AFFIRMATIVE ACTION FOR SOUTH AFRICAN CITIZENS: THE ROLE OF THE DEPARTMENT OF LABOUR

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SUMMARY

In the *Auf der Heyde* case the Labour Appeal Court held that in the South African context affirmative action should be limited to South African citizens. In this article the author evaluates the case and concludes that this interpretation by the Labour Appeal Court is acceptable in the historical context of the country. The main focus of the article is on the role of the Department of Labour in this regard. The Department provided certain guidelines concerning the issue of citizenship in the context of affirmative action. These guidelines are important but unfortunately not clear. The author recommends that the Department takes a clear policy decision with a view to ensuring that South African citizens are preferred in terms of affirmative action policies.

1 INTRODUCTION

1 1 Employment Equity Act

The Employment Equity Act[1] (hereinafter "the EEA") provides the touchstone for affirmative action in the workplace. It establishes "designated groups" – black people, women and people with disabilities[2] – as the beneficiaries of affirmative action measures[3] which have to be implemented[4] by "designated

[1] 55 of 1998. The EEA gives effect to s 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"). The EEA's purpose is to achieve equity in the workplace by eliminating unfair discrimination (s 2(a) and ch II) and to redress past disadvantages by implementing affirmative action measures (ss 2(b), 15(2) and ch III).

[2] Section 1 of the EEA. "Black people" is a generic term for Africans, Coloureds, and Indians. "People with disabilities" denotes people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment.

[3] Such measures must include measures to identify and eliminate employment barriers which adversely affect people from designated groups; measures to further diversity in the workplace; measures for reasonably accommodating people from designated groups; measures to ensure equitable representation of suitably qualified people from designated groups; measures to retain and develop people from designated groups; and measures to implement appropriate training measures (including skills development) (s 15(2)). The last two measures include preferential treatment and numerical goals, but exclude quotas (s 15(3)).

[4] In implementing affirmative action measures, employees must be consulted (ss 13(2)(a), 16, 17 and 18); an analysis of the workforce must be done (ss 13(2)(b) and 19); and an employment equity plan must be prepared (ss 13(2)(c) and 20). Certain items must be included in the plan: the objectives to be achieved for each year of such a plan; the affirmative action measures to be implemented as required by s 15(2); where under-representation of people

employers".[5] Over and above being a member of one of the designated groups, a person must also be "suitably qualified" in order to benefit under affirmative action.[6] A further requirement for beneficiaries of affirmative action – citizenship – on which the EEA is silent, was added by the Labour Court in *Auf der Heyde v University of Cape Town*.[7]

This article first recaps on the *Auf der Heyde* judgment and a previous evaluation of the case which shows the interpretation to be plausible.[8] Against this background, secondly, the focus turns to the guidance by the Department of Labour on this issue. Some recommendations are made, thirdly, for the Department to ensure that South African citizens benefit under affirmative action measures.

1 2 *Auf der Heyde* case

In *Auf der Heyde*, the court accepted that the concept of affirmative action as envisaged by the Constitution and the Labour Relations Act[9] (hereinafter "the LRA", which regulated affirmative action in the workplace prior to the EEA) was one that had been developed against the specific background of South Africa's discriminatory history.[10] It found merit in the submissions that the legacy of discriminatory practices to be addressed by affirmative action were those of "this country",[11] and that the only people to whom affirmative action measures should "legitimately and fairly" be directed, were people "previously and directly disadvantaged by unfair discrimination in the South African context".[12] Affirmative action to rectify the country's imbalances should, therefore, be confined to the pool of available South African blacks and women,[13] and South African citizens with disabilities who were discriminated against under apartheid and patriarchy. Put differently, nationality is an "essential and legitimate" limiting criterion.[14]

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from designated groups has been identified, the numerical goals, strategies and timetables intended to achieve these goals; the timetable for each year of the plan, the duration of the plan; the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made; the internal procedures to resolve any dispute about the interpretation or implementation of the plan; and the people responsible for monitoring and implementing the plan (ss 20(2)(a))-20(2)(h)). The Regulations to the EEA (GN R 1360 *GG* 20626 1999-11-23 (*Reg Gaz* 6674) provide information on demographic data, occupational levels and categories to which employers may refer when they establish their numerical goals. A duty to report on progress made is placed on every designated employer (ss 13(2)(d) and 21). Failure to comply with these requirements may lead to fines and to state contracts being refused or cancelled (s 53, Schedule 1 to the EEA).

