

Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces

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OPSOMMING

Geregeltelike Kennisname: Diskriminasie en Benadeling in die Konteks van Regstellende Aksie

Die artikel ondersoek die vraag of onbillike diskriminasie en die gepaardgaande benadeling van sekere groepe in Suid-Afrika, bewys moet word en of die leerstuk van geregeltelike kennisname voldoende is in die konteks van regstellende aksie. Die begrippe en terminologie in die Grondwet van die Republiek van Suid-Afrika, 1996, sowel as gewone wetgewing wat die Grondwet aanvul - die Wet op Gelyke Indiensneming 55 van 1998 en die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie 4 van 2000 - word ontleed en uitgelê. Die artikel stel voor dat die land se geskiedenis van onbillike sistemiese diskriminasie gegrond op kolonialisme, apartheid en patriargale praktyke, so welbekend en berug is dat die leerstuk van geregeltelike kennisname van toepassing is op regstellende aksie. Voorts, omdat sodanige geskiedenis, die tradisionele oorsake daarvan en uitwerking op swart persone en vroue breedvoerig en volledig gedokumenteer is, word aan die hand gedoen dat die toepassing van die leerstuk kan meehelp om sodanige persone te integreer in die Suid-Afrikaanse werkplek en breër samelewing. Hierdie benadering neem die huidige aspirasies en verwagtinge van die Suid-Afrikaanse bevolking in ag en maak 'n bydrae om die verlede te genees. So 'n benadering ondersteun verder die begrip van substantiewe gelykheid ('n groeps-gebaseerde begrip) en voldoen aan die Grondwet se waarde-gebaseerde metodologie van uitleg. Dit sal ook bydra tot die langtermyn doelwit om 'n nie-rassige en nie-seksistiese samelewing daar te stel. Dit is dus nie nodig om historiese diskriminasie en benadeling te bewys nie omdat sodanige diskriminasie en benadeling nie kontensieus is as 'n sosiale feit nie; dit is intendeel 'n vraag van kennisname van die geskiedenis omdat dit wyd en volledig gedokumenteer is. Die saak van *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) wat verg dat benadeling in die konteks van regstellende aksie "aangetoon" moet word, word ondersteun slegs in soverre inligting voor die hof geplaas word by wyse van byvoorbeeld boeke en verslae. Indien dit nie gedoen word nie, kan die hof uit eie beweging geregteelike kennis neem van onbillike historiese diskriminasie en benadeling. Ten laaste, sou die opvoedkundige, sosiale en ander ekonomiese werklikhede met betrekking tot ras en geslag verander in Suid-Afrika, sal die toepassing van die leerstuk van geregeltelike kennisname heroerweeg moet word. Dit sal ook die geval wees waar *nuwe* diskriminasie en benadeling voorkom en nie goed gedokumenteerd is nie.

1 Introduction

This article looks into the question of whether discrimination and its resultant disadvantage have to be proven or whether taking judicial notice thereof would be sufficient in the context of affirmative action in South African workplaces. In order to do this, it is necessary to explore the historical context against which affirmative action has been adopted in South Africa, to clarify terms and phrases used in the Constitution and to supplement the latter by ordinary legislation and Constitutional Court jurisprudence, all of which need to be interpreted. The only case on affirmative action to have reached the Constitutional Court will also be explored. Lastly, the concept of judicial notice will be investigated and applied to the concepts of discrimination and disadvantage.

2 Historical Overview

In South Africa, colonialist and apartheid laws, policies and practices – which were racist and patriarchal – provided for separate societies for blacks, whites, Indians and coloureds. Segregated land ownership, segregated, zoned living areas for the black urban population, and later, self-governing territories and homelands for the black rural population, pass laws for blacks, racial classification, the prohibition of marriage between whites and people of other races, separate and unequal education systems, health services and public amenities, and separate labour systems with job reservation for whites and wage differentiations between white and black and between the sexes, were at the order of the day.¹ Disabled people were kept dependant and discriminatory legislative provisions existed against them as well.²

This history of systemic discrimination and its resulting inequality and entrenched disadvantage for (a majority) blacks, coloureds and Indians,

