

# *Brian Williams*

*PO BOX 678  
MAITLAND 7404  
CAPE TOWN  
REPUBLIC OF SOUTH AFRICA*

*brianwil@netactive.co.za*

*021-5938227 fax*

*082-4993636*

*021-5938243 tel*

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**Anti-discrimination law within the workplace in South Africa-  
prospects for success**

### **Introduction**

Anti-discrimination law within the workplace in South Africa has limited prospects of achieving its noble goals and objectives. A major part of the reason for this is the passive nature of the law and the weakness of the systems of social and state intervention to ensure that purposes of the anti-discrimination legislation are realised

This does not mean that a degree of success will not be achieved. On the contrary the organizational ingredients exist, for trade unions to use the opportunities in the Employment Equity Act (EEA) as a tool to mobilize within the workplace. The present reality is that the unions have not used the EEA to transform the workplace.

Companies have no real inclination to implement anti-discrimination: affirmative action policies, unless there is some kind of pressure on them or there is a profit to be made. In cases where these policies have been implemented it has been motivated by negative incentives—the fear of punitive action or financial loss. In many case where companies have implemented discrimination law to favour previously disadvantaged categories of employees, these senior staff members have been assigned to human resources or marketing. The management ranks remain largely unchanged, white and male.

The Department of Labour in South Africa is in a state of transition and the expertise to monitor and implement the employment equity polices is limited. Since the creation of a single Department of Labour from the 11 departments inherited from the apartheid administration the new inflow of energetic change agents have all but disappeared. Since

the democratic elections of 1994 to the present, it is estimated that 85% of the senior managers who started in the new Department of Labour have left. It has been suggested, even within the Department of Labour, that the new managers who have come in to replace those who have left are not on the same level of expertise and dedication, as those of the first group who came from the anti apartheid liberation struggle. The consequence of these and other factors may have resulted in the many difficulties being experienced by this state department, in satisfying the various social partners, especially around employment equity issues.

The nature of the labour market is another factor, which hinders the successful reach of the EEA –most of the companies (72%) have on average 4 employees. 80% of the enterprises in South Africa do not have union representation for the staff. The rise of atypical forms of employment is another element of the labour market, which impacts on the application of anti-discrimination law in the workplace.

The modernization of prejudice has contributed to the difficulties experienced in making anti-discrimination law perform its transformative functions as required by the Employment Equity Act. There is a higher degree of sophistication in maintaining discrimination within the workplaces. The design of the law contributes to this sophistication by accepting that discrimination is justifiable as long as it is an inherent requirement of the job. The lawmakers have excluded the definition of “inherent requirement of the job” despite its centrality in anti-discrimination law, as it applies to the workplace.

There is also ideological opposition to affirmative action because of the racial categorization of people and the way in which the EEA is implemented which leads to new forms and practices of racism.

Various aspects of anti-discrimination provisions in the Constitution of South Africa and the EEA are covered in the paper together, with some rulings, which act as a guide to the implementation of employment equity in the context of South Africa as an emerging economy operating within a global market place.

This paper argues that anti-discrimination law in the form of employment equity, is a vital and strategic necessity for South Africa as an emerging economy in the global marketplace. Accordingly it is important to understand some of the arguments in support of the need to have anti discrimination forms of legislation to change the shape and texture of the labour market.

### **Affirmative action –a temporary measure.**

Affirmative action is a temporary measure, which seeks to correct a situation of social, economic and political distortion caused by the successive policies of colonialism and the socio legal institutionalizing of prejudice in the workplace and in society. Apartheid gave birth to affirmative action. After the historic election of 1994 the new government formulated a key piece of legislation the Employment Equity Act (1998). Its preamble recognizes...

“as a result if the apartheid and other discriminatory laws and practices there are disparities in employment, occupation and income within the national labour market and those disparities cannot be addressed simply by repealing the discriminatory legislation.”

## **Brief background**

The International Labour Organisation (ILO) in its 1997 country review of South Africa expressed serious concerns about the impact of the economic policy of the pre 1994 regime that calculatedly excluded the majority of its workforce from developing its human capital potential. It is therefore not surprising that the 1996 World Competitiveness Yearbook .....

“ rates South Africa last out of 46 countries with respect to the competitiveness of its management and labour.

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“as a result of the apartheid and other discriminatory laws and practices there are disparities in employment, occupation and income within the national labour market and those disparities cannot be addressed simply by repealing the discriminatory legislation

The sooner those who possess power start implementing employment equity policies along sensible and coherent economic lines, the sooner the country will become more globally competitive

## **Political management**

The government as the principal lawmaker and political manager of South Africa has chosen a social democratic framework within which it governs. The reasoning behind the strategic design of the various labour laws is the realization that South Africa has to rely on its own resources to compete globally. The rapid breakdown of trade and other barriers has moved the country closer to the borderless nature of the new world order.

