

**UNISA v REYNHARDT [2010] 12 BLLR 1272 (LAC): DOES AFFIRMATIVE ACTION HAVE A LIFECYCLE?**

**M Mushariwa\***

## **1 Introduction**

Affirmative action seeks to create a working environment based on principles of substantive equality,<sup>1</sup> the ultimate aim of this pursuit being the creation of a workforce representative of the population of South Africa.<sup>2</sup> One of the on-going debates around affirmative action is whether or not it has a life-span. The one school of thought argues that affirmative action requires a legislated sunset clause, in which the consideration of issues of race, gender and disability will no longer be required of employers.<sup>3</sup> Failure to have such a clause is held to give rise to an "institutionalised racial spoils system" and to result in reverse discrimination.<sup>4</sup> The other school of thought argues that the need for affirmative action is two-fold - to redress past inequalities but also to deal with existing inequalities within society - and having a sunset clause would pervert the aim of affirmative action to deal effectively with both kinds of inequalities and also to create a representative workforce.<sup>5</sup>

The question becomes, is it possible that we can reach a workplace within which affirmative action is no longer required? How will we know we have created such a workplace?<sup>6</sup> The goal of substantive equality within the setting of affirmative action is to remove both the visible and invisible barriers to employment equity.<sup>7</sup> How will we

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<sup>1</sup> McGregor 2003 SA Merc LJ 421, 435. See also Van der Walt and Kiutri 2006 *Obiter* 675, 681.

<sup>2</sup> See the preamble of the *Employment Equity Act* 55 of 1998.

<sup>3</sup> Dupper, Bhoola and Barbers *Understanding the Employment Equity Act* 131. See also Dupper 2008 SAJHR 438.

<sup>4</sup> Dupper, Bhoola and Barbers *Understanding the Employment Equity Act* 132.

<sup>5</sup> Dupper, Bhoola and Barbers *Understanding the Employment Equity Act* 132.

<sup>6</sup> This question will be answered within the conclusion of this case note.

<sup>7</sup> Preamble of the *Employment Equity Act* 55 of 1998.

know these barriers have been recognised and addressed appropriately? The effectiveness and fairness of employment equity is seen in its application and in most cases its "reality" is seen in whether or not designated employers meet their targets.<sup>8</sup>

A designated employer<sup>9</sup> must apply employment equity in a fair and rational manner in order for affirmative action to be seen to bear fruit.<sup>10</sup> Affirmative action is there to redress the inequalities of the past and must be seen to do so rather than to create a form of reverse discrimination.<sup>11</sup> In this paper it will firstly be argued that in order for an affirmative action policy to be of a standard capable of withstanding constitutional scrutiny, it needs to set clear targets of how it will achieve a representative workforce within a particular employer setting. Secondly, it is important that once these employment equity targets are reached affirmative action should no longer be applied within the organisation, in order to ensure that reverse discrimination does not occur. It will be argued that once employment equity targets are reached, only then will it be justifiable to exercise the principle of employing only the most suitably qualified candidate regardless of race, gender or disability. Thirdly, once equity targets are reached they must be maintained. If there is a change in composition this will require a reapplication of affirmative action, thus creating a distinct lifecycle for the application of the principle. Lastly it will be argued that different dynamics are at play within each individual designated employer setting. Most evident are the dynamics of representivity with a particular focus in most cases on race. In the

<sup>8</sup> Vermeulen and Coetzee 2006 SAJBM 53. See also Coetzee and Bezuidenhout 2011 *Southern African Business Review* 75.

<sup>9</sup> Section 1 of the *Employment Equity Act* 55 of 1995 defines a "designated employer" as

- a) an employer who employs 50 or more employees;
- b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;
- c) a municipality, as referred to in Chapter 7 of the Constitution;
- d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement;

<sup>10</sup> *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC) 25.3.

<sup>11</sup> Dupper 2002 SA Merc LJ 275, 292.

landmark decision of *UNISA v Reynhardt*<sup>12</sup> the Labour Appeal Court demonstrated that there is a lifecycle in an affirmative action policy which employers must be mindful of.