1 See the Native Land Act 27 of 1913; the Natives (Urban Areas) Act 21 of 1923, later the Natives (Urban Areas) Consolidation Act 25 of 1945; the Native Trust and Land Act 18 of 1936; the Group Areas Act 41 of 1950, later the Group Areas Act 77 of 1957; the Population Registration Act 30 of 1950; the Reservation of Separate Amenities Act 49 of 1953; the Prohibition of Mixed Marriages Act 55 of 1949; the Immorality Act 23 of 1957; the Promotion of Bantustan Self-government Act 46 of 1959 replaced by the National States Citizenship Act 26 of 1970; the Constitution of Bantu Homelands Act 21 of 1971; the Status of the Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1977; the Status of Ciskei Act 110 of 1981; the Native Labour Regulation Act 15 of 1911; the Black Labour Relations Regulation (Black Labour and Settlement of Disputes) Act 48 of 1953; the Black Labour (Settlement of Disputes) Amendment Act 59 of 1955; the Mines and Works Act 12 of 1911; the Wage Act 27 of 1956, later the Wage Act 44 of 1937, and still later the Wage Act 5 of 1957; the Public Service Act 54 of 1957, later the Public Service Act 111 of 1984; the Unemployment Insurance Act 53 of 1946, later the Unemployment Insurance Act 30 of 1966.

2 Thompson "Legislating Affirmative Action: Employment Equity and Lessons from Developed and Developing Countries" in Adams (ed) *Affirmative Action in a Democratic South Africa* (1993) 21 23.

women and the disabled, was (and still is) well-known – locally and internationally. Moreover, the country's history of colonialism and apartheid and its effects have been documented extensively, exhaustively and widely.³

Further, apartheid has been widely condemned. For example, the United Nations (UN) declared apartheid and its impact a “crime against humanity” and a negation of the UN Charter. Expressions of censure culminated in the adoption of the International Convention on the Suppression and Punishment of the Crimes of Apartheid in 1973 and the expulsion of South Africa from the UN and its agencies.⁴

3 Constitution

Only after many years of both international as well as national pressure, was a democratic constitutional order adopted, under which a commitment was made to achieving the objective of equality. The new Constitution⁵ – forming the basis of the legal system of South Africa – incorporated a notion of substantive equality in its Bill of Rights.⁶ This notion recognises that opportunities are determined by individuals' social and historical status, including race and gender, as part of a group

3 See Liebenberg (ed) *The Constitution of South Africa From a Gender Perspective* (1995); Butler *Democracy and Apartheid: Political Theory, Comparative Politics and the Modern South African State* (1998); Maylam *South Africa's Racial Past: The History and Historiography of Racism, Segregation, and Apartheid* (2001); Beck *The History of South Africa* (2000); Roberts *South Africa 1948-94: The Rise and Fall of Apartheid* (1996); Gann and Duignan (eds) *Colonialism in Africa, 1870-1960*, *The History and Politics of Colonialism, 1870-1914* (1969); *The History and Politics of Colonialism, 1914-1960* (1970); Jacobs *Environment, Power, and Injustice: A South African History* (2003); Perry *Apartheid: A History* (1992); Coleman (ed) *A Crime against Humanity: Analysing the Repression of the Apartheid State*; Worden *The Making of Modern South Africa: Conquest, Segregation, and Apartheid* (2000); O'Regan “Addressing the Legacy of the Past: Equality in the South African Constitution” in Loenen and Rodrigues (eds) *Non-Discrimination Law: Comparative Perspectives* (1999) 13-14; Thompson (ed) *A History of South Africa* (2001); The Complete Wiehahn Report Parts 1-6 and the White Paper on each Part with Notes by Professor NE Wiehahn chaired by Professor NE Wiehahn (1982); International Labour Conference 73rd Session 1987 Special Report of the Director-General on the Application of the *Declaration concerning Action against Apartheid in South Africa* International Labour Organisation (1987); International Labour Conference 77th Session 1990 Special Report of the Director-General on the Application of the *Declaration concerning Action against Apartheid in South Africa and Namibia* International Labour Organisation (1990); International Labour Conference 79th Session 1992 Special Report of the Director-General on the *Application of the Declaration concerning Action against Apartheid in South Africa* International Labour Organisation (1992).

4 Preamble, Art 1 UN GA Res 3068 (XXVIII), 28 UN GAOR Supp (No 30) at 75, UN Doc A/9030 (1974), 1015 UNTS 243, entered into force 1976-07-18 in accordance with article XV.

5 Constitution of the Republic of South Africa, 1996.

6 *Idem* s 9.

or groups.⁷ It acknowledges that discriminatory acts do not occur in isolation – they are part of patterns of behaviour towards groups, such as women and blacks – which results in “disadvantage” for such groups.⁸ Such disadvantage may be of social, economic, political and/or educational nature.⁹ The notion further holds that, as the prohibition of unfair discrimination is insufficient to achieve true equality, affirmative action measures are needed.¹⁰ Such measures distribute social goods in a group-based way on the basis of, for example, race and sex, and seek to correct imbalances where factual inequalities and disadvantages exist. Affirmative action is thus a temporary means to promote equality.¹¹

The Constitution in its preamble – an important source of interpretation in that it indicates the fundamental mischief it wants to remedy¹² – explicitly recognises the injustices of the South African people’s past and sets out to heal the divisions of the past though it does not elaborate on these injustices and divisions.

