
UNDERSTANDING THE NEED FOR ANTI-DISCRIMINATION LEGISLATION IN SOUTH AFRICA

Tameshnie Deane (University of South Africa)

1 Background

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

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

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

2 The beginnings of racial segregation

By the end of the nineteenth century, South Africa had been completely colonized by European powers. This was due to many factors, including the discovery of diamond and gold deposits in South Africa.¹ When the Europeans, led by the Dutch colonists, arrived in South Africa, they drove many of the native Africans from their home. This created a divided South Africa. The division was among racial lines and South Africa became divided between the Dutch colonists, known as Afrikaners, and the natives. During this time of division there were conflicts between the Afrikaners and the British forces as well. These conflicts resulted in the Anglo-Boer War.

Importantly, during the time of the war the British promised the natives power if they fought alongside them and won. To acquire their support the British gave land to the natives as proof of their good faith and intentions. Although the British won the war, the Afrikaners were granted powers. These powers were given in a manner so as to ensure that the British still retained considerable influence in southern Africa. Promises made to the Africans were broken and the power given to the Afrikaners was largely at their expense as they were excluded from political power and forced to give back land taken by the British, from Afrikaners, during the war years. Britain gave power to the Afrikaners, from 1906-1907, by granting constitutions which gave them political control of both the ex-republics. During 1907 and 1908, the former Boer Republics were granted self-government but, crucially, with a whites-only franchise.² In 1910,³ the British Parliament passed the *Act of Union* that brought British and Afrikaner colonies together under the same government.⁴ The Union's constitution kept all political power in the hands of whites and thus in the hands of the governing party called the Herenigde National Party.⁵

The founders of the Herenigde National Party invented apartheid as a means to cement their power over the economic and social system. Initially, the aim of apartheid was to maintain a white domination while extending racial

1 Thompson *A History of South Africa* 3rd ed (2001) 110.

2 Davenport & Saunders *South Africa: A Modern History* 5th ed (2000) 87.

3 The *South African Act of Union* 1910, which was passed by the British House of Commons in 1909 and ratified by the South African Parliament on 31 May 1910, was based on a colour bar clause that precluded all blacks from being eligible to become Members of Parliament.

4 A National Convention drew up a constitution and the four colonies became an independent dominion called the Union of South Africa on 31 May 1910.

4 Understanding the need for anti-discrimination legislation in South Africa

separation.⁶ This was a response to Africans' increasing participation in the country's economic life and their assertion of political rights. The principles of segregationist thinking evolved in response to economic, social and political pressures of the time.

In 1914, Afrikaners found themselves uncompetitive in the labour market as white workers demanded higher wages than those paid to blacks.⁷ Another threat to the government came from white workers. Much of the skilled and semi-skilled work on the mines was performed by immigrant white workers with mining experience from abroad. As mine owners tried to cut costs by using lower wage black labour in semi-skilled jobs, white labour became increasingly aggressive. These tensions culminated in a revolt on the gold-fields in 1922, which the Smuts Government put down with military force. In 1924, a pact government under Barry Hertzog, comprising Afrikaner nationalists and representatives of immigrant labour, ousted the Smuts regime.⁸

World War II⁹ saw two political leaders fighting for control of the South African government.¹⁰ During the 1930s, German National Socialism with its emphasis on the racial superiority of Germanic people and anti-Semitism had a big influence on the situation in South Africa. The idea of racial superiority was expanded to make use of the State for the good of certain minority groups and it attracted many Afrikaners, who constituted a minority group. In 1939 Malan and Hertzog formed the Herenigde (re-united) National Party (HNP).¹¹

3 Apartheid legalised

Racial segregation and the supremacy of whites were traditionally accepted in South Africa prior to 1948. However, in the general election of 1948 Dr Malan officially included the policy of apartheid in the Afrikaner Nationalist party platform. The conservative Afrikaner-dominated National Party under Dr Malan consequently defeated the ruling United Party of General Smuts in a surprise result to win the parliamentary elections and gain control of the South African

5 Thompson (n 1) 154.

6 Welsh *History of South Africa* (1998) 40.

7 Thompson (n 1) 190.

8 McCall *History of South Africa since September 1795* (1908) 50.

9 1931-1945.

10 Jan Smuts, an Afrikaner and a leader of the United Party, supported the British and the Allies, but Malan and his supporters supported the Germans.

