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## A LEGAL HISTORICAL PERSPECTIVE ON AFFIRMATIVE ACTION IN SOUTH AFRICA (PART 2)

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Part 1 of this article has traced South Africa's discriminatory history of colonialism and slavery. After the country's unification in 1910, further discriminatory policies and laws continued until the end of apartheid in the early 1990s. Part 1 particularly investigated the unravelling of discriminatory laws resulting from the recommendations by the Wiehahn Commission<sup>1</sup> – the first official initiative to gain support for non-discrimination and, noteworthy, in the workplace – and the South African Law Commission's *Interim and Final Reports on Group and Human Rights* (hereafter *Interim Report* and *Final Report*) targeting broader society.<sup>2</sup> Part 2 of the article traces further steps to eradicate discrimination and to redress its effects, particularly in the workplace. The interim Constitution,<sup>3</sup> amendments to the *Labour Relations Act*,<sup>4</sup> recommendations by the Labour Market Commission,<sup>5</sup> the final Constitution<sup>6</sup> and the *Employment Equity Act*<sup>7</sup> are looked into.

### 1 Equality embraced as a value, a right and a goal

#### 1.1 Constitution of the Republic of South Africa Act of 1993 (interim Constitution)

The interim Constitution, adopted in 1993, emerged from the Multi-party Negotiating Process at the World Trade Centre and represented a negotiated transition to democracy.<sup>8</sup>

People participated in the process of drafting the Constitution in a way that was internationally unprecedented.<sup>9</sup> The Negotiating Council, consisting of

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1 Reported as *The Complete Wiehahn Report Parts 1-6* and *The White Paper on each Part with Notes* (1982).

2 South African Law Commission *Interim Report Group and Human Rights* (1991); South African Law Commission *Final Report on Group and Human Rights* (1994).

3 *Constitution of the Republic of South Africa Act* of 1993.

4 28 of 1956.

5 A presidential commission appointed against the background of the Reconstruction and Development Plan in 1995 and chaired by Lewis and Ngoasheng. The findings of this Commission were reported as the *Labour Market Report: Restructuring the South African Labour Market: Report of the Presidential Commission to Investigate Labour Market Policy* (1996) (hereafter *Labour Market Report*).

6 *Constitution of the Republic of South Africa*, 1996.

7 55 of 1998.

8 Mureinik "A bridge to where? Introducing the interim Bill of Rights" 1994 *SAJHR* 31; Thompson (ed) *A History of South Africa* (2001) 253-254.

9 Pillay "Giving meaning to workplace equity: The role of the courts" 2003 *ILJ* 56.

representatives of all political parties participating in the Multi-party Negotiating Process, approved the Constitution, whereafter it was enacted by Parliament with a few minor amendments.<sup>10</sup> The interim Constitution contained an equality clause which stated that “every person shall have the right to equality before the law and to equal protection of the law”,<sup>11</sup> and prohibited unfair direct and indirect discrimination in a non-exhaustive way, listing fourteen grounds.<sup>12</sup>

In addition, explicit provision was made for affirmative action. Because the affirmative-action clause was controversial, the wording of the International Convention on the Elimination of all Forms of Racial Discrimination of 1965 was followed quite closely.<sup>13</sup> The section reads as follows:<sup>14</sup>

8(3)(a) This section [section 8(2)] shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

Affirmative-action measures were not to entrench a right as such,<sup>15</sup> but to authorise a “procedure” which might, but need not, result in entitlements for some people.<sup>16</sup> Section 8 was adopted in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm.<sup>17</sup>

Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it

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10 Mureinik (n 8) 31. The interim Constitution contained Constitutional Principles (set out in sch 4) which the final Constitution had to comply with. Constitutional Principles I, III and V made it clear that the commitment to equality was crucial. Constitutional Principle V endorsed a substantive notion of equality and held that equality before the law included laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or gender.

11 S 8(1).

12 Namely race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

13 Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 144.

