Article

Is a right to affirmative action the solution to the Orwellian postulate that all are equal but ...

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Abstract
Legislation often prescribes the broad parameters of social development, particularly in the creation of socio-economic entitlements and rights. In some cases such prescriptions may even be quite detailed. However, it is through the courts that these parameters are defined, narrowed, broadened, given substance and, ultimately, applied. It is thus the courts that create the body of jurisprudence that helps us to understand, and thus to analyse, such legislation. This article adopts as its starting point legislation that has been enacted to address the issues of the pervasive inequalities inherent in South African society, goes on to analyse the approaches adopted to solve similar problems in other jurisdictions, and then analyses the approaches adopted by South African courts in interpreting the legislation and giving content to the will of the legislature; ultimately addressing the question of whether affirmative action can now be described as a right.

Regular readers of Transformation will note that the article by Morris Montalti and Adrian Bellengère is not presented in the usual Transformation style. The original article we received was written for a legal audience. The editors and our referees felt that the submission was important but needed to be made more accessible to a broader audience. We have, therefore, asked the authors for ‘parallel texts’, with a narrative that runs along the top, and a further narrative, in the endnotes, that delves deeper into the legal issues for those who may be interested in this.

The Editors
Introduction

The road back from racial persecution – slavery or apartheid – is a long one. It will meet resistance because nobody ever likes to think they are guilty. But I see no alternative to the payment of this historical debt, and no better hope in Africa for a successful outcome than in the land of Nelson Mandela. (R Cohen International Herald Tribune March 11, 2006)

Affirmative action and remedial equality are politically, legally and philosophically contested concepts in many systems (Ginsburg and Merritt 1999), and it is often difficult to distinguish substantive issues from legal technicalities (Ssekasozi 1999:15). The South African Constitution (The Constitution) authorises legislative, and other measures, which are designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. These measures have become referred to as ‘affirmative action’. This is a relatively new aspect of contemporary liberal legal systems (Kymlicka and Wayne 2000:1-4) in that it effectively creates rights enforceable by an individual, but which are based on that individual’s membership of a particular social or cultural group. Such rights have been accorded to members of a broad array of social groups to redress inequalities associated with, race, sex, sexual orientation, disability status, indigeneity, and so forth (Young 2001). Rights, similarly, have been granted to the members of cultural groups constituted according to nationality, ethnicity, or religion, to acknowledge and accommodate particular beliefs or practices, or in recognition of collective claims to self-governance (Kymlicka 1995, Mancini 1996).

However, such rights openly distinguish amongst classes of people in the distribution of social rights and benefits, thus giving rise to significant controversies and raising many questions: for example, are group-differentiated rights inherently detrimental to individual interest? Why is distinguishing amongst classes of people in the allocation of rights and responsibilities not prima facie contrary to principles of equality? Is there a conflict between the concept of affirmative action itself and an ad hoc adjudication on affirmative action disputes? How are rights vested on such grounds to be compared to the theoretical existence of an independent individual right? This paper will not directly address these questions, but will focus on the aspect of this debate which underlies these questions, namely: is there a right to affirmative action in the context of the South African jurisprudence?
The first step will be to evaluate affirmative action in terms of different conceptions of equality itself. The notion of equality is a broad one and one thus needs to narrow the definition when analysing whether a right to it exists. Recent South African jurisprudential development has brought into sharp focus the crux of the tensions between the competing imperatives of equality.4

Since the promulgation of the Employment Equity Act5 (EEA) a new legal trend has emerged in South Africa in which persons belonging to previously disadvantaged groups approach the courts claiming the right to a benefit or to be appointed to a post in circumstances where they were not granted the benefit or were not appointed to the post. Their argument is that, because of the affirmative action programme governing the selection procedure, they have the right to preferential treatment over competing candidates who, it is alleged, benefited from discriminatory practices under the previous regime. In such cases judges are confronted with the daunting task of deciding whether affirmative action is an enforceable constitutional right or whether it should play only a defensive role (for example, to justify the appointment of a disadvantaged person). Conversely, several legal challenges have been instituted against the affirmative action policies implemented by the legislation, by those previously privileged, arguing that they have become victims of unfair discrimination. In such cases employers have raised ‘positive action’ as a defence against such allegations of discrimination (McGregor 2002(a):253, Coetzer & Others v Minister of Safety and Security & another (2003) 24 ILJ 163 (LC), Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others (2004) 25 ILJ 248 (LAC)). Rephrased slightly, the question thus becomes: should affirmative action be used both as a ‘shield’ and as a ‘sword’?

The central theme of this paper will be an assessment of the constitutional elements which support or detract from each view, within the context of group and individual rights. After first analysing the concept of equality, we will then focus on the South African context and will settle on the definition most pertinent thereto, namely the concept referred to as ‘equality of outcomes’ and how it is endorsed by Section 9(2) of the Constitution and by ‘equality legislation’. Then we will investigate the ‘equal treatment’ and ‘equal opportunity’ jurisprudence developed by the Supreme Court of the United States and European Court of Justice (ECJ), outlining the role of affirmative action. Thereafter we will analyse the judicial reasoning in two current South African Labour Court cases, namely Harmse v Cape Town
(2003) 24 ILJ 1130 (LC) and Dudley v City of Cape Town (2004) 25 ILJ 305 (LC). These decisions show *inter alia* the different understandings of the equal opportunity concept upon which the judges relied in reaching opposite conclusions concerning the nature of affirmative action. Finally, we will endorse the idea that the South African legal system (in terms of Section 9(2) of the Constitution, as elaborated upon in Minister of Finance and others v Van Heerden (2004 (11) BCLR 1125 (CC)) does indeed grant a right to affirmative action.

**Concept of equality**

Equality is in fact a *continuum*, an expansive value, which develops from ‘formal equality’ at one extreme to ‘substantive equality’ at the other. Anti-discrimination provisions are traditionally directed at achieving formal equality, whilst achieving substantive equality requires positive measures to redress existing group disadvantages. Between the two different poles lies the concept of ‘equality of opportunity’. The implementation of this intermediate concept is based on legal devices belonging to the former two: imposing anti-discriminatory duties together with the adoption of positive measures, either soft or aggressively prescriptive, to place individuals on an equal footing in order to compete fairly.

The concept of ‘formal equality’, as the starting point, or the ‘minimum content’ concept of equality is fairly widely applied, but in many instances has a limiting effect on the development of a concept of equality that moves further along the continuum. In some legal systems this formal notion of equality is also sometimes described as ‘equality of treatment’, or even as a ‘symmetrical’ view of equality. This formal notion views any action that explicitly uses prohibited grounds such as race and sex as criteria for decision-making, as suspect and unlawful, even if it is directed in favour of a disadvantaged group. The formal notion of equality thus recognises a prohibition of both unfair and fair discrimination, but abhors affirmative action on moral and legal grounds because it is based on the presumption that the law is an objective system of neutral rules. In this context, the State must act as a neutral force between its citizens, and the only way to avoid favouring one citizen over another is to accord the rights of the individual as individual rights. Thus, formal equality is blind to entrenched de facto inequalities, taking into consideration only the individual’s merit and skills to achieve social and economic welfare (Dupper 2002:278, McGregor 2003(a):423, De Waal et al 2002:223, Agrò 1975:131, Oppenheim 1983:1212).
The ‘equal opportunity’ approach recognises the danger of structural and/or systemic discrimination, inherent in a formal or symmetrical notion of equality, as factors that prevent individuals from starting a ‘race’ on an equal footing. However, like the symmetrical pattern, the ‘equal opportunity’ model continues to focus on the importance of the individual. It thus considers anti-discrimination provisions as paradigmatic legal tools to achieve equal opportunities and thus, ultimately, substantive equality, but at the same time accepts the idea that structural and de facto discrimination distorts the prospects of individuals because of their group membership. It thus permits the use of transitional remedial measures based on prohibited grounds such as race or sex, to equalise the point of departure of the role players. In this sense, ‘a coherent and comprehensive concept of equal opportunity must rely on a theory of substantive equality’ (Rosenfeld 1990:1689), though equality of outcomes remains unacceptable, unless it is the natural result of equal opportunities.

The prohibition of discrimination alone is not a guarantee of equality in practice, the realisation of which could require special measures to promote equal opportunities for members belonging to certain vulnerable groups. It is arguable that ‘equal opportunity is thus a [substantive] goal that can be achieved through different means’ (Cooper 2004:847), like the elimination of unfair discrimination, or the implementation of positive actions ‘inspired by the goal of substantive equality’ (Caruso 2003:342) that eliminate the causes of social disadvantage quantitatively and/or qualitatively. From this point of view affirmative action assuring equal opportunities is justified not only to equip individuals or categories of people for the wrongs perpetrated in the name of past discrimination, but also especially to promote certain highly desirable forms of social change, the so-called ‘forward-looking rationale’ (Dupper 2004:206, Karst 2004). Either way, individual rights continue to play a prominent role in the equality of opportunity model, and special entitlements for persons belonging to vulnerable groups are still seen as derogations from individual rights.

Equality of outcomes is regarded as the ‘pure’ model expressing substantive equality and is placed at the opposite end of the continuum from formal equality. Like the equal opportunity model, equality of outcomes places a duty on the state to redress past disadvantages. The state cannot simply remain neutral, because the refusal to redress existing societal discrimination is seen as an endorsement of the status quo and thus a form of positive discrimination. The commitment to remedy the injustices
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experienced by certain vulnerable social classes is thus not seen as a diminution of the individual right to equality, but it is in itself an integral part of equality achievement and protection. Indeed, within this model of ‘equality of opportunity’, the state not only has a duty to act positively to assure equality of opportunity, but it also has to correct the results of such discrimination.