There is a direct link between the labour market problems created by the discriminatory practices of Apartheid and the current imposition of a socio-economic cure in the form of the equity process, anti-discriminatory laws and a skills development revolution, driven by Sector Education Training Authorities (SETAs) in terms of the Skills Development Act. The Labour Relations Act is the main law governing employment relationships in the workplace.

## **Global Context**

The global nature of the market place imposes great challenges on the employment relationships between management and labour. The industrial and economic damage caused by the irrational policies of the previous system of government has left the labour market in a weakened state.

At a macro economic level the acceleration of skills development and vocational training, acts as an investment incentive. Economic efficiency is increased and this in turn stimulates industrial activity at a micro and macro level.

Job creation is the inevitable outcome of economic policies, which enhance the pool of skilled and qualified workers. Investors are attracted to countries, which have a wide pool of intellectual and human capital resources to choose from.

The elimination of discrimination raises economic efficiency throughout the economy by ensuring a more rational supply of labour resources. Measures to prohibit discrimination in employment ought to stimulate active participation in the labour market by all categories of employees and are therefore driven by economic imperatives.

The end goals and outcomes of the precise implementation of the principles of Employment Equity according to the lawmakers ought to be;

- World class performance standards and innovation
- High output, productivity and efficiency and effective service delivery
- Multi-skilled, highly competent and versatile workforce
- Revenue, wealth generation and the reduction of resource wastage
- Acceptable profitable margins for business
- Human dignity and respect for individual rights
- Higher prospects for social and industrial peace
- Lower levels of unemployment

### **The Constitution**

Laws create the ambit for contractual relations and impose a positive duty on those who employ others to contribute towards the micro and macro human capital development of all the country's people especially the designated groups. The constitution is the supreme law of the country and determines the justifiability or otherwise of the laws.

When the Constitution was certificated by the Constitutional Court, the provisions that address employment equity and affirmative measures were accepted as constitutionally valid.

The preamble to the Constitution of the Republic of South Africa Act 108 of 1996:

“ We the people of South Africa recognize the injustices of the past...adopt this constitution as the supreme law...so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

The Bill of Rights in chapter two of the Constitution expounds:

“This Bill of Rights is a cornerstone of democracy in South Africa. It ensures the rights of all people in our country and affirms the democratic value of human dignity, equality and freedom.

Section 9 promotes the achievement of equality, through legislative and other measures designed to protect, or advance persons, or categories of persons, disadvantaged by unfair discrimination...

### **Employment Equity Act (1998)-EEA**

The introductory text to the Employment Equity Act states that the EEA seeks to:

- Eliminate unfair discrimination in employment
- Ensure the implementation of the Employment Equity to redress the effects of discrimination
- Achieve a diverse work force broadly representative of our people
- Promote economic development and efficiency in the work force and
- To give effect to the obligations of the Republic as a member of the International Labour Organisations

The purpose of the Act, is to achieve equity in the workplace by promoting equal opportunity and implementing affirmative action measures. Given the essentially race and gender bias of Apartheid, the EEA has to unavoidably focus on those designated groups (blacks, women and the disabled) for preferential treatment. The cure must objectively be directed at the problem area.

Chapter two deals with the prohibition of unfair discrimination and spells out in s5 what the duties of an employer are. Section 6 sets out in simple but powerful terms the prohibited grounds of unfair discrimination. Section 11, requires an employer accused of unfair discrimination to prove that the discrimination was not unfair in terms of the Act.

Chapter three spells out the affirmative action approaches and in general terms it applies to designated employers unless the contrary is stated. Section 15 deals with affirmative action measures, which must be taken to ensure suitably qualified persons from designated groups (blacks, the disabled and females) have equal opportunities and are appropriately represented, in all the occupational categories within the workforce of the organisation.

The designated employers are those that are required to make statutory efforts to transform their workplaces in terms of plans and reports.

### **Brief analysis of court rulings**

Some of the failure of employment equity measures lies in the application of the law, which fails to take into account the economic logic of the EEA. Rycroft and Du Toit (2001: 11) are critical of the adjudication process diluting the purposes of affirmative action.

Rycroft suggests that contrary to the social purposes behind affirmative action policies, the adjudicative role can all too easily be a conservative one more attuned to the protection of individual rights, rather than the promotion of broader social purposes.

### **Constitutional Court**

The Constitutional Court in Harksen Vs Lane No (1998) 1SA 300 (CC) provided an important framework of evaluation.

“The determination whether differentiation amounts to unfair discrimination...requires a two stage analysis. Firstly, the question arises whether differentiation amounts to ‘discrimination’ and, if it does, whether, secondly, it amounts to ‘unfair discrimination’. It is well to keep those two stages of the inquiry separate...”

