Affirmative Action: separating fact from fiction*

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AFFIRMATIVE action is a lever for emotion. Emotion is by definition irrational. Irrationality can never sustain any argument worthy of being labelled 'decent'. And decency is the stuff of which reasonable societies are made.

So, in order to have a meaningful discourse about the subject, and perhaps even learn from each other's perspectives on it, it is imperative that we first remove emotion. This is because emotion is to a decent argument what a re-enforced steel bar is to a butter knife. No matter how hard or skilfully you try, you will never get through. There is then no point in trying to present a well-crafted argument to a person who is standing steadfastly behind an emotion shield.

Sadly, lawyers are not immune to emotional outbursts masquerading as argument or reason, even in the hallowed corridors of the Supreme Court of Appeal which dismissed affirmative action in the Barnard case as a throw back to the grand apartheid design[1]. Thankfully, the Constitutional Court intervened[2] and put a stop to that rather unfortunate characterisation of what its previous judgments have labelled a constitutional measure[3].

So, having hopefully prevailed upon us all to cast our emotion aside, let us separate fact from fiction in the realm of affirmative action.

The case against Affirmative Action and why it's bad

Opponents of affirmative action baulk at the measure on at least four related bases all of which, in my view, are anchored in emotion.

They say affirmative action amounts to quotas, 'race and gender norming', 'race and gender profiling', and, 'social engineering'.

None of these is an accurate characterisation of the restitutionary measures that I have seen attacked on these bases. Let us now explore each of the fictitious arguments against affirmative action.

* This is an edited version of an address given to University of Cape Town alumni in Johannesburg last year.

▪ First fiction: 'quotas'

A trenchant opponent of affirmative action defines 'quotas' as 'a numerical norm by reference to which a candidate succeeds or fails irrespective of merit'. Implicit in this argument is that black candidates are selected or promoted despite not being up to the task, and that, by contrast, white candidates are not selected or promoted despite their obvious merit. It was pushed with admirable vigour in the Barnard case from the Labour Court to the Labour Appeal Court to the Supreme Court of Appeal and ultimately in the Constitutional Court. The Labour Court and the Supreme Court of Appeal were seduced by it; the Labour Appeal Court was not impressed. Neither am I.

While the 'quotas' fiction was pursued fervently in papers and heads of argument filed in the Constitutional Court in the *Barnard* case, it all petered out into a damp squib during argument as it was not pursued. That was the fate that also befell the other three fictitious arguments: 'race and gender norming', 'race and gender profiling', and 'social engineering'. To me this came as no surprise because a fictitious argument can never withstand a factual probe.

The sad thing about it though is that this 'quotas' fiction has gained so much traction in South Africa that people who are deserving candidates of affirmative action tend to spurn the very idea that they are affirmative action appointees. They do so in the mistaken belief that affirmative action connotes lack of merit and mediocrity. Some rugby players, for example, have resisted being labelled affirmative action selections on the Springbok team, prompting the Minister of Sports to abolish what he termed 'quotas' in the Springbok rugby team selection.

But the 'quotas' thing is all a mirage. Section 15(1) of the Employment Equity Act defines affirmative action as a measure that is 'designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'.

Suitable qualification includes any one or a combination of:

a. formal qualifications;
b. prior learning;
c. relevant experience; or
d. capacity to acquire, within a reasonable time, the ability to do the job.

DON'T take my word for it. Read s 20(3) of the EEA. When determining whether or not a candidate has the ability to do the job, all these factors must be taken into account, so that lack of experience (a perennial fob-off against otherwise suitably qualified black people) is not a valid reason for not appointing or promoting a black person or woman or disabled person (designated groups). Again, don't take my word for it. Read s 20(5) of the EEA.

Affirmative action posits preferential treatment of designated groups and the setting of numerical goals with a view to achieving the objects of the EEA, namely, 'to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce'. But it expressly excludes quotas. Don't take my word for it. Read s 15(3) of the EEA.

The distinction between ,'numerical goals' on the one hand and 'quotas', on the other has not yet received judicial consideration. In para [42] of the *Barnard* case the Constitutional Court declines to give a definition to 'quotas' but takes its cue from s 15(4) of the EEA which seems set against inflexibility in pursuit of equitable representation in the workplace. In para [54] a suggestion is made that quotas amount to job reservation.