5 Ss 1 and 13(1) of the EEA. The term "designated employers" denotes essentially larger enterprises (in terms of the number of employees and turnover), municipalities, organs of state, and employers appointed as such in terms of a collective agreement (s 1). Employers who are not designated may comply voluntarily with the affirmative action requirements of the EEA (s 14).

6 Ss 15 and 20 of the EEA.

7 2000 8 BLLR 877 (LC).

8 The interpretation will, however, be qualified in the sub-text.

9 66 of 1995.

10 893G and 893I.

11 893F and 893I.

12 893H and 893I.

13 893I.

14 893H-893I.

1 3 A plausible interpretation[15]

An analysis of the *Auf der Heyde* case showed the interpretation to be plausible against the background of modern interpretation theory, which favours a contextualised and purposive approach, together with the (traditional) literalist approach.[16]

Contextualism holds that the meaning of particular words is to be found not so much in a strict etymological property of language, but in the "*subject or occasion*" on which the words are used and the "*object*" that is intended to be attained. It basically entails that a particular provision of a statute has to be understood as part of the whole. Context, thus, denotes both the language of the remainder of the statute and the matter, the apparent purpose and the scope, and the background of the law. "Background" is generally understood as "history" and is a contextual element frequently taken into account for purposes of interpreting ordinary as well as constitutional legislation where obscure language conceals the intention of the legislature.

Contextualism goes hand in hand with purposivism. The latter endeavours to establish the purpose that the legislator wanted to achieve by looking beyond the manifested intention. Purposivism nowadays is important as the key to constitutional interpretation. This, of course, also impacts on the interpretation of ordinary legislation, especially for legislation closely associated with South Africa's socio-economic and political transformation.

Two manifestations of purposivism are the mischief rule, and the assertion that statutory provisions are to be construed in the light of the objects they seek to achieve. The first mentioned's purpose in interpreting constitutional legislation is to remedy the "mischief" or "defects" of the previous constitutional system of apartheid. In interpreting ordinary legislation, the aim is to suppress the relevant "mischief" and to promote the remedy designed for its elimination.

Purposivism must further be synchronised with the needs of South Africa's democratic constitutional order – this is termed the "teleological approach". In this way, not only the purpose that lies behind a particular provision is relevant, but also a realisation of the "scheme of values" informing the legal and constitutional order in its totality. In this sense, purposivism is seen as a "value-activating" interpretation.

On an application of the contextualised and purposive approaches, subsection 9(2) of the Constitution on affirmative action – referring to "persons, or categories of persons disadvantaged by unfair discrimination" – is shown to have particular meaning for South African citizens, the black majority who were denied South African citizenship and had separate citizenship in the homelands under apartheid.[17]

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[15] Par 1 3 of this article is a summarised version of part of an article "Citizenship as requirement to benefit from affirmative action" submitted to *De Jure* during September 2005.

[16] See McGregor *The Application of Affirmative Action in Employment Law With Specific Reference to Its Beneficiaries: A Comparative Study* (unpublished LLD thesis UNISA (2005) 169-180, 187-198, 202-208). In the analysis, the author strongly relied on Du Plessis *Re-interpretation of Statutes* (2002); Devenish *Interpretation of Statutes* (1992); Botha *Wetsuitleg 'n Inleiding vir Studente* 2ed (1998); and Bekink *Principles of South African Constitutional Law (A Student handbook)* 3ed (2003).

[17] Citizenship is therefore a particularly sensitive issue in South Africa (Bekink 124).

If one considers the "subject or occasion" in respect of which the words of the subsection were used (that is, that the Constitution was a political compromise reached by the political parties during the constitutional negotiations in an attempt to reconcile a highly divided and unequal South African society in the early 1990s); and the "object" that it was intended to achieve (that is, equality for the black majority of South African people and women and South African citizens with disabilities), these point mainly to South African people disadvantaged by unfair discrimination under apartheid and patriarchy. Further, if these words are interpreted as part of the whole of the Constitution, the words in the light of their context (including the background history to the adoption of the Constitution), all relate mainly to the majority black population and to women in South Africa who suffered disadvantage, and whose position must now be rectified. Similar arguments put forward with regard to the Preamble to the Constitution, lead to an inference that the main focus of the Constitution is to heal the *South African people's* past and to enshrine *their* rights.