The equality of outcomes model is asymmetrical, leaning in favour of vulnerable groups. Discrimination against groups that have been historically disadvantaged is considered to be qualitatively different from different treatments aimed at remediing that disadvantage ‘substantially’. This model rejects the aspiration of individualism as misleading and accommodates measures based upon collective identity. It criticises the emphasis placed on the formal equality of individuals as ignoring the extent to which the enjoyment of rights is determined by a group’s social status and historical background, including race and sex. In this context, measures that favour relatively disadvantaged groups at the expense of those who are relatively privileged are not discriminatory but rather the consequence of such measures is a more equal society (Cooper 2004:816-7, Dupper 2002:280).

Hartney (1995:202-27) has exhaustively explained that, although rights based on social and cultural differences might be assigned on the basis of group membership, most such rights are vested in the individual rather than in any collective entity. Furthermore, although the right is per definition collective, its underlying interest is of an individual nature (Raz 1986:207-9). The same would apply with regard to the interest in bringing a rights based action. Rights and membership must be seen as mutually reinforcing ideals, as the relationship between them is far more nuanced than the liberal dichotomy would suggest. Rights are perhaps the predominant instruments through which the ethos of liberal individualism is expressed, whereas membership denotes social attachment. However, individuals do not, even upon constitutive attachment, wholly lose themselves in a collective entity. Consequently any legal right granted will create at least two categories of people: a group of people enjoying rights and a group of people excluded from those rights. This will be true for positive rights too. In fact, a right will be accorded only to a particular subset of people specifically in an attempt to reverse the inegalitarian consequence of a previous prescriptive exclusion, or to remedy the exclusionary effect of social practices other than those prescribed by law itself. And yet even this effort to include otherwise discriminated against people will, of necessity, result in a legal system
excluding a category of people. However, the exclusion of an advantaged class from a right afforded to a disadvantaged group finds its justification not on the basis of negative unequal characteristics ascribed to the excluded class, but rather on the grounds that the particular redress granted to the included class will be conducive to genuine equality for all. In a nutshell, the exclusion functions affirmatively to include a category of people in need of special protection in order to ensure the full and equal enjoyment of all rights and freedoms.8

Equality of outcomes: the South African constitutional and legislative context

The Preamble to the South Africa Constitution proclaims that the Constitution, as the supreme law of the Republic, has been adopted so as to

…heal the division of the past and establish a society based on democratic values, social justice and fundamental human rights […] improve the quality of life of all citizens and free the potential of each person…

The achievement of this ideal must be based on an acceptance by all South Africans that the black community suffered injustice, disadvantages, inequality, and marginalisation in all spheres of life, and that it is the correction of this imbalance, inter alia, that will set South Africa on the road to attaining justice, equality and democracy.

As inequality in all spheres of life was at the root of past injustices, the new constitutional framework is aimed at achieving socio-economic, as well as political equality. In the face of glaring socio-economic and political inequality, the constitutional right to equality and the adoption of special measures of redress, like affirmative action programmes, have been conceived as playing a pivotal role (Klug 1991).

Section 9 of the Constitution sets out the basic principles of formal equality, by recognising that everyone is equal before the law, prohibiting discrimination on various grounds, and by requiring that legislation be enacted to achieve these principles.9 However, the South African constitution extends its protection beyond the reach of such mere formal equality. Section 9(2) of the Constitution states specifically:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
This section has been specifically inserted to remove any doubts about the constitutionality of enacting positive measures, including affirmative action legislation, and the adoption of programmes aimed at promoting de facto or substantive equality. Such measures would include the adoption of race, sex or other category-conscious remedial action to address the legacy of systemic discrimination. The Constitution holds the view that affirmative action measures are not a limitation of the right to formal equality, but rather that they are necessary to achieve substantive or ‘true’ equality, namely the enjoyment of all rights and freedoms.

In this way the Bill of Rights includes not only the symmetrical notion of equality (formal equality), which rejects positive action as being as morally reprehensible as pernicious discrimination on the basis of race or sex, but also endorses an asymmetrical notion of equality (Smith 1995, Devenish 1996).10

It is thus clear that the South African constitutional framework envisages a two-pronged approach to attain substantive equality. Firstly, the elimination of existing patterns of discrimination – Sections 9(1), (3) and (4), and, secondly, the implementation of measures designed to protect and advance those people or categories of people disadvantaged by past discrimination – Section 9(2).11

The implementation of equality provisions in equality and labour legislation12 follows the same approach.

The Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) recognises that inequality is deeply embedded in the South African social framework13 and that to achieve substantive equality special legal measures will be required.14

For these reasons, PEPUDA not only establishes a far-reaching prohibition of unfair discrimination,15 but also extends its scope by imposing a positive duty and responsibility on the state and on all persons operating in the public and private sphere to promote and achieve equality.16

Of course the terms ‘discrimination’ and ‘equality’ thus also have to be defined and the PEPUDA does this stating that ‘discrimination’ means

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

(a) imposes burdens, obligation or disadvantage on; or
(b) withholds benefits, opportunities or advantage from any person on one or more of the prohibited grounds,17

and that ‘equality’
includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes. (PEPUDA)

By the same token, the Employment Equity Act (EEA) aims to achieve equity in the workplace by –

a) *promoting equal opportunity and fair treatment* in employment through the elimination of unfair discrimination; and

b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. (EEA)\(^{18}\)

In order to pursue these objectives every employer is both prohibited from unfairly discriminating (in the future),\(^{19}\) and must also eliminate (present) unfair discrimination.\(^{20}\) However, these provisions are not applicable to all employers and several restrictions do exist. For example only designated employers are required to comply with Chapter III of the EEA.\(^{21}\)

Affirmative action, mentioned in the EEA is defined as measures designed to ensure that suitably qualified people from designated groups have *equal employment opportunities* and are equally represented in all occupational categories and levels in the workforce of a designated employer. (EEA:S15)\(^{22}\)

However, although affirmative action can include preferential treatment and numerical goals or targets, it cannot provide quotas (Solomon 1999:232, Dupper 2004:192). Targets are flexible and take into account each specific context, whilst quotas on the other hand are inflexible and generally regulated. Importantly, in terms of Section 20(3)-(5) of the EEA, preferential treatment does not simply mean preferring a person from a designated group over a non-designated candidate when there is equality in score, but actually means preferring a less qualified candidate from a designated group to a more meritorious candidate from a non-designated group, in order to address the inequality suffered by the previously disadvantaged group in question.

**Equality of treatment and of opportunity and the role of affirmative action**

1. **The United States**

The United States of America is an example of a constitutional system that has clearly embraced the equality of treatment or ‘formal equality’ model.

The Supreme Court of the United States, when reviewing affirmative action
policies, has adopted a very specific standard of review, namely a strict one. The application of a standard of strict scrutiny has a crucial impact on the legitimacy and effectiveness of affirmative action policies. The Supreme Court has clearly created a watershed between state institutional discrimination and societal discrimination, the former being, necessarily, colour-blind (Smith 1997:235). In doing so, however, it has indirectly endorsed state institutional discrimination, though requiring it to be notionally colour-blind. The US Supreme Court strictly applies affirmative action policies, arguing that such state policies are colour blind, but in so doing the US Supreme Court is in fact endorsing state discrimination because such policies are in fact inherently discriminatory as they aim only at achieving ‘formal equality’.

**City of Richmond v J.A. Croson Co. 488 U.S. 469 (1989)**

The Court initially favoured affirmative action policies, as can be seen in the court’s judgement in *Regents of the University of California v Bakke* 438 U.S. 265 (1978) and *Fullilove v Klutznick* 448 U.S. 448 (1980). In the latter case the Supreme Court dealt with the constitutionality of ‘set-aside programmes’, and avoided the dispute concerning tiers of review by adopting a two stage-approach. The first stage was to determine whether the objectives of the impugned legislation were within the power of Congress. The second stage was to determine whether ‘the limited use of racial and ethnic criteria […] is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process clause of the Fifth Amendment’ (*Fullilove* 473). The Supreme Court held that Congress was acting within its power, and also accepted the race-based criteria in such programmes did not infringe the Constitution (US Congress 1990).

Subsequently, however, the Court became sharply divided on the issue of the appropriate standard of review to apply. In *City of Richmond v J.A. Croson Co. 488 U.S. 469 (1989)* the majority judgement of the court applied strict scrutiny to the review of affirmative action measures taken by local and state governments. In 1983, Richmond had adopted an ordinance that required affirmative action in the awarding of city construction contracts. This ordinance, The Minority Business Utilization Plan, provided that prime constructors must subcontract at least 30% of the contract to minority enterprise. The ordinance had been enacted by the city council after a public hearing at which the low level of minority presence in the construction business had been discussed. J.A. Croson Co was a company that was
subjected to this affirmative action programme. The company contended that it was difficult to find a minority enterprise that was willing to subcontract for what the company thought was a reasonable price. This led the company to request a waiver of the set-aside requirement. When this request was denied the company challenged the ordinance as being unconstitutional (see also Meyer 2004). Justice O’Connor questioned whether the city council had established a compelling state interest in redressing past discrimination, and found no factual basis that racial discrimination actually existed. Furthermore, Justice O’Connor stated that the programme was not specifically tailored to address the effects of past discrimination. The broad ordinance adopted by Richmond entitled a member of a minority group an absolute preference over other citizens solely on the ground of race, and no evidence displayed that the city council had used other race-neutral means to attempt to achieve minority participation. The purpose of utilising this standard of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test, or standard, also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype (City of Richmond 493). This approach has been perpetuated and can be seen in subsequent cases decided by the Supreme Court.

