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Affirmative Action Application or Black and White in South Africa Higher Education Institutions: Is it the way forward or not?

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Abstract

We will, demonstrate what affirmative action entails, its origin and the relationship with discrimination and equality. The paper will also highlight the implementation of affirmative action in the Higher Education sector in South Africa. Affirmative action or black and white are the additional corrective steps which must be taken in order that those who have been historically disadvantaged by unfair discrimination before 1994 are able to derive full benefits from an equitable employment environment. While there has been a significant increase in the number of women appointed into management positions, the proportion in relation to the total number of women in senior posts such as those of Vice Chancellors, Deputy-Vice Chancellors and Executive Deans still remains problematic. Considerations should be taken with regard to issues of access, equity and relevance. Indeed, affirmative action should be located within a rigorous process that will ensure that those who are for example, promoted to senior positions both in private and public sectors are able to demonstrate strategic thinking and action, quality execution of tasks, efficiency and effectiveness in achieving organisational goals. This will also be followed by a brief South Africa's case study of different entities (South African Breweries and Sowetan Newspaper). A comparison of USA's affirmative action and whether "there is a light at the end of a tunnel – affirmative action" will be done.

Keywords: *Affirmative Action, Discrimination, Preferential Treatment and Unfairness*

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Introduction

There has been a widespread talk about affirmative action from the doors of Parliament, across workplace corridors, down to ordinary layman in South Africa. Affirmative action is defined as the additional corrective steps which must be taken in order that those who have been historically disadvantaged by unfair discrimination are able to derive full benefit from an equitable employment environment (Government Gazette, 1998:22). In South Africa affirmative action is used as a method of attaining a diversified and integrated workforce both in private and public sectors (Kreitner & Kinicki, 2001:40). Affirmative action focuses on achieving equality of opportunity in an organisation and is mandated by national laws. Although affirmative action is intended to address the unjust inequalities of the past and discrimination against the previously disenfranchised black South Africans Kreitner & Kinicki (2001:40) argue that it is an artificial, transitional intervention intended to give managers a chance to correct imbalances in their workforce.

Since the advent of democratic government in 1994, South Africa has been building a new education and training system whose goal has been to meet the needs of a democratic society. Policy developments have been aimed at democratising the education system, overcoming unfair discrimination, expanding access to education and training opportunities, and improving the quality of education, training and research. Important policy instruments have been developed including legislation, White Papers and Green Papers. The basic principles of democracy, equity, quality, expansion of education and training opportunities, and the integration of education and training set out in these documents are generally consistent with the principles guiding this White Paper on Post-school Education and Training. Individual policy documents are referred to in the text where appropriate (White Paper for Post-school Education and Training, 2013:1). In addition to the Constitution of the Republic of South Africa, the Labour Relations Act No. 66 of 1995 (SA 1995), Basic conditions of Employment Act No. 75 of 1997, the Employment Equity Act No. 55 of 1998 (SA 1998a), the Employment of Educators Act No. 76 of 1998 (SA 1998b) and the Education Laws Amendment Act No.100 of 1997, for example deal with various aspects of the law which address affirmative action (Rossouw, 2008:1). These pieces of law are applied in both private and public sectors such as education. The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 obliges all institutions, including higher education and basic education, to avoid subtle, less obvious forms of discrimination and they prohibit the use of hurtful and abusive language (DoE, 2000:14). The expectation is that these laws will also help private and public institutions to develop policies that protect the rights of individuals and those of the organisation (DoE, 2000:14). Thus, legislation in South Africa is the primary source of employment relations whereby both employers and employees are bound by relevant labour legislation to execute their functions within the framework of such legislation and the Constitution of South Africa (DoE, 2000:12-14).