14 The interim Constitution's affirmative action clause differed slightly from the *Final Report* (n 2) 137. Du Plessis & Corder (n 13) 144 state that the word “disadvantaged” was used to connote that the consequences of the discrimination must still be felt at the time of a claim of previous disadvantage and affirmative action. Kentridge “Equality” in Chaskalson (ed) *Constitutional Law of South Africa* (2001) (looseleaf) 14-7 submits that s 8(2) supplemented rather than qualified s 8(1). She holds that s 8(3) on affirmative action elucidated, and elaborated on, the right to substantive equality in s 8(1): it was neither a qualification of, nor an exception to, the right to equality.

15 Du Plessis & Corder (n 13) 145.

16 *Idem* 130. Some of the negotiating parties insisted that affirmative action-measures had to be referred to as *reasonable* measures. It was, however, pointed out that the word *designed* required a rational scheme to fulfil the full and equal enjoyment of all rights. The notion of rationality or reasonableness was thus inherent in the clause.

17 *Kitshoff v Brink NO* 1996 (4) SA 197 (CC) par 42.

was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results is the primary purposes of s 8 ... .

While the practical detail of affirmative action was unclear, what was clear was that the notion was principally endorsed as a positive step or means to achieve equality.

## 1 2 ***Labour Relations Act 66 of 1995***

After the interim Constitution came into operation, the *Labour Relations Act*<sup>18</sup> had to be amended to bring it in line with the Constitution.<sup>19</sup> The amended Act<sup>20</sup> codified the body of jurisprudence on unfair labour practices developed by the Industrial Court and separated unfair dismissals<sup>21</sup> from the definition of unfair labour practices. The Act further regulated other unfair discrimination which might occur during the course of employment and provided for affirmative action through its definition of residual unfair labour practices.<sup>22</sup> This was pending the drafting of specific, separate legislation for non-discrimination and affirmative action in the workplace.

The “residual unfair labour practice” definition included any unfair act or omission between an employer and an employee that involved the unfair direct or indirect discrimination against an employee on a non-exhaustive list of sixteen grounds.<sup>23</sup> An employer was, however, not prevented from<sup>24</sup>

adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms ...

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18 28 of 1956.

19 See *Draft Negotiating Document in the Form of a Labour Relations Bill* Notice 97 GG 16259 10 February 1995 which culminated in the *Labour Relations Amendment Act 12 of 2002*.

20 *Labour Relations Act 66 of 1995*.

21 See ss 185-189.

22 Item 2(1)(a) of sch 7 to the *Labour Relations Act 66 of 1995*.

23 Namely any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

24 Item 2(2)(b) of sch 7 to the *Labour Relations Act*.

### 1 3 Labour Market Commission

In 1995, at the same time that the amendments to the *Labour Relations Act* were debated, the Labour Market Commission<sup>25</sup> investigated the development of a comprehensive labour market policy for the country. It investigated mechanisms aimed at redressing discrimination in the labour market, and a policy framework for affirmative action in employment. The Commission recommended that comprehensive employment equity legislation be promulgated as soon as possible.<sup>26</sup> This was necessary as the legacy of apartheid was structural, that is, it tended to be self-reproducing and self-reinforcing in the absence of concerted policy interventions to reverse it.<sup>27</sup>

As a starting point, the Labour Market Commission pointed out that South Africa had the highest levels of inequality of any country in the world. This statement was based on a survey by the *International Labour Organisation Country Review*<sup>28</sup> which the Labour Market Commission had requested in order to enable it to conduct its investigation. The Commission opted for both a formal and substantive approach to equality, recommending that a prohibition of discrimination as well as affirmative-action measures be included in equity legislation.<sup>29</sup> It held that non-discrimination cannot by itself produce equality in employment within a reasonable time frame. This provides the fundamental justification for corrective measures or affirmative action.

It recommended that affirmative action be directed at blacks (Africans, Asians and coloureds), women and people with disabilities.<sup>30</sup> In addition, the Commission recommended that consideration be given to means by which other types of legislation could be used to rectify the effects of other forms of discrimination in employment, including discrimination on the basis of age, language, ethnicity, sexual orientation, and marital status.<sup>31</sup>

Although it was believed that affirmative-action legislation should apply to all employers, the Labour Market Commission accepted that such a programme would be resource-intensive in the sense that it might require training and other mechanisms of human resource development. It might consequently not be available to newer and small firms. Accordingly, it was recommended that the

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25 See n 5 above.