**Adarand Constructors v Pena 515 U.S. 200 (1995)**

Even in this case the Court found that the federal ‘set-aside programme’ at issue violated the equal protection clause of the due process clause of the Fifth Amendment. The Court concluded that the equal protection clause of the Fifth Amendment was the same as the obligation imposed on the States by the Fourteenth Amendment. The majority affirmed that the standard of review should not be ‘dependent on the race of those burdened or benefited by a particular classification’ (Adarand 224), and racial classification by the federal government must serve a compelling government interest and must be narrowly tailored to further the interest. Justice Scalia’s concurring opinion made the following statement:

> In my view government can never have ‘a compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction […] there can be no such thing as a either a creditor or a debtor race. (Adarand 239)
Strict scrutiny means that the same test of validity is applied to all instances of racial classification. No distinction occurs between testing measures that remedy past injustices and those that perpetuate past injustices. This is not to say that the Supreme Court is ignorant of this distinction. Several dissenting judgments paid homage to the notion of substantive equality. For example Justice Stevens, in his dissenting judgment in *Adarand Constructors v Pena* 515 U.S. 200 (1995), stated:

> there is no moral or constitutional equivalence between a policy that is designated to perpetuate a caste system and one that seeks to eradicate racial discrimination. In this sense, invidious discrimination is an engine of oppression, subjugating a disfavoured group to enhance or maintain the power of the majority; on the contrary, remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. (*Adarand* 243)

Justice Stevens’ opinion recognises that the evil of inequality may not be eradicated by treating all individuals in the same way, namely according to a neutral, or formal standard, as there are deep-rooted patterns of group systemic and/or structural disadvantage.24

2. The European Union

The equality of opportunity model embraced by the EU is underpinned by this awareness, which is clearly visible in European Community law and in European jurisprudential interpretation. The purpose of Council Directive 76/20725 is to ensure the equal treatment of men and women with regard to access to employment, promotion, training, and working conditions.26 Article 2(1) of the Directive prohibits direct or indirect discrimination on the basis of sex, marital or family status,27 while Article 2(4) specifically allows for measures to promote equal opportunity, even though they may appear ‘discriminatory’.28 This is reinforced by Article 5 which states that the ‘application of the principle of equal treatment … means that men and women shall be guaranteed the same conditions without discrimination on ground of sex’.

Furthermore, Council Recommendation 84/635 on the promotion of positive action for women29 expressly refers in its preamble to Art 2(4) of the Directive, supporting it but noting that to achieve such equality, positive action aimed at eliminating existing inequalities is required.30 Indeed, since the enforcement of the Treaty of Amsterdam on 1 May 1999, Art 141(4) EC provides that with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any
Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.\textsuperscript{31}

The ECJ has had several opportunities to consider the legality of positive affirmative action measures under current European Community law.\textsuperscript{32} And a brief analysis of a few cases shows that its position has developed from a ‘formal’ view of equality towards an ‘equal opportunity’ view, verging on a recognition of ‘substantive’ equality.

\textit{Eckhard Kalanke v Freie Hansestadt Bremen C-450/93, in ECR I-3051 (1995)}

The potential conflict between individual rights and affirmative action was considered in \textit{Eckhard Kalanke v Freie Hansestadt Bremen C-450/93, in ECR I-3051 (1995)} (Caruso 2003, Charpentier 1998, Schiek 1996). The issue to be decided was whether the Directive precluded national rules which stipulated that, where candidates of different sexes short-listed for promotion were equally qualified, priority would automatically be given to women, in sectors where they were under-represented. The ECJ declared this kind of legislation incompatible with the European Community Treaty, electing to prefer the ideal of individual over group rights. The Court stressed that an affirmative action programme cannot be designed to guarantee the automatic result of actual employment, which would be tantamount to according an absolute and unconditional priority to women applicants. The Court felt that this exceeded the scope of the 1976 Directive, which only allowed for equality of ‘opportunity’, and infringed upon the applicant’s individual right to non-discriminatory treatment.\textsuperscript{33} The Court found that the special benefit afforded on the ground of sex went beyond of the scope of Art 2(4) of the Directive and constituted a forbidden form of discrimination:

\begin{quote}
A national rule that, where men and women who are candidates for the same promotion are equally qualified, women are automatically to be given priority in sectors where they are under-represented, involves discrimination on the ground of sex. (\textit{Eckhard Kalanke} Para 16)
\end{quote}

The Court thus applied a strict interpretation of the equality of opportunity principle (Charpentier 1996), in order to ensure that the notion of equality, though more developed than mere formal equality, did not progress beyond that of a limited equality of ‘opportunity’ model.
**Marschall v Land Nordrhein – Westfalen C-409/95, in ECR I-6363-6395 (1997)**

However, shortly after the *Kalanke* case the ECJ softened its initial approach. In the case of *Marschall v Land Nordrhein – Westfalen C-409/95, in ECR I-6363-6395 (1997)* the Court had to decide whether a national rule containing a clause to the effect that women were not to be given priority in promotion if reasons specific to an individual male candidate swings the balance in his favour (the so called ‘saving-clause’ or ‘Öffnungsklausel’) was designed to promote equal opportunity for men and women within the meaning of Art 2(4) of the Directive 76/207.

The Court observed that even where candidates were equally qualified, male candidates tended to be promoted in preference to female candidates arguably because of prejudice and stereotypes concerning the role and capacities of women in the work place, so that the mere fact that a male candidate and a female candidate were equally qualified did not mean that they had the same chances (*Marschall* Para 29-30).

In the light of these considerations, the Court held that a national rule that contains a saving-clause does not exceed the limit of the exception in Art 2(4) of the Directive if, in each individual case, it provides a guarantee for male candidates who are as qualified as female candidates. Such an approach would take into account all criteria specific to the individual candidate and will override the priority accorded to female candidates where one or more of those criteria tilt the balance in favour of a male candidate (*Marschall* Para 33). The saving-clause, no matter how vague, eliminated the invidious automatism of sex preferences, replacing it with a personalised assessment of candidates’ qualities. This was enough, according to the Court, to do justice to the principle of equality, as well as to the axiom of individual justice.

It follows that a measure which is intended to give priority to promoting women in sectors where they are under-represented, must be regarded as compatible with European Community law if, firstly, it does not automatically and unconditionally give priority to women when women and men are equally qualified; and, secondly, the candidatures are the subject of an objective assessment that takes into account the specific personal situations of each candidate. Underlying the Court’s reasoning in *Kalanke* was the sharp distinction between providing equality of opportunities and guaranteeing equality of results, the latter being prohibited by EC law. *Marschall* brought about a major change by allowing, subject to adequate saving clauses, preferential treatment in actual hiring. The *Marschall*
formula still requires that male and female candidates be equally qualified for preferential criteria to apply. Meritocracy is still fundamental to the process.


The ECJ further explained the equality of opportunity principle in Georg Badeck and others v. Landesanwalt beim Staatsgerichtshof des Landes Hessen, C-158/97, in ECR I-1875 (2000) (Caruso 2003:341) holding that when assessing candidates it is legitimate to take into account certain positive and negative criteria which, although formulated in terms which are neutral regarding sex and thus capable of benefiting men too, in general favour women. Thus it may be decided that seniority, age and the date of the last promotion are to be taken into account only in so far as they are of importance for the suitability, qualifications and professional capability of candidates. Similarly, it may be prescribed that the family status or income of the partner is immaterial and that part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect (Georg Badeck 31-32). In this way the Court upheld a statute enacted by the German Land of Hesse establishing a system of ‘flexible result quotas’.


On the other hand, as highlighted in Abrahamsson and Anderson v. Fogelqvist C-407/98, in ECR I-5539 (2000) to give preference to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex would be in conflict with the principle of equal opportunity. If allowed in this way, affirmative action would be used not only as a means for granting equal opportunity, but also to assure the outcome of the competition.
The scope and effect of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, candidatures are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows that such a method of selection is not such as to be permitted by Article 2(4) of the Directive (Abrahamsson Para 53).

Positive action in EC law thus aims at levelling the playing field for all players. It favours traditionally discriminated categories of individuals by allowing them to compete on an equal footing, but it does not promise victory. It consists of a number of techniques, such as special training and educational opportunities, which do involve redistribution of resources from one group to another. These policies are meant to allow for a fair game. Positive action is inspired by the goal of substantive equality that demands that unequal circumstances be treated differently. On those occasions in which actual hiring or promotions are based on preferential criteria, reverse discrimination might occur. Notwithstanding this, the core of individual equality is still preserved by means of formal devices. Saving clauses, strict meritocracy, the illegality of result-based or ‘hard’ affirmative action, the inadmissibility of fixed quotas of representation; are all legal tools designed to ensure that the group in need of protection has not become overly favoured, and that all other individuals outside the targeted group can still rely on the judicial protection of their ultimate fundamental right to equal treatment.