11 Thompson (n 1) 187.

government. The party under new premier Dr Malan began taking steps toward implementing apartheid (apartness), the national policy of racial separation. The Herenigde National Party became the governing party and was renamed the National Party.

The governing National Party based its political platform on a report by the Fagan Commission. This Commission was assigned to investigate the racial divisions of South Africa.¹² The Commission argued that due to the migration of Africans¹³ to the cities and the lack of African reserves, complete segregation was impossible. The National Party argued the opposite, namely that only a total segregation of the races would prevent eventual movements for equality and the subversion of white society by blacks. The National Party also stated that natives should be viewed as temporary residents in the cities and should eventually be relocated back to rural areas. Thus began segregationist laws. Upon winning the elections of 1948, the National Party began to embed apartheid in South Africa's legal system so that it would be difficult to change. They did this by providing a legal basis for the preferential treatment of whites and was therefore able to secure its power for future elections.

Apartheid thus formally began with the 1948 election. The purpose of apartheid was separation of races: not only of whites from non-whites but also of non-whites from each other. The National Party believed that a definite policy of separation between the white races and the non-white racial groups, and the application of the policy of separation also in the case of the non-white racial groups, was the only basis on which the character and future of each race could be protected and safeguarded.¹⁴

The National Party used its control of the government to fulfil Afrikaner ethnic goals as well as white racial goals. Apartheid turned into a systematic programme of social engineering.¹⁵ With the enactment of apartheid laws since 1948, racial discrimination was institutionalised. Race laws touched every aspect of social life and this included a prohibition on marriages between non-

12 Boahen (ed) UNESCO *General History of Africa, Vol VII: Africa under Colonial Domination 1880-1935* (1985) 60.

13 Between 1939 and 1945 South African urbanization grew, and by 1946 there were more black Africans than whites in the cities of South Africa.

14 The United Nations *Report of the United Nations Commission on the Racial Situation in the Union of South Africa* (1952) 139.

15 Thompson (n 1) 187.

whites and whites, and also the sanctioning of “white-only” jobs.¹⁶ A new concern for racial purity was apparent in laws prohibiting interracial sex and in provisions for the population registration requiring that every South African be assigned to one racial category or another. In the mid 1950's, the government overrode an entrenched clause in the 1910 Constitution so as to be able to remove coloured voters from the common voters roll. It also enforced residential segregation, expropriating homes where necessary and policing forced removals into “group areas”.¹⁷

Discrimination against black South Africans did not end there. Over the years, the government introduced a series of repressive laws, for example giving the government the power to arrest people without trial and to hold them indefinitely. The National Party passed further legislation which included the *Industrial Conciliation Act*¹⁸ which was seen as affirmative action for whites against cheaper black labour.¹⁹ This was followed by legislation providing for job reservation which controlled the entry into trades governed by trade unions.²⁰ Furthermore, the *Native Building Workers Act* prohibited blacks from doing construction in white urban areas.²¹ One can see that these legislative measures of the apartheid laws were designed to afford racial privileges to whites and laid the basis for the policy of job reservations.

The principal measures of enforcing apartheid since 1948 included the introduction of the so-called pass law of 1950²² which required all black people over the age of 16 years to carry identity documents. This law led to the creation of a national register in which each person's race was recorded. This system had consequences in the labour field since the policies and laws of apartheid determined what education and training a person would receive. The scope of a person's employment opportunities was also decided according to a person's racial category.

16 For example the *Mines and Works Act* 12 of 1911.

17 According to the National Party's Colour Policy of 1948.

18 The *Industrial Conciliation Act* 28 of 1956.

19 Sonn "Afrikaner nationalism and black advancement as two sides of the same coin" in Adams (ed) *Affirmative Action in a Democratic South Africa* (1993) 6.

20 The *Apprenticeship Act* 37 of 1944.

21 The *Native Building Workers Act* 27 of 1951.

22 The *Population and Registration Act* 30 of 1950.

Furthermore, section 77 of the *Industrial Conciliation Act*²³ and section 12 of the *Mines and Works Act*²⁴ included systematic policies favouring white over black workers. These policies were first developed by the coalition government of the National Party and the Labour Party (the Pact Government) during the 1920's. These policies were specifically designed to uplift the newly urbanized poor whites at the expense of the black workers by employing large numbers of unskilled and semi-skilled whites in state and para-statal corporations.²⁵ Statutory closed shops also functioned to preserve a range of crafts for white workers and to impede the development of more representative trade unions.²⁶ The list of discriminatory instruments in labour law is a long one and well-documented elsewhere.²⁷ It can, however, be stated with certainty that these discriminatory laws were deliberately pressed into service to achieve the goals of apartheid.