26 *Labour Market Report* (n 5) 137.

27 *Idem* 138.

28 International Labour Office Geneva (1996).

29 *Labour Market Report* (n 5) 140.

30 *Idem* 147.

31 *Ibid.* It was suggested that employers draw up their own affirmative action plans with reference to (at least) race, gender and disability, and that they do not implement quotas (at 149).

simplest and least costly way of dealing with these concerns would be for smaller firms (in terms of number of employees and turnover) to be exempted from the requirements of such legislation.<sup>32</sup>

An affirmative-action policy was to increase the rate of progress towards equity in employment.<sup>33</sup> Training and skills upgrading provided by employers, designed to compensate for both *extra*-market discrimination in the provision of education and for past discrimination in training *by employers*, also had to occupy a central position in the strategy.<sup>34</sup>

#### 1 4 **Constitution of the Republic of South Africa, 1996**

The final Constitution completed South Africa's negotiated transition to democracy.<sup>35</sup> It includes equality as a value<sup>36</sup> and as a substantive human right.<sup>37</sup> It confirms both a formal approach to equality, by outlawing unfair discrimination,<sup>38</sup> and substantive equality, by providing for affirmative action.<sup>39</sup>

The Constitution explicitly recognises the injustices of the past<sup>40</sup> and sets out the need to establish a society based on democratic values, social justice and fundamental human rights.<sup>41</sup> It sets the scene for a new era based on the values of human dignity; the achievement of equality and the advancement of human rights and freedoms; and non-racialism and non-sexism.<sup>42</sup> These may therefore be regarded as the core values of the Constitution.<sup>43</sup> The Bill of Rights likewise affirms this trilogy of values.<sup>44</sup>

It is submitted that the repetition of these values must be seen against the background of the history of the country which, under colonialism, slavery, patriarchy and apartheid, saw the denial of such values. In this regard, apartheid has been described as "a crime against humanity".<sup>45</sup> In similar vein, it has been said that the history of systematic discrimination in South Africa was premised on gross violations of human dignity.<sup>46</sup> The new democratic order, by

32 *Idem* 150.

33 *Idem* 140.

34 *Ibid.*

35 Laubscher "Employment law update" 2004 (April) *De Rebus* 54-55.

36 See Preamble, ss 1; 7 and 36.

37 See s 9.

38 Ss 9(3) and 9(4).

39 S 9(2).

40 Preamble.

41 *Ibid.*

42 S 1(a) and 1(b).

43 See Kentridge (n 14) 14-55; De Vos "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court" 2000 *THRHR* 63; De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 230.

44 Ss 7(1)(a); 36 and 39(1)(a).

45 *S v Makwanyane* 1995 (3) SA 391 (CC) 329.

46 Du Plessis & Corder (n 13) 149.

repetition of these values, makes clear what needs to be achieved and/or these values could be seen as guidelines for a transformed democratic dispensation.

In establishing equality as a right, the Constitution holds that “everyone is equal before the law and has the right to equal protection and benefit of the law”.<sup>47</sup> It holds that the State may not unfairly discriminate directly or indirectly against anyone on a non-exhaustive list of seventeen grounds.<sup>48</sup> It authorises affirmative action by stating, first, that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, it states, secondly, that<sup>49</sup>

legislative and other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.

The final Constitution creates a broad category for beneficiaries of affirmative action, namely people who have been disadvantaged by unfair discrimination. As no specific factors are used to connote disadvantage as such, the word should be given meaning in the light of the constitutional purpose.

Kentridge<sup>50</sup> accordingly states that the constitutional wording “disadvantaged by unfair discrimination” indicates people who are, or have been, disadvantaged by measures which impair their fundamental dignity or adversely affect them in a comparably serious way. She argues that the wording implies that it is not necessary to show present unfair discrimination against the beneficiaries of an affirmative-action policy. Past unfair discrimination, the effects of which are felt in the present, is sufficient. The emphasis is on the rationale underlying affirmative action, namely that an employment-equity programme must be designed to break a continuing cycle of systemic discrimination.<sup>51</sup>

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47 S 9(1). Equality as a *right* has been said to legally entitle people to claim the promise of the *value* of equality and provides the means to achieve substantive equality: Albertyn & Goldblatt “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” 1998 *SAJHR* 249.