Literature Review

This White Paper for Post-school Education and Training seeks to set out strategies to expand the current provision of education and training in South Africa, to improve its quality, to integrate the various strands of the post-school system, and to set out modalities for ways in which employers in both the private and public sectors can play an important role in the creation of a skilled labour force (2013: 1). Thus, affirmative action and employment equity both refer to proactive policies that aim to redress work-related inequalities along racial, gender and disability lines (White Paper for post-school Education and Training, 2013: 1). Affirmative action and employment equity programmes are legislatively driven, whereas diversity management is strictly voluntary and motivated by business objectives (Klarsfeld, 2010:231). The South African Employment Equity Act No. 55 of 1998 and the implementation of affirmative action are necessary steps and have their place in correcting the past imbalances and leading to a more diversified workforce within the private and public sectors in South Africa. For Kreitner, Kinicki and Buelens (2002:38) although affirmative action creates opportunities without discrimination, it does not foster the type of thinking that is needed to effectively manage diversity within private and public institutions. In line with this thought, Thomas (1990:4) makes the point that once the numbers mistake has been corrected, affirmative action alone cannot cope with the remaining long-term task of creating a work setting geared to the upward mobility of all kinds of people, including white males.

What affirmative action means in practice is an unnatural focus on one group, and what it means too often for many employees is that standards are compromised to favour one group (Thomas, 1990:5). Equal rights legislation and affirmative action programmes are about trying to achieve equality of opportunities by focusing on specific groups and righting past wrongs (Mor Barak, 2011:237). In this regard Klarsfeld (2010:231) points out that unfortunately many people associate diversity with

affirmative action, and yet they are not the same. However, notice should be taken that equal rights legislation and affirmative/positive action policies are prerequisites for the development of diversity management because they create an integrated approach to the social, legal, and organisational aspects in private and public institutions. Legislative compliance should thus be supported by employment practice strategies that focus on human capital development, inclusive practices and cultural tolerance geared towards a more productive workforce within the country (Thornbury, 2003:6).

Addressing Disability

The Department of Higher Education and Training, for example, intends to develop a strategic policy framework to guide the improvement of access to and success in post-school education and training for people with disabilities. The framework will require all post-school institutions to address policy within institutional contexts and to develop targeted institutional plans to address disability. These should be based on norms and standards for the integration of students and staff with disabilities in all aspects of university or college life, including academic life, culture, sport and accommodation, developed through the strategic policy framework (White Paper for Post-school Education and Training, 2013:xv). Greater awareness of the needs of students and staff with disabilities needs to be built, alongside the capacity to address disability at all levels of post-school institutions, including lecturers, support staff and management. Particular attention will be paid to the plight of women with disabilities and disabled students from poor families, throughput rates of disabled students, and the need for training and work-based opportunities for students both during and upon completion of their programmes Paper for Post-school Education and Training, 2013: xv).

Stereotypes and Prejudice

Some important successes have been achieved. The rapid expansion of enrolments in universities and colleges, quality improvements in parts of the system, desegregation and the opening up of opportunities to black and woman students are unprecedented in our history. In addition, the South African government has established a skills levy system that provides the necessary resources to enhance skills development for both private and public sectors. While there has been a significant increase in the number of women appointed into management positions, the proportion in relation to the total number of women in senior posts such as those of Vice Chancellors, Deputy-Vice Chancellors and Executive Deans still remains problematic (DoE, 2000:8). A greater challenge, however, is that even those women who have risen to senior management positions are struggling to overcome the entrenched beliefs, values and social and cultural constructs that create patriarchal practices and power relations in many organisations (Naidu, Joubert, Mestry, Mosoge & Ngcobo, 2008: 103).

