EQUALITY IN EMPLOYMENT IN SOUTH AFRICA AND THE UNITED STATES

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INTRODUCTION

South Africa (SA) and the United States (US) underwent severe political changes late in the second half of the 20th Century which prompted legislation aimed at employment equity. In South Africa change began with a shift from white minority political control to non-white majority political power in the 1990s and in the US with the Civil Rights Movement of the 1960s. This paper discusses the demographics of the labour market in the two countries, the legislative framework for employment equity, the state of compliance, and some of the positive and negative aspects of the move to legislate employment equity. Some comparisons between the two countries are drawn, as well as implications for the future.

EMPLOYMENT EQUITY IN SOUTH AFRICA

According to the 1996 Census, South African population is approximately 40.5 million, with 77 percent Africans, 11 percent White, 9 percent Coloured and 3 percent Indians (Statistics South Africa, 2001). It was estimated that 52 percent of the total population was female. In 1999, 17 million people were in the labour force (World Bank, April 2001, p. 50) while 34% of the economically active population (in 1996) were found to be unemployed.

The Employment Equity Act (EEA) was enacted by the Parliament in 1998. It aims to redress the ghettoization of the blacks-including coloureds and Indians-women and persons with disabilities (called the designated groups) in the workplace. The objective of the EEA is to achieve equality in the workplaces by elimination of unfair discrimination and promotion of equal opportunity, through the implementation of positive and pro-active measures (termed as affirmative action measures) to advance the designated groups. The EEA requires employers with either 50 or more employees or certain specified turnover (in monetary terms) to undertake affirmative action measures with a view to ensure that the designated groups have equitable representation in all occupational categories and levels in an employer's workforce consistent with their availability in the external labour market.

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Rationale for Employment Equity Legislation

Historically, the labour market was a distorted one, with inequality in access to education, skills, managerial and professional work, based on race and ethnicity (Bowmaker-Falconer et al., 1998; 1997). Racial discrimination was created in labour legislation, for example in job reservation clauses that restricted access to skilled jobs, preserving them for white employees, in the Mines and Works Act (1904) and Industrial Conciliation Act (1956). These provisions have been abolished since 1980 and significant labour law reforms have occurred in the last five years. However, the apartheid labour market has left most employees inadequately trained and economically disempowered. South Africa's peaceful transition through its 1994 national election and constitutional measures has given hope that the Constitutional democracy will provide equal protection and opportunity to all citizens regardless of colour, gender, religion, political opinion or sexual orientation.[1]

The legacy of workplace discrimination against blacks, the majority population, is systematically being eroded, albeit slowly. According to one survey of 161 large firms in South Africa (employing 560, 000 workers), in the year 2000 (Breakwater Monitor, BWM, 2000), 10% of managers were black, 5% each were coloured and Indian; thus, 80% of all managers were white. Of these managers, 79% were male and 21% female. In 1998, the percentages of blacks, coloureds, and Indian were 6, 4 and 4 respectively with 86% white managers, and 84% male and 16% female, (BWM, 2000).

According to the Commission on Gender Equality (CGE, 1999) women constituted the major segment of the SA population but accounted for only a third of the labour force. They were mainly concentrated in service, retail and manufacturing sectors.[2] Across all sectors, women were mainly to be found occupying jobs associated with stereotyped domestic roles; thus gender equality within in the workplace, according to the CGE was underpinned by job segregation and perceived roles associated with gender group (CGE, 1999).[3]

The Department of Labour (1999) states that whites had 104 per cent wage premium over Africans; men earned approximately 43 per cent higher wages than similarly qualified women in the similar industrial sectors and occupations (cited in Thomas, in press).

Another indication is the representation of women and Africans in the senior public sector positions. According to the Household Survey (1995, latest available) men accounted for 78% and women for only 22% of all legislative, senior officials and management positions in the workforce. Of the 78% that were men, 46% were white, 23% 6% Asian, and 3% Coloured. Of the 22% that were women, 12% were white, 8% were black, 1% Asian and 1% coloured (Booysen, 1997, p39).