## 2 The facts of the case

The respondent, Professor Reynhardt, a white male, had been appointed as the Dean of the Faculty of Science at the University of South Africa (UNISA) for one term. He then applied to serve for a second term. However, Professor Summers, a coloured male, was appointed in his place. Professor Reynhardt claimed in the Labour Court that his non-appointment amounted to unfair discrimination.<sup>13</sup> The Labour Court agreed with Professor Reynhardt that although the employment equity plan that had been designed by UNISA was in line with the principles and values of the Constitution, the manner in which it had been implemented was unfair. The UNISA employment equity plan provided that once equitable representation had been achieved (UNISA required a ratio of 70% to 30% in favour of blacks) then the principle of the "most suitable candidate"<sup>14</sup> would apply in the filing of vacancies, and no further affirmative action would be implemented.

The appointment of Professor Summers meant that the target would be surpassed, as the ratio had become 80% to 20%. The Labour Court held that the appointment of Professor Summers was therefore a breach of UNISA's employment equity plan and that it amounted to unfair race discrimination against Professor Reynhardt. UNISA took the case on appeal to the Labour Appeal Court. In arriving at its decision the Labour Appeal Court held the following:

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<sup>12</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC).

<sup>13</sup> *Reynhardt v University of South Africa* 2008 4 BLLR 318 (LC).

<sup>14</sup> In terms s 20(3) of the *Employment Equity Act* 55 of 1995 "a person may be suitably qualified for a job as a result of any one of, or any combination of that person's- formal qualification; prior learning; relevant experience; or (d) capacity to acquire, within a reasonable time, the ability to do the job".

Firstly, one of the aims of the *Employment Equity Act* is to eliminate unfair discrimination. Secondly, the court held that the key test in disputes of unfair discrimination is found in the case of *Harksen v Lane NO*,<sup>15</sup> where it was held that the questions to be asked were:

1. Does the differentiation amount to discrimination on a specified ground?
2. If the differentiation amounts to discrimination; does it amount to unfair discrimination?
3. Unfairness is presumed where discrimination is on a specified ground that has been identified.
4. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his situation.<sup>16</sup>

Having established a ground of discrimination the court then considered the following questions:

1. Does the measure target personal categories of persons who have been disadvantaged by unfair discrimination?
2. Is the measure designed to protect or advance such persons or categories of persons?
3. Does the measure promote the achievement of equality?<sup>17</sup>

In the case of Professor Reynhardt, he was held to have proved discrimination on the basis of race. The court then needed to evaluate if that discrimination was fair within the circumstances of the case. Affirmative action does discriminate. Its discrimination is held to be fair due to the aim of affirmative action, which is to identify individuals who have been the victims of unfair discrimination, and to seek to advance such individuals so as to achieve equality.<sup>18</sup>

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<sup>15</sup> *Harksen v Lane* 1997 4 SA 1 (CC).

<sup>16</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1276.

<sup>17</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1279.

<sup>18</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1279.

The Labour Appeal Court found that the employment equity plan of UNISA was seeking to redress the historical imbalances of the past by deciding upon the targets of 70% to 30% in representivity.<sup>19</sup> The court further held that within the UNISA employment equity plan was an express statement of when employment equity would no longer be necessary, which was once the targets had been reached.<sup>20</sup> The policy was that once the equity target had been reached then the selection of a candidate needed to be on the basis of merit, and that in this particular case the "most suitable candidate" was Professor Reynhardt. The court held it was on this point that UNISA failed to act rationally and fairly in the correct implementation of their employment equity plan, and thus failed to show that they had acted to promote the achievement of equality. UNISA's appeal to the Labour Appeal Court was therefore dismissed.<sup>21</sup>

### 3 Analysis of the case

The court in its analysis of the facts of the case was clear on the constitutionally justified discrimination that would occur in the application of affirmative action. This was necessary, the court thought, to achieve the aim of redressing the imbalances within South Africa arising from its apartheid past.<sup>22</sup> It is noteworthy that in the *Reynhardt* case the emphasis is on race and the racial composition within each level of the posts of Dean and Vice Dean.<sup>23</sup> No mention is made of the gender composition of the occupants of these posts or of the appointment of persons with disabilities within these posts, and of whether or not any targets had been set in that regard. The aim of affirmative action is to create a representative workforce with respect to race, gender and disability,<sup>24</sup> yet there is a clear focus in this case on race

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<sup>19</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1280.

<sup>20</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1280.

<sup>21</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1281.

<sup>22</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1279.

<sup>23</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1276-1277.

<sup>24</sup> Preamble of *Employment Equity Act* 55 of 1995.

alone.<sup>25</sup> Affirmative action is not just about race. The quest for representivity requires an investigation into the gender and disability composition of incumbents also.