To “recognise” means to “identify, acknowledge, accept, admit, realize, be aware of, be conscious of, appreciate, be cognisant of ...” To recognise the injustices of the past in the Constitution points to the significance thereof.

The Constitution further sets out to establish a society based on democratic values, social justice and human rights.¹³ The achievement of equality, non-racism and non-sexism are founding values of the country.¹⁴ The Bill of Rights affirms the values of human dignity, equality and freedom.¹⁵ With regard to equality, it is stated that equality includes the full and equal enjoyment of all rights and freedoms.¹⁶ In an endeavour to promote the achievement of equality, unfair discrimination

7 In contrast to formal equality which views individual ability and merit as the only relevant factors required to achieve success in society. See Fredman *Women and the Law* 1997 383; McGregor “The Nature of Affirmative Action: A Defence or a Right?” 2003 *SA Merc LJ* 421 422-23; De Waal and Currie *The Bill of Rights Handbook* (2005) 232-34; Du Toit et al *Labour Relations Law A Comprehensive Guide* (2006) 573-75; *Dudley v City of Cape Town* 2004 25 *ILJ* 305 (LC); *Dudley v City of Cape Town* 2008 29 *ILJ* 2685 (LAC).

8 Banton *Discrimination* (1994) 8.

9 Faundez *Affirmative Action: International Perspectives* (1994) 34.

10 Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 59; Adam “The Politics of Redress: South African Style Affirmative Action” (1997) *The Journal of Modern African Studies* 231 231-34; UNESCO Prevention of Discrimination The Concept and Practice of Affirmative Action Final Report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5 17 June 2002 par 33.

11 See the authorities cited in note 8 *supra* and note 35 *infra* for a further discussion on the nature of affirmative action.

12 See Du Plessis *Re-interpretation of Statutes* (2002) 118.

13 Preamble to the Constitution of the Republic of South Africa, 1996.

14 *Idem* s 1.

15 *Idem* s 7.

16 *Idem* s 9(2).

is prohibited on a non-exhaustive list of grounds¹⁷ and provision is made for affirmative action through¹⁸ “... legislative and other measures, designed to *protect or advance* persons, or categories of persons, *disadvantaged by unfair discrimination ...*” (own emphasis).

The Constitution thus authorises affirmative action in a broad manner. The beneficiaries of affirmative action measures are those persons, or categories of persons “disadvantaged by unfair discrimination.” The *cause* of such disadvantage is clearly unfair discrimination, but neither the cause(s) nor the effects are further elaborated on in the Constitution itself. In other words, the Constitution does not offer a clearly articulated statement recognising the nature of disadvantage that needs to be remedied, neither does it specify the nature of the unfair discrimination (the grounds on which it has occurred) which have caused such disadvantage. Moreover, the Constitution is silent on proving disadvantage and/or its cause(s).¹⁹

Other laws are thus required to supplement and expand the basic constitutional framework. These laws must be interpreted as part of the broader constitutional legal basis.²⁰

In this regard, the Constitution propagates a value-based methodology of interpretation and states that the values that underlie an open and democratic society, based on human dignity, equality and freedom, must be promoted.²¹ When interpreting any legislation, the spirit, purport and objects of the Bill of Rights, must be promoted.²²

Besides ordinary laws, the Constitutional Court, of course, also plays an important role in expanding and interpreting the Constitution.

3 1 Supplementing the Constitution

3 1 1 Ordinary legislation

3 1 1 1 Introduction

Ordinary legislation, such as the Promotion of Equality and Prevention of Unfair Discrimination Act²³ (PEPUDA) and the Employment Equity Act²⁴ (EEA) – both associated with the socio-economic transformation of the country – expand the basic constitutional framework and clarify the

17 *Idem* s 9(3). In other words, besides the listed grounds namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, other analogous grounds may also exist.

18 *Idem* s 9(2).

19 *Idem* s 9(5). The Constitution does provide for a test in the context of proving a claim for unfair discrimination.

20 Bekink *Principles of South African Constitutional Law (A Student Handbook)* (2003) 107.

21 S 39(1)(a) of the Constitution of the Republic of South Africa, 1996.

22 *Idem* s 39(2).

23 4 of 2000.

24 55 of 1998.

nature of the injustices and divisions of the past, and the terms “disadvantage” and “unfair discrimination,” as found in the Preamble and in section 9(2) of the Constitution respectively. Only these two acts will be discussed.