The fundamental "mischief" that the Constitution has to remedy, it has been submitted, is the disadvantage suffered by particular groups under apartheid and patriarchy in the past. Accordingly, the Constitution uses affirmative action as a remedial measure to suppress this "mischief" and to advance equality. In this way the state respects, protects, promotes and fulfils the right to equality, and aspires to a realisation of the "scheme of values" informing the South African constitutional order.[18] Such an interpretation was seen as a "value-activating" interpretation in an effort to achieve equality. In particular, it can be seen as enhancing the dignity of South African citizens, an aspect severely scorned under apartheid and patriarchy. And, it could be seen as a way of integrating people into the new South African order.

With regard to the EEA,[19] similar arguments showed that, when taking into account the Explanatory Memorandum to the Employment Equity Bill and the Preamble to the EEA, a contextualised and purposive approach pointed particularly to South African *citizens*, and to redressing *their* inequalities.

In light of the above, the Labour Court's interpretation in *Auf der Heyde* thus appears to be correct in that nationality is a legitimate limiting factor for establishing the beneficiaries of affirmative action.[20]

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[18] See s 7(2) of the Constitution.

[19] An interpretation of the affirmative action provisions of the EEA will hold true for the LRA as well, because the two statutes' wording in this regard is similar, and both are interpreted against the historical context of an apartheid society, currently transforming into a democratic society.

[20] This interpretation was, however, qualified. South Africa has for many years drawn heavily for its unskilled labour requirements on certain countries in the southern African region, namely Lesotho, Mozambique, Botswana and Swaziland (Restructuring the South African Labour Market: Report of the Presidential Commission to Investigate Labour Market Policy chaired by DH Lewis and MM Ngoasheng (1996) 175, The Complete Wiehahn Report Parts 1-6 and the White Paper on each Part With Notes by Professor NE Wiehahn chaired by Wiehahn (1982) part 6 pars 2.7-2.11). Specific sectors, such as mining and agriculture, recruited large numbers of migrant workers. These workers were employed on temporary contracts, usually renewable every 12, 18 or 24 months, and were repatriated to their countries of origin once the contracts expired. They were usually guaranteed of returning to the same job within a specified period of time, and usually in terms of bilateral treaties between the countries (Labour Market Report 172, 174-175). Workers admitted under these treaties had fewer rights than people admitted under the (then) Aliens Control Act 96 of 1991 (subsequently repealed by the Immigration Act 13 of 2002 (also see par 3 below)). Generally, the latter could apply for citizenship after a period of permanent residence of five

2 DEPARTMENT OF LABOUR

2 1 Introduction

The Department of Labour is responsible for the administration, monitoring, and enforcement of the EEA.[21] The Commission for Employment Equity advises the Minister of Labour on policy issues concerning the EEA,[22] and codes of good practice[23] to provide employers with information that may assist them in implementing the EEA, and in particular in implementing affirmative action measures.[24] The Minister may, on advice of the Commission for Employment Equity, issue regulations.[25]

Two codes of good practice were issued. The Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans[26] contains practical guidelines regarding procedure and substance for implementing affirmative action measures. The second, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices gives guidance on how to attract, manage, develop

years, while the former could not, even after lengthy periods of working in South Africa (Glaser and Possony *Victims of Politics The State of Human Rights* (1979) 337-338; and Labour Market Report 175-176, 179, 181). During the investigations of the Labour Market Commission, the National Union of Mineworkers and the Chamber of Mines requested that an end be made to the unequal treatment of such migrant workers. At that stage, the Department of Home Affairs indicated that investigations were under way with a view to amending the relevant treaties, which were no longer in line with international requirements. It recommended that the (then) prevailing migration policy be amended so as to have one act regulating all aliens coming into South Africa and that all workers be treated equally. It further recommended that, in allocating permits for entry to the South African labour market, three criteria should apply. First, national skills requirements should be taken cognisance of. Secondly, a preferential policy was mooted in terms of which workers from the mentioned countries would be granted access to the South African labour market on a continuing basis, and to all sectors. Thirdly, the entry for work should be based on the need to redress past injustices regarding access to the South African labour market. In this regard, it is submitted that these "mischiefs" towards migrant workers need to be remedied, and that the Constitution can be a "remedial measure" in this sense too. Although the South African history is one in which the most visible and vicious pattern of discrimination has been racial, "other" systematic motifs of discrimination were also inscribed on the country's fabric *(Brink v Kitshoff* 1996 4 SA 197 par 41). It does, however, appear that non-citizens as a group were not envisaged as one of the main target groups of affirmative action at the time of the drafting of the Constitution or the EEA. Nevertheless, an interpretation that includes not only the mischief of the past constitutional order against the South African people, but goes further and includes other groups on the receiving end of apartheid and other discriminatory laws and practices, is substantiated by the rules of interpretation which provide that the provisions of the Constitution and the EEA must be understood as part of the whole of their texts. In this regard, it is submitted that while both texts point mainly to the history and background of apartheid, they also point to a broader context: the country's aspirations to non-racialism and non-sexism, the achievement of equality, the advancement of human rights and freedoms, and diversity (Preamble, s 1 of the Constitution; Preamble, s 1 of the EEA). In this way, (similar to the arguments in par 1.3 above) the Constitution and the EEA aspire to a realisation of the "scheme of values" informing the legal and constitutional order in its totality. A clear policy decision in this regard needs to be taken by the Department of Labour against the background of relevant inter-state treaties and the Immigration Act.