48 Namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. S 9(3) similarly provides that no person may unfairly discriminate directly or indirectly against anyone on these grounds.

49 S 9(2).

50 (n 14) 14-38–14-39. Although the author discusses s 8(3) of the interim Constitution, the interpretation holds true for s 9(2) of the final Constitution, as the sections are similar enough in this respect for comments on one to apply to the other.

51 *Ibid.*

## 1 5 *Employment Equity Act 55 of 1998*

### 1 5 1 Green Paper on Employment and Occupational Equity

Shortly after the final Constitution came into operation, the Minister of Labour published a *Green Paper on Employment and Occupational Equity*<sup>52</sup> (hereafter *Green Paper*) with a view to introducing a comprehensive statutory regulation of equality rights in employment. The *Green Paper* stated that Government was committed to “positive measures” to overcome the legacy of discrimination and disadvantage inherited from the previous apartheid state and society.<sup>53</sup> As with the *Labour Market Report*,<sup>54</sup> it provided both for prohibiting unfair discrimination and for measures encouraging employers:<sup>55</sup>

to undertake organizational transformation to remove unjustified barriers to employment for all South Africans, and to accelerate training and promotion for individuals from historically disadvantaged groups.

The *Green Paper* emphasised that income distribution and occupational status in South Africa were among the most unequal in the world, and that these went hand in hand with race and gender discrimination.<sup>56</sup> It relied in this regard on the figures of the *International Labour Organisation Country Review*<sup>57</sup> which

52 *Government Gazette* No 17303 GN 804 1 July 1996.

53 *Idem* ch 1 par 1 1 3.

54 See s 1 3 above.

55 *Green Paper* (n 52) ch 1 par 1 1 5 2.

56 *Idem* Summary pars 2 1; 2 1 1; 2 1 3; 2 2 1; 2 5 1.

57 See n 28 above. Among the employed, one-third of blacks earned less than R500 per month, compared with fewer than 5 per cent of whites at that stage. A white male South African was 5 000 times more likely than a black woman to be in a top management position. These distortions within the occupational and professional structures of the labour force were further illustrated by a survey of organisations (*Breakwater Monitor Study* University of Cape Town Graduate School of Business (1996)). In the top managerial ranks of companies, blacks (the *Breakwater Monitor Study* uses the term “Africans”) constituted only 2,99 per cent, coloureds only 0,43 per cent, and Asians only 0,21 per cent, with whites at 96,38 per cent. The same *Study* found that, for the lowest job grades, whites constituted 1,05 per cent, blacks 89,01 per cent, coloureds 7,94 per cent and Asians 1,20 per cent. No correlation existed between the composition of the workforce at technical, professional and managerial levels and the overall demographics of the country. It was pointed out that the situation would not redress itself automatically since occupational segregation remained pervasive in the country, The *Green Paper* relied on the findings of the *October 1994 Household Survey* (Central Statistical Services) (1994) which showed that more than two out of every five employed blacks (the *Review* uses the term “Africans”) were in labouring jobs, whilst about one out of every fifty whites were in such jobs. For top positions, not only had blacks and other non-whites been chronically under-represented in managerial positions, but whites had been artificially eased into management without the prerequisite qualifications, in both the private and the public sectors. Also, the public service displayed great discrepancies with regard to male-female ratios. Moreover, the *Green Paper* pointed out that by 1997, only 236 employees with disabilities out of 1,18 million were employed in the public service. Serious problems existed with regard to occupational segregation in general. In 1989, only 6 per cent of artisans and 14 per cent of apprentices were black, and most of these were in the construction industry. Of the indentured apprentices in 1990, 74 per cent were white, 10,5 per cent were black, 9,6 per cent were coloured and 5,8 per cent were Asian. Those blacks who had entered the system were found mostly at the lower levels. In addition, blacks were found mostly in the mining and construction sectors and seldom in the more lucrative financial and services sectors. See n 91 below.