3 1 1 2 *Promotion of Equality and Prevention of Unfair Discrimination Act*

The PEPUDA, in a detailed manner, acknowledges the pain and suffering of a great majority of South African people and wants to eradicate social and economic inequalities which were generated by colonialism, apartheid and patriarchy.²⁵ It aims to promote *de jure* and *de facto* equality and equality in terms of outcomes.²⁶ It particularly mentions the advancement of²⁷

historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure such consequences ... (own emphasis).

Its reach, however, goes wider than that of historically disadvantaged people in that it targets people disadvantaged by both *past* and *present* unfair discrimination.²⁸ As a guiding principle in the application of the Act, it states that the existence of systemic discrimination and inequalities must be *recognised* and *taken into account*, particularly in respect of²⁹

... race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by *colonialism, the apartheid system and patriarchy* ... (own emphasis).

To recognise systemic discrimination and its resultant disadvantage for certain groups in legislation, carries a certain weight as the latter is generally viewed as an expression of the will of the people through their democratically elected representatives.

The Act places a duty and responsibility on the state, institutions performing public functions and all people to promote equality in respect of race, gender and disability.³⁰ Very importantly, it *prioritises* the promotion of equality in respect of these very same grounds.³¹

Unlike the Constitution then, the PEPUDA names the injustices and divisions of the past (in the Preamble of the Constitution) namely the unfairly discriminatory systems of colonialism, apartheid and patriarchy and the discriminatory grounds on which these systems were practised. It makes clear the wide reach of the disadvantage these systems have

25 Preamble PEPUDA. PEPUDA does not apply to any person to whom and to the extent to which EEA applies (s 5(3)).

26 S 1 PEPUDA.

27 *Idem* preamble.

28 *Idem* s 3(1).

29 *Idem* s 4(2).

30 *Idem* s 28(3)(a).

31 *Ibid.*

caused in respect of race, gender and disability, as extending to *all* spheres of life.

Similar to the Constitution, the PEPUDA is silent on proving “disadvantage,” a test for “disadvantage” or its causes, in the context of affirmative action. However, the Act articulates in detail the past systems of colonialism, apartheid and patriarchy to have unfairly discriminated against and disadvantaged people on the basis of race, sex and disability.³²

3 1 1 3 *Employment Equity Act*

The EEA,³³ similar to the PEPUDA, *recognises* in a fairly detailed manner that “as a result of *apartheid and other discriminatory laws and practices*”³⁴ (own emphasis), there are disparities in employment, occupation and income within the labour market. These disparities, it states, created pronounced disadvantages for black people, women, and people with disabilities³⁵ and those are the beneficiaries of affirmative action under the EEA.³⁶ In 2007, South African people of Chinese descent have been declared to fall within the ambit of the definition of “black people” for purposes of the EEA.³⁷

32 See par 3 1 1 1 *supra*.

33 The affirmative action provisions of the EEA apply to people from designated groups only (see ss 1 4(2)). The EEA aims “to achieve equity” in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce (s 2). The Act gives some definition of affirmative action measures as follows: “Affirmative action measures are ... 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” (s 15(1)). Affirmative action measures are thus a tool or a means to attain the end of “equitable representivity” in the workplace. It is part of a broader strategy in the effort to promote the achievement of equality as set out in the Constitution and it is a defence to unfair discrimination (s 6(2)(a)); Van Niekerk (ed) *Law@work* (2008) 135ff; 151ff). The Labour Court stated in *Dudley v City of Cape Town* 2004 25 *ILJ* 305 (LC); *Dudley v City of Cape Town* 2008 29 *ILJ* 2685 (LAC) that affirmative action does not provide an individual employee with a right to be appointed or promoted and cannot give rise to a claim of enforcement under chapter III of the EEA.

34 Preamble EEA.

35 *Idem* s 1 EEA. “Black people” is a generic term for Africans, Coloureds, and Indians, whereas “people with disabilities” connotes people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment.

36 *Idem* s 1 EEA.

37 *Chinese Association of South Africa v Minister of Labour* case no 59251/2007 (TPD). During the 18th and 19th centuries large numbers of Chinese people were imported to work in mines in South Africa (Thompson *A History of South Africa* xxi). Before 1994, Chinese people were classified as “coloureds” but were not included under any of government’s benefit programmes after 1994. This led to the Chinese Association of South Africa

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Again, to *recognise* unfair discrimination and its resultant disadvantage in legislation is important as legislation is generally viewed as an expression of the will of the people.

The EEA thus clearly articulates that the discriminatory system of apartheid (though it recognises that other such laws and practices also existed) basically caused economic disadvantage to blacks, women and the disabled in the workplace.