The latest available statistics (Statistics SA, 1998, 41) indicate that as of December 1997, 87% of management in the Public Service (Director and above) were men, and only 13% were women. Over half the men who were public sector managers were white (Booysen, 1997, p. 39).Women comprised only 1.3% (49) of the 3773 directors of the 657 companies listed on the Johannesburg Stock Exchange. Only 14 women were listed as executive directors, chairwomen or managing directors, and less than 1% board members were women (Naidoo, 1997 in Booysen, 1997).

Employer Obligations under the EEA

The EEA requires employers in consultation with unions and employees to:

- Conduct a review of employment policies and practices to identify the specific job barriers faced by the designated group members and attempt to remove them;
- Conduct a workforce survey and analysis to identify the under-representation of members of the designated groups relative to their availability in the external workforce;

- Develop an employment equity plan with numerical goals and timetables, monitoring and evaluation procedures; report on remuneration and benefits in each occupational category and level;[5]

Develop measures an employer will undertake to progressively reduce any disproportional differentials as well as an employment equity plan.

Whenever unfair discrimination is alleged in terms of the Employment Equity Act, a reverse onus of proof is on the employer to establish that the practice is fair. As part of a required employment equity plan, all employers with 50 or more employees are required to review all their employment and human resources practices to remove any provisions or practices which may have a discriminatory effect. This includes recruitment and selection, and remuneration. It is in these two areas, as well as in the provision of substantive benefits and conditions of employment, where discrimination is most likely.

The EEA requires that employers give due consideration to 'suitably qualified person' in their recruitment of designated groups. Such a person may have either formal qualifications, prior learning, relevant experience, or capacity to acquire-within a reasonable time-the ability to do the job.

Capacity to acquire the ability to do the job will require training and support. Currently few black men and women are qualified to fill semi-skilled, skilled and professional jobs, due to apartheid practised by the previous white regime. The EEA along with the Skills Development Act (1998) requires employers to provide training to designated groups.

The EEA encourages employers to provide improved internal grievance procedures against discriminatory behaviour and harassment. Labour inspectors have the enforcement powers. Those disputes that cannot be resolved through internal procedures will be referred to the Commission for Conciliation, Meditation and Arbitration (CCMA) and ultimately the Labour court (Hepple, 1997).

State of Compliance with the EEA by Employers

According to the Department of Labour (DOL) as of August 31, 2000, 3083 employers filed their annual EE reports. Out of this number 2170 (70.3%) employers reported correctly while the balance were either granted extensions (14.5%) or were not used by the DOL (15.1%) due to wrong format etc. (See www.labour.gov.za).

The firms reported having almost 2.2 million employees which amounted to 28% economically active workers.

The DOL estimates the overall compliance for private companies to be 60% of the companies.

The DOL found that employers provided poor quality of information; there was no link between EE barriers and AA measures; and that AA measures were not meaningfully reported.

The most frequently identified barriers were reported to be: training and development; recruitment and selection process; corporate culture; performance and evaluation system; succession and experience planning, and job classification and grading.

The DOL concluded that there were no significant improvement in the representation of designated groups since (baseline profiles of) 1998; the quality of reporting may indicate poor quality EE processes and plans; no significant shifts were experienced in anticipation of the implementation of EE legislation; and that it reinforces the need for EEA.

Another survey of 103 companies by the CGE (1999), though not directly related to employer compliance with the EEA, it nevertheless has some important implications for the EEA as noted below.

The CGE survey (1999) found that employers cited several problems in integrating women in their workforce: a) resistance by male employees (across the organizational spectrum); b) stereotyped perceptions; and c) poor skills among female employees.

However, employers adopted the following criteria for recruitment and promotion (CGE, 1999): a) psychometric testing including subjective and culturally biased testing; and b) emphasis on skills, formal qualifications and experience.