underscored the need to define inequalities in terms of how race and gender *work together*.<sup>58</sup> It emphasised that, historically, discrimination had occurred *within* the labour market as a result of discrimination in hiring, training, promotion and retrenchment, and owing to unnecessary hindrances perpetuated by the ways in which work and training were organised.<sup>59</sup> In addition, many laws, regulations and policies *outside* the labour market ensured the disadvantage of the majority of South Africans.<sup>60</sup> In this regard, critical factors reinforcing inequality included unequal education<sup>61</sup> and training, disparities in the ownership of assets,<sup>62</sup> the unequal division of household labour and child care<sup>63</sup> (especially in communities with poor infrastructure), the proximity of living areas to workplaces and regional backlogs.<sup>64</sup>

In terms of the *Green Paper*, the strategy to secure social and economic equality therefore had to reach “far beyond” employment equity. Broad non-discrimination measures applying to all employers, employees and applicants for employment were mooted.<sup>65</sup> With regard to affirmative-action measures, it was proposed that employers conduct organisational audits and develop employment-equity plans for historically disadvantaged groups, namely black people, women and people with disabilities.<sup>66</sup>

### 1 5 2 Employment Equity Bill

The point of departure of the *Employment Equity Bill*,<sup>67</sup> similar to the *Green Paper*, was that apartheid (and other discriminatory laws and practices) have left behind a legacy of inequality. The disparity in the distribution of jobs, occupations and incomes *in* the labour market revealed the effects of discrimination against black people, women and people with disabilities. These disparities were reinforced by social practices which perpetuated discrimination

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58 *Green Paper* (n 52) ch 2 par 2 2 1. The *Green Paper* first endeavoured to define the nature of inequalities faced by different groups, and the extent to which inequalities arose within the labour market, before it went on to establish measures to successfully combat these.

59 *Idem* ch 3 par 3 1 1 2.

60 *Idem* ch 3 par 3 2 1.

61 These constituted separate education under apartheid with little money, inferior qualifications, little secondary education, under-resourced teaching conditions and arbitrary language requirements (*idem* ch 3 pars 3 2 3-3 2 7).

62 Apartheid prevented blacks from owning land and limited their access to loans, markets and infrastructure (*idem* ch 3 pars 3 2 8; 3 2 9).

63 Women typically faced the burden of unpaid household labour in addition to income-generating work. On the one hand, for many women, household responsibilities left them no time for paid employment. On the other hand, a rigid work organisation had prevented women from performing well, as time had to be taken off from work for child and other family responsibilities (*idem* ch 3 par 3 2 11).

64 *Idem* ch 3 pars 3 1 1; 3 2 2.

65 *Idem* ch 4 par 4 2 2.

66 *Idem* ch 2 pars 2 1; 2 2 4; 2 2 7; ch 4 pars 4 2 3; 4 6; 4 7.

67 Explanatory Memorandum to the *Employment Equity Bill Government Gazette* 18481 GN 1840 1 December 1997 5 and 21.

in employment against these groups, as well as by factors *outside* the labour market, such as the lack of education, housing, medical care and transport. The *Employment Equity Bill* stressed that

[t]hese disparities can not be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.

The *Employment Equity Bill*, again similar to the *Green Paper*, argued that black people, women and people with disabilities faced significant disadvantages in employment. These included occupational segregation, inequalities in pay, lack of access to training and development opportunities, and high levels of unemployment.<sup>68</sup> Under apartheid, black people in particular had suffered particular and pernicious disadvantages as a result of job reservation and a lack of access to skills and education.<sup>69</sup> The *Bill* repeated and emphasised that South Africa had the most unequal distribution of income in the world.<sup>70</sup>

### 1 5 3 Employment Equity Act

Eventually, the *Employment Equity Act* was passed. It follows the constitutional model of formal and substantive equality in that it aims at eliminating unfair discrimination,<sup>71</sup> and to redress the disadvantages in employment by implementing affirmative-action measures.<sup>72</sup>

With regard to the latter, the Act provides that it is not unfair discrimination to take affirmative-action measures consistent with the purpose of the Act.<sup>73</sup>

68 *Idem* 6.

69 *Ibid.*

70 *Idem* 6-8, referring to the *International Labour Organisation Country Review* (n 28).