Similar to the Constitution, the EEA is silent on proving “disadvantage,” a test for “disadvantage” or its causes, in the context of affirmative action.³⁸ However, the Act recognises and articulates in detail, the past system of apartheid to have unfairly discriminated against people on the basis of race, sex and disability. The Act also clearly articulates the resulting disadvantage of these systems on groups possessing these characteristics.

3 1 2 Constitutional Court Jurisprudence

3 1 2 1 Clarifying Discrimination and Disadvantage

The Constitutional Court has made clear that the achievement of equality goes to the bedrock of our constitutional architecture.³⁹ It also clarified the historical injustices of the past, the nature of disadvantage suffered, the discriminatory systems which have caused such disadvantage and the discriminatory grounds on which these systems had operated. In

lobbying for Chinese people to be classified as a designated group in terms of the EEA and to benefit from affirmative action measures. See eg Letter Chinese Association of South Africa to the Parliamentary Portfolio Committee on Labour to the Department of Labour [undated]. After public hearings by the Portfolio Committee it was recommended that an amendment to the EEA be drafted to ensure that South African citizens of Chinese descent would be recognised as historically disadvantaged (see Letter Parliamentary Portfolio Committee on Labour to Department of Labour dated 19 May 2004; Report of the Parliamentary Portfolio Committee on Labour on public hearings on employment equity held during May 2003 [undated]). After informal discussions between business, labour and government, it was, however, decided that the issue was of a political nature and could not be supported (see McGregor *The Application of Affirmative Action in Employment Law with specific reference to the Beneficiaries: A Comparative Study* unpublished LLD thesis UNISA [2005] 56). Since then the Chinese Association has brought a successful application to the (then) TPD for an order to declare Chinese people “disadvantaged.” See also fn 36.

38 It is arguable that it may be inferred from this silence in the PEPUDA and the EEA that the legislator has not deemed it necessary for disadvantage and/or its causes to be shown in a historical context. Both laws, like the Constitution, provide for a test in the context of a claim for unfair discrimination (see ss 13 and 11 respectively).

39 See eg *Brink v Kitshoff* 1996 4 SA 197 (CC) par 40; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 74; *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) par 6; *Satcwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) par 17; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 22.

interpreting the Constitution, the Constitutional Court emphasised historical racial discrimination as follows:⁴⁰

The policy of apartheid systematically discriminated against black people in *all aspects of social* life. ... [T]he most visible and most vicious pattern of discrimination has been racial The deep scars of this appalling programme are still visible in our society (own emphasis).

And⁴¹ “[o]ur Constitution recognises ... decades of systematic *racial discrimination* entrenched by the apartheid legal order ...” (own emphasis).

Moreover, the Constitutional Court recognised that disadvantage due to discrimination based on sex, though not as visible, or as widely condemned as discrimination on grounds of race, has nonetheless resulted in “... *deep* patterns of disadvantage” (own emphasis).⁴²

Very importantly, the Court has further widened the scope of disadvantage beyond the abovementioned traditional or common disadvantage based on race and gender found in the country. It pointed out that, besides uneven race, class and gender attributes⁴³

... there are *other* levels and forms of social differentiation and systemic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of *new* patterns of disadvantage (own emphasis).

The wording in the preamble and section 9(2) of the Constitution then primarily relates to disadvantage resulting from unfair discrimination on the grounds of race and sex, but it is not limited to these. It may include *other* or *new* disadvantage with an objective existence, caused by unfair discrimination. This may include discrimination on any of the listed grounds as set out in subsection 9(3) of the Constitution or on unspecified grounds.⁴⁴

4 *Van Heerden* Case

The case of *Minister of Finance v Van Heerden*⁴⁵ is the only case on affirmative action that has reached the Constitutional Court so far, and since it revolved around a test for affirmative action, the Court touched on the notion of disadvantage.

The matter involved the rules of the Political Office-Bearers Pension Fund for members who entered Parliament after the new constitutional order, in terms of which three different categories of members with

40 *Brink v Kitshoff* 1996 4 SA 197 (CC) par 41.

41 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 4 SA 490 (CC) par 74.

42 *Brink v Kitshoff* 1996 4 SA 197 (CC) par 44.

43 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 27. See also *Hoffmann v SA Airways* 2000 21 ILJ 2357 (CC).

44 See par 3 *supra*.

45 2004 6 SA 121 (CC).

differentiated employer contributions (favouring new parliamentarians for a short period) were created. The applicants (the Minister of Finance and the Fund) successfully appealed against an order of the High Court which found that the rules of the Fund were unfairly discriminatory and unconstitutional.