**Affirmative action as a right or as a defence: Harmse versus Dudley**

1. **Harmse v Cape Town (2003) 24 ILJ 1130 (LC)**

In South Africa the debate regarding affirmative action as a right or a defence is an ongoing one. In *Harmse v Cape Town (2003) 24 ILJ 1130 (LC)* the Labour Court has suggested that affirmative action as defined and conceived by the Constitution and the EEA is more than just a defence against a claim of unfair discrimination, a ‘shield’, and that it places a positive obligation on employers generally to take pro-active measures to promote affirmative action and to eliminate unfair discrimination, thus becoming a ‘sword’ in the hands of the disadvantaged. In contrast, in *Dudley v City of Cape Town (2004)*, the
Labour Court expressed the conviction that the EEA does not recognize an individual ‘right to affirmative action’, and declined to follow the earlier Harmse judgment.\textsuperscript{37}

In Harmse, a court was considering the nature of affirmative action for the first time since the EEA had come into operation. Harmse, an unsuccessful job applicant, had alleged that the City of Cape Town had not reviewed the EEA Section 20(3) and (4) factors, thus unfairly discriminating against him, which is prohibited by section 6 of the EEA.\textsuperscript{38} The Labour Court concluded that if one were to have regard to only Section 6 of the EEA, then one could hold that affirmative action was no more than a defence to a claim of unfair discrimination (\textit{Harmse 1141H}).

However, the Labour Court went further and held that affirmative action was more than just a defence in the hands of an employer, and should not be confined to such a limited role in the elimination of unfair discrimination:

\begin{quote}
The definition of affirmative action in Section 15 indicates a role for affirmative action that goes beyond the passivity of its status as a defence. Affirmative action measures include measures to ‘eliminate employment barriers’, to ‘further diversity’ in the workplace and to ensure ‘equitable representation’. In these respects affirmative action involves more than just a defensive posture. It includes pro-activeness and self-activity on the part of the employer. The Act \textit{obliges} an employer to take measures to eliminate unfair discrimination in the workplace. (\textit{Harmse 1141I-1142A})\textsuperscript{39}
\end{quote}

The court then stated that section 6 prohibits unfair discrimination against an employee ‘in any employment or practice’ and then went on to find that the section 20(3)-(5) factors also constitute an ‘employment policy or practice’ (\textit{Harmse 1143C-I}).\textsuperscript{40} Therefore misapplying, or failing to apply these factors when determining whether a person is ‘suitably qualified’, would constitute unfair discrimination. Section 5 of the Act obliges every employer ‘to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’. Thus a failure by any employer to promote equal opportunity by eliminating present unfair discrimination in any employment policy or practice, which would include determinations of suitable qualification, amounts to discrimination.\textsuperscript{41}

The Court reasoned that the Act had to be interpreted to give effect to its purpose, which is to achieve equity in the workplace by promoting equal opportunity (through the elimination of unfair discrimination) and by implementing affirmative action measures (to redress the disadvantages
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experienced by designated groups). The Court went on to say that section 20 (3)-(5) is an integral part of the elimination of unfair discrimination and while section 6 specifically lists several ground on which an employer cannot discriminate, the list is not exhaustive and thus could include citing a ‘lack of experience’ to avoid appointing someone.42

The Court also underlined that if an employer’s conduct falls within the category of unfair discrimination, the employee may refer the instance of unfair discrimination to the Court.43

Finally, the Court held that it was only partially correct to regard affirmative action only as a defence. The real answer was in the determination of who was making the claim of affirmative action:

It may found a cause of action in the hands of one and defence in the hands of another. If one were to have regard only to Section 6 of the Act44 then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. In this sense it serves as a shield. However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace [rectius: to assure equal opportunity45] it also serves as a sword […] The protection and advancement of persons or categories of persons disadvantaged by unfair discrimination, by legislative and other measures is recognised by the Constitution as part of the right to equality. It is not fashioned as an exception to the right to equality […] It is part of the fabric and woven into the texture of the fundamental right to equality in Section 9 of the Constitution. In this sense, ‘affirmative action’ is more than just a defence or shield. If at all it be ‘shield’, it would be inconceivable that it is available only to those in society who have power, namely employers. If this were the case then employees would, insofar as their full and equal enjoyment of all rights and freedoms is concerned, be at the mercy of an employer with no or no real remedy should the employer fail to promote substantive equality. (Harmse 1145A)

2. A right to affirmative action
The Court declined to answer the question of whether an employee from a designated group had a right to affirmative action arising out of an employment equity plan. However, it suggested that if an employer adopted such a plan then an employee might have a legitimate expectation that the employer would act in compliance with such a plan.46 Broadly speaking, the question
is whether the proposed beneficiaries of an affirmative action plan under PEPUDA or Section 9(2) of the Constitution have a ‘right to affirmative action’ if the state or other subject fails to comply with the Act or the Constitution. Pillay J in Harmse simply expressed the view that ‘on an analysis of the Constitution’ (Harmse 1146F) and the EEA, one might be satisfied that they provide for a right of affirmative action. If this position, that a right exists in general terms, is accepted the important debate would then concern the exact scope or boundaries of such a right. In this regard, for example, in McInnes v Technikon Natal (2000) 6 BLLR 701 (LC) 47 Penzhorn AJ held that ‘so-called “affirmative action discrimination” cannot constitute a fair basis for dismissing, as opposed to appointing, an employee’ (McInnes 709I).48

3. Dudley v City of Cape Town (2004) 25 ILJ 305 (LC)

The Labour Court in Dudley v City of Cape Town reached the opposite conclusion to the finding in Harmse. In this case Dudley, an unsuccessful job applicant, applied to the Labour Court alleging that the City of Cape Town’s failure to appoint her was unfair discrimination, an unfair labour practice, a breach of the EEA and a breach of the City’s obligations in terms of the Constitution. The City opposed this arguing that their failure to advantage a member of a designated group did not constitute unfair discrimination.49

The Court, in finding for the City of Cape Town, concluded that the approach adopted in Chapter III of the EEA gave expression to the notion of substantive equality embraced by Section 9(2) of the Constitution, which is equated with equality of outcomes, whilst Chapter II was identified with formal equality. In so doing, the Court found that Chapter II and III differed significantly in application and refused to construe the Act in the light of a holistic view of the constitutional equality provision. Chapter II, prohibiting unfair discrimination, was directly enforceable by any aggrieved individual or by members of an affected group. The question of whether or not there had been discrimination was a matter of law and fact, which the court alone would decide. Chapter III, however, was structured in such a way that it is only operational within the context of a collective environment. The content of this collective environment is statutorily defined and thus an employer’s obligations to implement affirmative action are limited to obligations in terms of the Act alone.50

The Court was persuaded that affirmative action measures are collective
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in nature, participative and programmatic, and that admitting an individual right to affirmative action, namely permitting an ad hoc adjudication, would be opposed to these fundamental features as drawn up by the legislature. The Court held the view that there is a clear-cut distinction between formal equality and substantive equality, and consequently interpreted the legal tools provided by Chapter II and III of the EEA as different, in fact opposite, in nature, purpose and operation.51

Consequently the Court established that the applicant did not have the locus standi to approach the Labour Court directly for an order that the City develop and implement an employment equity plan (Dudley 332E). Neither would the position have been different had the applicant been mandated by all the City’s employees to support that position. The Court also held that the respondent had not enacted an affirmative action policy outside the framework of Chapter III of the EEA (Dudley 332F-333A).

The Dudley case highlights a lack of clarity as to the scope of affirmative action within the EEA, and displays both a misunderstanding of the intertwined concepts of equality (especially that of ‘equal opportunity’), and their relationship to each other, and of the nature of the various means to pursue them. In essence, Dudley shows that a formal interpretation of substantive equality is capable of rendering meaningless the legislative tools that are aimed at translating substantive equality into workable rules. This is true even in South Africa where substantive equality means equality of outcomes. But Dudley is wrong, not only because it links equality of opportunity to mere formal equality, but also because it construes the equality of opportunity formula regardless of the specific South African constitutional framework.

Considering the above, South African courts are likely to be faced with more vexing affirmative action questions, some of which may fall outside the scope of the EEA. The PEPUDA, for instance, undoubtedly displays innovative features when compared with the EEA.52 However, there can be no question, as held by the Constitutional Court, that the EEA is a statute enacted to give effect to the constitutional right to equality by eliminating unfair discrimination, promoting equal opportunity, and implementing affirmative action in the field of employment. One could certainly make the same claim in respect of PEPUDA (Albertyn et al 2001), and the differing stances adopted in Harmse and Dudley are not immune from critical examination beyond the workplace context. Taking all this into consideration we propose assessing this issue in the light of Section 9 of the Constitution,
as recently interpreted in *Minister of Finance and others v Van Heerden 2004(11)BCLR 1125 (CC).*

The nature of affirmative action in the light of *Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 (CC)*

The majority judgment in *Van Heerden* seems to support an individual’s right to affirmative action, although this was not the central question before the Court. In fact, the argument of the judgment is based on the defensive use of affirmative action accorded by Section 9(2) of the Constitution, but many statements in the judgment strongly suggest that in the South African constitutional framework affirmative action may also be a fundamental and enforceable right.

The case concerned employer contributions to the Political Office-Bearers Pension Fund, a new fund set up after the 1994 elections. The fund provided for three classes of member, one of which comprised members who were members of the pre-1994 apartheid era Closed Pension Fund. Van Heerden was such a member. Rule 4.2.1 of the fund provided that employer contributions in respect of such members would be less than those made in respect of the other two categories. Van Heerden, applied to the High Court complaining that this differentiation was arbitrary, unreasonable, unfairly discriminatory and thus unconstitutional. This was opposed on the basis that the measures constituted ‘limited affirmative action’.

The High Court held that a person relying on section 9(2) of the Constitution to justify discriminatory measures had to prove that the measures were taken to promote the achievement of equality which, it found, the Minister of Finance had failed to do. Accordingly, the Cape High Court found that Rule 4.2.1 was not a measure designed to advance a previously disadvantaged group but on the contrary, was arbitrary, overhasty and amounted to unfair discrimination (*Van Heerden 1129C-1134H*), and declared it discriminatory and constitutionally invalid.

