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Legal evaluation of affirmative action in South Africa[1]

Summary

With its equality jurisprudence only in its infancy stage, affirmative action will provide a difficult challenge to the Constitutional Court. Employment equity and affirmative action, like other projects of social transformation translated into law, need to be balanced with individual and collective needs of security, continuity and national integration. The specific challenge facing the court will be to integrate its approach to affirmative action with its endorsement of the notion of substantive equality and the normative standards it has developed for the determination of unfair discrimination. It is submitted that the latter do provide at least a rudimentary focus, which is sensitive and open-ended enough to accommodate the complex array of competing interests at stake in affirmative action disputes. In this article, the implications of the court's equality approach for affirmative action are considered, with reference to some pertinent issues, such as the applicable standard for the constitutional review of affirmative action, and the fairness and proportionality of affirmative action measures (including the problem of the over- or under-inclusiveness of affirmative action). The present state of South African case law on the subject is considered, with comparative references to approaches adopted in other jurisdictions.

Juridiese beoordeling van regstellende aksie in Suid-Afrika

Terwyl die Grondwetlike Hof se regspraak oor gelykheid nog in die beginfase daarvan verkeer, sal regstellende aksie vir die hof 'n moeilike uitdaging stel. Billike indiensneming en regstellende aksie, soos alle projekte van sosiale transformasie wat regtens afdwingbaar gemaak word, moet in ewewig gebring word met kompeterende belange soos die sekuriteits- en kontinuïteitsbehoeftes van individue en instansies en die noodsaak van nasionale integrasie. Die spesifike uitdaging vir die hof is om die benadering wat by regstellende aksie gevolg word, te integreer met die hof se onderskrywing van die idee van substantiewe gelykheid en die algemene normatiewe standaarde wat die hof in verband met onbillike diskriminasie ontwikkel het. Dit word aan die hand gedoen dat laasgenoemde ten minste 'n rudimentêre basis daarstel wat in beginsel oop en sensitief genoeg is om die wye spektrum van kompeterende belange wat by regstellende aksie op die spel is, te kan akkommodeer. In hierdie artikel word die implikasies van die hof se benadering tot gelykheid en onbillike diskriminasie vir regstellende aksie oorweeg, met verwysing na 'n aantal pertinente aangeleenthede, soos die gepaste grondwetlike standaard vir die geregtelike hersiening van regstellende aksie, asook die billikheid en proporsionaliteit van regstellende aksie maatreëls (insluitende die kwessie van onder- en oor-inklusiewe regstellende aksie). Die huidige stand van die Suid-Afrikaanse regspraak word oorweeg, met vergelykende verwysings na ander jurisdiksies.

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1. Introduction

A major legislative development in South Africa took place with the coming into effect of the *Employment Equity Act*.[2] The Act seeks to implement the broad equality objectives of the Constitution of the Republic of South Africa[3] in the field of employment by prohibiting all forms of unfair discrimination in the workplace, and, in addition, requiring all so-called designated employers[4] to institute affirmative action measures in favour of black people,[5] women and people with disabilities. Affirmative action is defined as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."[6] Section 6(2) of the Act also states that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act.

Section 6(2) of the *Employment Equity Act* states that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act. The Act provides little guidance on the legal standards for valid affirmative action. The vexing equality problems that are normally associated with the implementation of similar programmes are therefore left to be resolved through judicial interpretation and application of the Act. The *Employment Equity Act* itself only requires the Act to be interpreted in compliance with the Constitution and the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.[7] The most important directly applicable constitutional provision for the interpretation of the Act is section 9(2), which 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.

2 Act 55 of 1998. Chapter 2 of the Act (dealing with the prohibition of unfair employment discrimination) came into operation on 9 August 1999, and chapter 3 (dealing with the affirmative action obligations of employers) on 1 December of the same year.

3 Act 108 of 1996.

4 Section 1 defines designated employers to mean (a) an employer with more than 50 employees, or (b) an employer with less than 50 employees, but with an annual turnover of an amount equal to or in access of the applicable annual turnover of small businesses specified in schedule 4 to the Act. The Act applies to organs of state, excluding the National Defence Force, National Intelligence Agency and the South African Secret Service.

5 "Black people" is defined in section 1 of the Act as a "generic term which means Africans, Coloureds and Indians".

6 Section 15.

7 Section 3(a).

There is at present no judgement of the South African Constitutional Court in which the implications of this section for the validity of affirmative action has been addressed. Affirmative action measures may be attacked on various grounds, such as their effect on existing contractual rights, their arbitrariness, or because of their restriction of specific rights, such as the rights to property, occupational freedom, or administrative justice, but most notably because of their discriminatory effect on non-designated groups. Only the latter aspect will be addressed in this study. In what follows, I will refer to some of the more pertinent constitutional aspects and the present state of the South African case law on the subject, with comparative references to approaches adopted in other jurisdictions. In particular, I will deal with the issues of the applicable standard of constitutional review of affirmative action, the balancing of the rights of non-beneficiaries with the achievement of affirmative action objectives and the problems in respect of defining the beneficiaries of affirmative action.