The classification by the applicants of the Fund as an affirmative action measure⁴⁶ – though this was not fully argued – was accepted by a majority in the Constitutional Court. In essence, the court held that affirmative action measures that “properly fall” within the requirements of section 9(2) of the Constitution were not presumptively unfair and established a three-pronged rationality test to determine this: Do the measures target people or categories of people who had been disadvantaged by unfair discrimination; are such measures designed to protect or advance such people or categories of people; and do they promote the achievement of equality?⁴⁷

This discussion focuses only on disadvantage as found in the context of the first leg of the three-pronged test. In this regard, the Court held that “[t]he beneficiaries [of affirmative action measures] must *be shown* to be disadvantaged by unfair discrimination” (own emphasis).⁴⁸

The Court held that the measures of redress must favour a group or category designated in section 9(2), that is, people disadvantaged by unfair discrimination.⁴⁹ In this case, the Minister and the fund submitted that the differentiated contribution scheme was set up to promote the attainment of equality between previous pension fund members and new members who were in the past excluded from parliament on account of race and/or political affiliation. This objective they would advance by identifying separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it was clear that not all new parliamentarians belonged to the class of people prejudiced by past disadvantage and unfair discrimination. It appears that the Court relied on the evidence led in the court *a quo*.⁵⁰

However, an “overwhelming majority” of parliamentary members were excluded from parliamentary participation by past apartheid laws

46 *Idem*. See the minority judgements of Mokgoro J (paras 97; 98; 105) and Ngcobo J (par 108) who did not agree that the fund constituted an affirmative action measure.

47 *Idem* par 37.

48 *Idem* par 38.

49 *Ibid*.

50 *Idem*. See note 53 of the judgement where the Court referred to the “uncontested evidence” by an administrator of the fund before the High Court that the *overwhelming majority* of members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief, and were thus disadvantaged by unfair exclusion.

on account of race, political affiliation or belief.⁵¹ The evidence that a small minority of people who had not been disadvantaged by apartheid but who also benefited from the differential pension contribution scheme was insufficient to undermine the legal efficacy of the scheme.⁵² The court stated that it was often difficult, impractical or undesirable to devise an affirmative action scheme with “pure” differentiation demarcating precisely the targeted classes.⁵³ Within each scheme, there may be exceptional or hard cases, or windfall beneficiaries.⁵⁴

5 Judicial Notice

The question whether a court should take judicial notice of a fact, is one of law and is decided by the court.⁵⁵ The South African law of evidence makes provision for this doctrine and allows a judicial officer to accept the truth of certain facts which are known to him or her, even though no evidence was led to prove these facts.⁵⁶ This may happen in two situations: where facts are so well-known so as not to be the subject of reasonable dispute, (that is, general knowledge which requires no

51 *Ibid.*

52 *Idem* par 39.

53 *Idem* par 40.

54 *Ibid.* Mokgoro J in a minority judgement did not find it necessary to decide the correctness of the test that the *majority* of members of a category must be people designated as disadvantaged by unfair discrimination (paras 86, 88, 89). She further pointed out that apartheid has categorised people and attached consequences to those categories and in accordance with a person’s membership of a group (with no relevance to the circumstances of individuals). Recognising this she stated s 9(2) now allows for affirmative action measures which target “whole” categories of people to be advanced on the basis of membership of a group. In order to benefit from a measure enacted in terms of s 9(2) it is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination. On this understanding of s 9(2) she argued it is then clear that the state need not show that each individual member of the advanced group actually suffered past disadvantage, as long as an individual was part of a group targeted (paras 85-86). For arguments why individual members of a favoured category may benefit under affirmative action measures even though they have not been disadvantaged see also Dupper “In Defence of Affirmative Action” 2004 *SALJ* 187 204-05; McGregor “The concept of ‘Disadvantage’ and Affirmative Action” 2002 *SA Merc LJ* 808 812; *Auf der Heyde v University of Cape Town* 2000 8 BLLR 877 (LC); *Stoman v Minister of Safety & Security* 2002 23 *ILJ* 1020 (T). India, for example, and on the other hand, makes provision for this. Individual people who do not share the group characteristics of social, economic or educational backwardness among certain backward classes, the so-called “creamy layer,” are not entitled to benefit under affirmative action measures.