The Minister of Finance therefore sought permission from the Constitutional Court to appeal directly to it. In this application the Minister contended that the High Court had misconceived the true nature of the equality protection enshrined in the Constitution by resorting to a formal rather than a substantive notion of equality. The purpose of the differentiated scheme of employer benefits, he argued, was in fact to advance equality (*Van Heerden 1135A-B*). Van Heerden opposed this on several grounds. The Constitutional Court granted leave to appeal, upheld the appeal itself and declared the order of the Cape High Court unconstitutional and invalid.
In so deciding, the Constitutional Court gave a significant interpretation of Section 9(2) and many of the Court’s statements are of great benefit in understanding the double nature of affirmative action. Moseneke J, writing for the majority, emphasised that the achievement of equality authorises the adoption of measures to protect or advance persons or categories of persons, and that affirmative action represents but a tailored means to achieve that purpose.56

Furthermore, Moseneke J held that ‘the achievement of equality’ is both a guaranteed and justifiable right and an interpretative standard against which all law, including therefore the EEA and the PEPUDA, must be tested:

The achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance. (Van Heerden 1136D)57

According to the Court, substantive equality is thus the legal paradigm that informs the interpretation of all egalitarian constitutional imperatives:

what is clear is that our Constitution and in particular Section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow. (Van Heerden 1140A-B)

Sachs J, in his concurring opinion, canvassed the role of Section 9(2) with regard to Section 9(3) stating that Section 9(2) is not a separate element but is in fact ‘an integral and an overreaching constitutional principle’ and that Section 9(3) had to be ‘interpreted in the light of the constitutional vision established by Section 9(2)’ (Van Heerden 1173H-1174B).

The achievement of equality is based on the constitutional commitment to restore and protect the equal worth of everyone, and society as a whole and all organs of state, including the judiciary, have a positive duty to promote that (Jagwanth 2004:743-5). Reconciling competing interests of those positively and negatively affected by affirmative action must be done in a manner that takes into account the severe degree of systemic inequality with which most of the population lives, and ‘in this context redress is not simply an option, it is an imperative’ (Van Heerden 1173B).

Mosenke J stated:
In explicit terms, the Constitution commits our society to ‘improve’ the
good of life of all citizens and ‘free the potential of each person’. Our
Supreme law says more about equality than do comparable Constitutions.
Like other Constitutions, it confers the right to equal protection and
benefit of the law and the right to non-discrimination. But it also
imposes a positive duty on all organs of state to protect and promote
the achievement of equality – a duty that binds the judiciary too? (Van
Heerden 1136F-1137A)

Considering the above, the Constitution does not only simply allow for a
duty to impose affirmative action, as Section 15 of the EEA does towards
designated employers, but actually imposes that duty in itself on all kinds
of employers and other public or private institutions (McGregor 2003(a):435,
Garbers 2003:91).58

Consequently it seems to us that a positive duty to promote equality
requires more than the mere programmatic implementation of an equity plan,
because to impose a duty on someone necessarily implies the conferring of
a corresponding right on someone else. The maxim *Ubi ius ibi remedium*, if
approached from another angle, surely must mean that where there is a
remedy, there must be a corresponding right. Furthermore, the recognition
of a constitutional duty on the judiciary to promote the achievement of
equality clashes with the judgment in *Dudley*.59 On the contrary, all courts,
and not just the Constitutional Courts are obliged, to examine each equality
claim.60

The considerations underpinning the majority judgment thus seem to
acknowledge that affirmative action designed to advance disadvantaged
groups is also an enforceable right similar to the individual right not to be
discriminated against. The characteristics of this right, however, do differ in
some respects from traditional individual rights. The measures envisaged in
Section 9(2) must target categories of persons. Thus a person or groups of
persons are advanced, and can claim their rights on the basis of membership
of a group (*Van Heerden* 1156A-B). Furthermore, regarding its implementation,
‘the right to achieve equality’ requires an ‘abiding process’, including
strategies, policies and measures that must be (necessarily) taken. The
achievement of equality does not detract in any way from the right to equal
treatment or from the right not to be discriminated against. Both are
guaranteed by Section 9(1) and (2).61

In the light of this constitutional interpretation, the decision in *Dudley*,
in our view, is flawed. It fails to recognise that a measure enacted in terms
Is a right to affirmative action the solution of Section 9(2) of the constitution is not an exception to the notion of equality, but is an integral part of it. The Court in *Dudley* interpreted the parts of Section 9 as existing as watertight compartments, whilst the court in *Harmse* was of the view that Section 9 must be read as a whole, so that ‘any matter which engages the issue of equality engages the whole section’ (*Van Heerden* 1159B). Thus the achievement of equality seems to be both a defence and a right. However, to be used at all, the affirmative action measure in question must fall within the ambit of Section 9(2), otherwise the measure would constitute unfair discrimination on prohibited grounds (*Van Heerden* 1141D-F, 1155F-I, 1156F-J).

To determine whether a measure falls within Section 9(2) entails a threefold enquiry: (a) it must target persons or categories of persons who have been disadvantaged by unfair discrimination; (b) it must be designed to protect or advance such persons or categories of persons – in essence, the remedial measure must be directed at an envisaged and reasonable future outcome; (c) it must promote the achievement of equality (*Van Heerden* 1141G-H, 1142G).

Regarding this last requirement, the Court clarified that determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of the broader society. However, It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. … In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened. (*Van Heerden* 1143G-H)\(^6^2\)

With regard to the first requirement, that the measure target a specific group, the court adopted a robust approach stating that:

often it is difficult, impractical, or undesirable to devise a legislative scheme with ‘pure’ differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or ‘hard cases’ or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. (*Van Heerden* 1142C-D)
However the court must exercise caution when assessing such measures:

It is my view that care should be taken to ensure that measures enacted under it actually do fall within the ambit intended by the section. If the aim of the section is to advance persons or groups previously disadvantaged by unfair discrimination, the section should be used for that purpose alone. To do otherwise would be to allow the section to be used to enact measures which should not be tested under Section 9(2) because they benefit persons who do not belong to groups previously disadvantaged by unfair discrimination. … A measure which is part of the framework for the advancement of equality cannot ever be said to discriminate unfairly. … That being the case, Section 9(2) must be used only in appropriate cases and with great circumspection. The vision of substantive equality and the need for transformation cannot be underestimated. For that reason Section 9(2), as an instrument for transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for Section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for the disadvantage, the effect will be to render constitutionally compliant a measure which has the potential to discriminate unfairly. This cannot be what Section 9(2) envisages. (Van Heerden 1156E-I)

In essence, the court robustly endorsed the notion that legislation be enacted for the purpose of advancing persons previously disadvantaged, but warned that such legislation should only be used for that purpose alone as the use of such legislation in inappropriate circumstances, ie where the consequence is the preferment of a previously advantaged group, may inadvertently result in unfair discrimination.

Conclusion

We contend that the promotion of equal opportunity and the attainment of equal outcomes are different targets of the aim to achieve de facto equality. Equality of opportunity can also be achieved by affirmative action programmes inspired by the goal of substantive equality. Therefore an interpretation of equality of opportunity as an expression of mere formal equality is incorrect. However, the traditional concept of equality which is based on equal individual rights, the so-called formal interpretation of substantive equality, continues to inform European Court of Justice (ECJ) jurisprudence on gender issues. Equality requires equal treatment of all individuals, or different treatments based on objective individual differences. The judicial
interpretation of the principle of equality as a whole includes a general prohibition against discrimination, and it is often treated as either a synonym or as a necessary corollary of all egalitarian imperatives. Although non-discrimination rules are particularly forceful when discrimination is the result of traditional biases against specific groups, they are only enforced to address individual instances of inequality. Non-discriminatory rules are thus individual in nature. In the EU debate, such individual rights continue to occupy centre stage. Within this framework, the ECJ has conceptualised the possible derivation from individual rights of special entitlements for vulnerable categories of persons (women). Such derogations are occasionally permissible, but only if justified by legitimate goals and only if implemented by non-disproportionate means.

In this respect, South African equality jurisprudence differs substantially from EU jurisprudence. Affirmative action programmes are not in fact in themselves seen as a deviation from the right to equality guaranteed by Section 9 of the Constitution. Formal equality and substantive equality are complementary, and both contribute to the constitutional goal of achieving equality to ensure full and equal enjoyment of full rights. A disjunctive reading of formal and substantive equality would frustrate the foundational equality objective of the Constitution and its social justice imperatives. South African Courts should therefore be extremely careful not to interpret or construe equality legislation within an inapt framework that devalues the substantive egalitarian imperative as being a mere derogation of the formal equality paradigm. It is in this specific constitutional framework that an individual or collective right to demand that an employer or other entity adopts and/or implements an affirmative action programme should find support. Both Section 9(3) and (2) provide instances of enforceable fundamental rights.

But the South African experience suggests even more. The notion that legal rights create two distinct categories of persons, namely bearers of rights, to be distinguished from mere claimants of rights, is true both of rights that arise by virtue of legislation and of rights that arise as a result of adjudication. Although an adjudicatory process may engage private parties in seemingly isolated disputes, nevertheless, any right accorded as a result of such adjudication takes on the character of a rule of law. In doing so it creates a prospective set of bearers of rights who are otherwise indistinguishable from those generated by rights in legislation. Any subsequent individual claimant who complies with the criteria set out in the
previous adjudication must be granted the right and thus membership in the category of bearers of rights.