Other laws condoning the segregation of races and therefore discriminatory practices include, for example, the *Bantu Education Act*.²⁸ Under this *Act*, Africans were to receive an education designed to provide them with skills to serve their own people in the homelands or to work in labouring jobs under whites, thereby cementing their isolation from various jobs. The aim of the *Bantu Education Act* was to prevent Africans from receiving an education that would lead them to aspire to positions they wouldn't be allowed to hold in society.²⁹

Further discriminatory provisions were to be found in the *Wage Act*,³⁰ which permitted differentiation between categories of employees on the grounds of sex and race, and laid the basis for discriminatory wage determinations.³¹ The *Native Labour Regulation Act*³² also discriminated against blacks in employment. The *Act* specifically prohibited strikes by African workers. It also

23 The *Industrial Conciliation Act* 28 of 1956 was later repealed by the *Industrial Conciliation Act* 94 of 1979.

24 The *Mines and Works Act* 12 of 1911 was later repealed by the *Mines and Works Act* 38 of 1987.

25 Adams *Affirmative Action in a Democratic South Africa* (1993) 22.

26 Basson *et al Essential Labour Law: Collective Labour Law* 3rd ed (2002) 130.

27 Van der Horst (ed) *Race Discrimination in South Africa - A Review* (1981) 70.

28 The *Bantu Education Act* 47 of 1953.

29 Boahen (n 12) 60.

30 The *Wage Act* 40 of 1956 (subsequently the *Wage Act* 45 of 1957).

31 Murray "Women and night work" 1984 *Industrial Law Journal* 47 and also see Louw "Sex discrimination and the Labour Relations Act" 1990 *SA Merc LJ* 164. These discriminatory provisions were repealed by the *Wage Amendment Act* 48 of 1981.

32 The *Native Labour Regulations Act* 15 of 1911.

limited skilled jobs in mining to whites only. Furthermore, the *Bantu Building Workers Act*³³ allowed black people to be trained as artisans in the building trade, something previously reserved for whites only, but they had to work within an area designated for blacks. It also made it a criminal offence for a black person to perform any skilled work in urban areas except in those sections designated for black occupation.

Under the prime ministership of Dr Verwoerd apartheid developed into a policy known as “separate development”, whereby each of the nine African (Bantu) groups was to become a nation with its own homeland, or Bantustan. The *Natives Land Act*³⁴ attempted to do this by reducing all Africans in white owned rural areas to tenants or wage labourers.³⁵ It also provided for the establishment of “native reserves” or Bantu Homelands. The theory behind the concept of separate development was that blacks should be allowed to exercise their normal political, economic and social rights in the areas reserved for them. The government sought to present separate development as a policy which provided a means of removing discrimination through a process of separate evolution of the constituent people of South Africa.³⁶

In summary, therefore, apartheid laws affected people's most fundamental rights and freedoms: political rights, freedom of movement and residence, property rights, freedom to work and to practice occupations, freedom of marriage and other family rights. They established obvious inequality before the law in relation to the rights, freedoms and opportunities enjoyed by 20 per cent of the population consisting of whites or Europeans or persons regarded as such. As the above discussion suggests, apartheid evolved through a steady accumulation of laws and amendments. The cumulative effect of apartheid was to create a comprehensive and deeply entrenched system of racial discrimination in South Africa.³⁷

4 Repeal

South Africa is now beginning to emerge from this period in which a lack of

33 *Bantu Building Workers Act* 27 of 1951.

34 *The Natives Land Act* 27 of 1913.