It is also noteworthy that not only had the employment equity plan of the university to be of a standard that would be able to withstand constitutional scrutiny, but it also needed to set targets describing how it was to create this representative workforce. A clear commitment to transformation may be seen within the University, as the targets had been reached.<sup>26</sup>

The issue in question was the continued application of the employment equity plan once those targets had been reached. The employment equity plan clearly stated at what stage employment equity would no longer be applied and when individuals would be appointed on the basis of merit, irrespective of race. In this case the most suitably qualified individual was Professor Reynhardt.<sup>27</sup>

It has been held that affirmative action remains a means to an end and it is therefore justified by its consequences.<sup>28</sup> The consequence is the achievement of equality. The need for affirmative action will end when past imbalances are rectified.<sup>29</sup> The issue then becomes how it will be possible to identify the point in time when it will be clear that past imbalances have been rectified and affirmative action can thus cease. In the case of *Willemse v Patelia NO*<sup>30</sup> the court stated that if an employer has met its employment equity targets, the only consideration with regards to appointment or promotion should be merit, and each applicant should be treated equally.<sup>31</sup>

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<sup>25</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1276-1277.

<sup>26</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1275.

<sup>27</sup> *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) 1280.

<sup>28</sup> Currie and De Waal *Bill of Rights Handbook* para 9.5 .See also McGregor 2006 *Juta's Business Law* 17.

<sup>29</sup> McGregor 2006 *Juta's Business Law* 19.

<sup>30</sup> *Willemse v Patelia* 2007 28 ILJ 428 (LC).

<sup>31</sup> *Willemse v Patelia* 2007 28 ILJ 428 (LC) para 50.

In another case, that of *Alexandre v Provincial Administration of the Western Cape Department of Health*,<sup>32</sup> the court raised concerns about whether or not the non-application of affirmative action once targets had been reached in a particular department would "advance the spirit and purpose of employment equity and the notion of substantive equality as endorsed by our legislative and constitutional framework."<sup>33</sup>

The *Reynhardt* case gives us an indication of the circumstances when affirmative action can cease to be applied, but it is clearly an instance that is specific to a particular employer and the wording within that employer's employment equity plan. The employer must have a comprehensive employment equity plan that is able to withstand constitutional scrutiny. Clear targets must be set to increase representivity within the workplace. The *Reynhardt* case also points to the reality that the legacy of apartheid and the disparity it created will take time to eradicate through the application of affirmative action.<sup>34</sup> The representivity that resulted in the *Reynhardt* case came about as a result of a clear commitment by the employer to meet employment equity targets.

Within the process of applying affirmative action the goal must be not only the advancements of individuals previously disadvantaged. Another goal which employers must always have in mind is the creation of a workplace where substantive equity is a reality and where, over time, appointments will be based on merit. This also places a duty on employers to ensure that once they have reached their targets in applying affirmative action they maintain the equitable

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<sup>32</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 26 ILJ 765 (LC).

<sup>33</sup> *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 26 ILJ 765 (LC) para 33.

<sup>34</sup> The *Industrial Conciliation Act* 11 of 1924 facilitated the exploitation of domestic workers and farm workers, who had no rights or job security. Such jobs were mostly held by blacks. In terms of s 77 of the *Industrial Conciliation Act* 94 1979 the Minister of Labour was able to promulgate provisions to safeguard the jobs of Whites and certain Coloured and Indian workers in the altruistic guise of safeguarding against racial competition.

representation.<sup>35</sup> Maintenance would require that should there be a shift in representation as against the set targets, then affirmative action would be applied again. By implication this would mean that another "lifecycle" of affirmative action would begin.

In terms of section 9(2) of the *Constitution*, 1996, 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. The concept of equality usually results in individuals being treated the same way or subjecting them to similar rules, whereas equity refers to fairness in employment policies by the employer, recognising and acknowledging differences, particularly race, gender and disability<sup>36</sup>. Equity in employment comes with the understanding that treating all employees in the same way infringes on the goal of substantive equality if the results are unequal.<sup>37</sup> To achieve equity in the workplace, affirmative action is necessary to remedy the consequences of past discriminatory practices which made it impossible for members of disadvantaged groups to compete for jobs and opportunities on an equal footing.<sup>38</sup>

The process of achieving equity requires affirmative action, and the outcome of the process is to be a workplace based on equity and fairness.<sup>39</sup> The Constitutional Court in *Republic of South Africa v Hugo*<sup>40</sup> held that with the recognition that society affords each human being equal treatment on the basis of equal worth, this is not achievable as a goal if we insist upon identical treatment in all circumstances before that goal is achieved. "Equality requires that equals be treated equally and as a corollary that unequals be treated differently."<sup>41</sup> Therefore from the point of view of

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<sup>35</sup> Naff and Dupper 2009 *IJCLLR* 186.