From this perspective, the South African Constitutional Court assertions that (1) ‘the achievement of equality is ... a guaranteed and justifiable right in our Bill of Rights’ (Van Heerden 1136D), and (2) that the Constitution ‘imposes a positive duty on all organs of state’, including the judiciary, ‘to protect and promote the achievement of equality’ (Van Heerden 1137A) to make the constitutional commitment to the ideal of substantive equality and societal transformation a specific and unique reality, instead of a hollow promise of change.

That said, the contentious elements underlying affirmative action go beyond the mere sacrifice that group-differential treatment imposes on formal (individual) equality (Van Heerden 1139F), but refer to the price, in terms of individual (liberal) rights, that a subset of people belonging to a category of previously privileged people must inevitably pay. In this respect, we finally contend that group differentiated rights are critically diverse in nature, making a contextual assessment essential in every instance. Sachs J, in his concurring opinion in the Van Heerden decision, unambiguously captures the core of the question:

The main difficulty concerning equality in this case is not how to choose between the need to take affirmative action to remedy the massive inequalities that disfigure our society, on the one hand, and the duty on the State not to discriminate unfairly against anyone on the grounds of race, on the other. It is how, in our specific historical and constitutional context, to harmonise the fairness inherent in remedial measures with the fairness expressly required of the State when it adopts measures that discriminate between different sections of the population. ... The necessary reconciliation between the different interests of those positively and negatively affected by affirmative action should, I believe, be done in a manner that takes simultaneous and due account both of the severe degree of structured inequality with which we still live, and the constitutional goal of achieving an egalitarian society based on non-racism and non-sexism. (Van Heerden 1172H-1173B)

To my mind, where different constitutionally protected interests are involved, it is prudent to avoid categorical and definitional reasoning and instead opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation. (Van Heerden 1174D-E)

Given our historical circumstances, and the massive inequalities that
plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged. That is what promoting equality (Section 9(2)) and fairness (Section 9(3)) require. Yet some degree of proportionality, based on the particular context and circumstances of each case, can never be ruled out. That, too, is what promoting equality (Section 9(2)) and fairness (Section 9(3)) require. (Van Heerden 1178E-G)63

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Notes
1. See also Rosenfeld 1991. To mention but a few of the other thorny issues, one could canvass: 1) whether, and in which field, the role of the merit and efficacy can be compensated by the principle of equal representation of social disadvantaged groups or other social targets (see Louw 2004(a), Louw 2004(b), McGregor 2003(a), Oppenheim 1983, Young 1962, Gustapane 1987, Ferguson 2004, Leach 2004, Lerner 2004); 2) whether and to which extent formal equality can be departed from in order to advance substantive equality (see Sanders 2003, Pretorius 2001, Mashigo 1995, Oliver 1995, Van der Merwe 1994, Ainis 1992, Assanti 1996, Gianformaggio 1996, Ainis 1993, D’Aloia 2002); 3) whether it is fair for a limited portion of people to carry the cost of redress to the disadvantaged, and what kind of justification should be applied to affirmative measures (see Mazrui 2004, Mosley 1996, Dupper 2004, Makhonya Dibodu 1995, Madala 1999, Greene 1989, Clara 2004); 4) whether there is any rationale to the fact that the beneficiaries of positive actions may be individuals other than those disadvantaged by past discrimination; 5) whether it is possible to develop a fair and ‘socially acceptable’ concept of disadvantage, and the relationship between past disadvantage and current beneficiaries who may no longer be disadvantaged (see McGregor 2002(b), Rand and Light 2004); and 6) whether remedial measures entail collateral risks, and whether they are really able to eliminate bias by changing widely entrenched attitudes at the grassroots (see Killenbeck 2004, Little 1994, Mississippi University for Women v. Hogan 458 U.S. 718 (1982)).

2. Section 9(2) of the Constitution reads as follows: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken’.
3. In *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC), at 329A-C, the Labour Court stated that ‘affirmative action is to be collective in nature, that it is to be participative and programmatic, and that it is to be essentially self-regulatory. There are targets, there are categories, there are dates, and there are numbers. That is its working vocabulary. Its antithesis is an ad hoc adjudication of the kind that the applicant seeks to enforce in this matter, on the basis that there is an independent and individual right to affirmative action’.


6. Before the *Harmse* and *Dudley* judgments, under the LRA, in *Abbott v Bargaining Council for the Motor Industry* (1999) 20 *ILJ* 330 (LC), at 334, the Court found that an applicant for employment derived no rights from a contractual or negotiated affirmative action policy. In *Ntai & Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC), at 218-219, the Court pointed out that Section 9(2) of the Constitution also specifically endorsed the use of affirmative action to protect or advance persons, disadvantaged by unfair discrimination, but stressed that ‘this does not mean, of course, that an “anti-discrimination clause” such as item 2(1)(a) of schedule 7 to the LRA can be interpreted as awarding a victim of discrimination the right to affirmative action. On the contrary, a legislative measure such as chapter 2 of the EEA is needed to provide possible remedies in this regard’. Indeed, in *Stoman v Minister of Safety and Security* (2002) 23 *ILJ* 1020 (T), at 1035H-I, the Court found that ‘The emphasis is certainly on the group or category of person, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South Africa Society’ (See also *Walters v Transitional Local Council of Port Elizabeth* (2000) 21 *ILJ* 2723 (LC)).

7. Margalit and Raz 1990 have indeed shown that, even those rights that logically can be asserted only by group qua group (a right to collective determination, for instance) nonetheless remain grounded, from a liberal perspective, in individual interest.

8. Even in the different context of the United States, in *Gratz v Bollinger* 123 S. Ct 2411 (2003), at 2444, Ginsburg J (dissenting) stated that ‘actions designated to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated’.

9. S9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law...
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic, social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10. Madala 1999:1548: ‘By including affirmative action as a fair defence to discrimination, the Legislature indicates that the law does not view affirmative action measures as a form of reverse discrimination, but rather as a form of fair discrimination. Through the inclusion of affirmative action as a recognised defence to discrimination, the framers of the Act avoided the debate in the United States as to whether affirmative action constituted reverse discrimination. […] It is unlikely that this debate will occur in South Africa, as the Constitution, the Labour Relations Act, and the Employment Equity Act all explicitly include affirmative action measures as a legitimate defence to allegation of discrimination or inequality, and hence as congruent with the constitutional commitment to equality’.

11. This double dimension is implicit in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC), where Ackerman J emphasises that ‘particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied’ (National Coalition para 60). See also President of the Republic of South Africa v Hugo 1997 (6) BCLR 708 (CC); 1997 (4) SA 1 (CC) at 729G, where Goldstone J remarked: ‘We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context’ (Freedman 2000).

13. The Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act: ‘[a] although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy’.

14. The achievement of equality ‘implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequence’ (The Preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act).

15. Chapter 2, Section 6 of the PEPUDA: ‘Neither the State nor any person may unfairly discriminate against any person’. The Chapter also contains specific prohibitions of unfair discrimination on the ground of race (Section 7), gender (Section 8), disability (Section 9), and extends the conception of discrimination to include the prohibition of hate speech (Section 10), harassment (Section 11) and dissemination of information that unfairly discriminates (Section 12).

16. Chapter 5 of the PEPUDA (sections 24-29). Section 5 of the PEPUDA provides that ‘(2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provision of this Act must prevail. (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies’.

17. Section 1 of the PEPUDA (emphasis added). The same provision states that prohibited grounds are ‘(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other grounds where discrimination based on that other ground – (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedom in a serious manner that is comparable to discrimination on a ground in paragraph (a)’.

18. Chapter I, Section 2 of the EEA (emphasis added); Section 1 specifies that ‘designated groups’ means black people, women and people with disabilities.

19. Chapter II, Section 6(1) of the EEA: ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or
practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth’. Section 6(2) of the EEA adds that ‘it is not unfair discrimination to – (a) take affirmative action measures consistent with the purpose of this act; or (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job’.

20. Chapter II, Section 5 of the EEA: ‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’ (emphasis added).

21. Section 12 of the EEA defines a ‘designated employer’ as being generally a person who employs 50 or more employees, or a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of specified parameters listed in Schedule 4 of the EEA (Section 1). Section 14 of the EEA enables employers that are not ‘designated employers’ to comply voluntarily with Chapter III of the Act. Designated employers must achieve the purpose of redressing the disadvantage in employment by implementing affirmative action measures in favour of members belonging to ‘designated groups’ (ie black people, women and the disabled).

22. Such measures would include the means of identifying and eliminating employment barriers, including unfair discrimination, as well as devices to ensure the equitable representation of suitably qualified people from designated groups. Section 20(3) of the EEA states:

a person may be suitably qualified for a job as a result of any one of, or any combination of that person’s –

(a) formal qualification;
(b) prior learning;
(c) relevant experience; or
(d) capacity to acquire, within a reasonable time, the ability to do the job, and subsection (4) reads that when determining whether a person is suitably qualified for a job, an employer must –

(a) review all the factors listed in subsection (3); and
(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors;

finally, subsection (5) provides that in making such a determination ‘an employer may not unfairly discriminate against a person solely on the ground of that person’s lack of relevant experience’ (EEA:S20(3)-(5)).