The key challenges facing the South African higher education system remain as outlined in the White Paper: “to redress past inequalities and to transform the higher education system to serve a new social order, to meet pressing national needs, and to respond to new realities and opportunities” (White Paper 3, 1997:1). More specifically, as the White Paper indicates, the role of higher education in a knowledge-driven world is three-fold:

- Human resource development: the mobilisation of human talent and potential through lifelong learning to contribute to the social, economic, cultural and intellectual life of a rapidly changing society.
- High-level skills training: the training and provision of person power to strengthen this country's enterprises, services and infrastructure. This requires the development of professionals and knowledge workers with globally equivalent skills, but who are socially responsible and conscious of their role in contributing to the national development effort and social transformation.
- Production, acquisition and application of new knowledge: national growth and competitiveness is dependent on continuous technological improvement and innovation, driven by a well-organised, vibrant research and development system which integrates the research and training capacity of higher education with the needs of industry and of social reconstruction. (White Paper 3, 1997:12).

Affirmative action particularly in higher education should be supported in the context of the challenges illuminated above. Considerations should be taken with regard to issues of access, equity and relevance. Indeed, affirmative action should be located within a rigorous process that will ensure that those who are for example, promoted to senior positions both in private and public sectors are able to demonstrate strategic thinking and action, quality execution of tasks, efficiency and effectiveness in achieving organisational goals. It will be a futile exercise of people are promoted only on the basis of colour and gender and yet lacking in requisite knowledge, skills, attitudes, values and competences.

Post School Education in America

The issue about affirmative action has also struck our Universities and/or higher education like lightning, hence it is said Universities in South Africa are wrestling with an issue familiar to many Americans: affirmative action.

In this regard part of the government's policies to develop our country and improve the economic, social and cultural life of its people. The post-school system that is envisaged is one that will be more equitable, much expanded and more diverse than it is at present, and will include a key role for employers in the provision of education and training opportunities. The system will be integrated in such a way that the different components complement one another, and work together to improve the quality, quantity and diversity of post-school education and training in South Africa (White Paper for Post-School Education and Training (2013: xviii) (Kelto 2011).

Since the dawn of the new era, many articles or studies that have been undertaken in respect of affirmative action have been very emotionally charged, capricious and very few are level headed. These in my opinion, are a serious anomalies and/or deficiencies.

Valuing diversity and managing diversity requires organisations to adopt a new way of thinking about differences between people. Rather than 'pitting' one group against another, both valuing diversity and managing diversity strive to recognise the unique contribution each and every employee can make (Kreitner *et al.*, 2002:37). This philosophy is different by far from that of affirmative action.

In this article, we intend to interrogate a topic which is extremely difficult to comprehend, let alone implementing, especially because it dwells into the marrow contained inside the bone of the past which was riddled with inequality almost in every sphere of life.

Since the advent of democratic government in 1994, South Africa has been building a new education and training system whose goal has been to meet the needs of a democratic society. Policy developments have been aimed at democratising the education system, overcoming unfair discrimination, expanding access to education and training opportunities, and improving the quality of education, training and research (White Paper for post-school Education and Training, 2013:xv).

Definition of Affirmation Action

Affirmative action is sometimes referred to as Positive discrimination or Reverse discrimination. Affirmative Action is not similar to reverse discrimination or equal employment opportunities. It is another form of discrimination though not unfair - It redresses injustices experienced by groups who have been disadvantaged in the past. - It eliminates unfair discrimination and develops the skills of those who did not have opportunities - It promotes equal opportunities in employment and thus it is a temporary intervention in the workplace. The findings of the study concluded that Affirmative Action is essential to the economic and skills development of the disadvantaged groups in particular and the South African society in general.

In a nutshell, Affirmative action means discrimination in favour of racial or other social groups on the ground that it would be in the public interest to take steps to redress the balance of racial or social disadvantage from which members of the group have suffered (Bailey *et.al.* 1985:434).

A leading scholar in the field of Affirmative Action, Professor Faundez, defines affirmative action in the following manner "involves treating a sub-class or a group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion to, of certain goods"; (Bailey *et. al.* 1985).

