the fact that he was appointed as a result of an irregular application of the policy could not have caused *Auf der Heyde* to expect that he would similarly be appointed (*University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC)).

164 The 1995 LRA's wording on affirmative action was similar to that of the EEA – although generally more vague – and the interpretation of the one holds true for the other (see chapter 3 pars 3.4.3; 3.5.1.4 above).

In order to provide a proper basis for evaluating the case, it is necessary to investigate current theory on the interpretation of statutes, both ordinary and constitutional.

The Constitution is a special piece of legislation that forms the basis of the legal system of South Africa,¹⁶⁵ and, consequently, that of affirmative action. It contains various terms and phrases – not all of which are clear – that must be interpreted and applied. It has in fact been said that the South African Constitution is riddled with many such uncertain terms and phrases that need to be refined and developed to give full meaning to the purpose of the Constitution.¹⁶⁶ Also, the Constitution does not, and cannot, contain or provide for all the legislative requirements that are needed from a constitutional point of view. Other legislative enactments, such as the 1995 LRA and the EEA in the context of employment equity, were thus required to enhance and expand the basic constitutional framework. These laws must be interpreted as part of the broader constitutional legal basis.¹⁶⁷ The arguments and evaluation are set out in two parts. In the first, it is shown that a proper interpretation of the Constitution, the 1995 LRA and the EEA indicates that the focus of affirmative action is mainly on South African citizens. In the second, it is shown that, in addition to the main focus being on citizens, there is room to interpret the Constitution and the EEA to allow for affirmative action for other groups as well – not necessarily citizens – who might have been disadvantaged by past discrimination.

165 Bekink *South African Constitutional Law* 107.

166 *Ibid.*

167 *Ibid.*

2.3.3.2 Contextualism and purposivism

(a) Introduction

Modern interpretation theory favours contextualism and purposivism *together with* the (traditional) literalist approach.¹⁶⁸ In this regard it has been held that¹⁶⁹

‘the meaning of particular words is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the *subject or occasion* on which they are used and the *object* that is intended to be attained’ (own emphasis).

(b) Contextualism

Contextualism seeks to augment and enrich literalism.¹⁷⁰ It basically entails that a particular provision of a statute has to be understood as part of the whole. Words and expressions used in a statute must be interpreted in the light of their context. Context, therefore, denotes both the language of the rest of the statute and the matter, the apparent purpose and the scope, and, within limits, the background of the law.¹⁷¹ It allows for an unconditional examination of all internal and external sources.¹⁷² ‘Background’ is generally understood as history and is a contextual element that is frequently taken into account for purposes of interpreting *ordinary* legislation where obscure language conceals the intention of the legislature.¹⁷³ With regard to the right to equality, it was held in *Brink supra*:¹⁷⁴

168 Du Plessis *Re-interpretation of Statutes* 111; Botha *Wetsuitleg* 27; 54-5.

169 See *West Rand Estates v New Zealand Insurance Co Ltd* 1925 AD 245 at 261.

170 Du Plessis *Re-interpretation of Statutes* 112.

171 *Op cit* 113 (see *Jaga v Dönges; Bhana v Dönges (Dönges)* 1950 4 SA 653 (A) at 662D-667H).

172 Devenish *Interpretation of Statutes* 36.

173 Du Plessis *Re-interpretation of Statutes* 115.

174 1996 (4) SA 197 at par 40.

‘As in other national constitutions, s 8 [of the interim Constitution] is the product of our own *particular history* ... [the interpretation of s 8] must be based on the specific language ... as well as our own constitutional *context*. Our *history* is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. ... It is in the light of *that history and the enduring legacy* that it bequeathed that the equality clause needs to be interpreted.’

But the Constitutional Court has also emphasised the importance of construing constitutional provisions in context, holding that this includes the history of, and background to, the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions entrenching fundamental rights.¹⁷⁵

The context which must be considered in the assessment of equality claims is thus one that is factual, textual and historical.¹⁷⁶ The particular factual matrix within which equality is claimed, is important. So, too, is the place of equality in the text of the Constitution. The textual commitment to equality must itself be understood in the historical context in which the text was drafted, as is made clear in the Preamble. The emphasis placed there on reparation and construction suggests that a fundamental principle underlying the constitutional commitment to equality is that of anti-subjugation.¹⁷⁷ This is explained as follows:¹⁷⁸

‘The core value of this principle is that all people have *equal worth*. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the Laws ... mediated by the

175 *Ibid* (see also *Makwanyane* 1995 6 BCLR 665 (CC) at par 10).

176 De Vos ‘Equality for All’ 68-9 holds that substantive equality implies that the courts must examine the actual impact of an alleged violation of the right to equality on the individual, within and outside different socially relevant groups, in relation to the prevailing social, economic and political circumstances in the country.

177 Kentridge ‘Equality’ 14-5 (see also *Gqozo* (2) 1994 (1) BCLR 10 (Ck) where it was stated that a purposive interpretation must have regard to the ‘contemporary norms, aspirations and expectations and sensitivities of the population as expressed in the Constitution’).

178 Tribe *American Constitutional Law* 1515-6.

antisubjugation principle, the equal protection clause asks whether the particular conditions complained of, examined in their social and historical context, are a manifestation or a legacy of official oppression' (own emphasis).

(c) Purposivism

Contextualism goes hand in hand with purposivism.¹⁷⁹ The latter endeavours to establish the object or purpose which the legislator wanted to achieve¹⁸⁰ by looking beyond the manifested intention.¹⁸¹ It endeavours to infer the design or purpose which lies behind the legislation.¹⁸² It has been said that purposiveness nowadays seems to be becoming the substitute for clear language as the key to constitutional interpretation.¹⁸³ This will, of course, also have an impact on the approach of the courts to the interpretation of *ordinary legislation*, especially where legislation closely associated with socioeconomic and political transformation has to be interpreted.¹⁸⁴

(i) Liberal interpretation

It has often been said that, when using a purposive interpretation, the Constitution, and the Bill of Rights in particular, ought to be given a generous or liberal interpretation.¹⁸⁵

179 Devenish *Interpretation of Statutes* 112.

180 Botha *Wetsuitleg* 32.

181 Devenish *Interpretation of Statutes* 36.

182 *Ibid.*

183 Du Plessis *Re-interpretation of Statutes* 115.

184 *Ibid.*; Pillay 'Workplace Equity' 59.

185 Du Plessis *Re-interpretation of Statutes* 116 (see, for example, *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 (2) SA 221 (T) where it was stated that the Constitution should be interpreted 'liberally'; *National Coalition for Gay & Lesbian Equality No 2* 1999 (1) SA 6 (CC) at par 21 where it was held that the term 'sexual orientation' as used in s 9(3) of the Constitution must be given a 'generous interpretation of which it is linguistically and textually fully capable of bearing').

However, it has been cautioned that this view ought to be qualified.¹⁸⁶ To construe the Constitution purposively is not always tantamount to considering it generously or broadly: a purposive interpretation can also be restrictive precisely because it is purposive.¹⁸⁷ Moreover, an overly generous interpretation of a constitutional benefit which, in terms of the Constitution itself, may be subject to limitation by section 36 in terms of law of general application will be inapposite, especially once the constitutionally envisaged legislation has indeed been enacted.¹⁸⁸

(ii) Manifestations of purposivism

Two manifestations of purposivism are often found in the interpretation of *ordinary* statutes. First, the mischief rule and, secondly, the assertion that statutory provisions are to be construed in the light of the objects they seek to achieve.¹⁸⁹

A Mischief rule

The mischief rule holds:¹⁹⁰

‘To arrive at the real meaning we have ... to consider, (1) what was the law before the measure was passed; (2) what was the mischief or defect for which the law had not provided; (3) what remedy the Legislator had appointed; and (4) the reason of the remedy.’

186 Du Plessis *Re-interpretation of Statutes* 116.

187 *Ibid* (see, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) at par 17; *SA National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) at par 28).

188 Du Plessis *Re-interpretation of Statutes* 116.

189 *Op cit* 117.

190 *Hleka v Johannesburg City Council* 1949 1 SA 842 (A) at 852-3 (see also Botha *Wetsuitleg* 99-100; Du Plessis *Re-interpretation of Statutes* 117).

The purpose of the mischief rule is to suppress the mischief and to promote the remedy designed for its elimination, but without going wider than is necessary to remedy the mischief in question.¹⁹¹ The line of reasoning informing the mischief rule has also been used in *constitutional* interpretation, holding that the previous constitutional system of South Africa was the 'fundamental "mischief"' to be remedied by the application of the new Constitution.¹⁹² Looked at in this way, the Constitution can then be seen as a 'remedial measure' that must be construed generously in favour of redressing the mischief of the past and of advancing its own objectives for the present and the future.¹⁹³

B Provisions are to be construed in the light of the objects they seek to achieve

Two broad trends of thought exist in this regard. On the one hand, although giving effect to the policy, object or purpose of a law is an accepted strategy of *statutory* interpretation, this strategy is appropriate only once the language of a provision is not clear.¹⁹⁴ In other words, clear and unambiguous language trumps other indicia of policy, object or purpose. On the other hand, in some instances, purposivism is seen as an ally of the literalist approach.¹⁹⁵ This implies that judges, as interpreters, are readily prepared to proceed beyond the literal form of a provision that has to be construed and to go by the design or purpose which lies behind it.¹⁹⁶ In this regard, much is made of, for example, preambles to legislation. While preambles have traditionally been reserved for legislation of a formal and solemn nature, they are often

191 Du Plessis *Re-interpretation of Statutes* 117 (see, for example, *Sefalana Employee Benefits Organisation v Haslam* 2000 2 SA 415 (SCA) at par 8).