2. Standard of constitutional review of affirmative action

There is a conspicuous divergence between courts in different jurisdictions concerning the appropriate standard of constitutional review of affirmative action. The chosen standard is always suggestive of the controlling judicial understanding of equality and how affirmative action relates to the achievement of equality. It is well known that the United States Supreme Court, in *Adarand Constructors v Pena*,[8] settled the issue that all racially-based governmental affirmative action programs are subject to strict judicial scrutiny (under the Equal Protection Clause of the 14th Amendment). A majority of the Court has consistently rejected the notion that so-called "benign racial classifications" deserve to be judged according to a less stringent standard than invidious discrimination. Under the strict scrutiny test for race-based affirmative action,[9] American courts have held that racial

8 515 US 200, 115 SCt 2097, 132 LEd 2d 158 (1995).

9 The United States Supreme Court has adopted a strict standard for governmental affirmative action under the Equal Protection Clause of the 14th Amendment to the Constitution: see Player 1988:95. Generally, racial or ethnic distinctions of any kind, including so-called benign discrimination, are inherently suspect and need to satisfy the strict scrutiny test of the Court: *Wygant v Jackson Board of Education* 476 US 267, 106 SCt 1842, 90 LEd 2d 260 (1986); *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854; *Adarand Constructors Inc v Pena* 515 US 200 (1995). First, the distinction must be justified by a compelling governmental interest and the means chosen to achieve the purpose must be narrowly tailored to the achievement of that goal. To establish the compelling governmental interest requirement, the government must make some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. The government must itself have actively discriminated in employment or may seek to remedy the effects of discrimination committed by private actors within its jurisdiction, where it becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion: *City of Richmond v JA Croson Co* 488 US 469 at 492, 109 SCt 706 at 720. See also Robinson *et al* 1998:803-805; Skaggs 1998:1176. A plan cannot be premised

preferences must only be a "last resort option".[10] In *Croson*,[11] the court struck down the reservation of a percentage of the city of Richmond's contracts for minority business enterprises, partly because the city had not considered race-neutral alternatives to increase minority participation in contracting before adopting the racial set-aside. The court argued that because minority businesses tend to be smaller and less established, race-neutral financial and technical assistance and more favourable bonding requirements for small and/or new firms might have been equally effective without excluding other firms on racial grounds. The court in *In re Birmingham Reverse Discrimination Employment Litigation*[12] struck down the Birmingham preferential promotional goals, because there had not been an adequate attempt to pursue non-racial alternatives. The court pointed to the increase in black fire-fighters from 8 in 1978 to 42 in 1981 as proof that non-racial means can be effective and suggested one non-racial alternative, the elimination of seniority points as a ranking factor in promotions, and one less intrusive race-based alternative, the use of race as only one of many relevant factors in selection. By contrast, in *Peightal v Metropolitan Dade County*,[13] the court held that the employer's unsuccessful attempts to pursue non-racial alternatives, such as additional outreach programmes, high school and college recruitment programmes, were adequate. However, these attempts had only limited success because of the adverse effect of the rank-ordered fire-fighter test.

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upon a retributive notion of societal injustice, nor upon the discrimination being practised by other employers within the industry: Player 1988:317. Societal discrimination, without more, has been held to be too amorphous a basis for imposing a racially classified remedy: *Wygant v Jackson Board of Education* 476 US 267 at 274-276, 106 SCt 1842 at 1847-1848 (1986); *Regents of the University of California v Bakke* 438 US 265, 98 SCt 2733, 57 LEd 2d 750 (1978); *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854 (1989); *Shaw v Hunt* 517 US 899, 116 SCt 1894, 135 LEd 2d 207 (1996). It is submitted that this approach will be held unnecessarily restrictive in South Africa in the light of the wording of section 9(2) of the Constitution. In terms of the equality framework developed by the Constitutional Court there is no single fixed standard in terms of which the fairness or justifiability of a breach of the non-discrimination principle is measured in all circumstances. The standard depends on the interplay of the relevant factors that are taken into account when the fairness or justifiability of a discriminatory measure is appraised.

10 *Engineering Contractors Association v Metropolitan Dade County* 122 F3d 895 (11th Cir 1997) at 926; *Contractors Association v City of Phila* 6 F3d 990 (3rd Cir 1993) at 1008. See also Robinson *et al* 1998:805. It appears that under the more relaxed intermediate scrutiny standard applicable to gender preferences, governmental employers are not required to implement the program only as a last resort.

11 *City of Richmond v JA Croson Co* 488 US 469 at 507, 510, 109 SCt 706 at 729, 102 LEd 2d 854 (1989).