In essence, affirmative action is tantamount to discrimination. It is trite that there are four (4) types of discrimination, which are evident in Labour Law sphere but also practiced in organisations such as universities and schools, *viz*:

- Direct Discrimination: Where an employer treats an employee or prospective employee less favourably than he would treat another employee, due to difference in race or sex. You don't have to have a protected characteristic to be discriminated against. If someone thinks you have a characteristic and treats you less favourably, that's direct discrimination by perception.
- Indirect Discrimination: This occurs where a requirement is set for access to benefit a job and the application of that requirement (although on the face of it, is non-discriminatory) has the result that it is made difficult or impossible for persons of a certain group or sex to obtain access to that benefit or job. An example is a conduct that differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not alter the fact that in

the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race.

- Discrimination by victimization: Refers to a situation where an employee is victimized because he has tried to rely on or enforce the rights given to him (Labour Law Brief 1998).

Lastly Professor Brassey regards discrimination as evil, “Before we will tolerate it, therefore, we must be satisfied that the purpose it serves is sufficiently weighty to warrant to it” (Brassey 1995). We are of the view that the aforesaid description of discrimination by Professor Brassey is a dynamic statement which warrants him to be commended/praised.

The Importance of the Study of Affirmative Action

Undoubtedly, on a daily basis, there are talks about or in respect of Affirmative Action. It is not surprising that even scholars in this subject differ and debate furiously;

There has been a flurry of articles in the local rag, the Cape Times, arguing about the pros and cons of affirmative action. It was all started by Prof. David Benatar from UCT when he published an article arguing that affirmative action was unethical.

Prof Benatar argued that one of the problems with affirmative action was that employers would appoint “less qualified” or “weaker” black candidates above “more qualified” or “stronger” white candidates. I find this kind of reasoning particularly unconvincing (De Vos 2007).

In the absence of a clearly formulated affirmative action policy, there is little incentive for elites at major organisations to “think outside the box” and to interrogate issues around qualifications, standards and excellence. This results in the dominant group – which at many universities and private firms remains white, middle class and well-heeled – retaining a monopoly on authenticating knowledge and allowing them to be ‘gatekeepers’ to the institution.

Affirmative action is thus deeply troubling exactly because it has the potential to effect deep transformation (De Vos 2007).

As can be gleaned from the abovementioned, the study of affirmative action is not just important but of paramount importance.

Is Affirmative Action of Current interest in the Field?

We will demonstrate hereunder that the interest in the field of Affirmative Action study has grown since the dawn of a new era in 1994 to date, be it in work places, schools and institutions of higher education.

Now that the country has stepped back from the precipice of fiscal disaster, we can shift our collective gaze to the next hot button winter issue: affirmative action. The U.S. Supreme Court heard arguments earlier this month in *Schuetz v. Coalition to Defend Affirmative Action*, a challenge to Michigan’s 2006 ballot initiative that resulted in a state constitutional ban on race-based discrimination or preferential treatment in public-university admissions decisions (Cohen 2013).

Cohen (who is a law clerk to the Chief Justice of the Constitutional Court of South Africa) continues to draw a parallel debate, with implications for the U.S’s legal system, is raging in South Africa about how to best balance “merit” and “transformation” (i.e. affirmative action) within its legal profession.

Lastly, it is also not surprising that by the time South Africa gained independence in 1994, all but five of the country’s 165 judges were white men. A headcount earlier this year found that 100 black men and 49 black women, 71 white men and 21 white women served as judges. The numbers are even more astounding when one looks at the magistrates’ courts (the lowest level of the court system which many had argued was the most racist). Indeed, in 1990, of the 829 magistrate judges in South Africa, 811 were white, even were Asian, five were of mixed racial descent and two were black. Today, 974 are black and 687 are white, 647 are women and 1014 are men (Cohen 2013).

Does Affirmative Action has Practical Application to the Work Situation?