192 *Qozeleni v Minister of Law and Order (Qozeleni)* 1994 1 BCLR 75 (E) at 81G-H.

193 Du Plessis *Re-interpretation of Statutes* 117.

194 *Op cit* 118.

195 *Op cit* 118-9 (see *Standard Bank Investment Corporation Ltd v Competition Commission Liberty Life Association of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) where the majority followed the first and the minority followed the second approach).

196 Du Plessis *Re-interpretation of Statutes* 118.

found in post-1994 legislation.¹⁹⁷ Statements of purpose and founding provisions are also quite readily included nowadays – especially in Acts with potentially far-reaching policy effects.¹⁹⁸ Today, legislation which has been enacted with the specific aim of promoting constitutional values is thus construed with reference to the preambulatory and other value statements in the Constitution itself.¹⁹⁹

C Teleological approach

Purposivism must lastly be synchronised with the needs of a democratic legal and constitutional order – termed the ‘teleological approach’.²⁰⁰ In this way, not only the design or purpose that lies behind an individual provision is relevant, but also a realisation of the ‘scheme of values’ informing the legal and constitutional order in its totality.²⁰¹ In this sense, purposivism is thus a ‘value-activating interpretation’.²⁰²

Against this background, with contextualism and purposivism as the main approach to both ordinary and constitutional statutory interpretation, the affirmative action provisions of the Constitution, the 1995 LRA and the EEA will now be considered in order to arrive at a probable interpretation of these provisions. The case of *Auf der Heyde* will then be evaluated against these. Lastly, some guidance from the Department of Labour will be considered.

197 *Ibid.*

198 *Ibid.*

199 *Ibid*; Botha *Wetsuitleg* 88 (see, for example, *Dulabh v Department of Land Affairs* 1997 4 SA 1108 (LCC) at pars 52; 53. In *Dönges* 1950 4 SA 653 (A); *Qozeleni* 1994 1 BCLR 75 (E) at 79D-E; *Khala v Minister of Safety & Security* 1994 (2) BCLR 89 (W) at 91F-G the courts used, without reservation, the preambles of different Acts to assist with the interpretation of same.

200 Du Plessis *Re-interpretation of Statutes* 119; Devenish *Interpretation of Statutes* 43-8.

201 Du Plessis *Re-interpretation of Statutes* 119.

202 *Op cit* 118. The teleological approach has not yet been explained in these terms, but there are dicta where this line of reasoning informing the teleological approach has met with approval (see, for example, *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC) at par 46; *Du Plessis v de Klerk* 1996 5 BCLR 658 (CC) at par 181).

2.3.3.3 Constitution

When the wording of the equality clause in the Constitution is considered, it is clear that it is not explicitly stated that only South African citizens should benefit from affirmative action. The wording of section 9(1) of the Constitution, relating to equality before the law and to equal protection and benefit of the law, refers to 'everyone'.²⁰³ One can argue that this right was worded in such a way so as to specifically apply to literally everyone – citizens and aliens.²⁰⁴ It has been held that all other rights in chapter 2 of the Bill of Rights not particularly applicable to citizens,²⁰⁵ are applicable to aliens.²⁰⁶ If aliens were to be treated differently in respect of

203 Which contradicts the wording of the Preamble – 'every citizen is equally protected by the law' (own emphasis) (see chapter 3 par 3.5.1.3; fns 193, 194; 195 above for the meaning of s 9(1)).

204 Other rights in the Bill of Rights have also been worded to apply to 'everyone'. See the rights on human dignity (s 10); life (s 11); freedom and security of the person (s 12); privacy (s 14); freedom of religion, belief and opinion (s 15); freedom of expression (s 16); assembly, demonstration, picket and petition (s 17); freedom of association (s 18); freedom of movement and residence (s 21(1); 21 (2)); fair labour practices (s 23(1)); environment (s 24); housing (s 26); health care, food, water and social security (s 27); education (s 29); language and culture (s 30); access to information (s 32); just administrative action (s 33); access to courts (s 34). Sections 9(3) and (4) refer to the right of 'anyone' not to be discriminated against. Rights worded in the negative similarly refer to 'no one', for example ss 13; 25; 28 referring to slavery, property and children respectively. Further specific rights with regard to labour relations refer to 'every worker', 'every employer' and 'every trade union' (s 23(2), (3), (4) and (5)). With regard to children's rights, the wording 'every child' has been used (s 28); with regard to certain communal rights, the wording 'persons belonging to a cultural, religious or linguistic community' has been used (s 31); with regard to criminal justice, the wording 'everyone who is arrested', 'everyone who is detained' and 'every accused person' has been used (s 35).

205 Some rights have been formulated to apply to *citizens only*: citizens are equally entitled to the rights, privileges and benefits of citizenship (s 3); political rights (s 19); deprivation of citizenship (s 20); a number of rights relating to freedom of movement and residence, and passports (ss 21(3); 21 (4)); the right to choose a trade, occupation or profession (s 22).

206 Rautenbach & Malherbe *Staatsreg* 60. It is argued that all constitutional rights, except those specifically reserved for citizenship in the Constitution itself, may be invoked by non-citizens, whether they be permanent residents, temporary residents, visitors or even undocumented aliens. This should not be taken to mean that non-citizens will be able to claim equal treatment with citizens in every respect, but merely that the fact of non-citizenship is not sufficient per se to justify the denial of any particular right to non-citizens (Carpenter 'Equality and Non-discrimination' 39). Case law has held that the Constitution applies to non-citizens (see, for example, *National Coalition for Gay and Lesbian Equality No 2* 2000 (2) SA 1 (CC); *Larbi-Odam* 1998 (1) SA 745 (CC) (discussed in chapter 3 par 3.5.1.3(a)(i)A above; par 2.3.4.2 below). Non-citizens may be treated differently from citizens, but they are not without rights. Note, however, that it is argued that affirmative action is not a right (see chapter 3 par 3.5.2.3(c)(i) above).

such rights, this would be a limitation of the particular right and of the right to equality.²⁰⁷ Such a limitation will be upheld only if it complies with section 36 of the Constitution.²⁰⁸

In turn, section 9(2), relating to the promotion of the ‘achievement of equality by legislative and other measures’ which *may* be taken – affirmative action – refers to ‘persons, or categories of persons disadvantaged by unfair discrimination’. The words ‘persons or categories of persons’ are qualified by the words ‘disadvantaged by unfair discrimination’.

Through an application of contextualism and purposivism to interpret section 9(2), the following becomes clear: if (a) one considers the ‘subject or occasion’ in respect of which these words were used (that is, that the Constitution was a political compromise reached by the various political parties during the constitutional negotiations in an attempt to reconcile a highly divided and unequal South African society); and (b) considers the object that it was intended to achieve (that is, equality for the black majority of South African people and women), it is submitted that the section points mainly²⁰⁹ to such people that now have to be affirmed. It is further submitted that, first and foremost, it holds the South African people to be its core focus. Such an interpretation is sensitive to the political context of affirmative action.²¹⁰

Furthermore (and still applying contextualism and purposivism), if section 9(2) is interpreted as part of the whole Constitution, the words in the light of their context, including the matter, the purpose, the scope and the background, all similarly relate mainly, it is submitted, to the majority black population and women in South Africa, both of which suffered disadvantage under an apartheid and patriarchal society. The section refers to individuals and categories of people who were discriminated against, and who must now be protected, advanced, and integrated into the new South African order.²¹¹ Such an interpretation has

207 Rautenbach & Malherbe *Staatsreg* 60.

208 See chapter 3 par 3.5.1.3(c) above.

209 Note that it is stated, *mainly*, and not exclusively or absolutely.

210 See Kentridge ‘Equality’ 14-37(see also chapter 3 par 3.5.1.4(a) above).

211 *Ibid.*

regard to contemporary norms and to the aspirations, expectations and sensitivities of the South African population.²¹² It is submitted that this restrictive interpretation is apposite precisely because it is purposive.²¹³

In addition, a consideration of the Preamble of the Constitution²¹⁴ in order to establish the intention of the legislator supports this interpretation. The Preamble provides as follows:

'We, the people of South Africa,

Recognise the injustices of our past ...

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, ... adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past ...

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law,

Improve the quality of life of all citizens and free the potential of each person ...

May God protect our people' (own emphasis).