12 20 F3d 1525 (11th Cir 1994) at 1545-1547.

13 26 F3d 1545 (11th Cir 1994) at 1557-1558.

By comparison, Canadian courts tend to interpret employment equity legislation more generously, in the light of the Canadian Supreme Court's endorsement of a substantive approach to equality. Affirmative action is not seen as an exception to equality, but as a means of effecting equality in a substantive sense.[14]

The Canadian approach has been very influential in the development of the Constitutional Court's equality jurisprudence. In devising its own substantive equality approach, the Court has identified a number of "factors" to guide the investigation into the fairness of a discriminatory measure, which it believes will orientate the investigation to the promotion of substantive equality. The inquiry should be "situation-sensitive", focussing on the actual impact of a differential measure on the complainant, with reference to the over-all effect of factors such as the historical, social and economic position of the complainant, the purpose of the discriminatory measure and its effect on third parties.[15]

Although the application of this approach does not entail a fixed standard of review, (because the strictness of the review will depend on how the factors inter-act in concrete cases), it is safe to say that, when it comes to affirmative action, the effect of the Court's approach will be the opposite of the strict scrutiny approach. What the substantive equality approach means, in relation to the constitutional standard for affirmative action, is that it will generally be judged according to a lower standard, because of its benign purpose and because its beneficiaries will be historically disadvantaged due to discrimination, whereas the complainants will normally be considered members of previously advantaged groups.

In at least one case, a tribunal has sought to apply this reasoning to affirmative action. In *Durban City Council (Physical Environment Service Unit) v Durban Municipal Employees Society (DMES)*,[16] the complainant was a black man who unsuccessfully applied for a position as an artisan motor mechanic. The advertised requirements for the job included that the successful candidate must have served an apprenticeship as a motor mechanic, be in possession of the relevant apprenticeship papers and be able to carry out repairs and maintenance to certain equipment. The complainant completed the required apprenticeship and acquired the papers in 1987. He was employed as an artisan motor mechanic for only one year, before he suffered the bad luck of being retrenched. Thereafter, in spite of his sustained efforts, he was unsuccessful in securing the same kind of work. He was employed mainly as a truck driver. In the practical test and interview conducted to select the successful candidate, the complainant acquired a total score of 395, which was well below the score of the successful

14 See for example *Canadian National Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 1143; *Ontario Human Rights Commission v Ontario (Ministry of Health)* (1994) 21 CHRR (Ont CA) D/259 at D/265.

15 *Harksen v Lane NO* 1997 11 BCLR 1489 (CC) at 1510E; *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC) at 1667D.

16 (1995) ARB 6.9.14 (http://www.irnet.co.za).

candidate, a white male, of 1031. The department substantiated its preference for the successful white candidate mainly with reference to his superior experience and the cost implications involved if someone with the complainant's level of experience were to be appointed. At the time of the appointment, there were six artisans, 4 white, 1 Asiatic and 1 coloured. The tribunal found that the selection process was unfair and unreasonable. It pointed out that, because of the discriminatory laws that governed the training of apprentices, it is clear that it might be difficult to find a black artisan with a level of experience comparable to that of the successful white candidate. Discriminatory laws, which had a negative effect on the training of apprentices, were only removed from the statute book in 1983. Accordingly, if experience were to be the dominant selection criterion, people in the complainant's situation will continue to be excluded. It held that, in terms of its affirmative action obligations, an employer is required to identify potential and train people with the view to capacity building so that they can move into the job categories from which they have previously been excluded. Although it was feasible, the employer put no such programmes in place. In the result, the tribunal therefore ruled that the selection process was flawed by excluding the complainant from any consideration, and it declined to confirm the appointment of the successful candidate.

The case illustrates the difference in focus required of a substantive, as opposed to a formal equality analysis. A formal equality approach would probably have focused on the difference in qualifications of the candidates, on the assumption that everyone is basically similarly situated in their ability to have acquired those, so that it is only just and equitable to prefer the better qualified candidate. A substantive equality approach does not make the same assumption and requires an examination of underlying conditions contributing to differences in the means to compete. If the candidates are not similarly situated in terms of the structural conditions for attaining the tools to compete, and especially if their different capacities are attributable to patterns of systemic discriminatory exclusion, then a substantive equality approach would require that reasonable means be found not to compound the disadvantage through a continuation of the cycle of exclusion. The case also exemplifies the extent that the state has imposed a duty on public and private employers to contribute to the equalisation of social conditions affecting equal access to employment.

It was, naturally, not held that the designated group candidate must be preferred in an unqualified sense. In terms of the Constitutional Court's test for fairness, it is the cumulative effect of all the relevant factors that is determinative, and that includes the extent that an affirmative action measure affects the rights/interests of third parties. What is at stake here is, of course, the difficult "balancing" part of the process of evaluating the fairness of affirmative action. The remaining main point to be discussed, then, is the proportionality standard prescribed by the Act, or applied by the courts/tribunals when weighing the objective of workplace transformation against other competing interests.