Without any shadow of a doubt, this can be demonstrated in many ways. However, due to time constraints, I will only focus my attention to the recent Constitutional Court’s decision, i.e. this Constitutional Court’s judgment was handed down this week (Tuesday, 02nd September 2014);

The judgements in the case involving Renate Barnard brings an end to an episode which started seven (7) years ago with a unanimous decision by the Constitutional Court which upheld the appeal, and endorses lawfulness of race discrimination against white police officer;

It essence, what the Constitutional Court decided was whether the decision of the National Commissioner of the South African Police Services (SAPS) not to promote Ms. Barnard to the position of superintendent in the SAPS National Evaluation Service (NES), constitutes unfair discrimination on

grounds of race in contravention of Section 9 of the Constitution and section 6 of the Employment Equity Act (Act);

In this matter the Court upheld the appeal. In the main judgment by Moseneke ACJ, writing for the majority, (Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe, Madlanga J and Zondo J concurring) held that the SAPS Employment Equity Plan is a restitutionary measure contemplated in section 9 (2) of the Constitution and section 6 (2) of the Act. He therefore found that the Supreme Court of Appeal misconceived the issues before it, as well as the controlling law (South African Police v Solidarity obo Barnard 2014).

Is Affirmative Action Topical?

In demonstrating that Affirmative Action discussion is topical solidarity research institute indicated that Mr Jimmy Many, the Employment Equity Commission chairman, has recently released the last Employment Equity Report. The commission will again find that affirmative action is progressing too slowly. In other words, affirmative action is failing. The debate in South Africa should move from whether affirmative action is fair to why it has failed so that it could be phased out in its current form and redesigned to ensure a better life for all;

The Solidarity Research Article continues to state that good education and proper training are measures that bring about real empowerment, because according to Francis Bacon, knowledge is power. According to Aristotle, knowledge is also virtue. Therefore, the right thing to do is to give our people power through knowledge. The wrong thing to do is to focus just on the output of racial representatively while neglecting the input of decent education. Current affirmative action fails to solve the real problems of disempowered people;

A successful affirmative action programme will:

- Focus on broadening the pipeline of skills. The emphasis will move to training and development so that a broader basis could benefit by affirmative training;
- Remove blockings in the skills pipeline to accelerate growth and service delivery. Growth and service delivery is the best affirmative action processes;
- Be brought in line with the latest international trends (Hermann 2008).

Conclusion

Is there a light at the end of the black and white appointment tunnel?

This is of course a difficult question to provide a simple and straight forward answer. It might even be fair to actually conclude that the answer is both in the positive and negative depending on the school of thought one stems from.

The bottom line is that South Africa has no choice but to address the issue of racial inequality (Winer *IBID*). Affirmative action is a way of making the workplace more representative and fair. It makes sure that qualified people from designated groups have equal opportunities in the workplace. In South Africa, these groups are black people (including black, coloured and Indian people), women and people with disabilities. Historically, these groups have been under-represented in many key work areas (and over-represented in others).

We wish to conclude by saying that South Africa is fortunate if not blessed because we are not in the forefront of implementing affirmative action. All that needs to be done is to be cautious and carefully learn from the mistakes, ups and downs of the different case studies and above all, the experiences of various international jurisdictions.

The rationale is to address the imbalances of the past by taking both formal and substantive approaches in achieving equality, i.e. treatment & outcome. Obviously it's in support of the constitutional legislative framework and other measures designed to protect or advance persons or category of persons disadvantaged by unfair discrimination. There's a turning point in this only until equality in the workplace has been achieved by the previously disadvantage groups, i.e. black people, women and people with disabilities. Affirmative action may have helped individuals from the designated groups who already found themselves higher up on the skills ladder, but that these effects were too small and concentrated on too few individuals to have had an impacted on the average previously disadvantaged individual (Burger and Jafta; 2006).

We are cautiously optimistic that there seems to be a light at the end of "Affirmative Action Tunnel". All that needs to be done, is to take baby steps, i.e. no "rushing" towards the "light" without due consideration and in the process, making fatal mistakes.

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