<sup>36</sup> Dupper, Bhoola and Barbers *Understanding the Employment Equity Act* 131.

<sup>37</sup> Hepple 2000 *CLJ* 564.

<sup>38</sup> Dupper 2002 *SA Merc LJ* 276.

<sup>39</sup> Dupper 2002 *SA Merc LJ* 277.

<sup>40</sup> *Republic of South Africa v Hugo* 1997 4 SA 1 (CC).

<sup>41</sup> Rosenfeld 1986 *CLR* 1700.

the constitutionally mandated goal it is clear that affirmative action is primarily about numbers but also about taking into account the particular circumstances of the employer.<sup>42</sup> Employers must therefore within their employment equity plans be seen both to intend the achievement of substantive equality and to describe how it is to be achieved.<sup>43</sup> The test is whether or not the measures to be put in place are causally linked to the objective of a equitable and representative workforce.<sup>44</sup> There is recognition that affirmative action is "compensation for past invidious discrimination" and thus a "compelling state purpose"; and therefore that "affirmative action does not violate the rights of even the innocent person (a non-member of the designated group) as their burden is "outweighed by the benefits of affirmative action."<sup>45</sup>

It has been held that the substantive approach to equality requires a deliberate acknowledgement and assessment of historical differences and discrimination in order to meaningfully address inequality.<sup>46</sup> In terms of section 20(1)(e) of the *Employment Equity Act*<sup>47</sup> an indication is given as to the duration of an employment equity plan. It may not be shorter than one year or longer than five years. Employment equity goals set by an employer are therefore by implication given a maximum of five years to be achieved. In the case of *Solidarity on behalf of Barnard v SA Police Service*<sup>48</sup> it was held that an employment equity plan needed to be applied according to the principle of fairness and the consideration of an employee's right to equality and dignity. It has been argued that affirmative action is justified by its goal of the achievement of equality. Once equality has been achieved the rationale for affirmative action falls away, in which case continued efforts in the interest of affirmative action might well be regarded as unfair discrimination.<sup>49</sup>

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<sup>42</sup> Dupper *et al* *Essential Employment Discrimination Law* 259.

<sup>43</sup> Smith 1995 SAJHR 94.

<sup>44</sup> Dupper *et al* *Essential Employment Discrimination Law* 270.

<sup>45</sup> Rosenfeld 1985 *Ohio St L J* 921.

<sup>46</sup> Gaibie 2011 *ILJ* 21.

<sup>47</sup> *Employment Equity Act* 55 of 1998.

<sup>48</sup> *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC).

<sup>49</sup> Dupper *et al* *Essential Employment Discrimination Law* 262.

America has applied affirmative action for a much longer period than South Africa. Dworkin points out that according to the best evidence yet available affirmative action is not counter-productive but seems to be an impressive success in the United States.<sup>50</sup> It is clear that unless remedied the effects of past discrimination may continue for a substantial period of time and even indefinitely.<sup>51</sup> Therefore there clearly needs to be a rational connection between the affirmative action measures employed by a particular employer and the aims which they are designed to achieve, one of which is a representative workforce.<sup>52</sup> It has been noted that having a representative public service is a goal in itself. The *Constitution* therefore views affirmative action not as a limitation of the right to equality but rather as a measure necessary to the achievement of equality.<sup>53</sup>

It has been noted that affirmative action cannot be implemented in isolation of other societal and economic issues, and that so as long as disparity continues to exist within society along racial lines, be it through a lack of access to education or a lack of basic services, such disparity will continue to manifest itself within the employment arena.<sup>54</sup> Dupper<sup>55</sup> points out that the forward-looking rationale of affirmative action is that it is a way of overcoming prejudice by changing widely held attitudes towards members of disadvantaged groups as well as being a tool for integrating disadvantaged groups into a democratic society, thereby breaking down what would be an endlessly continuing cycle of poverty, subservience and social inequality. It has been held that the duty of the employer within the letter and spirit the *EEA* is to systematically develop its workforce out of a life of disadvantage.<sup>56</sup>

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<sup>50</sup> Dworkin *Sovereign Virtue* 408. See also Bowen and Bok *Shape of the River*.