23. The medical School of the University of California at Davis had a separate admissions programme to increase the enrolment of economically and/or educationally disadvantaged minority students. This programme applied different
academic standards and reserved 16 of 100 openings to minorities. Bakke challenged the policy on the grounds that it constituted race discrimination in terms of Title VI of the Civil Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment. The Supreme Court held that affirmative action programmes were possible to redress past discrimination (see Ball 2000, Schwartz 1988, Welch 1998). Regarding affirmative admission policy in the field of education, see also Hopward v. Texas, 78 F.3d 932 (5th Cir. 1996). Unlike the Bakke case, the Court of Appeal (fifth circuit) struck down the affirmative action policy of the University of Texas Law School. The Court held that the Fourteenth Amendment does not permit discrimination in favour of minority groups to the detriment of whites, and that race may not be used as a factor in school admission policy. The Court found insufficient evidence to show ‘present effects of past discrimination’ (Hopward 953). More recently, see Grutter v Bollinger 123 S. Ct 2325 (2003), and Gratz v Bollinger 123 S. Ct. 2411 (2003). For a wide-spread perspective regarding admission affirmative action programmes at University and the recent American debate see: Feinberg 1998, Soto 2004, Crump 2004, Ware 2004, Friedman 2004, Tilles 2004, Sedler 2003-2004, Huskey 2004, Turner 2003.

24. On this case see Pretorius 1996.


26. Art. 1(1) of Directive defines the purpose of the Act as being ‘to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions’.

27. Art. 2(1) For the purpose of the following provision, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status…

28. Art. 2(4) This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in article 1(1).

29. Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women, in OJ 1984 L 331, 34. The third recital contained in the Preamble recognises that ‘existing legal provision on equal treatment, which is designed to afford rights to individuals, is inadequate for the elimination of all existing inequalities unless parallel action is taken by governments […] to counteract the prejudicial effects on women in employment which arises from social attitudes, behaviour and structures’.

30. It recommends that member states
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(1) adopt a positive action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment … in order

(2) (a) to eliminate or counteract the prejudicial effects on women in employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women;

(b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future, and at higher level of responsibility in order to achieve better use of human resources.


32. For a comprehensive overview see Pager 2003.

33. As derogation from an individual right laid down in the Directive, Article 2(4) must be interpreted strictly… National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond equal opportunities and overstep the limits of the exception in Article 2(4) of the Directive. Furthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels… such a system substitutes for equality of opportunity as envisaged in Article 2(4) the result which is only to be arrived at by providing such equality of opportunity (Eckhard Kalanke Para 21-23).

34. Furthermore, in Lommers v. Minister van Landbouw, Natuurbeheer en Visserij, in ECR I-2891 (2002), the ECJ held that ‘the Directive does not preclude a scheme set up by a Ministry to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the ministry to its staff is reserved for female officials alone whilst male officials may have access to them only in cases of emergency, to be determined by the employer. That is so, however, only in so far, in particular, as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to those nursery places on the same conditions as female officials’ (Lommers 50). See also Klaus 2002:156-9.

36. See also *Cupido v GlaxoSmithKline South Africa (Pty) Ltd* (2005) 6 BLLR 555 (LC). Formerly, under the LRA, in *Abbott v Bargaining Council for the Motor Industry* (1999) 20 ILJ 330 (LC), at 334, the Court found that an applicant for employment derived no rights from a contractural or negotiated affirmative action policy. In *Ntai & Others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC), at 218-219, the Court pointed out that Section 9(2) of the Constitution also specifically endorsed the use of affirmative action to protect or advance persons, disadvantaged by unfair discrimination, but stressed that “this does not mean, of course, that an “anti-discrimination clause” such as item 2(1)(a) of schedule 7 to the LRA can be interpreted as awarding a victim of discrimination the right to affirmative action. On the contrary, a legislative measure such as chapter 2 of the EEA is needed to provide possible remedies in this regard”. Indeed, in *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T), at 1035H-I, the Court found that “The emphasis is certainly on the group or category of person, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward a fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South Africa Society”. See also *Walters v Transitional Local Council of Port Elizabeth* (2000) 21 ILJ 2723 (LC).

37. The unsuccessful applicant sought leave to appeal directly to the Constitutional Court instead of first to the Labour Appeal Court, the normal avenue, arguing that the matter raised an important issue concerning the constitutional right to equality and that it was essential to obtain clarity thereon. The Constitutional Court in *Dudley v City of Cape Town & Another* (2004) 25 ILJ 991 (CC) admitted that the interpretation and application of the EEA potentially raises important constitutional issues (*Dudley* 993E-F), but it refused the application holding that the Labour Courts, specifically the Labour Appeal Court, should not be bypassed in matters falling within their jurisdiction (*Dudley* 994D-E). The Constitutional Court held that it would be prepared to consider the merits of the issue in the light of the Labour Appeal Court’s decision (*Dudley* 994H). At the time of writing, the case is still pending before the Labour Appeal Court.

38. Mr Harmse, a ‘black person’ belonging to a ‘designated group’ for the purposes of the EEA, applied for three posts but was not short-listed for any of them. He approached the court alleging that the respondent had failed to review all the factors mentioned in Section 20(3) and (4) of the EEA to establish whether the applicant was ‘suitably qualified’, and that therefore he had been unfairly discriminated against on the basis of a lack of relevant experience. He argued that this kind of unfair discrimination is prohibited by Section 6 of the EEA.

39. Chapter III of the Act contains the definition of a person ‘suitably qualified’
under section 20(3)–(5), which applies only to designated employers. The Court, however, linked the definition of a person ‘suitably qualified’ to the Act as a whole, and thus binding on all employers, not just designated employers. Chapter I, Section 4 (‘Application of this Act’) of the EEA states that ‘(1) Chapter II of this Act applies to all employers. (2) Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups. (3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service’.

40. Section 1 of the EEA defines ‘employment policy or practice’ as including, but not being limited, to ‘selection criteria’ and ‘performance evaluation system’.

41. Of the same opinion is Westmoreland who affirms that ‘the new conception of discrimination lays the foundation for a demand for a comprehensive regime of affirmative action. Qualified black people candidates who would lose out in a competition to an equally or more qualified white candidate have a claim of a right to affirmative action, at least until the workplace is proportional to the racial makeup of the community’. The author suggests that there are two broad meanings of discrimination. One view argues that any different treatment on the basis of any prohibited grounds (race, sex, sexual orientation) is discrimination. This view believes that it is wrong to use arbitrary characteristics as grounds for treating people differently in any factual context. This view also envisages affirmative action as wrong as it uses prohibited grounds (race, sex, sexual orientation) as a reason to treat persons differently. The second view deems that the litmus test is not whether people have been treated differently on the basis of a prohibited ground, but whether this has resulted in harm or prejudice. Therefore, different treatment on the grounds of factors like race, sex or sexual orientation can be lawful if it does not result in harm. In this sense, affirmative action is not a reverse discrimination, but implementation of substantive equality. By the same token, treating people in the same way can be discriminatory if it has a harmful result.

42. ‘The Act must also be interpreted so as to give effect to its purpose. Section 2 of the Act defines its purpose as follows: “The purpose of this Act is to achieve equity in the workplace by – (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in the workforce”. Viewed in this matter, Section 20(3)-(5) is an integral part of steps to be taken by an employer to promote equal opportunity in the workplace by eliminating unfair discrimination. One way in which employers could unfairly discriminate is by elevating “lack of relevant experience” to a “sine qua non” for the purposes of appointment or indeed promotion. This mischief has been identified and addressed by the Act. The Act in Section 6 lists
a number of grounds on which an employer (whether designated or otherwise) may not discriminate. The grounds referred to in section 6 do not constitute an exhaustive list. This is illustrated by the use of the word “including” just before the listed (specified) grounds’ (Harmse 1144B-D).

43. ‘This would be consistent with one of the purposes of the Act, namely “promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”. To hold otherwise would place a restriction on the jurisdiction of this court which is warranted neither by the express language of the Act nor by its purpose’ (Harmse 1144E-F).

44. Section 6 of the EEA reads as follows: ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth’.

45. Emphasis added.

46. In this regard, see also Garbers 2003:99. The central role of an affirmative action plan was also stressed under the LRA. In McInnes v Technikon Natal (2000) 6 BLLR 701 (LC), at 710G-H, the Court held that an employer has the onus to show that the preference accorded to a person belonging to an underrepresented class is in compliance with the affirmative action policy plan: ‘What needs to be considered then is whether the discrimination against the applicant is sanctioned by the LRA. This in turn requires an examination of the respondent’s affirmative action and employment policies in order to determine firstly whether these policies fall within the ambit of what is sanctioned by item 2(2)(b), and secondly whether the selection […] fell within the ambit of such policies’. Indeed, some countries belonging to the European Community have positively provided that, until a women’s advancement plan has been drawn up, no appointments or promotions may be made in sectors in which women are underrepresented (see par. 10(5) of the Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung, in GBVBI., I, 729, adopted on 21 December 1993 by the Land of Hesse). Thus, that provision implicitly recognises that if the advancement plan for women is not yet in force, no appointments or promotion may be made, as in that case the employer would contravene a recognised right.

47. In this case, the applicant was employed on contract, which was later renewed. The applicant’s post was to become permanent and she was informed to apply ‘as a matter of form’. After her interview, the majority of the selection committee recommended her appointment. This was not done. The applicant’s main cause of action – that she expected her appointment to be renewed permanently – was found to be reasonable in the circumstances. So she claimed that she was dismissed in terms of Section 186(b) of the LRA. It was not disputed that the
applicant (as an applicant for employment) was discriminated against on the basis of race or sex but the respondent alleged that this was justifiable in terms of its affirmative action policy, which, in turn, was permissible in terms of item 2(2)(b). It was accepted that the onus rested on respondent to show this. The Labour Court scrutinised the employer’s policy to determine, first, whether it fell within the ambit of what was allowed by this term, and, secondly, whether the selection of a different person ahead of the applicant fell within the ambit of such policies.