The references to 'every citizen' and 'all citizens'²¹⁵ in the Preamble are most probably attributable to the fact that black citizens of the previous homelands were denied South African citizenship.²¹⁶ They had separate citizenship regulated in terms of the National States Citizenship Act.²¹⁷ Only when the interim Constitution came into operation was the 'independence' of the homelands terminated and did their citizens regain their South African citizenship.²¹⁸ Because of this, citizenship is a particularly sensitive issue in South Africa, and

212 *Ibid.*

213 See par 2.3.3.2(c)(i) above.

214 See par 2.3.3.2(c)(ii)B above.

215 More specific than 'We, the people' and 'all who live in it' in the preceding lines.

216 Rautenbach & Malherbe *Staatsreg* 61.

217 See chapter 3 fn 33 above (also see Glaser & Possony *Victims of Politics* 357).

218 Restoration and Extension of the South African Citizenship Act 196 of 1993.

particularly at this stage with the country only a few years into transition.²¹⁹

It is not submitted that the references to ‘every citizen’ and ‘all citizens’ in the Preamble be interpreted to narrow down the scope of the Constitution to include only citizens (as further wording in the Preamble itself refers to ‘We, the people’, ‘our past’, ‘all who live in it’, ‘our people’ and ‘each person’). It is however submitted that the use of these words in the Preamble – broader concepts than ‘every citizen’ and ‘all citizens’ – at the very least support a reasonable inference that the main focus of the Constitution is on the South African people, to heal *their* past and to enshrine *their* rights. The fundamental ‘mischief’ or defect²²⁰ which the Constitution seeks to remedy is the previous constitutional system based on race and sex, which resulted in the systemic and structural disadvantage suffered by groups, which logically points mainly to the country’s own people – South African citizens.

The Constitution seeks to advance the objective of (*inter alia*) ‘the achievement of equality’²²¹ for South African citizens, with affirmative action as a means to that end. In other words, the Constitution uses affirmative action as a remedial measure to suppress this past ‘mischief’ and to advance equality. In this way, it aspires to a realisation of the ‘scheme of values’, particularly the value of equality, informing the South African legal and constitutional order.²²² It can thus be seen as a ‘value-activating interpretation’ in an effort to achieve equality for the South African people at some stage in the future.

Further, the Bill of Rights holds:²²³

‘It [the Bill of Rights] enshrines the rights of *all people in our country* and affirms the democratic values of human dignity, equality and freedom’ (own emphasis).

219 Bekink *South African Constitutional Law* 124.

220 See par 2.3.3.2(c)(ii)A above.

221 Founding Provisions; s 1(a) of the Constitution.

222 See par 2.3.3.2(c)(ii)C above.

223 Section 7(1) of the Constitution.

It is submitted that the reference to ‘all people in our country’²²⁴ – a broader concept again – should similarly be interpreted to refer principally to South African citizens, and to affirm the right to equality for them. Such an interpretation would be in line with the interpretation clause of the Bill of Rights.²²⁵

2.3.3.4 1995 Labour Relations Act and Employment Equity Act

The 1995 LRA and the EEA do not explicitly refer exclusively to South African citizens as beneficiaries of affirmative action. The Preamble of the EEA states:²²⁶

‘Recognising –

that as a result of *apartheid and other discriminatory laws and practices*, there are disparities in employment, occupation and income within the *national* labour market; and that those disparities create such pronounced *disadvantages for certain categories* of people that they can not be redressed simply by repealing discriminatory laws,

Therefore, in order to –

promote the constitutional right to equality ...
ensure the implementation of employment equity to redress the effects of discrimination;
achieve a diverse workforce broadly representative of *our people ...*’ (own emphasis).

It is submitted that, as the EEA gives effect to section 9 of the Constitution and is, in this sense, associated with socioeconomic transformation of the country, it is imperative that a

224 Although wider than ‘every citizen’ and ‘all citizens’, but similar to ‘We, the people’, ‘all who live in it’ and ‘our people’ in the Preamble.

225 See s 39(1) of the Constitution; chapter 3 par 3.5.1.2(a) above.

226 See also chapter 3 par 3.5.2.1 above regarding the Green Paper on Employment and Occupational Equity, which preceded the EEA and stated clearly that organisational transformation was required to remove unjustified barriers to employment for ‘all South Africans’.

contextualised and purposive approach be followed when interpreting it.²²⁷ It is suggested that the words ‘apartheid’ and ‘our people’ appear to a large extent to be context-specific and strongly point to South African citizens, although not exclusively. It is further submitted that such an interpretation is in line with the obligation that the EEA must be interpreted in compliance with the Constitution so as to give effect to the latter’s purpose.²²⁸

In terms of a purposive and contextualised approach, the Explanatory Memorandum to the Employment Equity Bill²²⁹ may also be considered in order to establish the object that the legislator sought to achieve. The Bill sets the tone with its opening statement:²³⁰

‘Apartheid has left behind a legacy of inequality.’

Frequent references to ‘apartheid’,²³¹ the ‘imbalances of the past’²³² and ‘past discrimination’²³³ appeared in the Bill. It can reasonably be inferred that its main aim was to redress the inequalities of apartheid. The Bill accordingly recognised that measures were necessary to remedy these pervasive inequalities which defined ‘South African society’.²³⁴ Again, it appears to be context-specific, but not to apply to citizens exclusively.

Evaluation of interpretation of Constitution, EEA and Auf der Heyde case

227 See pars 2.3.3.2(b); 2.3.3.2(c) above.

228 Sections 3(a); 3(b) of the EEA; chapter 3 par 3.5.1.2(a) above. Reference is however made to ‘other’ discriminatory laws and practices as well. This is discussed in par *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* below.

229 See Botha *Wetsuitleg* 98 who argues that explanatory memoranda can be used to interpret statutes.

230 Introduction to the Explanatory Memorandum to Employment Equity Bill 5.

231 *Ibid*; Vision of the Explanatory Memorandum to Employment Equity Bill 5; The Legacy of Discrimination of the Explanatory Memorandum to Employment Equity Bill 6-7.

232 See Introduction to the Explanatory Memorandum to Employment Equity Bill 5.

233 Vision of the Explanatory Memorandum to Employment Equity Bill 5.

234 Constitutional and Other Requirements of the Explanatory Memorandum to Employment Equity Bill 9.

It is submitted that the Labour Court correctly interpreted the issue of ‘citizenship’ in terms of the 1995 LRA in *Auf der Heyde*, in that the main focus of affirmative action in South Africa is on blacks and women who are citizens. A similar interpretation of the EEA would also be correct.²³⁵ Such an interpretation promotes the spirit, purport and objects of the Bill of Rights²³⁶ and, as such, promotes the value of equality that underlies the new democratic South African society.²³⁷ In this way it can be said that affirmative action is applied and implemented fairly.²³⁸

However, the interpretation in *Auf der Heyde* can be disagreed with to the extent that the judgment implies that *only* citizens may benefit from affirmative action. It is submitted that affirmative action for non-citizens as a disadvantaged group is possible. It can be argued that, although a contextualised and purposive interpretation of the Constitution, the then 1995 LRA and the EEA requires that affirmative action be meant *primarily* for South African citizens belonging to one of the designated groups – black people, women and people with disabilities – the broader picture of South Africa shows that other groups – not necessarily citizens – were discriminated against in South Africa under apartheid.

Apartheid, which was a race-based policy, indirectly discriminated against all black people on the basis of nationality.²³⁹ This has particular significance for South Africa in a few

235 See ss 3(a); 3(b) of the EEA.

236 Section 39(2) of the Constitution; chapter 3 par 3.5.1.2(a) above.

237 Section 39(1) of the Constitution.

238 As was held in *Auf der Heyde* (2000) 8 BLLR 877 (LC) at 161 (par 2.3.2 above). This case has been criticised as being too widely stated (Pretorius ‘Affirmative Action’ 27). It is argued that, although it is true that the Constitution visualised as the beneficiaries of affirmative action *South Africans* disadvantaged by unfair discrimination, it is not inconceivable that these groups may in particular circumstances derive benefit from the appointment of black, female or disabled non-citizens, in so far as their appointment may contribute to the dismantling of ‘behavioural or structural impediments’ in employment that operate to the disadvantage of designated groups (*ibid*). Although this may be true, it is submitted that such an approach may lead to a situation where affirmative action will not reach its main intended targets, namely ‘suitably qualified’ South African citizens belonging to one of the designated groups. See, however, par *Evaluation of the concepts ‘suitably qualified’ and ‘merit’* above where it was pointed out that it is realistic to expect that, owing to skills shortages in South Africa, ‘suitably qualified’ citizens may not be found for all jobs.