<sup>51</sup> *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 60.

<sup>52</sup> Grogan *Workplace Law* 287.

<sup>53</sup> Dupper 2002 SA *Merc LJ* 275.

<sup>54</sup> Mushariwa 2011 *Obiter* 451.

<sup>55</sup> Dupper 2004 *SALJ* 205.

<sup>56</sup> *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (2007) 28 *ILJ* 1774 (LC) 1798.

The American experience of affirmative action is that it is a temporary measure.<sup>57</sup> Employers are called upon to attain racial balance in the workforce but not to maintain it through the application of affirmative action.<sup>58</sup> Through case law and the application of a strict scrutiny policy there has been a slow eradication of the application of affirmative action in education as well as in government procurement within the United States.<sup>59</sup> It is noteworthy that the particularity of the experience of affirmative action in the United States is due to its particular social and economic context, which is different from that of South Africa.<sup>60</sup> Affirmative action in South Africa is remedial, whereas in the United States it facilitates free speech, meritocracy and the marketplace.<sup>61</sup> An implied sunset clause was given in the case of *Grutter v Bollinger*<sup>62</sup>, a case in which the United States Supreme Court upheld the affirmative action admissions policy of the University of Michigan Law School. The Court expected that 25 years from the date of judgment the use of racial preferences would no longer be necessary to further the interests approved. The phrase "25 years from now" was held to imply a time clause for affirmative action within the United States.<sup>63</sup>

Within South Africa affirmative action has always been recognised as a temporary measure, but the disparities created through the application of apartheid will take time to be fully eradicated. Through the *Reynhardt* case, though, it is clear that within the setting of a specific employer affirmative action does have a lifecycle. The factors that influence the lifecycle are firstly the wording within the employment equity plan of an employer, the employer's commitment to reaching specific targets of representation within a predetermined period of time, and lastly the understanding that the representivity reached must still be monitored and maintained so that the further application of affirmative action does not amount to reverse discrimination. Affirmative action remains a means to an end. This should be kept in mind by

<sup>57</sup> Naff and Dupper 2009 *IJCLLR* 181.

<sup>58</sup> Naff and Dupper 2009 *IJCLLR* 187.

<sup>59</sup> Richman 2010 *De Paul Journal of Social Justice* 62. See also Taylor 2010 *Pub Cont L J* 855.

<sup>60</sup> Kende *Constitutional Rights in Two Worlds* 181.

<sup>61</sup> Kende *Constitutional Rights in Two Worlds* 181.

<sup>62</sup> *Grutter v Bollinger* 539 US 306 (2003).

<sup>63</sup> Schuck 2002 *Yale L & Pol'y Rev* 284.

employers when applying employment equity in order for substantive equality to become a reality for all within the labour arena. It is therefore clear that the life span of affirmative action is determined by its justification. Once that justification falls away it can no longer be fairly implemented.

#### 4 Conclusion

In the case of *UNISA v Reynhardt* it was held that once an employer has reached his employment equity targets it is no longer justifiable for the employer to continue to apply affirmative action. The employer must therefore in the lifecycle of affirmative action apply the principle of the most suitably qualified candidate. Appointments must then be based on merit. The non application of affirmative action is subject to an employer's commitment to meeting employment equity targets. It is therefore possible within a specific employment setting to create a workplace that no longer applies affirmative action due to its targets having been reached. It is still important, however, that employers realise that they have reached this stage, as a failure to recognise this will result in employees or potential candidates who are not beneficiaries of affirmative action suffering discrimination that is not justified. Also, once employment equity targets are reached it is vital that they be maintained. Once a subsequent disparity comes into existence affirmative action must again be applied. Ultimately, the goal of affirmative action must be seen as to break down both the visible and invisible barriers to achieving equality within the workforce and, in doing so, to create an environment where the constitutional values of equality, human dignity and freedom are truly recognised and protected.

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*UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC)

*Willemse v Patelia* 2007 28 ILJ 428 (LC)

**List of abbreviations**

CLJ	Cambridge Law Journal
CLR	California Law Review
ILJ	Industrial Law Journal
IJCLLR	International Journal of Comparative Labour Law and Industrial Relations
Ohio St L J	Ohio State Law Journal
Pub Cont L J	Public Contract Law Journal
SAJBM	South African Journal of Business Management
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
Yale L & Pol'y Rev	Yale Law and Policy Review