48. Similarly, it has been held that the compliance with the Broad-Based Black Economic Empowerment Act No. 53 of 2003 can never be a justification for a dismissal: ‘This point has not been tested in our courts in relation to BEE, but if cases dealing with affirmative action are anything to go by […] one cannot use BEE as a defence for dismissal […] an employer cannot dismiss an employee in order to make an affirmative action appointment. Such dismissal would be automatically unfair’ (see http://www.legalbrief.co.za/article.php?story=20041113185747345).

49. Dr L Dudley, a black female medical doctor, unsuccessfully applied to the City of Cape Town for the position of Director: City Health. The position was offered to Dr I Toms, a white man, also a medical doctor. After (unsuccessfully) referring the case to the Commission for Conciliation, Mediation and Arbitration, Dudley brought an application in the Labour Court seeking, inter alia, an order to set aside the appointment of the white male candidate and appointing her in that position. In her statement, Dudley alleged that failure to appoint her constituted unfair discrimination, an unfair labour practice, a breach of the affirmative action provision of the EEA and a breach of the City’s constitutional obligation, such as those created by Sections 9(1), (2) and (3) and 10 (human dignity). (Dudley 316A-317E) The City of Cape Town opposed the case on various grounds, but mainly argued that an employer’s failure to apply affirmative action criteria by failing to advantage or prefer a member of a designated group could not in law constitute unfair discrimination in terms of Section 6(1) and (2) of the EEA, and thus the claim disclosed no cause of action (Dudley 317F-318J).

50. A comparison of these two chapters shows that there are indeed points of distinction that are significant for this case. The prohibition against unfair discrimination is directly enforceable by a single aggrieved individual or by the members of an affected group. Whether or not there has been discrimination is a matter of law and the application of the law to the relevant facts complained about. That is a matter for the decision of this court or an arbitrator and the content of the prohibition is not in any way the subject of consultation between employer and employees. By contrast, the structure of the Chapter III is such that, by definition, it is intended to and can be brought into operation only within a collective environment. This is inherent in the nature of the duties of an employer outlined in Section 13(2). Those are: consultation, analysis, preparation
of an employment equity plan and reports to the director-general on progress in the implementation of the plan. Each of those phases is given statutory content. That is important, for Section 13(1) qualifies the employer’s obligation as being one that is ‘in terms of this Act’. In the debate before me, the applicant and the amicus stressed the use of the words ‘must … implement affirmative action measures’ in Section 13(1) without regard to this qualification. In consequence, a number of their submissions have in my view accorded inadequate weight to the structure of Chapter III (Dudley 320B-F). Significantly, at 322E-F Tip AJ stated that ‘the provision of chapter III displays very clearly that its essential nature is programmatic and systematic. Importantly, its methodology is uncompromisingly collective. This is evident from the Act’. Accordingly, at 324B, the judge emphasized that the consideration of Chapter V (which deals with monitoring and enforcement of EEA) ‘furnish additional insight into the nature of affirmative action within the meaning of EEA’.

51. Chapter III, according to the Court, ‘goes beyond “equality of opportunity” and formal equality. The latter two remove obstacles in the form of discrimination. That objective receives distinct treatment in the Bill of Rights; in Section 9(4). … It likewise receives distinct treatment in Chapter II of the EEA. Just like Section 9(2) of the Constitution provides that the need for positive measures arises from past discrimination, Section 15(2) of Chapter III provides that barriers “including unfair discrimination” must be identified and eliminated. Those are some of the measures requiring consultation and that must be entrenched in the employment equity plan. It is of course logical that the first item to be addressed in an equity plan should be the removal of any remaining systemic unfair discrimination. If that were not done, affirmative action measures would constantly be impeded. However, that logical requirement does not put into place a bridge between the provision of Chapter II and III. Their purpose and operation remain distinct. In general, a failure to comply with the requirements of Chapter III will be a non-compliance issue and not one of unfair discrimination’ (Dudley 330D-H).

52. Amongst the most innovative features, the PEPUDA establishes Equality Courts and sets out a range of complementary remedies that can be used in their own or in combination with each other to address individual and systemic discrimination (Section 16-23). Significantly, Section 20(1) reads that proceeding under the PEPUDA may be instituted by ‘(a) any person acting in their own interest; (b) any person acting on behalf of another person who cannot act in their own name; (c) any person acting as a member of, or in the interest of, a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interest of its members; (f) the South African Human Rights Commission, or the Commission for Gender Equality’. Section 21(2) provides that a court may make an appropriate order in the circumstances, including ‘(f) an order restraining unfair discriminatory practices or directing that
specific steps be taken to stop the unfair discrimination, hate speech or harassment; (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question; (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question; (i) an order directing the reasonable accommodation of a group or class of persons by the respondent’.

53. In 1993 the Closed Pension Fund (CPF) was set up by the pre-1994 tricameral parliament to provide pensions exclusively for parliamentarians whether or not they were re-elected in the 1994 democratic election. Van Heerden was a member of this fund. It was adopted during the constitutional negotiations to allay fears regarding the security of the existing pensions of political office-bearers. A new pension fund, the Political Office-Bearers Pension Fund, was established in 1998. The rules of the Pension Fund created three categories of members. A category A member was a member under 49 years of age who was not a member of the CPF. A category B member was a member over 49 years old who is not a member of the CPF. A category C member was a ‘member who is a member of the CPF’. Each member made a fixed contribution to the fund. However, contributions payable by the employer were calculated according to a differentiated scale. Rule 4.2.1 of the Political Office-Bearers Pension Fund prescribed the variances, which essentially were that employer contributions for category C members were less than those for categories A and B members.

54. The High Court held that a person relying on Section 9(2) of the Constitution to justify discriminatory measures bears the onus of proving, on a balance of probabilities, that the measures have been taken to promote the achievement of equality, and found that the Minister and the Fund had failed to discharge this onus.

55. (a) Ameliorative measures under Section 9(2) of the Constitution, if based on any grounds listed in Section 9(3), had to be presumed unfair in terms of Section 9(5), and the applicants failed to rebut the resultant presumption of unfairness; (b) the scheme was unfair because the state did not allege that, in order to benefit the favoured group, it was essential that the disfavoured group should receive lower employee benefits; (c) though the majority of CPF members was better off than those who were not, Rule 4.2.1 had an adverse impact on 15 members of Category C, the so-called ‘jammergevalle’, and in testing the constitutional invalidity of the challenged scheme, an objective approach would have required the consideration of the position of all members affected (Van Heerden 1135E-1136B).

56. ‘Section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorizes legislative and other measures designed to protect or advance persons or categories of people disadvantaged by unfair discrimination. Restitutionary measures, sometimes referred to as ‘affirmative action’, may be taken to promote the achievement of equality. The measures must
be “designed” to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality’ (Van Heerden 1138E-F) (Emphasis added).

57. Emphasis added.

58. Chapter I, Section 5 of the PEPUDA reads that the Act ‘binds the State and all persons’ and that the Act ‘does not apply to any person to whom and to the extent to which the Employment Equity Act […] applies’. In this sense, Section 24(2) of the PEPUDA, which states ‘all persons have a duty and responsibility to promote equality’, might be applied to persons to whom EEA applies, but in instances where the provisions of the PEPUDA go beyond those in the EEA. Clearly employees who are employed by a non-designated employer under the EEA are not able to take advantage of employment equity plans under Section 20 of EEA. Notwithstanding, Section 24(2) might at least suggest that even non-designated employers should adopt some practical measures to ‘promote equal opportunity’ as envisaged in Section 5 of the EEA. Furthermore, Section 1 of the PEPUDA fails to include the provision found in the constitutional definition of ‘organ of state’ (Section 239) that excludes courts and judicial officers from the definition of ‘organ of state. Thus, by implication, courts and judicial actors are included in the ambit of the Act.

59. Tip AJ averred that the Court had no power to accommodate individual claims based on affirmative action under the EEA stating: ‘had it been the intention of the legislature […] one would expect that to have been included in the powers set out in s. 50(1)’ of the EEA. (Dudley 328A)

60. It is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discrimination practice and whether it ameliorates or adds to group disadvantage in the real life context, in order to determine its fairness or otherwise in the light of the Constitution. (Van Heerden 1138A).

61. ‘Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework. The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution … From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact’ (Van Heerden 2004:1137B-E).

‘Such measures are not in themselves a deviation from, or invasive of, the right
to equality guaranteed by the Constitution. They are not “reverse discrimination’ or positive discrimination ... they are integral to the reach of our equality protection. In other words, the provision of Section 9(1) and Section 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure “full and equal enjoyment of all rights”. A distinctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives’ (Van Heerden 1139D-F).

62. Mokgoro J at 1154C-D, noticed that ‘section 9(2) is forward-looking and measures enacted in terms of it ought to be assessed from the perspective of the goal intended to be advanced. The measures must promote the achievement of equality by advancing those previously disadvantaged in the manner envisaged. This is not to say that the interest of those not advanced by the measure must necessarily be disregarded. However, the main focus in section 9(2) is on the group advanced and the mechanism used to advance it’. See also Sachs J, at 1175F-H.

63. Emphasis added.

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LEGISLATION

Broad-Based Black Economic Empowerment Act 53 of 2003


Declaration No 28 concerning article 141(4) (ex article 119(4)) of the Treaty establishing the European Community, annexed to the final act of the Treaty of Amsterdam.

Employment Equity Act 55 of 1998


Labour Relations Act 66 of 1955