71 See s 2(a) and ch II of the Act. Ch II came into operation on 9 August 1999. The non-discrimination provisions apply to all employers and employees (s 4(1)).

72 See s 2(b) and ch III of this Act. Ch III came into force on 1 December 1999.

73 S 6(2)(a). Affirmative action has been described as a transformative device (Adam "The politics of redress: South African style affirmative action" 1997 *The Journal of Modern African Studies* 240) and a socio-political priority that may be said to assume something of the nature of a latter-day value, but not a universal value (*George v Liberty Life Association of Africa Ltd* (1996) 17 *ILJ* 571 (IC) 592D). It has been stressed that affirmative action is strictly a procedure, a strategy, a means to an end or, a measure to achieve a goal. Affirmative action is thus not a value as such. In contrast, non-discrimination has been held to be a value and a constitutional right (593E). Measures are *mechanisms* for redressing systemic, structural discrimination, strategies for reaching the goal of a non-sexist society, or *methods* to remedy inequality. The concept is supported as an acceptable *tool* in the struggle to eliminate discrimination and as a redistributive and remedial measure to ensure that equality can be reached (Hodges Aeberhard "Affirmative action in employment: Recent court approaches to a difficult concept" in Loutfi (ed) *Women, Gender, and Work. What is Equality and How Do We Get There?* (2001) 443; Kentridge (n 14) 14-14; 14-35). The reason for any measure is a specified goal. Measures imply action. Once the goal is achieved by the action taken, the rationale for the measure falls away. In the South African context, the reason for affirmative action measures is the achievement of substantive equality. This is a long-

Affirmative action is instituted as a mandatory measure, designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.<sup>74</sup>

The *Employment Equity Act* defines designated groups as black people, women and people with disabilities.<sup>75</sup> “Black people” is a generic term for Africans, coloureds, and Indians.<sup>76</sup> “People with disabilities” connotes people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment.<sup>77</sup>

The term “designated employers”<sup>78</sup> is defined to include, essentially, larger enterprises (in terms of the number of employees and turnover),<sup>79</sup> municipalities,<sup>80</sup> organs of state,<sup>81</sup> and employers appointed as such in terms of a collective agreement.<sup>82</sup> Employers who are not designated may comply voluntarily with the affirmative-action requirements of the *Employment Equity Act*.<sup>83</sup>

To implement affirmative action, an employer must consult with its employees,<sup>84</sup> conduct an analysis,<sup>85</sup> and prepare an employment-equity plan.<sup>86</sup>

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term goal to be achieved through measures and programmes aimed at reducing inequality (Dupper “Affirmative action and substantive equality: The South African experience” 2002 *SAMLJ* 292). The measures to attain the goal are distinguished from the goal itself (see *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC)). This implies that when South African society has been transformed and normalised, affirmative action in an equal society would constitute discrimination on grounds of race and gender. See also *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC) for a contrasting opinion. This judgment has, however, been widely criticised (see, eg, Garbers “Is there a right to affirmative action appointment?” (*Dudley v City of Cape Town and Another*)” 2004 13 *CLL* 61; McGregor “The nature of affirmative action: A defence or a right?” 2003 15 *SAMLJ* 808).

74 Ss 2(b); 13(1) and 15(1). A further Act, the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, aims to promote equality and to eradicate social and economic inequalities in *all* spheres of society. This Act does not apply to any person to whom, and to the extent to which, the *Employment Equity Act* applies (s 5(3)).

75 S 1.

76 *Ibid.*

77 *Ibid.*

78 *Ibid.*

79 Namely employers who employ fifty or more employees and employers who employ fewer than fifty employees, but who have an annual turnover that is equal to, or is above, the applicable turnover for a small business in terms of sch 4 to the *Employment Equity Act*.

80 As referred to in ch 7 of the Constitution.

81 As defined in s 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service. See also s 58 of the *Employment Equity Act*.

82 In terms of s 23 or s 31 of the *Labour Relations Act* to the extent provided for in the agreement.

83 S 14.

84 S 13(2)(a). Ss 16-18 indicate the nature of consultation, who the employer must consult with, the matters for consultation, and provide for disclosure of information.