3. Fairness and proportionality

Although the Constitution unequivocally endorses the importance of the objective of remedying the effects of past inequality, it also requires that this has to be achieved in a fair and proportional manner. In *City Council of Pretoria v Walker*,[17] Sachs J remarked that "[p]rocesses of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage." An unnecessarily unreasonable impact on the rights of non-designated groups could render affirmative action unfair or unjustifiable. The fairness of discriminatory action depends primarily on its impact on the complainant. In *President of the Republic of South Africa and Another v Hugo*,[18] Goldstone J said that each case 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.[19]

The notion of substantive equality does not only provide a mandate for affirmative action, it is also the criterion to distinguish between constitutionally legitimate and illegitimate forms of affirmative action. Section 9(2) obviously does not state that all measures equipped with an affirmative action label will automatically fulfil all the substantive equality requirements of the Constitution.[20] Neither is it enough that the purpose of such measures is to protect or advance previously disadvantaged groups, since this would satisfy but one of the substantive equality requirements. The Constitution protects affirmative action measures that objectively satisfy all the requirements of substantive equality.[21] In concrete terms, an

17 1998 (3) BCLR 257 (CC) at par 123.

18 1997 (6) BCLR 708 (CC) at 729F-H.

19 Compare Dellinger 1995:19, who states that the underlying purpose of the requirement that discriminatory measures must be "narrowly tailored", are twofold. First, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decision-making; and second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable

20 Compare *Ontario Human Rights Commission v Ontario (Ministry of Health)* (1994) 21 CHRR D/259 at D/266. The majority of the Ontario Court of Appeal reversed the lower court's decision and held that section 14(1) of the Code does not preclude review of an affirmative action programme. Weiler J noted that while section 14(1) of the Ontario Human Rights Code was designed to protect affirmative action programmes from challenges based on their inherent violation of the formal equality provisions of the Code, it was also intended to promote substantive equality.

21 The wording of s 9(2) differs from the affirmative action provision of the interim Constitution. Section 8(3)(a) provided that the equality and non-discrimination clauses shall not "preclude" measures designed to achieve the adequate protection and advancement or persons, or groups of persons, or categories of persons disadvantaged by unfair discrimination, in order to enable their full and

affirmative action measure will comply with the constitutional requirements for equality only if it conforms to the rationality, fairness and justifiability requirements of sections 9 and 36 of the Constitution.[22] These requirements were developed by the Constitutional Court in a conscious attempt to give practical expression to the notion of substantive equality when applying the equality and non-discrimination clauses of the Constitution.[23] The affirmative action defence of the *Employment Equity Act* must, therefore, be read against the background of the aim of affirmative action to facilitate substantive equality.

Employers are, therefore, constitutionally enjoined to devise affirmative action programmes in a way that does not impact unfairly upon the rights or interests of non-designated groups. The United States Supreme Court requires affirmative action measures not to "unnecessarily trammel" the rights of non-preferred groups.[24] In the Canadian case of *Shewchuk v Ricard*,[25] Nemetz CJ proposed that in evaluating the overall-impact of affirmative action plans, they should be carefully scrutinised by the courts with respect to both whether they are ameliorative in fact and, if ameliorative, whether the effect of the law or programme is so unreasonable that it is grossly unfair to other individuals or groups. Applying this principle, the court in the *Manitoba Rice Farmers* case[26] held that a programme of

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equal enjoyment of all rights and freedoms. Some have understood this phraseology to state an exception to the principle of equality, thus precluding discrimination attacks on affirmative action. See Du Plessis & Corder 1994:130; Cachalia *et al* 1994:31; *George v Liberty Life Association of South Africa Ltd* [1996] 8 BLLR 985 (IC) at 1000; *Van Rensburg v Northern Cape Provincial Administration (CCMA)* NC 354 14 July 1997. Others, while seemingly conceding the exceptional character of affirmative action measures, have sought to extract some equality requirements from particular phrases used in the subsection (such as "adequate protection", or "equal enjoyment"). See *Public Servants Association v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 640H-642F; *MWU obo van Coller v Eskom* [1999] 9 BALR 1089 (IMSSA) at 1094D-1095F. Both approaches have had the disadvantage that affirmative action was evaluated in terms of requirements that were not fully integrated into the constitutional equality framework. See Smith 1995:89. Section 9(2) now makes the debate as to whether measures designed to protect and advance disadvantaged groups should be seen as exceptions to the principle of equality or not, obsolete.

22 For an apparently different point of view, see Ackermann 2000:549, and compare Pretorius *et al* 2000:9-8 *et seq*.

23 See for example Ackermann J in *National Coalition of Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 at par 58-64, *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at 729F-H.