### **Labour Court rulings**

The Labour Court has at other levels played a role in dealing with claims of discrimination in the work place. The Leonard Dingler employee representative council vs Leonard Dingler and others (1998) and 191LJ285 (LC) was the first major discrimination case. The court ruled against the company and defined direct discrimination, indirect discrimination and unfair discrimination.

” Discrimination is unfair if it is reprehensible in terms of a society’s prevailing norms. Whether or not society will tolerate the discrimination depends on what

the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational”.

### **Additional evaluation commentary**

The requirement that certain categories of designated employers have an employment equity plan to change their workplaces over a five-year period, is an important step in the right direction. However, the employer is only required to show that he/she took “reasonable steps to implement the employment equity plan”. The section, which acts as an evaluation instrument is s42. This section is so vague, generalized and ambiguous, to the point of being unenforceable.

The Minister of Labour in his recent budget speech (18 May 2001) in the National Assembly was critical of the poor implementation process of the EEA provisions. Despite this recognition of slow progress, the prospect of the Department of Labour being able to make any meaningful contribution to the employment equity process via it’s enforcement mechanism is very limited.

The EEA specifically s15 (4) prohibits policies which exclude non-designated groups from employment or promotion within an organisation. The Constitution makes it possible for all persons from designated and non-designated groups to use the EEA as a basis to advance their positions as members of various groups within society. White males would be able to impose their right of access to jobs in those occupational categories where under-representation exists.

This is in line with the non-racial objectives of the constitution and the Bill of Rights, which states that it enshrines the rights of all people in our country. There is no statutory definition of an inherent requirement for the job.

The general approach by the business world has been to treat anti-discrimination law as a burden and interference in the right of companies to choose the best people whom they regard as suitable and competent to perform a particular job. Accordingly companies are not willing participants in the transformation drive to embed an anti-discrimination value system in the workplace.

The trade unions have not used the EEA as a tool to advance an understanding of the philosophy of the EEA and the organizational power, which it has to change the workplaces. Many of the unions still do not know the most basic aspects of the law. There have been no major campaigns to create a mass public awareness of the anti discrimination laws which exist.

The NGO sector has been completely quiet about the strategic and valuable aspects of the law, which can be used to advance the social justice components in the workplace.

There are many weaknesses in the law but there are areas of the EEA, which can be used to create fertile conditions for change.

However many employees who have been unfairly discriminated against lack the courage to take up the issues in the workplace, for fear of being victimized and harassed.

### **From this analysis the situation looks bleak.**

- The labour unions are not making an impact around anti discrimination issues in the workplaces, partly because they do not fully understand the law and partly because they lack the resources to make a difference.
- Companies are reluctant to implement the law and generally view the EEA as an unwarranted interference in their right to choose the staff they regard as valuable for their enterprises.
- The various state departments have tended to implement the affirmative action provisions along ethnic lines, depending on who the decision-makers are. Questions of nepotism and ideological considerations appear to have precedence in state employment, especially in management positions.
- Individuals are also afraid to take on the companies or organizations around unfair discrimination issues because the prospects of victimization are so great.
- The civil society organizations have not taken up the question of anti discrimination in the workplace.
- There is a persistence of unfair discrimination because of the modernization of prejudice factors. In addition the value system of those who are decision-makers remain largely influenced by the white male logic and the patriarchal notion of superiority.
- The judicial system has also ignored the social aspects of the law as a tool of transformation around groups rather than individuals.

### **Conclusion**

In the light of the constitutional commitment to equality, non-racialism, non-sexism and anti-unfair discrimination, the provisions of the EEA are strategic elements in a bigger process of transformation of work places

It is important to consider that the constitution which is the supreme law in South Africa and section 9(2) creates a wider net for affirmative action in support of all persons, or categories or persons, disadvantaged by unfair discrimination.

The Constitution and the Employment Equity Act are the tools we need to rebuild society. Despite the passive nature of the EEA as a serious instrument of social change, there are key elements one can use within the Constitution and the EEA to mobilize for a change in thinking and approach by those who are employment decision-makers.

Affirmative action is in essence an anti-discriminatory tool, which seeks to create the socio-economic basis for human dignity, equality and the establishment of non-racial values. Linked to the transient nature of the affirmative action policies and strategies, are the legislative pressures to compel those who have economic and social power to use their privileged positions to contribute to the normalization of society.

Anti discriminatory legislation in the context of South Africa's troubled past is a fundamental social, economic and political requirement. The path to a more rational use of the country's labour pool is by including those who have previously been denied opportunities. It is regrettable that the current prospects for success are so limited, given the serious problems in implementation and the artificial application of the employment equity provisions.

**BRIAN WILLIAMS**