Nevertheless, the Constitutional Court in the *Barnard* case was unanimous in its finding that the SAPS did not pursue numerical goals so rigidly as to amount to 'quotas'.[4]

What we learn from the *Barnard* case is that the question of whether or not the implementation of affirmative action measures amounts to impermissible 'quotas' rather than legitimate 'numerical goals' must be decided on a case by case basis. In *Barnard* there was no 'job reservation' or inflexible pursuit of numerical representation. The Constitutional Court found that Capt Barnard had in fact been promoted up the ranks of the SAPS on numerous occasions and so could not validly advance the argument that her advancement in the SAPS was arrested by a rigid pursuit of racial representivity.[5]

▪ Second fiction: 'race and gender norming'

This is a mischaracterisation of affirmative action.

The American concept of 'race or gender norming' (otherwise known as 'within group norming') has been defined as 'the process of statistically adjusting the scores of minority job applicants on job qualification tests by rating each test taker's score against the results of others in his or her racial or ethnic [or gender] group'.[6]

In the United States, an illustration of 'race norming' has been said to be 'a system in which a white man gets a score of eighty on a test, an Hispanic gets a score of seventy and a Negro a sixty, but after "norming", the white man has the lowest score and the Negro the highest, so he gets the job.'[7]

'Gender norming' has been defined in the United States as '… translat[ing] into a man having to carry fifty pounds to qualify for the job, while a woman only needs to carry twenty-five.'[8]

It is not clear why this characterisation featured in the *Barnard* case at all because there was no suggestion in that case that the performance scores of any candidate, including Ms Barnard herself, had been adjusted in order to favour the one candidate or to prejudice the other.

▪ Third fiction: 'race and gender profiling'

The concept of 'race and gender profiling' is not far removed from 'gender norming'.

It connotes taking into consideration the physical characteristics or shortcomings ostensibly peculiar to a disadvantaged race or gender for purposes of advancement or appointment in the workplace in preference to the race or gender with *ostensibly* 'superior' physical characteristics.

For example, there is in some quarters a perverse belief that black people have a less developed aptitude for mathematics than white people. So, the argument goes, in order to advance black people in fields that require a highly developed aptitude for mathematics, you push them up despite their supposed 'natural' disinclination for mathematics.

Adolf Hitler is rumoured to have said a lie told often enough becomes an absolute truth that, like faith, requires no proof. The fabled superiority of the white race and inferiority

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of the black race spring immediately to mind. This idea of 'race and gender profiling' is a manifestation of that untested 'absolute truth'. Like Hitler's race paradigm, it is absolute rubbish.

▪ **Fourth fiction: 'social engineering'**

The charge of 'social engineering' conjures up the 'grand apartheid design' of which the Supreme Court of Appeal wrote in the *Barnard* case. It is, as I understand it, a mechanism aimed at socialising people in a particular pre-determined way. Examples include:

- the criminalisation of inter-racial marriages, thus socialising people to marry intra-racially;
- the criminalisation of the sharing of ablution facilities by people of different races, thus socialising people to relieve themselves only in the company of their own race;
- the prohibition, by force of law, of inter-racial coital acts, thus socialising people to have sex only with members of their own race.

A measure that aims to achieve equity in the workplace by ensuring 'the equitable representation of suitably qualified people from designated groups of all races, including white females, hardly qualifies as 'a throwback to the grand apartheid design'. In fact the comparison is deeply offensive to the many men and women of all races who either lost their lives or sacrificed many years they could have spent with their families (or in some instances both), so that the constitutional design of equality can ultimately be achieved. There is no 'social engineering'.

Affirmative action is not 'social engineering'.

HERE is the harsh reality. Affirmative action is a constitutional measure and those who have benefited from apartheid must just grin and bear it! The Constitutional Court has confirmed this in at least four judgments.

The first of these is *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) where the Constitutional Court observed as follows in this regard (at para [7]):

> 'The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.'

The 'others' on whom the process of transformation will at times inevitably weigh more heavily are obviously those who are beneficiaries of apartheid – white people. The 'commitments' referred to are the Constitution's foundational values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'[9].