85 S 13(2)(b).

86 S 13(2)(c). A plan must include certain items, such as numerical goals, strategies and timetables intended to achieve goals (see also s 20(2)(c)).

In addition, a duty to report on progress made in implementing a plan is placed on every designated employer.<sup>87</sup> Failure to comply with these requirements may lead to fines and to State contracts being refused or cancelled.<sup>88</sup>

Section 15(2) lays down which issues must be included in affirmative-action measures implemented by a designated employer. It requires measures to identify and eliminate employment barriers which adversely affect people from designated groups; measures to further diversity in the workplace, based on equal dignity and respect for all people; measures for reasonably accommodating people from designated groups; measures to ensure equitable representation of suitably qualified people from designated groups; measures to retain and develop people from designated groups; and appropriate training measures (including skills development).<sup>89</sup> The last two measures include preferential treatment and numerical goals, but exclude quotas.<sup>90</sup> A designated employer is not required to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.<sup>91</sup>

## 2 Conclusions

This article gave a holistic legal-historical perspective on the need to redress past discrimination by affirmative-action measures, and particularly in the workplace as found in South Africa today. It provided an opportunity to view developments in context and to enhance an understanding of the values underlying the current South African society.

The country has been riddled with inequalities since colonialism and slavery in the seventeenth century which further multiplied with practises and laws entrenching patriarchy, sexism and apartheid until the 1990s. Centuries of discrimination have been unravelled from the late 1970s to the 1990s by meaningful legal steps to prohibit discrimination and to undo its resultant inequalities. Amendments to labour laws, recommended by the Wiehahn Commission, paved the way for the demise of discriminatory laws towards a

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87 S 13(2)(d).

88 See s 53 and sch 1 to the *Employment Equity Act*.

89 See ss 15(2)(a)-15(2)(d). The *Skills Development Act 97* of 1998 provides for training and development of people in order to create a bigger pool of people from which employers may recruit and hire.

90 S 15(3).

91 S 15(4). This section provides some fairness and proportionality towards people of non-designated groups (Pretorius "Legal evaluation of affirmative action in South Africa" 2001 *JJS* 20).

democracy based on the values of human dignity, the achievement of equality, the advancement of rights and freedoms, and non-racialism and non-sexism. Further, following recommendations by the South African Law Commission in the early 1990s, the Multi-party Negotiating Process and the Labour Market Commission both in the mid-1990s, the achievement of equality is now pursued under a new democratic order. The *value* of the achievement of equality as well as the *right* to equality has been built into the Constitution. A substantive notion of equality has been adopted. This notion both prohibits unfair discrimination and provides for affirmative action to remedy structural discrimination. Affirmative action is a legal means to promote equality.<sup>92</sup> Subsequent to the Constitution, the *Employment Equity Act* introduced mandatory affirmative-action measures in the workplace. In this way it contributes to breaking systemic discrimination for blacks, women and the disabled in the workplace, normalising South African workplaces and giving further impetus to attaining equality.

While a prohibition on discrimination will stay part of the South African democracy, affirmative-action measures will be phased out in time, that is, when equality is attained. Practising affirmative action in an equal society would constitute discrimination.

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92 The *Annual Report of the Commission for Employment Equity 2006-2007* (Department of Labour (2007)) shows that progress towards achieving equity in the workplace is slow. Currently, blacks (that is Africans, coloureds and Indians) represent 22,2 per cent of all employees at top management level in workplaces, 26,9 per cent at senior management level and 36,5 per cent at the professionally qualified and middle management level. The percentage change for females generally increased at the former two levels while it decreased at the latter level (at 9-11). Blacks represent 90 per cent of all employees at the unskilled occupational level (at 10). Blacks represent 87,2 per cent of employees at the non-permanent level (*ibid*). People with disabilities has decreased in representation in the workforce (at 15) (compare n 57 above). While progress has been made with equity in employment, inequality generally among South Africans has increased since 1996 in all race groups except the white population ("Income gap 'widens for SA blacks" *Business Day* 7 November 2007 referring to a survey by the South African Institute of Race Relations released in early November 2007). Inequality among blacks is rising faster than any other population group, despite an above average income increase (*ibid*).