239 Indications are that nationality is a sensitive ground in South Africa. The PEPUDA (see chapter 3 fn 333 above) contains a directive principle to the effect that, ‘in view of the *overwhelming evidence of the*

respects. First, for many years South Africa drew heavily for its unskilled labour requirements on certain countries in the southern African region, namely Lesotho, Mozambique, Botswana and Swaziland.²⁴⁰ Specific sectors, such as mining and agriculture, recruited large numbers of migrant workers. Such migrant workers were employed on temporary contracts, usually renewable every 12, 18 or 24 months, and were repatriated to their countries of origin once the contracts expired.²⁴¹ These workers were usually guaranteed of returning to the same job within a specified period of time.²⁴² Because of the temporary nature of their contracts, even if they had worked continuously for many years in South Africa, they could not qualify for permanent residence or citizenship.²⁴³ Secondly, it has further particular significance for South

importance, impact on society and link to systemic disadvantage and discrimination on the grounds of ... nationality ... special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of "prohibited grounds" [of discrimination] by the Minister [for Justice and Constitutional Development] ...' (own emphasis) (s 34(1)(a)). It also holds that the Equality Review Committee must within one year investigate and make the necessary recommendations to the Minister in this regard (s 34(1)(b)). It appears that no investigation has been undertaken thus far. See also chapter 2 par 2.1.3.4(d) above for the international situation, which reveals that discrimination on the ground of nationality is widespread.

240 See Labour Market Report 175; Wiehahn Commission Report part 6 pars 2.7-2.11; Van Jaarsveld *Van Riebeeck tot Vorster* 408-11.

241 See Labour Market Report 169; 175; Wiehahn Commission Report part 6 pars 2.7- 2.11; Thompson 2 167-70; 181; 186; 192-3; 230.

242 Usually in terms of bilateral treaties between South Africa on the one side, and Mozambique, Lesotho, Botswana and Swaziland on the other side (Labour Market Report 172;174-5). Workers admitted under these treaties had fewer rights than people admitted under the then Aliens Control Act 96 of 1991(subsequently repealed by the Immigration Act 134 of 2002). Generally, the latter could apply for citizenship after a period of permanent residence of five years, while the former could not, even after lengthy periods of working in South Africa.

243 Glaser & Possony *Victims of Politics* 337-8; Labour Market Report 175-6;179;181. In this regard, the NUM and the Chamber of Mines requested the Labour Market Commission to end the unequal treatment of migrant workers from the Southern African region in 1996. At that stage, the Department of Home Affairs indicated that investigations were under way with a view to amending the relevant treaties, which were held to be outdated and not in line with international requirements. It recommended that the (then) prevailing migration policy be amended so as to have one act regulating all aliens coming into South Africa and that all workers be treated equally. It further recommended that, in allocating permits for entry to the South African labour market, three criteria should apply. First, national skills requirements should be taken cognisance of. Secondly, the granting of permits for work should be based on the country of origin of the applicant. Owing to the fact that South Africa has used unskilled labour from Lesotho, Mozambique, Botswana and Swaziland, a preferential policy should be adopted in relation to the South African Customs Union countries and Mozambique in terms of which skilled

Africa as part of Africa, a black continent, where the race factor has impacted on black aliens in general. These ‘mischiefs’ also need to be remedied.²⁴⁴ The Constitution can thus be a ‘remedial measure’ in this sense too.

It is submitted that it is possible for section 9(2) of the Constitution to be used to affirm non-citizens as a ‘category’ of people disadvantaged by unfair discrimination in the past. This, it could be argued, would be possible because the broad wording of both the Constitution – ‘persons, or categories of persons, disadvantaged by unfair discrimination’ – and the EEA – ‘as a result of apartheid and *other* discriminatory laws and practices’ – left the back door open to include affirmative action²⁴⁵ for categories of people unfairly discriminated against on the basis of, for example, nationality. In this regard, it has been held in *Brink supra*:²⁴⁶

‘Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, *other* systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s 8 [of the interim Constitution], the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm’ (own emphasis).

Though ‘other’ discriminatory laws and practices – related and unrelated to apartheid – may therefore exist, it nevertheless seems that non-citizens as a group were not envisaged as one of the main target groups of affirmative action at the time of the drafting of the Constitution or the EEA.

workers from these countries would be granted access to the South African labour market on a continuing basis. They should not be restricted to agriculture and the mines, but should be allowed to seek work in all sectors. It held that the diversification of employment options was of particular importance given the decline of the mining industry as a major employer and the adverse consequences that this would have on employment and incomes for the region. Such a more balanced employment spread, the Labour Market Commission argued, would also lead to better regional integration. Thirdly, the entry for work should be based on the need to redress past injustices regarding access to the South African labour market.

244 See par 2.3.3.2(c)(ii)A above.

245 By legislative and other measures designed to protect or advance such people, as stipulated by s 9(2) of the Constitution.

246 1996 (4) SA 197 at par 41.

Nothing, however, prohibits such an interpretation that includes not only the mischief of the past constitutional order against South African citizens, but goes further and includes other groups on the receiving end of apartheid and other discriminatory laws and practices which impacted generally on aliens in South Africa. Non-citizens who have suffered discrimination as a group (in accordance with a substantive notion of equality), such as migrant workers, may be able to substantiate such a claim.²⁴⁷ Sufficient evidence of past discrimination will have to be presented. In some instances, however, such as in the case of the migrant worker system employed by the mines, past discrimination has been amply documented and may not be difficult to prove; it may even be 'assumed'. Care should be taken though to provide guidelines on exactly what evidence is necessary to prove unfair discrimination against a group.

This interpretation is substantiated by the rules of interpretation, which provide that the provisions of the Constitution and the EEA must be understood as part of the whole of the texts.²⁴⁸ It is submitted that both texts point mainly to the broader history and background of apartheid,²⁴⁹ but also to the broader context of the country, that is, to a context that aspires to non-racialism and non-sexism, to the achievement of equality, to the advancement of human rights and freedoms, and to diversity.²⁵⁰ In this way, the Constitution and the EEA aspire to a realisation of the 'scheme of values' informing the legal and constitutional order in its totality

247 The question that needs to be asked is who would turn out to be the beneficiaries of such affirmative action measures in practice? People who worked as migrant workers and stayed on in the Republic, or previous migrant workers coming back to South Africa? Or should a policy be adopted in terms of which workers from the countries mentioned above, are recruited? (see fn 243 above). See also the request by the Chinese Association of South Africa to the Parliamentary Portfolio Committee on Labour for Chinese to be classified as a designated group in terms of the EEA in order to benefit from affirmative action measures. After public hearings, the Committee recommended that an amendment be drafted to ensure that South African citizens of Chinese descent would be recognised as historically disadvantaged (Letter Parliamentary Committee on Labour to Department of Labour 19 May 2004; Report Parliamentary Portfolio Committee on Labour on public hearings on employment equity held during May 2003). After informal discussions between business, labour and government, it was, however, decided that the issue was of a political nature and could not be supported.

248 See par 2.3.3.2(b) above.

249 See pars 2.3.3.3; 2.3.3.4 above.

250 Preamble; s 1 of the Constitution; Preamble; s 1 of the EEA.

and constitute a 'value-activating interpretation'.²⁵¹ Such an approach is in line with the interpretation clause of the Constitution which requires that, when interpreting the Bill of Rights, the values that underlie an open and democratic society based on human dignity, equality and freedom, must be promoted, and that, when interpreting any legislation, the spirit, purport and objects of the Bill of Rights must be promoted.²⁵²

2.3.3.5 *Department of Labour*

As a source for interpreting the EEA, the Department of Labour's guidance regarding who may be appointed under affirmative action is analysed. On the Department's website under 'Frequently asked questions', a question that is asked is whether foreign nationals qualify as members of designated groups.²⁵³ In response, the Department states:²⁵⁴

'Although foreign nationals may be included in the various designated groups as *reported* by the employer, it would be unacceptable to use these employees as the basis for *measuring and setting numerical goals*.

Since the Act [EEA] requires that employers compare their workforce profiles with relevant **local** demographics, employers should strive to be representative of these' (own emphasis).

Evaluation of Department of Labour

It is submitted that these statements are ambiguous and can be interpreted to mean that foreign nationals who have already been appointed, or foreign nationals who will be appointed in the ordinary course of business (not on the basis of affirmative action), can be reported on in terms of the EEA. They do, however, preclude employers from using foreign

251 See par 2.3.3.2(c)(ii)C above.

252 See s 39(1); 39(2) of the Constitution; chapter 3 par 3.5.1.2(a) above.

253 <http://www.labour.gov.za/docs/legislation/eea/faq.html> s 7 headed 'Classification'.

254 *Ibid.*

nationals for measuring and setting numerical goals; in other words, aliens may not be utilised as part of the employment equity plan, the setting of goals and the actual provision for affirmative action – which go to the heart of the process. It can be argued that the statements seem to imply that foreign nationals may therefore be recruited and appointed in the ordinary course of business for particular jobs, *but may not be appointed on the basis of affirmative action*.

The statements of the Department of Labour appear to be some sort of compromise between total exclusion of foreign nationals when *reporting* on the representivity of designated groups, and *actually appointing* them on the basis of affirmative action in terms of an employer's employment equity plan.