24 *See United Steelworkers of America v Weber* 443 US 193, 99 SCt 2721 at 2730, 61 LEd 2d 480 (1979); *Johnson v Transportion Agency, Santa Clara County, California* 480 US 616, 107 SCt 1442 at 1455, 94 LEd 2d 615 (1987).

25 (1986) 28 DLR (4th) 429 (BCCA) at 437.

26 *Manitoba Rice Farmers Association v Human Rights Commission (Manitoba)* (1987) 50 Man R (2d) 92 (QB) at 102.

preference for native persons in respect of licenses to harvest wild rice did not qualify for protection under section 15(2) of the Charter, because the dominant purpose of section 15 of the Charter is to preserve equality. In the view of the court, it follows as a matter of principle that a special law or program which is put forward under section 15(2) cannot be justified if it unnecessarily denies the existing rights of the non-target group. After reviewing the evidence as to the size of the resource and the respective demands made upon it by members of the target group and others, the court concluded that the onus lies on the government to prove that the denial of permits to all persons in the non-target group was reasonably required to meliorate the conditions of hardship of the target group.

Whether a burden is unfair is obviously open to interpretation. The factors that must be considered in evaluating fairness in terms of the constitutional conception of substantive equality, do not provide a recipe that will guarantee complete consistency and instances of intuitive or even ideological adjudication of the fairness of affirmative action will be difficult to avoid. They do, however, identify relevant and important considerations that could provide a structured basis for a transparent, reasoned and principled analysis of the constitutionality of the affirmative action measure in question.[27]

The only provision of the *Employment Equity Act* expressly addressing the fairness and proportionality question, states that an employer is not required to take any decision concerning an employment policy or practice that would establish an "absolute barrier" to the prospective or continued employment or advancement of people who are not from designated groups. It seems therefore that the Act does not require, but also does not prohibit such policies. The constitutional standards for fairness and proportionality would, however, allow such disproportional exclusion of non-designated groups only in the most unusual of circumstances. A few examples may illustrate the circumstances under which courts/tribunals have, so far, found that an affirmative action measure disproportionally burdens the rights of non-designated group members.

The complete exclusion of members of non-designated groups from competition for jobs was dealt with in *Public Servants Association of South Africa v Minister of Justice*.[28] The case concerned the decision of the Department of Justice to earmark certain posts as "affirmative action posts".

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27 Compare the following factors, as distinguished by Dellinger 1995:19, that typically make up the "narrow tailoring" test as applied by the United States Supreme Court to affirmative action: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the programme's scope; (iii) the manner in which it is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decision-making process, (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the programme and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the programme.

28 1997 5 BCLR 577 (T).

This decision severely prejudiced a number of senior white male officials in the State Attorney's Office, who were not considered for 30 vacancies. The only persons from within the department who were invited to the selection interview were women with considerably less experience than the male candidates. The court invalidated the policy because of its arbitrariness and the disproportional exclusion of white males. In the opinion of the court, the measures adopted by the department was indeed "somewhat haphazard, at random and over-hasty". The department applied affirmative action without an over-all plan or directives from the Public Service Commission and adopted measures that were not intended to be implemented in the absence of a management plan. No explanation was given of the basis upon which the posts were reserved. No attempt was made to balance the need to enhance the representativity of the Department with competing interests, such as the interests of the excluded class of employees and the efficiency needs of the Department.

Another difficult proportionality problem concerns the relevance of significant differences in the level of qualifications between affirmative action candidates and their competitors. A strict proportionality test would entail that preference for affirmative action candidates should be restricted to situations of relative equality of qualifications only, since it would minimise the extent of the preference. This is the situation referred to as the "tie-breaker" in the United States and adjudged to be valid under Title VII of the Civil Rights Act in the case of *Johnson v Transportation Agency, Santa Clara, California*.[29] It also seems to be the approach preferred by the European Court of Justice.[30] In the light of the high degree of equalisation of educational opportunities in Europe, the European proportionality standard may well be justifiably high. In a number of cases, tribunals have adopted a different approach for South African circumstances, and held that preferential appointments cannot be restricted to situations of equal qualifications only, because such a rule inadequately compensates for educational disadvantage and the historic exclusion of designated groups from the opportunity to acquire job-related experience.[31] Affirmative action candidates will often be less experienced precisely because of limited opportunities in the past to acquire that experience. Such candidates may thus be preferred even in circumstances of substantial differences in job qualifications.

No case so far, however, has held that this preference is unqualified, and all that is required is that an affirmative action candidate must be able to meet minimum job qualifications in order to be preferred. Courts and tribunals have, in the course of their fairness or proportionality analysis,

29 480 US 616, 107 SCt 1442, 94 LEd 2d 615 (1987).