21 See ss 34-45 of the EEA.

22 S 30(1)(c) of the EEA.

23 Ss 30(1)(a), 54(1)(a) and 54(1)(b) of the EEA. The Minister may issue, change or replace codes.

24 S 54(1)(a) fn 8 of the EEA.

25 S 30(1)(b) of the EEA.

26 GN R 1394 *GG* 20626 1999-11-23 (*Reg Gaz* 6674).

and retain talent in the workforce through effective human resource management.[27] Regulations have also been issued.[28]

Neither the codes nor the regulations address the issue of citizenship as a requirement to benefit from affirmative action measures. However, on the Department's website, under "Frequently asked Questions",[29] some guidance has been given in this regard.

2 2 Early pointers

In response to the question: "Do foreign nationals qualify as members of designated (disadvantaged) groups?", it was stated:[30]

> "Although foreign nationals may be included in the various designated groups as *reported* by the employer,[31] it would be unacceptable to use these employees as the basis for *measuring and setting numerical goals*"[32] (own emphasis).

The preclusion from using foreign nationals for measuring and setting numerical goals is welcomed. These goals go to the heart of the employment equity process as their purpose is to increase the representation of people from designated groups in each occupational category and level in the workforce where under-representation has been identified, and to make the workforce reflective of the country's demographics.[33]

However, allowing an employer to include non-citizens for reporting purposes, is ambiguous. This may be interpreted to mean that foreign nationals who have already been appointed, or who will be appointed in future in the ordinary course of business (not on the basis of affirmative action), can be reported on in terms of the EEA.

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

It is submitted that this situation is not ideal, as, first, employers may abuse the guideline. Second, the approach of allowing foreign nationals to be reported as part of designated groups, may lead to a misleading picture and figures in respect of South African people who have actually been appointed in terms of affirmative action measures. It is submitted, thirdly, that it would defeat the purpose of both the Constitution and the EEA if employers were allowed to recruit black, female and/or disabled non-citizens and to use such figures for affirmative action purposes. It has been shown

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27 GN R 1358 *GG* 27866 2005-08-4.

28 See fn 4 above.

29 http://www.labour.gov.za/docs/legislation/eea/faq.html.

30 http://www.labour.gov.za/docs/legislation/eea/faq.html s 7 headed "Classification".

31 See item 2 of the Employment Equity Report Form EEA 2 where an employer must report on the total number of employees in the workforce for the various occupational categories under the groups African, Coloured, Indian and White. Item 2, a snapshot report of an employer's workforce profile, does not distinguish between citizens and non-citizens. This may create a misleading picture of the facts in the particular workforce.

32 See item 15.1 of the Employment Equity Report Form EEA 11 where an employer must report on the numerical goals set for the various occupational categories under the groups African, Coloured, Indian and White.

33 See fn 4 above, Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans s 8.4.1.

above that, on an accurate interpretation of the Constitution and the EEA, affirmative action measures are meant to benefit South African citizens.[34] This should be true for purposes of both measuring and setting numerical goals and for reporting purposes.

2 3 Recent indications

The Minister of Labour has recently reiterated that foreign black people from "anywhere in the world" cannot be included in any employer's employment equity numerical goals.[35] He made it clear that the intention in enacting the EEA was to remedy disadvantage suffered as a result of apartheid discrimination, and that foreign black employees would not have been subjected to this.[36] The Minister did state, however, that employers cannot discriminate against foreigners by excluding them from employment merely on the grounds of their lack of South African citizenship, where they have a valid work permit and are legally entitled to be in the country.