This is, of course, not ideal, as employers may abuse the guideline. Moreover, the approach of allowing foreign nationals to be reported as part of designated groups may lead to incorrect figures in respect of South African people who have actually been appointed in terms of affirmative action measures. It is submitted that it would defeat the purpose of both the Constitution and the EEA if employers were allowed to recruit black, female and/or disabled non-citizens and to use such figures for affirmative action purposes. It is further submitted that, on an accurate interpretation of the Constitution and the EEA, affirmative action measures are meant to benefit primarily South African citizens – and not aliens.²⁵⁵ This should be true for purposes of both measuring and setting numerical goals and for reporting purposes. Recommendations to clarify these are made below.²⁵⁶

2.3.4 Citizenship as a criterion to benefit from affirmative action: can it be unfairly discriminatory against non-citizens?

2.3.4.1 Introduction

255 See par *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

256 See chapter 7 par 4.3 below.

A related question is whether citizenship (which is not a listed ground of prohibited discrimination in either the Constitution or the EEA) as a criterion to benefit from affirmative action can be an 'unlisted' ground²⁵⁷ in terms of the Constitution and/or the EEA, and, on this basis, be argued to be, first, discriminatory, and, secondly, unfairly discriminatory against non-citizens or aliens in South Africa. The relevant right here is the right to non-discrimination.

Section 9(3) and (4) of the Constitution respectively hold that the 'the state may not unfairly discriminate directly or indirectly against anyone' and that 'no person may unfairly discriminate directly or indirectly against anyone'. The use of the word 'anyone' implies that the right to non-discrimination is applicable to every person.²⁵⁸

2.3.4.2 *Citizenship as an unlisted ground of discrimination: Larbi-Odam case*

It was pointed out above in the *Larbi-Odam* case that citizenship may constitute an unlisted ground because it is an attribute that has the potential to impair the dignity of a person, or affect such a person adversely in a serious manner.²⁵⁹ This is based on the fact that citizenship may be used or misused to marginalise or oppress people and thus affect their dignity.

Having determined that 'citizenship' is an unlisted ground of discrimination, it is now necessary to establish the possible unfairness of such discrimination. Unfairness of discrimination on an unlisted ground is not presumed in terms of the Constitution (or the EEA), and such unfairness must be proven.²⁶⁰

2.3.4.3 *Establishing unfairness of discrimination*

257 See chapter 3 par 3.5.1.3(a) above for a discussion of unlisted grounds.

258 See par 2.3.3.3 above.

259 See chapter 3 par 3.5.1.3(a)(i)A above.

260 See chapter 3 pars 3.5.1.3(b); 3.5.2.3 above.

It is submitted that citizenship is a ground highly relevant to affirmative action in the South African context and that its use in benefiting mainly (but not exclusively) disadvantaged South African citizens is justifiable. Such submission is based on the fact that citizenship is indeed a particularly sensitive issue in South Africa, as pointed out above.²⁶¹

In assessing the possible unfairness (against non-citizens) of the use of citizenship in the context of affirmative action, it should be kept in mind that the principles of international law require that affirmative action measures not be contrary to the non-discrimination principle.²⁶² In other words, there must be a sufficient connection between the ground/s on which affirmative action measures are applied and the right to equality (with affirmative action being a means to achieve equality). In the South African historical context, this means that race, sex and disability (the designated groups being blacks, women and the disabled²⁶³) as grounds on which to affirm previously disadvantaged people can be said to be 'sufficiently connected' or 'relevant' to the right to equality. This argument will be taken one step further in an endeavour to establish whether an application analogous to the issue of citizenship can be found as an additional criterion (over and above being a 'suitably qualified' member of a designated group) to benefit from affirmative action.

With this as background, the factors laid down by *Harksen supra*²⁶⁴ for enquiring into the unfairness of the discrimination will be considered. The determining factor in the unfairness enquiry will be the 'impact' of the discrimination on non-citizens. The focus of this enquiry is on the holder of the right, his or her position in society and the kind of harm suffered by him or her. It assesses questions of fairness and rationality in relation to the values underlying the right to equality itself.

First, when considering the position of non-citizens in society, and whether they have

261 See par 2.3.3.3 above.

262 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

263 See chapter 3 par 3.5.2.3(c)(iii) above.

264 1998 (1) 300 (CC) (see chapter 3 pars 3.5.1.3(a); 3.5.1.3(b) above for a detailed discussion of the *Harksen* case).

suffered from patterns of disadvantage in the past, it cannot be denied that they generally constitute a vulnerable minority group²⁶⁵ and may have suffered from discrimination in the past, in terms of both listed and unlisted grounds, and related particularly to apartheid (but also unrelated to such policy). It is submitted that the extent of past patterns of disadvantage and stereotyping against non-citizens is not relevant in the context of affirmative action where non-citizens are excluded from the benefits as a rational way of ensuring that citizens receive the benefits of affirmative action. This is explained below.²⁶⁶

Secondly, the nature and purpose of affirmative action (as interpreted) are *not* in the first instance aimed at impairing the dignity of aliens, but are aimed first and foremost at achieving equality for millions of South Africans, a worthy societal goal against the background of apartheid. This is not meant to demean non-citizens or have the cruel effect of undermining the confidence and self-worth of non-citizens.²⁶⁷ It is plainly meant to benefit citizens who were disadvantaged under apartheid and patriarchy. The impact on non-citizens, namely that they cannot be appointed or promoted to a job on the basis of affirmative action, is therefore narrow or partial.²⁶⁸ Affirmative action is, of course, also a temporary measure, which implies that the impact on non-citizens is limited.²⁶⁹

It can be argued that affirmative action mainly for citizens is one occasion on which non-citizens will not be able to claim equal treatment with citizens. Put differently, the nature of and the purpose sought by such discrimination make it clear that it is not directed, in the first instance, at disadvantaging non-citizens, but at achieving a worthy and important (domestic) societal goal, namely furthering substantive equality for South African citizens. Affirmative action as a specific measure to achieve this goal is desperately needed in South Africa, a

265 Not necessarily a permanent minority (see chapter 3 par 3.5.1.3(a)(i)A above).

266 See pp 190-1 below.

267 See *National Coalition for Gay & Lesbian Equality No 2* 2000 (2) SA 1(CC) at par 42.

268 It is not argued that non-citizens cannot obtain jobs at all.

269 See chapter 2 pars 2.1.2.4(c); 2.1.3.4(c); chapter 3 par 3.5.2.3(c)(i) above. It should be kept in mind that application for citizenship may in any event be made after five years in South Africa (see par 2.3.5.3 below).

country with the highest inequality figures in the world.²⁷⁰

In this context, it may then be questionable whether non-citizens do in fact suffer impairment of their dignity as a result of the limitation of affirmative action mainly to citizens. It is submitted that it cannot be said that, in this instance the dignity – the intrinsic value or worth – of a non-citizen has been affected.²⁷¹ Equality and dignity seem not to be so closely related here as in the instance of affirmative action for citizens of the country.²⁷² Affirmative action is a situation-specific *means*²⁷³ with the purpose of achieving ‘equality’ (a right) in a conciliatory effort to heal the very unequal South African society, and to protect and advance mainly the majority of South African black people and women who were discriminated against under apartheid and patriarchy. It is submitted that in this process, the dignity of the majority people is entrenched.

Thirdly, other relevant factors, including the extent to which the discrimination has affected the rights and interests of non-citizens, must be considered. It is submitted that it cannot be said that ‘discrimination’ in this sense has affected the rights or interests of non-citizens, or has affected their dignity in any fundamental way, or that an impairment of a comparably serious nature has been inflicted on them.²⁷⁴ It is submitted that affirmative action for citizens does not indicate any inferiority on the part of aliens, but is merely a context-specific measure to rectify previous, large-scale unfair discrimination suffered by South Africans.²⁷⁵ It does not indicate that non-citizens are less worthy of the right to non-discrimination, but simply that the purpose of affirmative action is first and foremost one of

270 See chapter 3 pars 3.4.4; 3.5.2.1 above.

271 See chapter 2 par 2.2.3.2 above.

272 See chapter 3 pars 3.5.1.2;(b)(iv); 3.5.1.2(b)(v) above.

273 Authorised by the Constitution and given content to in the workplace by the EEA (see chapter 2 pars 2.1.2.4(c); 2.1.3.4(c); chapter 3 fn 249; fn 250 above.

274 It is submitted that non-citizens in South Africa do not have rights or interests in the context of affirmative action. If citizens do not have a right to affirmative action, so much more so for aliens (see *Dudley* (2004) 25 ILJ 305 (LC); chapter 3 par 3.5.2.3(c)(i) above).

275 It may, however, indicate that non-citizens are less worthy of affirmative action measures at this particular time in South Africa’s history.

achieving equality for millions of South Africans. A large number of blacks and women still need to be affirmed at this early stage in implementing affirmative action (with employers having been required by law to implement affirmative action only since 1999).²⁷⁶ To include foreign nationals under the ambit of affirmative action at this stage of South Africa's transition to an egalitarian society would thwart the process of achieving equality for South African blacks, women and disabled people. It is submitted that requiring South African citizenship in order to benefit from affirmative action is not only necessary, but *essential*, particularly in the context of a *majority* of black people and women that have to be affirmed. Such a restrictive criterion, aimed at breaking down structural inequalities and achieving true equality for South Africa, is rational and fair, as well as being justifiable and constitutional.