30 *Kalanke v Freie Hansestadt Bremen* [1996] 1 CMLR 175 (ECJ); *Marschall v Land Nordrhein-Westfalen* [1998] 1 CMLR 547 (ECJ).

31 *Gruenbaum v SA Revenue Service (Customs and Excise)* CCMA KN20090 6 November 1998, discussed in Rycroft 1999:1419-1420.

tried to balance the need of workplace transformation with considerations such as the nature of the duties of the job, the efficiency needs of the employing institution and the particular situation of non-designated group members. For instance, if the job in question is an entry-level position which does not require any special skills, the efficiency needs of the employing institution should not be significantly affected by not appointing the better qualified candidate, and if it involves no undue financial hardship for the employing institution, and the detriment suffered by non-preferred group members does not entail unreasonable barriers to securing entry-level employment or an unreasonable impediment to their career advancement, preferring the lesser qualified candidate would be constitutionally valid. If, on the other hand, it involves a promotion to higher level positions, this fact plus a possible array of other factors may tilt the scales in the opposite direction. The transformation needs must be weighed against the substantial need to obtain the services of employees with proven discretion, responsibility and experience. The impact on the internal non-designated candidates of not being selected might be much more drastic, depending on the circumstances, and the efficiency needs of the employer are clearly more substantial.[32]

A third line of cases dealt with the validity of discharging employees for the sake of implementing affirmative action objectives. In line with the position taken in the United States, it has been held that the discharge of employees in order to create space for affirmative action appointments, goes too far. For instance, in *Van Zyl v Department of Labour*,[33] it was decided that affirmative action cannot constitute a fair basis (under the provisions of the *Labour Relations Act* 66 of 1995[34]) for dismissing, as opposed to appointing, an employee. In this case, the complainant, a white woman, who had been employed for 17 years with the Department of Labour, received a notice of dismissal in terms of the department's policy of reorganisation, which was adopted with the express purpose of increasing the level of representation of blacks in identified job categories. The tribunal held that the dismissal was unfair and not necessitated by the constitutional directive of creating a representative public administration. An employer may only dismiss an employee for reasons of misconduct, lack of capacity or for legitimate operational reasons (i.e. redundancy caused by an economic downturn, new technology or restructuring of the business), which did not include affirmative action objectives.

A related but different question is whether affirmative action objectives may be taken into account in deciding who should be selected for retrenchment or redundancy. Seniority is usually the deciding criterion, with the least senior employees the first to be retrenched. The United States Supreme Court has been unwilling to adapt this rule for affirmative action

32 See for example *McInnes v Technicon Natal* (2000) 9 LC 6.15.1 (http:-www.irnet.co.za).

33 (1998) 7 CCMA 5.3.1.

34 Sections 187 and 188, read with items 2(1)(a), 2(2)(a) and (b) of Part B of Schedule 7.

purposes in situations where the most recent appointees were blacks, employed pursuant to an affirmative action programme (*Firefighters Local Union No. 1784 v Stotts* [35] and *Wygant v Jackson Board of Education* [36]).

Interestingly, the Australian High Court advanced a different approach, which will in all likelihood find favour with the Constitutional Court. In *Australian Iron and Steel v Banovic*,[37] the court preferred to adjudicate the issue in terms of the normal principles applicable to indirect discrimination. The court took the position that the seniority-based lay-off principle of "last hired, first fired", would be an inappropriate basis for lay-offs in circumstances where it would have the effect of perpetuating the effects of prior discrimination in appointment. If groups that have been discriminated against in the past constitute the majority of the most recent appointees, the seniority principle will be an indirectly discriminatory redundancy selection device. In the absence of any evidence to justify the "last on, first off" method's exacerbation of the adverse effects of past discriminatory practices on women, the court upheld the industrial tribunal's finding of indirect discrimination.

4. Beneficiaries

The issue of the beneficiaries of affirmative action, and in particular the problem of the over- and under inclusiveness of affirmative action measures has also arisen in affirmative action disputes. An affirmative action measure will be under-inclusive if it benefits only some of the groups that it is supposed to, when judged in terms of the purpose of protecting or advancing persons or categories of persons disadvantaged by unfair discrimination. In this respect, the question is often mooted whether an affirmative action plan must make equal provision for all designated groups in order to be valid. Must all groups historically disadvantaged as a result of discrimination equally benefit from a particular affirmative action programme, or may an employer be selective and concentrate on one or some of the designated groups only?[38] Applicable legislation in Canada makes it possible that an employer adopting employment equity programmes may choose to benefit any of the designated groups it desires, subject to the human rights law in the jurisdiction.[39] The validity of affirmative action plans have also been upheld in the United States, despite being under-inclusive.[40]

Section 9(2) of the Constitution identifies as the beneficiaries of affirmative action all persons, or categories of persons, disadvantaged by unfair discrimination. The accommodation of all disadvantaged groups will more often than not be impossible and an employer will frequently have to choose between members of such groups. Preferences for one amongst a