35 S 1 of the *Natives Land Act* 27 of 1913.

36 UNESCO *General History of Africa: Africa under Colonial Domination 1880-1935* (1995) 20.

freedom, the denial of human dignity, discrimination and inequalities were the antithesis of a democratic country. As can be seen today, the apartheid social and legal system has had a devastating effect on the social, economic, political and cultural life of black³⁸ South Africans.³⁹ To assist the new government of South Africa in its democratic goals an interim Constitution was promulgated in December 1993.⁴⁰ South Africa held its first democratic election in April 1994 under this interim Constitution which was committed to a new constitutional order premised upon an open and democratic government and the universal enjoyment of fundamental human rights. That commitment is expressed in the preamble to the Interim Constitution by an acknowledgement of the need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

With this end in view the interim Constitution "provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".⁴¹

The African National Congress-led government then embarked on a programme to promote the reconstruction and development of the country and its institutions.⁴² This called for the pursuit of democratisation and socio-economic changes.

5 Employment equity policies

On 10 December 1996, President Mandela signed the new Constitution into

37 *Ibid.*

38 It is important to note that the term "black people" in South Africa is a generic term used to describe Africans, Coloureds and Indians. See the *Employment Equity Act* 55 of 1998 s 1 of Ch 1.

39 Thompson & Benjamin *South African Labour Law* Part CC1 (2002).

40 The *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter referred to as the interim Constitution).

41 See the so-called postamble to the interim Constitution.

42 The *Constitution of the Republic of South Africa* 108 of 1996 (hereinafter referred to as the Constitution). In its Preamble the Constitution provides for a democratic society based on human dignity, equality and freedom.

law and it entered into force on 3 February 1997.⁴³ While there is a general acceptance that historical workplace inequalities in South Africa need to be addressed,⁴⁴ employment equity remains a highly emotive topic. While affirmative action in employment is seen as a means of creating equal employment opportunity, it is still perceived as reverse discrimination.⁴⁵ Employment equity policies are perceived as the cornerstone of reconstruction and development. Labour market discrimination and inequities are the result of labour market policies that predate apartheid. As can be seen from the above discussion, during the apartheid years these inequities were intensified and cemented by a host of laws that reserved certain jobs for certain people. Job reservations in favour of whites has placed blacks at a considerable disadvantage. As a result there remains in the South African workplace major differences in skills and wages between blacks and whites.

In an effort to narrow the gap between blacks and whites, the government of South Africa has passed a series of employment laws in 1998, mandating, among other things, affirmative action and job training or skills development.⁴⁶ The reason for these laws was the concern that reliance on labour market voluntarism⁴⁷ to redress disparities and end discrimination would have limited or no impact. The government therefore sought to ensure that all employers were to be compelled to take steps to redress disadvantage and inequality. In addition government was required by the Constitution,⁴⁸ as well as the International Labour Organisation, to enact laws that would prohibit discrimination and promote the economic advancement of the majority.⁴⁹

Legislative exclusion and other forms of discriminatory practices placed blacks at a considerable disadvantage in today's labour market. It therefore follows that if nothing is done to change social relations and to provide blacks with access to resources and means to overcome the economic marginalisation of the past, the patterns of economic control that have been produced by the apartheid system will remain unchanged even in a non-racial, non-sexist

43 The interim Constitution required the Constituent Assembly to draft and approve a permanent constitution by 9 May 1996.

44 Thomas & Robertshaw *Achieving Employment Equity. A Guide to Effective Strategies* (1999) 5.

45 *Human Affirmative Action and the Development of People* (1993) 1.

46 These laws include the *Labour Relations Act* 66 of 1995, the *Skills Development Act* 97 of 1998 and the *Basic Conditions of Employment Act* 75 of 1997.

47 This refers to voluntary measures that may be taken by the labour market

48 S 9(5) of the Constitution.

49 The International Labour Organisation Convention No 111.

democratic South Africa. Hence, there is a need for corrective action to break this cycle of inequality and redress past imbalances. Affirmative action is such a strategy to redress past imbalances in the labour market and society.

As an example, the purposes of the *Employment Equity Act* can be studied. It seeks to promote the constitutional right to equality and the exercise of true democracy in order to eliminate unfair discrimination in employment, ensure the implementation of employment equity, redress the effects of discrimination and achieve a diverse workforce broadly representative of all people.⁵⁰ It seeks to promote economic development and efficiency in the workforce and to give effect to the obligations of the Republic as a member of the International Labour Organisation.⁵¹

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

50 Ch 2 of the *Employment Equity Act* 5 of 1998.

51 Charlton & Van Niekerk *Affirming Action Beyond 1994 - Laying the Foundation for Comprehensive and Effective Affirmative Action Into the 21st Century* (1994) 30.