Evaluation of citizenship as unfairly discriminatory against non-citizens

It is submitted that, even though using citizenship as a criterion to benefit mainly South African citizens may be *discriminatory* against non-citizens (on the basis of an 'unlisted ground', as demonstrated by *Lari-Odam*²⁷⁷), and *unfairly discriminatory* in that it may *potentially* affect non-citizens' dignity, its use can be justified in the context of South Africa's history. It is therefore contended that citizenship as a criterion for benefiting from affirmative action finds proper, analogous application in terms of international law, similar to race, sex and disability in the South African context: citizenship is a ground relevant to affirmative action and is not discriminatory.

Thus, it is again submitted that the Labour Court, in principle, arrived at the correct interpretation in *Auf der Heyde* by holding that (mainly) South Africans should benefit under affirmative action. It is submitted that a similar interpretation of the EEA would be in compliance with the Constitution.²⁷⁸ Also, the EEA would then have been interpreted to give

276 See chapter 1 fn 64; chapter 3 fn 284 above.

277 See par 2.3.4.2 above.

278 Section 3(a) of the EEA.

effect to its purpose, namely to redress disadvantages experienced by designated groups.²⁷⁹ It may also be said that such an approach promotes and reinforces the value of equality underlying an open and democratic society, as well as the spirit, purport and objects of the Bill of Rights.²⁸⁰ In this regard, the value of dignity for South African citizens is particularly entrenched.²⁸¹

Although no case on affirmative action has yet reached the Constitutional Court, it is submitted that a purposive and contextualised approach will most probably be followed when having to decide whether non-citizens generally fall under the ambit of affirmative action. If the court considers the constitutional text in its entirety, and the historical context, it will be logical to apply affirmative action mainly to South African citizens who are black, disabled and/or female. Although this may be seen to potentially discriminate between citizens and non-citizens, it cannot be seen to be unfairly discriminatory in the South African context where affirmative action is used as a remedy (which determines its own relevant criteria) to achieve equality. Such an interpretation recognises the fact that affirmative action has been developed against the specific background of South Africa's history and that the intended beneficiaries of affirmative action are mainly South African citizens.

2.3.5 Citizenship as a criterion to benefit from affirmative action: can a distinction be made on the basis of the various ways in which citizenship may be acquired?

2.3.5.1 Introduction

A last, related question that must be distinguished from the issue of citizenship and whether or not it should be used as a ground for discriminating between citizens and non-citizens in the context of affirmative action, is whether a distinction may be made between

279 Section 3(b) of the EEA.

280 Section 39(1); 39(2) of the Constitution.

281 See chapter 2 par 3.3.2; chapter 3 pars 3.5.1.2(b)(i)-3.5.1.2(b)(v) above.

citizens on the basis of the various ways in which citizenship may be acquired. Put differently, it should be established who are regarded as South African citizens for purposes of the affirmative action provisions of the EEA. In this regard, it is necessary to scrutinise the Constitution, the Citizenship Act²⁸² and the Immigration Act.

2.3.5.2 *Constitution*

Section 3 of the Founding Provisions of the Constitution states:

(1) There is a *common* South African citizenship.

(2) All citizens are –

(a) equally entitled to the *rights, privileges and benefits* of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship' (own emphasis).

2.3.5.3 *Citizenship Act*

To give effect to section 3(3) of the Constitution, the South African Citizenship Act (hereafter the 'Citizenship Act') was enacted to regulate the acquisition, loss and restoration of citizenship. The Act's concept of citizenship holds as its core value that all people lawfully and permanently residing within South Africa are entitled to be full members of the country.²⁸³

South African citizenship may be obtained in one of three different ways, namely by birth in the territory of the Republic (*ius soli*),²⁸⁴ by descent from a parent (*ius sanguinis*)²⁸⁵

282 88 of 1995.

283 Klaaren 'Non-citizens and Constitutional Equality' 297.

284 Section 2 of the Citizenship Act.

285 Section 3 of the Citizenship Act.

and through a process of naturalisation.²⁸⁶ Citizenship by birth basically entails that any person born in the territory of the Republic is a citizen by birth.²⁸⁷ Citizenship by descent applies to a person born outside the South African territory, one of whose parents was, or is, a South African citizen at the time of the person's birth.²⁸⁸ Naturalisation entails a process whereby an alien who settles in the country, and complies with certain requirements,²⁸⁹ can apply for South African citizenship to the Minister of Home Affairs.²⁹⁰ Provision is also made for loss of citizenship.²⁹¹

2.3.5.4 *Immigration Act*

The Immigration Act regulates residency of aliens in the country. It distinguishes

286 Section 4 of the Citizenship Act.

287 Section 2(1) of the Citizenship Act. Some exceptions exist, for example children born to parents enjoying diplomatic immunity in the Republic (s 2(2)).

288 Section 3(1) of the Citizenship Act. Such birth must be registered in South Africa in terms of the Births and Deaths Registration Act 51 of 1992 (s 3(1)(b) of the Citizenship Act).

289 Section 3(1)(b) of the Citizenship Act.

290 Section 5(1) of the Citizenship Act requires, for example, that such a person not be a minor; that the person must have been lawfully admitted to the country for permanent residence; that such person must be ordinarily resident in the country and must have been ordinarily resident for a continuous period of not less than one year immediately preceding the date of the application, and that, in addition, the person must have been resident in the Republic for a further period of not less than four years during the eight years immediately preceding the date of the application (this may be done away with in exceptional circumstances (ss 5(5); 5(9))); that the person must be of good character; that the person must intend to continue to reside in the Republic; that the person must be able to communicate in any one of the official languages; and that the person must have adequate knowledge of the responsibilities and privileges of South African citizenship. Further detailed provisions apply to spouses, widows and widowers of South African citizens (s 5(5)).

291 South African citizens may lose (s 6 of the Citizenship Act) or renounce their citizenship voluntarily (s 7), or may be deprived of it by the Executive (ss 8; 9; 10). For the sake of completeness, note that s 20 of the Constitution holds that no citizen may be deprived of citizenship. Any limitation of this right must, therefore, comply with the Bill of Rights. In other words, a law of general application, such as the Citizenship Act, may limit this right to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In certain circumstances, people may have dual citizenship (s 6(2)).

between temporary²⁹² and permanent²⁹³ residents, and between aliens and citizens. It does not distinguish meaningfully between different classes of citizens on the basis of the various ways of acquiring citizenship, namely by birth, descent and naturalisation. It in fact holds that permanent residents have all the rights, privileges, duties and obligations of a citizen, except those which a law or the Constitution explicitly ascribe to citizenship.²⁹⁴

Evaluation of the Citizenship and Immigration Acts

It seems that the Citizenship Act does not meaningfully differentiate between classes of citizens, except in the case of deprivation of citizenship.²⁹⁵ Neither does the Immigration Act make such a distinction. The latter in fact narrows down differentiations between citizens and permanent residents.²⁹⁶

It is argued that discrimination between citizens and non-citizens should generally be prohibited, as the Constitution guarantees equality for all. But, it is also held that certain rights and privileges may be ascribed to citizens (only) in terms of law of general application that must comply with the limitations set out in section 36 of the Constitution, and which will, as such, not constitute unfair discrimination. In this regard, the right to vote and the right to a

292 Section 10 of the Immigration Act. A temporary resident would be a 'foreigner', who is defined as 'an individual who is neither a citizen nor a resident, but is not an illegal foreigner' (s 1).

293 Section 25 of the Immigration Act.

294 Section 25(1) of the Immigration Act. These different forms of residence are not discussed as it is argued that South African citizenship – and not mere residence, whether permanent or temporary – is a requirement to benefit from affirmative action. It is contended that 'residence' in South Africa is not connected closely enough to the remedial measure of affirmative action.

295 A naturalised citizen may be deprived of citizenship if citizenship was obtained in a fraudulent way (s 8(1) of the Citizenship Act). Such a person will then be regarded as having the citizenship which he or she had before he or she became a South African citizen (s 11(1) of the Citizenship Act). The Act also allows for the deprivation of the South African citizenship of *any* South African citizen who also has the citizenship or nationality of another country, on the basis of such citizen having been sentenced in any country to a period of not less than 12 months' imprisonment for any offence which, if it was committed outside the Republic, would also have constituted an offence in the Republic (s 8(2)(a) of the Citizenship Act). Any citizen may be deprived of citizenship if the Minister of Home Affairs is satisfied that this would be in the public interest (s 8(2)(b) of the Citizenship Act).

296 Rights and privileges of temporary residents have, however, not been spelt out clearly.

passport come to mind.

However, it is argued that the differentiation between citizens and non-citizens for purposes of affirmative action should be distinguished on the basis that affirmative action is a *remedial measure* (and not a *right* that may be limited in terms of section 36) to address the specific disadvantage it wants to rectify. Affirmative action is needed as a *remedy* to primarily advance South African citizens who are disadvantaged owing to past discriminatory laws and practices based on apartheid and patriarchy.