35 467 US 561, 104 SCt 2576, 81 LEd 2d 483 (1984).
36 476 US 267, 106 SCt 1842, 90 LEd 2d 260 (1986).
37 (1989) 168 CLR 165.
38 See the discussion by Smith 1995:92-93.
39 Bevan 1994:2-6.
40 *Hunter v St Louis-San Francisco RR* 639 F2d 424 (8th Cir 1981).

number of suitably qualified members of disadvantaged groups cannot constitutionally be based on automatic preferences for certain categories, or combinations of categories, of disadvantage, but on careful consideration of what is reasonable and justifiable in the circumstances of each individual case. Therefore, it does not seem advisable, or indeed possible, to attempt any abstract ranking of different forms of disadvantage in order to devise an order of preference regarding designated groups. In concrete individual cases, an assessment of the relative importance of different individual or collective profiles of disadvantage in a particular employment context may be relevant for affirmative action decisions. For instance, the composition of the workforce of a specific employer may reflect that some groups are more disadvantaged than others, justifying special preferences in their favour. Since this "preference" is based on demonstrable need, and not on any arbitrary form of hierarchical "ranking" of the groups, it should be protected from challenges in terms of either section 9(2) or section 36(1) of the Constitution, or the *Employment Equity Act*.

Decisions involving selections between suitably qualified members of disadvantaged groups should therefore not be approached on the basis of any abstract *a priori* scale of preference for certain varieties of disadvantage or categories of the disadvantaged, since that would automatically shut out individuals who are not members of that group. Such an unsubstantiated preference for certain groups would constitute discrimination between groups and individuals who, being also "disadvantaged by unfair discrimination", should qualify to be considered on an equal footing for affirmative action. In *Motala v University of Natal*,[41] the court upheld the validity of different cut-off scores for Indians and Africans for admission to medical studies. This finding does not seem to have been based on a general rating of the groups in terms of degrees of disadvantage, but on an appropriate contextualised consideration of different degrees of educational disadvantage. The applicant was an Indian who was refused admission to the medical school of the University of Natal in favour of Africans with lower matriculation results obtained under the previous segregated educational dispensation. It was contended on behalf of the applicant that the Indian community had itself suffered substantial disadvantage as a result of discrimination. Accordingly, it was submitted that discrimination between members of the African community and those of the Indian community, under the policy adopted by the respondent for selection of first year medical students, was unfair discrimination. The court upheld the constitutionality of the preference on the strength of the different degrees of disadvantage suffered by each group. It stated:

> [t]he contention by counsel for the applicants appears to be based upon the premise that there were no degrees of 'disadvantage'. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the 'four tier' system of education was

41 1995 (3) BCLR 374 (D) at 383B-F.

> significantly greater than that suffered by their Indian counterparts. I do not consider a selection system which compensates for this discrepancy runs counter to the provisions of sections 8(1) and 8(2) [of the interim Constitution].[42]

In *Durban Metropolitan Council (Parks Department) v SAMWU*,[43] the grievant, a coloured man, was passed over in favour of an African for a supervisory position. The arbitrator noted that in terms of the applicable affirmative action policy, no automatic preference is given to any particular class of disadvantaged persons. The nature of the position, the demographic profile of the department, the qualifications and work experience of the candidates were some of the relevant criteria that should determine the decision. He then went on to apply the identified criteria to the facts of the specific case:

> Coloured employees in the Council exceed the demographic profile of the Durban Metropolitan area by one percent whereas the African component with the Council is under-represented by twenty percent. This weighs the discretion in favour of an African being appointed.
>
> Furthermore, the position of supervisor is low, standing at grade three. To swell the Coloured component at this level where the supply of labour is relatively abundant would be inconsistent with the objectives of the [affirmative action policy]. However, if the position was, say, for a Head of Department, a Coloured candidate should not be refused appointment purely on the basis that it would distort the demographics of the Council relative to the area profile.
>
> On the other hand, if the Applicant's score was markedly better than Mr Cele's, then by applying the merit principle this factor could be weighted more heavily in the Applicant's favour. Likewise, if he had acted in the position, that would have operated in his favour.[44]

An affirmative action measure is over-inclusive if it benefits not only members of groups disadvantaged by unfair discrimination, but also members of groups not so disadvantaged. In this respect, much has been said about the contentious issue whether affirmative action programmes should benefit only those individuals who were actually disadvantaged by past discrimination, or if it should also include non-victim members of a group, which on average suffered discrimination.[45] It is clear from its wording,

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42 See also the following observation in *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) (PA 6/98): "[t]hat the outcome was to a certain extent dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants is more of a reflection on the remaining strangeness of our society, rather than an indication of arbitrariness on his [the Commissioner's] part".

43 (1998) 7 ARB 6.9.5.