The second judgment is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), where the Constitutional Court observed more boldly as follows (at para [76]):

> But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution.

In the third judgment, *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), the Constitutional Court made it absolutely clear that affirmative action was not unconstitutional but rather formed part of our equality DNA. It said (at paras [30] and [31]):

> '[O]ur constitutional understanding of equality includes what Ackermann J in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another* calls

> 'remedial or restitutionary equality'. Such measures are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.
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> [31] Equality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular s 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.'

To summarise *Van Heerden* in this regard, affirmative action is not 'reverse discrimination'. It is the DNA of our equality jurisprudence. So, grin and bear it.

Elsewhere in the same judgment (at para [33]), the Constitutional Court also found that affirmative action was not presumptively unfair. In other words, it was the person who claimed that affirmative action, in any given set of facts, was unfair who bore the onus to prove its unfairness. It said:

> 'It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in s 9(3), pass muster under s 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of s 9 is internally inconsistent or that the provisions of s 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the Judiciary to second-guess the Legislature and the Executive concerning the appropriate measures to overcome the effect of unfair discrimination.'

Van Heerden was decided on 29 July 2004. It is a unanimous judgment of the Constitutional Court. Yet on 28 November 2013, more than 9 years later, 5 judges in the Supreme Court of Appeal went on a different path in the *Barnard* case by placing the onus on the SAPS to prove that its affirmative action measure was not unfair, and then, having concluded that the SAPS had failed to discharge that onus, set aside the Commissioner's decision not to appoint a white female to a salary level at which white females were over-represented.

A silver tongue (a Cicero-esque attribute) is both an admirable and advantageous quality for Counsel to possess. Just by an admirable turn of phrase you can send the scales teetering in your client's favour in close encounters. But surely, with such imposing authority as *Van Heerden* it is hard to imagine just by what rhetorical trick the SCA could have been swayed to find as it did. I'd sure love a piece of it.

But seriously, the rule of law works only where there is certainty. You can't have the highest Court laying down the law and the other Courts going off on their own tangent just because they don't like the law. There'll be anarchy.

In the *Barnard* case, the fourth and most recent in this line of cases, the Constitutional Court put matters beyond any doubt on the subject of affirmative action on so many fronts. I highlight just a few:

- First, it held that affirmative action, on the facts of that case, did not amount to 'quotas'[10].
- Second, it acknowledged (per van der Westhuizen J) that white people – even those who committed no wrong – benefited from an injustice (code for apartheid)[11].
- Third, it found (again as it did in *Van Heerden* more than 10 years ago) that affirmative action was not presumptively unfair[12].
- Fourth, it found that affirmative action was 'not a refuge for the mediocre or incompetent'[13]. So, black rugby players who are selected for the Springbok team on grounds of affirmative action can now walk tall safe in the knowledge that they are there on merit. The Constitution, and the Constitutional Court, has their back.
- Fifth, it acknowledges that 'past disadvantage still abounds'[14].

Conclusion

To those who complain about the unfairness of the whole thing to people who had nothing to do with apartheid, Van Der Westhuizen J sums things up poignantly in my view when he writes, citing President John F Kennedy's January 1962 State of the Union Address: 'It is the fate of this generation … to live with a struggle we did not start, in a world we did not make.'

Affirmative action is a fact of life. It's time we stop being apologetic about it, or embarrassed by it. A

Endnotes

1 *Solidarity obo Barnard v SAPS 2014 (2) SA 1 (SCA) at para [80]*
2 In *SAPS v Solidarity obo Barnard (CCT 01/14) 2014 ZACC 23 (02 September 2014)*
3 *Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC); National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)*
4 At para [66] (per Moseneke ACJ), para [123] per Cameron J, Froneman J et Majiedt AJ
5 At para [67]
6 http://dictionary.reference.com/browse/race+norming
7 *Deceived: Corrupt Leadership and the American Empire*, Marlin Creasote, books.google.co.za/books?isbn=0971093806, at chapter 1 page 5
8 Ibid.
9 See s 1(a) of the Constitution
10 At paras [42], [66] and [123]
11 At para [128]
12 At paras [37], [53], [86] and [138]
13 At paras [41] and [80]
14 At para [29]