2.3.5.5 *Notion of 'common citizenship'*

The notion 'common citizenship,'²⁹⁷ as seen above, does not form part of the Bill of Rights, but of the Founding Provisions of the Constitution. It can therefore be described as a 'guarantee' and is not subject to limitation in terms of section 36 (as with the rights in chapter 2 of the Bill of Rights). In other words, short of a constitutional amendment, legislation may not be enacted that, as from a particular date, there will be no South African citizenship, or that a section of the permanent inhabitants will become the citizens of another state.²⁹⁸

297 As found in s 3(1) of the Constitution (set out in par 2.3.5.2 above).

298 Rautenbach 'Rights Protected in the Bill of Rights' 1A68; Rautenbach & Malherbe *Staatsreg* 62.

The notion 'common citizenship' means 'belonging equally to' or 'without rank or position'.²⁹⁹ Put differently, there cannot be classes of citizenship.³⁰⁰ All citizens are therefore equal with regard to their citizenship, or no citizen is more important than another. It would therefore appear that the notion, in principle, aims at unifying all people in one sovereign South African state³⁰¹ and entrenches the existence of South African citizenship.³⁰²

The notion 'common citizenship' thus mainly seems to be a response to the past when the black majority in the homelands were denied South African citizenship and had separate citizenship.³⁰³ Again, because of this, citizenship is a particularly sensitive issue in South Africa.³⁰⁴

Section 3(2) further incorporates equality into the notion of citizenship.³⁰⁵ It states that all citizens are equally entitled to the rights, benefits and privileges of citizenship. It is submitted that these 'rights, benefits and privileges of citizenship' refer to the 'political rights', namely the right to form a political party and related activities,³⁰⁶ to free, fair and regular elections and to vote,³⁰⁷ to enter and remain resident anywhere in the Republic,³⁰⁸ not to be

299 Bekink *South African Constitutional Law* 69; De Waal, Currie & Erasmus *Bill of Rights Handbook* 367; Fowler's *Dictionary* 226.

300 Bekink *South African Constitutional Law* 69.

301 *Op cit* 124.

302 Rautenbach & Malherbe *Staatsreg* 62. This principle fully applies to all citizenship legislation and its application by executive and administrative actions affecting citizenship (Rautenbach 'Rights Protected in the Bill of Rights' 1A68).

303 Cheadle, Davis & Haysom *Constitutional Law* 268; Motala & Ramaphosa *Constitutional Law* 250; Rautenbach & Malherbe *Staatsreg* 3 (see also par 2.3.3.3 above).

304 See par *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above. The notion 'common citizenship' is, however, also seen as a commitment to universal values (Cheadle, Davis & Haysom *Constitutional Law* 268. See, for example, the Universal Declaration of Human Rights, article 21; the International Covenant of Civil and Political Rights, article 25).

305 De Waal, Currie & Erasmus *Bill of Rights Handbook* 367.

306 Section 19(1) of the Constitution.

307 Section 19(2); 19(3) of the Constitution.

308 Section 21(3) of the Constitution.

deprived of citizenship,³⁰⁹ to a passport,³¹⁰ and to choose a trade, occupation or profession.³¹¹ Again, they do not relate to affirmative action, which is a *means* to achieve equality.³¹²

Evaluation of the notion 'common citizenship'

It is submitted that affirmative action cannot be interpreted to be a right as such – for either citizens or non-citizens. Neither is it a right, privilege or benefit of citizenship. Affirmative action is a means to achieve the goal of substantive equality (a right) contained in the Bill of Rights. It is a remedial measure³¹³ to protect and advance mainly disadvantaged people in the South African context, with citizenship as a criterion to benefit from such action (over and above being a 'suitably qualified' member of a designated group). It is submitted that *citizenship* is an essential criterion in ensuring that affirmative action measures reach the intended beneficiaries in the workplace. This is due to the fact that citizenship was misused in the past by the apartheid government, as pointed out above.³¹⁴ The notion 'common citizenship' in the Constitution points mainly to the 'mischief' of the previous government, which granted separate citizenship to the black majority. Affirmative action is meant primarily to benefit South African citizens as a group. It can, however, not be denied that such an interpretation may have implications for South Africa, a country with rapidly changing

309 Section 20 of the Constitution.

310 Section 21(4) of the Constitution.

311 Section 22 of the Constitution.

312 See De Waal, Currie & Erasmus *Bill of Rights Handbook* 367 who put forward the same interpretation.

313 See chapter 2 pars 2.1.2.4(c); 2.1.3.4(c); chapter 3 pars 3.5.1.4; 3.5.2.3(c)(i) above. Even a citizen who is a member of a designated group and 'suitably qualified' is not, as of right, entitled to affirmative action (*Dudley* (2004) 25 ILJ 305 (LC)). And, not all citizens will eventually benefit from affirmative action. See also *Abbot* (1999) 20 ILJ 330 (LC); *Walters* (2000) 21 ILJ 2723 (LC); *Ntai* (2001) 22 ILJ 214 (LC).

314 See par 2.3.3.3 above. In this regard, it is suggested that the Constitution surely does not seek to create new patterns of unfair discrimination against, for example, non-citizens.

demographics.

But, as was seen above, citizenship may be acquired in a variety of ways. The Constitution itself does not differentiate between classes of citizens, but propagates the notion of a 'common citizenship' as discussed above. Also, the Citizenship Act and the Immigration Act do not meaningfully distinguish between such classes.³¹⁵ Although it may be tempting to argue that citizenship by birth provides the closest historical link for beneficiaries of affirmative action in South Africa, this would represent a purely academic argument and could lead to problems: (a) if one accepts that there are naturalised South African citizens who have been in the country for a lengthy period of time and who have in fact suffered disadvantage as a result of the policies of apartheid and other discriminatory laws and practices, they should be included as beneficiaries of affirmative action; and (b) it might be an onerous burden on employers to establish the manner in which an employee, or applicant employee, has acquired citizenship. Citizens by birth, by descent and by naturalisation may thus all be eligible for affirmative action. The question that remains is whether long-time and recently naturalised citizens may benefit? In this regard, the comparative research conducted in respect of the US may be useful.³¹⁶ This issue will be addressed in the last chapter and a specific recommendation will be made with regard to a cut-off date for recently naturalised citizens.³¹⁷

3 CONCLUSIONS

3.1 Introduction

Brief summaries are provided here, as the various issues have been dealt with comprehensively in the evaluatory paragraphs under each issue.³¹⁸

315 The latter actually reduces the differences between citizens and permanent residents.

316 See chapter 5 par 4.3.2 below.

317 See chapter 7 par 4.3 below.

318 See pars *Evaluation of disadvantage*; *Evaluation of degrees of disadvantage*; *Evaluation of the concepts 'suitably qualified' and 'merit'*; *Evaluation of interpretation of Constitution, EEA and Auf der*

In this chapter, the focus was on the interpretation of the concept 'disadvantage' by the courts under the EEA; on the notion of degrees of disadvantage; on the deficiencies of categorisation under the EEA; on the reasons and meaning of the concept 'suitably qualified' as set out in the EEA; and on the use of citizenship to benefit from affirmative action.

3.2 Disadvantage

3.2.1 *Past personal disadvantage or group membership*

It is submitted that the Labour Court has interpreted the term 'disadvantage' correctly as relating to group membership. Put differently, an affirmative appointment or promotion need only show that the person benefiting is a member of one of the designated groups disadvantaged by discrimination generally, whether directly or indirectly. This is in accordance with the notion 'substantive equality' as embraced by the Constitution, the Constitutional Court, and the fact that actual past disadvantage as a requirement for affirmative action cannot be inferred from the Constitution or the EEA.³¹⁹ A standard for proving past discrimination has consequently not been an issue.³²⁰

Heyde case; Evaluation of Department of Labour, Evaluation of citizenship as unfairly discriminatory against non-citizens; Evaluation of the Citizenship and Immigration Acts; Evaluation of the notion 'common citizenship' above.

319 See par *Evaluation of disadvantage* above.

320 Although not an issue in South Africa at the moment, evidence of past disadvantage may become relevant at a later stage when large numbers of blacks, women and the disabled have in fact benefited under affirmative action (see chapter 7 par 2.1.3 below for a recommendation in this regard).