44 See also *Public Service Association — Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 May 1998, discussed in Rycroft 1999:1426.

45 Gibson 1990:308; Sloot 1986:220. In *Durban City Council (Electricity Department) v Kalichuran* (1995) 4 ARB 6.9.5, the arbitrator interpreted the terms of the

though, that section 9(2) of the Constitution makes provision for both individualised and group-based affirmative action measures. The fact that it clearly refers to "persons or categories of persons disadvantaged by unfair discrimination," means that also individuals, who themselves are not actual victims of unfair discrimination, but who belong to a group, which has been so disadvantaged, qualify for affirmative action benefits.[46] As long as such measures can be said to be designed to "protect or advance" the disadvantaged group to which they belong, they serve an objective expressly sanctioned by section 9(2). It appears then that this would leave little scope for the kind of attack on affirmative action plans that was successfully launched in the *Croson* case.[47] The court affirmed its previous approach that the beneficiaries of affirmative action plans need not be the actual victims of discrimination, but held nevertheless that the scope of the specific plan was too broad. It was intended to benefit African-American contractors, but included amongst its beneficiaries also other minority groups in respect of whom no evidence of previous discrimination had been proffered.[48] Secondly, the plan was not geographically narrowly tailored because also black entrepreneurs from anywhere in the country could reap its benefits.[49]

In *Thomas auf der Heyde v University of Cape Town*,[50] the Labour Court considered whether a black person who was not a South African citizen could be the beneficiary of an affirmative action programme. Jammy AJ was of the opinion that there is merit in the applicant's contention that such persons

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applicable affirmative action policy to require that in order to qualify for preferential treatment, a person must establish that he or she is the actual victim of disadvantage. *In casu* he found that the Indian applicant failed to provide any evidence of systematic exclusion based on race. See also the statement by Landman J in *George v Liberty Life Association of Africa Ltd* [1996] 8 BLLR 985 (IC) at 1005: "the constitution, the supreme law of the land, recognises that even within a racial group which has suffered discrimination there may be and indeed are persons who have had opportunities and who have not been, or not been disadvantaged to the extent of their fellows. Affirmative action in a South African context is not primarily intended for their benefit. Affirmative action as used in the Constitution is not premised on the American concept of affirmative action being 'racially based remedial action'."

46 This interpretation was adopted in the arbitration award of *Durban City Council (Electricity Department) v SAMWU* (1995) 4 ARB 6.9.23. The arbitrator also relied on the utilitarian argument that it would be impossible to implement affirmative action if each and every applicant had to go through a test as to whether he as an individual had been disadvantaged by past practices. A graduate from one of the best schools or universities in the county would, for example, find it difficult to satisfy the test of individual disadvantage. See also Kentridge 1996 (updated):14-39; Smith 1995:90. Compare Rycroft 1999:1423-1425.

47 *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854 (1989).

48 488 US 469 at 506, 109 SCt 706 at 728 (1989).

49 488 US 469 at 508, 109 SCt 706 at 729 (1989).

50 Case no 603/98 5 May 2000.

should not benefit in terms of the University of Cape Town's affirmative action policy. Although it is not required that the individual beneficiaries need to be personally disadvantaged, they must be members of groups that have been disadvantaged by discrimination.[51] The court concluded that non-citizens fall outside any of those categories.[52] This conclusion is too widely stated. Although it is true that the groups that the Constitution visualised as the beneficiaries of affirmative action are South Africans disadvantaged by discrimination, it is not inconceivable that these groups may in particular circumstances derive benefit from the appointment of black, female or disabled non-citizens, especially in so far as their appointment may contribute to the dismantling of behavioural or structural impediments in employment that operate to the disadvantage of designated groups.

6. Conclusion

With its equality jurisprudence only in its infancy stage, affirmative action will provide a difficult challenge to the South African Constitutional Court. The course it takes will have to steer carefully between the compelling transformational needs of the country and the equally important imperative to keep all governmental social reform projects within the confines of the Constitution. Employment equity and affirmative action, like many other projects of transformation translated into law, will put under pressure the fragile compromises that are the current cement keeping the South African constitutional state together. It is therefore of vital importance that social transformation through systems of employment equity be brought within the normative framework of the Constitution itself. In this way the Constitution maintains its function of balancing the need to effect fundamental socio-political transformation with the needs of security, continuity and national integration. Without such a proper constitutional contextualisation for employment equity, it tends to be experienced as a polarising accentuation of especially racial divisions. Only time will tell whether the Constitutional Court has succeeded in maintaining the authority of the Constitution over this and other projects of transformation. It is submitted that it has started off on the right foot by endorsing the notion of substantive equality and developing standards to determine unfair discrimination sensitive and open-ended enough to accommodate the complex array of competing interests at stake in affirmative action disputes.

51 At paragraph 71.
52 At paragraph 72.

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