55 Schwikkard and Van der Merwe *Principles of Evidence* (2009) 481-82.

56 *Idem* 481. Other possibilities in this regard include rebuttable presumptions and presumptions of fact. A rebuttable presumption is a rule of law compelling the provisional assumption of a fact (Zeffert, Paizes and Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffert)* (2003) 170; Schwikkard and Van der Merwe 478-79). They are provisional in the sense that the assumption will stand unless it is destroyed by countervailing

external evidence) or where facts can be readily ascertainable by accurate sources so that evidence to prove them would be completely unnecessary (or even absurd).⁵⁷ The reasons for the existence of the doctrine of judicial notice are twofold. First, it expedites cases in the sense that much time would be wasted if every fact which was not admitted had to be the subject of evidence.⁵⁸ Second, the doctrine tends to produce uniformity of decision on matters of fact (where a diversity of findings may sometimes be embarrassing).⁵⁹

In some instances, a court may take judicial notice of some facts without any enquiry, that is, without consulting any specific source, whereas in other instances judicial notice may only take place with reference to a source of indisputable authority. The distinction between the two is that in the former instance, evidence may generally not be led to refute facts which have been properly noticed, while in the second instance, evidence may generally be led concerning the disputability or indisputability of the source.⁶⁰

The former encompasses facts that are “reasonably known among reasonable informed and educated people”.⁶¹ This knowledge must be *notorious* and not the result of personal observation.⁶² The latter entails facts which are not generally known but easily ascertainable from sources such as surveys of governmental or other reliable authority.⁶³

The South African courts have used books to establish historical facts. This may be done at the court’s own initiative, or the court may be referred to them.⁶⁴ In *Consolidated Diamond Mines of South West Africa v Administrator of South West Africa*,⁶⁵ the court stated that

... the early history of the Sperrgebiet, [in respect of exclusive prospecting and mining rights] closely bound up as it is with the establishment of German sovereignty in South-West Africa, is really a matter of *general historical knowledge of which the Court, ... might probably have informed itself from history books and have taken judicial cognisance ...* . We have indeed been referred by counsel to a book ... which is said to be of recognised historical

evidence. In other words a fact is presumed unless the contrary is proved by the party against whom the presumption operates (Zeffert, Paizes and Skeen 170-71). Presumptions of fact may be described as “merely frequently recurring examples of circumstantial evidence” or “a mere inference of probability which the court may draw if on all the evidence it appears to be appropriate” (Schwikkard and Van der Merwe 478-80; Zeffert, Paizes and Skeen 168-69). These presumptions appear to be less appropriate in the context of affirmative action because the South African history is notoriously known and has been documented well.

57 Schwikkard and Van der Merwe 479; Zeffert, Paizes and Skeen 715.

58 Schwikkard and Van der Merwe 480-81.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Idem* 481.

63 *Idem* 479.

64 *Ibid.*

65 1958 4 SA 572 (AD) 609ff.

accuracy. As, however, the relevant information has been put before us in affidavits filed on behalf of the appellant and the respondents do not deny the facts but merely dispute certain inferences and certain conclusions of law we are asked to draw of them, it is unnecessary for us to travel beyond the record (own emphasis).

The courts have also taken judicial notice of facts of a sociological character.⁶⁶ For example, in *Moller v Keimoes School Committee*⁶⁷ the Appellate Division took judicial notice of the early history of South Africa and of attitudes of early settlers on racial issues.

As a matter of *public history*, we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, who the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We also know that, while slavery existed, the slaves were blacks and that their descendants, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites. Believing ... that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilisation, they condemned intermarriage or illicit intercourse between persons of the two races. ... the vast majority of Europeans have always condemned such unions, and have regarded the offspring of such unions as being in the same racial condition as their black parents ... these prepossessions, or, ... prejudices, have never died out, and are not less deeply rooted at the present day among the Europeans in South Africa, whether of Dutch or English or French descent (own emphasis).

Where the disadvantage of a particular group, or a mixed group, and/or its causes are truly contentious as social fact/s, that group's alleged disadvantage should not be accepted as a legal fact,⁶⁸ and the doctrine of judicial notice cannot be used in such circumstances. The same will be true for new disadvantage. Convincing evidence may have to be produced on the nature of such disadvantage and its causes simply because such new disadvantage and its causes may not be well-known or well-documented as yet and is unclear as a social fact.

6 Analysis

Flowing from the above, it is submitted that South Africa's history of past discrimination of colonialism, apartheid and patriarchy and its resultant disadvantage for certain groups are sufficiently notorious to form a proper subject for judicial notice: it is a matter of historical knowledge. Moreover, this history – its traditional or common causes and effects on blacks, women and the disabled in particular – have been documented extensively and widely in reputable books and reports.⁶⁹

66 Zeffert, Paizes & Skeen 724.

67 1911 AD 635 643.

68 Peirce "A Progressive Interpretation of Subsection 15(2) of the Charter" 1993 *Saskatchewan LR* 263 288-95 from which ideas have been borrowed.