3.2.2 Degrees of disadvantage

The notion of degrees of disadvantage has featured intermittently in case law, but does not appear to have been pursued by litigants with much vigour. This is to be welcomed, and for the reasons relating to evidentiary problems set out above.³²¹ Moreover, the notion is not found in the EEA, which, instead, advocates the notion 'equitable representation' in order to determine the appointment of members of different designated groups on the basis of affirmative action. A concrete, contextualised approach is recommended for dealing with degrees of disadvantage in practice. Specific recommendations in this regard are made below.³²²

3.2.3 Deficiencies of categorisation

It was seen above that specific deficiencies of categorisation as used by the EEA include over-inclusiveness, under-inclusiveness, degrees of disadvantage not recognised *within* designated groups and *between sub-groups* within a designated group, and no recognition of multiple disadvantage.³²³ In addition, factors other than group membership have been mooted to determine the beneficiaries of affirmative action.³²⁴ Specific recommendations with regard to recognising multiple disadvantage are made and substantiated below.³²⁵

321 See par *Evaluation of degrees of disadvantage* above.

322 See chapter 7 par 2.2.3 below.

323 See par 2.1.4 above.

324 *Ibid.*

325 See chapter 7 par 2.3.3 below.

3.3 The concepts 'suitably qualified' and 'merit'

It was seen above that South Africa has embraced a 'modified' concept of merit, namely that of 'suitably qualified'. This approach was explained on the basis of the lack of skills, qualifications and experience by members of the designated groups owing to apartheid educational policies and workplace practices. The concept 'suitably qualified' thus accommodates the educational and experiential levels, as well as the capacity of the groups that need to be affirmed. Although the EEA lays down four factors to give meaning to the concept 'suitably qualified', and though some pointers have emerged from case law, these remain somewhat unclear.³²⁶ Specific recommendations will be made below in order to clarify the concept 'suitably qualified'.³²⁷

3.4 Citizenship

It was pointed out above that neither the Constitution nor the 1995 LRA (or the EEA) explicitly require citizenship as a criterion to benefit from affirmative action – this was added by the case of *Auf der Heyde*.³²⁸ In an endeavour to evaluate this judgment, current theory on the interpretation of statutes, both ordinary and constitutional, was investigated. It was seen that modern interpretation theory favours contextualism and purposivism, together with the (traditional) literalist approach.³²⁹ Two manifestations of purposivism often found in interpretation – the mischief rule and the assertion that statutory provisions are to be construed in the light of the objects they seek to achieve – were investigated.³³⁰ The first mentioned's purpose in interpreting ordinary legislation is to suppress 'mischief' and to promote the

326 See pars 2.2.1; 2.2.2; 2.2.3; 2.2.4; *Evaluation of the concepts 'suitably qualified' and 'merit' above.*

327 See chapter 7 par 3.3 below.

328 See par 2.1.2 above.

329 See par 2.3.2 above.

330 See par 2.3.3.2(c)(ii) above.

remedy designed for its elimination.³³¹ In interpreting constitutional legislation, its aim is to remedy the fundamental ‘mischief’, namely the previous constitutional system of the country. Put differently, the Constitution has been interpreted as a ‘remedial measure’ to redress the mischief of the past.³³²

Against this background, both the Constitution and the EEA were interpreted. It was argued that, on an application of the contextualised and purposive approaches, section 9(2) of the Constitution relating to affirmative action, which refers to ‘persons, or categories of persons disadvantaged by unfair discrimination’, has particular meaning for South African citizens.³³³ It was argued that, if one considers the ‘subject or occasion’ in respect of which these words were used, and the object that the section is intended to achieve, the section points mainly to people disadvantaged by unfair discrimination in the past under apartheid and patriarchy.³³⁴ Further, if these words are interpreted as part of the whole Constitution, it was submitted that the words in the light of their context (including the matter, the apparent purpose and scope, the background history to the adoption of the Constitution, and other provisions of the Constitution), all relate mainly to the majority black population and to women in South Africa who suffered disadvantage under an apartheid and patriarchal society, which discrimination must now be rectified. Similar arguments were put forward with regard to interpreting the Preamble of the Constitution. It was submitted that, at the very least, a reasonable inference can be drawn that the main focus of the Constitution is to heal the South African people’s past and to enshrine their rights.³³⁵ It was submitted that the fundamental ‘mischief’ that the Constitution has to remedy is the disadvantage suffered by certain groups under apartheid and patriarchy in the past. The Constitution thus uses affirmative action as a remedial measure to suppress this ‘mischief’ and to advance equality. Such an approach, it was submitted, points to an interpretation that it was the intention of the legislature to have

331 See par 2.3.3.2(c)(ii)A above.

332 *Ibid*; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

333 See par 2.3.3.3 above.

334 *Ibid*.

335 *Ibid*.

affirmative action mainly for South African citizens.³³⁶ Moreover, it was pointed out, in this way the state respects, protects, promotes and fulfils the right to equality, and aspires to a realisation of the 'scheme of values' informing the South African constitutional order. Such an interpretation could thus be seen as a 'value-activating interpretation' in terms of the teleological approach³³⁷ in an effort to achieve equality. In particular, it was submitted, it can be seen as enhancing the dignity of South African citizens, an aspect severely scorned under apartheid.³³⁸ Further, it could be seen as a way of integrating such people into the new South African order.³³⁹

With regard to the EEA, an Act argued to be associated with the socioeconomic transformation of the country, similar arguments were advanced to show that, when taking into account the Explanatory Memorandum to the Employment Equity Bill and the Preamble of the EEA, a contextualised and purposive approach pointed particularly to South African citizens, with the main aim being to redress the inequalities of apartheid.³⁴⁰

It was therefore concluded that the Labour Court's interpretation in *Auf der Heyde* was correct, in that South African citizens from disadvantaged groups should benefit from affirmative action,³⁴¹ or, nationality is a legitimate limiting factor. The interpretation in *Auf der Heyde* was thus agreed with, but such agreement was qualified. In this regard, it was argued that groups of non-citizens, such as migrant workers who have been discriminated against in the past, may be able to claim affirmative action owing to the fact that the affirmative action provisions of both the Constitution and the EEA are broadly worded.³⁴²

The Department of Labour's guidance on whether foreign nationals qualify as members

336 *Ibid.*

337 See pars 2.3.3.2(c)(ii)C; 2.3.3.3; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case above.*

338 See pars 2.3.3.3; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case above.*

339 *Ibid.*

340 See par 2.3.3.4; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case above.*

341 See par *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case above.*

342 *Ibid.*

of designated groups, was analysed.³⁴³ It was submitted that the guidance was ambiguous. It was submitted that employers might abuse the guideline, and that it may lead to incorrect figures in respect of South African people who are appointed in terms of affirmative action measures. It was furthermore submitted that it would defeat the purpose of both the Constitution and the EEA if employers were allowed to recruit black, female and/or disabled non-citizens and to use such figures for affirmative action purposes. Recommendations to clarify and ensure that affirmative action indeed reaches citizens are made below.³⁴⁴

With regard to the further issue as to whether the use of citizenship as a requirement in order to benefit from affirmative action can possibly be discriminatory as against non-citizens, it was argued that the addition of 'citizenship' as a criterion for benefiting from affirmative action passes the test of the principle of international law that affirmative action measures must not be contrary to the non-discrimination principle.³⁴⁵ It was seen that citizenship has been interpreted to be an unlisted ground of non-discrimination.³⁴⁶ But, it has been pointed out that the use of citizenship in this context is not unfairly discriminatory, as there is a sufficient connection between citizenship as a criterion to benefit from affirmative action (a means to achieve equality) and the right to equality.³⁴⁷

Lastly, it was seen that the related issue of whether, for the purposes of affirmative action, a legitimate distinction can be made with regard to the different ways in which citizenship may have been acquired, could not be supported.³⁴⁸ The Citizenship and Immigration Acts, and the Constitution, were investigated, all pointing to there being no meaningful differentiation between the different classes of citizens based on the various ways in which citizenship may have been acquired.³⁴⁹ In fact, it was pointed out that the Constitution

343 See pars 2.3.3.5; *Evaluation of Department of Labour* above.

344 See chapter 7 par 4.3 below.

345 See chapter 2 pars 2.1.2.4(b)(i)A; 2.1.2.4(b)(i)B above.

346 See chapter 3 pars 3.5.1.3(a)(i)A; par 2.3.4.2 above.

347 See pars 2.3.4; *Evaluation of citizenship as unfairly discriminatory against citizens* above.

348 See par 2.3.5 above.

349 See pars 2.3.5.2; 2.3.5.3; 2.3.5.4 above.

fosters the notion of common citizenship.³⁵⁰ This notion was seen to mean that there cannot be classes of citizenship.³⁵¹ It appeared that the notion mainly seems to be a response to the past when citizenship was misused and the black majority had separate citizenship in the homelands.³⁵² Because of this, citizenship is a particularly sensitive issue in South Africa. It was seen that, though the notion of equality was incorporated into the notion of citizenship, this did not affect affirmative action, which is not a right (for citizens or non-citizens) but a remedial means to achieve equality.³⁵³ It was submitted that citizenship is essential as a criterion to ensure that affirmative action measures reach their intended beneficiaries. A cut-off date for recently naturalised citizens to possibly benefit from affirmative action will be addressed in the last chapter.³⁵⁴

Having set out the South African position with regard to the beneficiaries of affirmative action, the attention now turns to the US, the first country with which the South African position will be compared.

350 See par 2.3.5.5 above.

351 See par *Evaluation of the notion 'common citizenship'* above.

352 *Ibid.*

353 *Ibid.*

354 See chapter 7 par 4.3 below.