This first part of the statement, again, is welcomed. The second part is agreed with to the extent that there is compliance with the provisions of the Immigration Act.[37]

3 RECOMMENDATIONS

To effect the appointment of South African citizens under affirmative action, it is recommended that, as a matter of priority, the Department of Labour take a formal policy decision that South African citizens be appointed and promoted under affirmative action in the workplace. Such a policy decision should make it unambiguously clear that affirmative action measures are meant for those South African citizens who suffered disadvantage under patriarchy and apartheid: foreigners who have not shared in this history, should not reap these benefits.

It is recommended that such a decision be preceded by debate between business, labour and the government at the National Economic Development and Labour Council, similar to the debate that preceded the Employment Equity Bill. The involvement of the Commission for Employment Equity is important as it advises the Minister of Labour on policy matters.[38]

Such a policy decision must be reflected in a departmental source which is accessible to employers. It is suggested that the question "Do foreign nationals qualify as members of designated (disadvantaged) groups?" be re-stated and the previous ambiguous answer be amended to read as follows:

> "Foreign nationals may neither be included in the various designated groups as reported by the employer, nor is it acceptable to use these employees as the basis for measuring and setting numerical goals."

It is recommended that corresponding amendments be made to the Regulations to the EEA and to the Codes of Good Practice referred to above, to ensure certainty.

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[34] See par 1 3 above.
[35] *Legalbrief Today* "Employment: Equity Goals Don't Include Foreign Blacks" 2005-09-07.
[36] *Ibid*.
[37] See par 3 below.
[38] See s 30(1)(c) of the EEA.

Lastly, over and above ensuring affirmative action for citizens, it is recommended that a broader effort be made by government and business to ensure that South African citizens in fact acquire jobs in the South African labour market. Generally, a sensible approach may be to consider nationals first for available jobs, and, only if no such persons with suitable qualifications can be found, can the employer go wider and recruit foreigners.

The Immigration Act has in fact laid the basis for such an approach. On the one hand, the Act provides that work permits for "quota" work may be issued only if the foreigner falls within certain categories determined by the Minister of Home Affairs.[39] A "general" work permit may be issued only if the prospective employer satisfies the Department of Home Affairs that, despite a diligent search, it has been unable to employ a person in the country with qualifications equivalent to those of the applicant.[40]

It is further provided that permanent residence permits may be granted only if it can be shown that the position and related job description were advertised in the prescribed form and that no "suitably qualified" citizen or resident has been found to fill the position.[41] Moreover, such a foreigner must have extraordinary skills or qualifications.[42] It is, however, realistic to expect that, due to skills shortages in South Africa, suitably qualified citizens may not currently be found for all available jobs.[43]

On the other hand, the Immigration Act provides that the South African economy should have access to the "needed" contributions of foreigners.[44] Such contributions are, however, explicitly stated so as not to adversely impact on the rights and expectations of South African workers.[45] This approach clearly involves a weighing up of competing interests and can only be efficiently enforced in favour of South African citizens if there is full cooperation between the Department of Labour and the Department of Home Affairs.

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39 See s 19(1) of the Immigration Act.

40 See s 19(2)(a) of the Immigration Act.

41 S 27(a) of the Immigration Act. Also see par 1 1 and fn 6 above.

42 S 27(b) of the Immigration Act.

43 Historically, discrimination occurred *within* the labour market (as a result of discrimination in hiring, training and promotion, and as a result of unnecessary hindrances perpetuated by the ways in which work and training were organised under apartheid and patriarchy), as well as *outside* the labour market (through, *eg*, unequal education and training under apartheid). In the workplace, policies of job reservation for whites and the little (if any) training offered to employed blacks and females put them at a skills-based disadvantage (Labour Market Report 139). In an effort to address these skills shortages, the EEA requires designated employers, as part of their employment equity plans, to have measures in place to retain and develop people from designated groups, as well as measures to implement training measures (see fn 3 above). Notwithstanding, it has been reported recently that there are critical skills deficiencies at present. See, *eg*, *Business Day* "Seeing Themselves as Others See Us" 2004-05-18 where business and union leaders expressed concern about the level of skills of the South African labour force: "Skills Crisis" 2004-03-01 *Business Day* pointing to shortages of intermediate and low skills: "Miljoene Rande vir Opleiding Help Nie" 2005-02-20 *Rapport* pointing to a serious shortage of skills despite millions of rand spent on training since 2000; and the Commission for Employment Equity Annual Report 2002-2003 59, pointing out that not enough skills development interventions have been made at, particularly, the level of middle management.

44 Preamble (h) to the Immigration Act. The Act also provides that the needs and aspirations of the age of globalisation should be respected (Preamble (d)).

45 See Preamble (i) and s 2(j) of the Immigration Act.