69 See note 3 *supra*.

It appears that the Constitution, in fact, paved the way for using the doctrine of judicial notice by recognising the injustices of the past. The PEPUDA and the EEA – which expand on the Constitution – have recognised this in greater detail by naming the discriminatory systems of colonialism, apartheid and patriarchy and the social and economic nature of the disadvantage it has caused for blacks, women and the disabled. It could never have been the intention of the legislator to require a showing of, or proving disadvantage, and/or its causes for these groups against the background of this notorious and well-documented history.

It appears true that is unnecessary and wasteful to prove historical discrimination, for this exacerbates conflict and division.⁷⁰ It focuses on the wrongs of the past and promotes an unhealthy social ethic, namely the endeavour to prove that one is a victim. Further, the author agrees that deeming blacks not to have suffered disadvantage unless they can prove the contrary, appears to be “fundamentally misplaced.”⁷¹ This is so because South Africa’s past policy of apartheid has been branded as “a crime against humanity”⁷² and its devastating effect on black communities has been documented so amply as to require no additional proof.⁷³ Another valid argument is that by proving disadvantage, it may be counterproductive to the present transforming society.

7 Conclusions

The fundamental mischief which the Constitution seeks to remedy in this regard is the previous, widely condemned, discriminatory system/s and their resultant entrenched disadvantage for certain groups. This it does by recognising the injustices of the past and setting out to heal the divisions of the past mentioned in the preamble of the Constitution.⁷⁴ The Constitution further broadly authorises affirmative action measures for people disadvantaged by unfair discrimination in section 9(2).⁷⁵ These provisions have been supplemented and expanded on in detail in ordinary legislation (the PEPUDA and the EEA) and by the Constitutional Court to mainly encompass traditional disadvantage caused by unfair discrimination based on the grounds of race, sex and disability, as practised by the systems of colonialism, apartheid and patriarchy, but also to include new disadvantage caused by unfair discrimination.⁷⁶

70 Rycroft “Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies” 1999 *ILJ* 1411 1423.

71 Du Toit “When does Affirmative Action in Favour of Certain Employees become Unfair Discrimination against Others?” paper presented at a conference on Equality – Theory and Practice in South Africa and Elsewhere at the University of Cape Town January 2001 1 13.

72 *Ibid.*, par 3 *supra*.

73 *Ibid.*

74 See par 3 *supra*.

75 *Ibid.*

76 See paras 3 1 1 1 – 3 1 3; 3 1 2 1 *supra*.

Neither the Constitution, nor the PEPUDA or the EEA, have expanded on a requirement for proving disadvantage and its causes. In this regard it has been mooted that the country's history of past discrimination of colonialism, apartheid and patriarchy and its resultant disadvantage for specific groups are sufficiently notorious to form a proper subject for judicial notice: It is not contentious as a social fact – it is a matter of historical knowledge. Moreover, this history – its traditional or common causes and effects on blacks and women – has been extensively and widely documented.⁷⁷ Using the doctrine of judicial notice in this context is apposite where a majority black people and women, who have been unfairly discriminated against, disadvantaged and deprived of their dignity, must now be advanced and integrated⁷⁸ into the new South African order.

Such an approach will have regard to contemporary aspirations and expectations of the South African population⁷⁹ and will contribute to healing the divisions of the past, a vision expressed in the preamble to the Constitution.⁸⁰ It will also foster the notion of substantive equality – a group-based notion⁸¹ – against the background of centuries of systemic racial discrimination and patriarchal subordination. Such a construction makes sense from an historical, socio-economic and legal perspective and complies with the Constitution's value-based interpretation methodology.⁸² It will contribute to achieving the long term goal of a non-racial, non-sexist South African society in which each person will be recognised and treated as a human being of equal worth and dignity.⁸³

In essence, it is not necessary to prove historical discrimination and disadvantage. The majority approach in the *Van Heerden* case that disadvantage must be “shown” is supported only in so far as information needs to be put before the courts by way of reference to books, reports and/or employment equity plans. If this is not done, the court may take judicial notice out of its own accord of unfair discrimination and disadvantage.

However, as educational, social and economic realities between the races, intra-racially and between the genders change in South Africa, the concept of judicial notice for these concepts will have to be revisited.

77 See note 3 *supra*.

78 See Dupper 2004 SALJ 187 214-215.

79 See *S v Gqozo* (2) 1994 1 BCLR 10 (Ck).

80 See par 3 *supra*.

81 See *S v Gqozo* (2) 1994 1 BCLR 10 (Ck).

82 See note 8 *supra*.

83 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 44.