A paradox thus seems to exist, as noted by the CGE (1999): one the one hand companies are citing poor skills level amount females to be the main barrier. On the other hand, they continue to include it as a criteria for recruitment and promotion. Thus, this means that male employees would be the most likely job incumbents, relative to women.

Pros of Employers Equity

Employers Equity is helping employers to focus not only African blacks but all coloureds, Indians and other designated groups such as women and persons with disabilities (Jain, 1993).

It is encouraging more and more employers to devise new and innovative measures to pro-actively recruit, promote and train the designated groups. It goes beyond poaching of African blacks by one employer from another to plan staffing in a systematic and planned manner. A survey of 23,000 South African employees found that the negative attitudes have increased sharply among black employees. Another recent study (Thomas, 2000) suggests that black managers may leave companies, ("job hop,") for higher salaries and related perks due to not fitting into historically established corporate cultures.

It is motivating employers to develop human resources information systems (Jain, 1993).

It is sensitizing employers to labour market demographics of the designated groups while developing their EE plan (Jain, 1993).

Cons of the EEA

According to the DOL's latest evaluation of the state of EE in SA (2000), as noted above, there was no significant improvement in the representation of designated group members. Similarly the CGE survey of employers (1999) found that there were significant job barriers in the recruitment and promotion of women. It seems employers in SA have a long way to go as yet. At the same time, one has to realize that the EEA has been in effect only two years and the legacy of apartheid will take some time to overcome.

The EEA treats women as a homogeneous category. White and black women currently have extremely different levels of education and training, job opportunities and wages. Even among black women, there are significant differences. Legislation at present does not require companies to disaggregate their information on race and disability by gender. This presents the possibility that targets for women will be met by advancing the already privileged thereby denying black women access to training and traditionally male jobs (Samson, 1999).

Companies below the threshold limit of 50 employees are not covered by the EEA. Since the vast majority of African women work in the informal sector or as domestic workers, most of them will remain uncovered by EEA in their workplaces (Samson, 1999).

The fines for non-compliance may not be a sufficient deterrent. The first time offenders could be fined up to R500,000 but they could also be charged anything much less as well.

We are in agreement with Samson (1999), that an evaluation of the compliance with the EEA must take into consideration: a) the economic and financial factors relevant to the sector in which the employer operates; b) present and anticipated economic and financial circumstances of the employer; (c) progress in implementing EE by other employers; d) reasonable efforts made by the employer to implement EE (Samson, 1999). This will make EE planning flexible according to the needs of an employer rather than a fixed target in terms of numerical goals.

EMPLOYMENT EQUITY IN THE UNITED STATES

According to the 2000 Current Population Survey, the US population of whites, 16 and over, is 175,924 million. Of these 67 percent are in the labour force. Seventy-six percent of white males participate in the labour force and sixty percent of white females. The black population, 16 and over, is 25,560 million. Of these, 65 percent are in the labour force. Seventy-two percent of black males participate in the labour force and sixty-six percent of black females. There are differences between white and black, and male and female labour force participation. Black males participate less than white males, and black females participate more than white females. This has been an historical aspect of the US labour market. Some of the same historical differences occur between white and black unemployment rates. In July 2001, during a period of low unemployment, the white male unemployment rate was 3.4 percent, and the white female rate was 3.5 per cent. This is contrasted with a black male unemployment rate of 7 percent, more than twice that of white males. The rate for black females was 6.0 percent.

There is a third group, in addition to whites and blacks, those of Hispanic origin who are receiving increased attention because of migration from Latin America and their increased numbers in the US. The US population of Hispanics is 23,157 million, of whom 68 percent are in the labour force. Their unemployment rate in July 2001 was 6.0 percent or, the same as black females.

The major Equal Employment Opportunity (EEO) laws in the United States are the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans With Disabilities Act of 1998. The Civil Rights Act of 1964 has been amended through the years, most recently in 1991[6]. We will confine most of our discussion to the Civil Rights Act of 1964 and its amendments[7].

Rationale for Employment Equity Legislation

Before passage of the Civil Rights Act of 1964, open and explicit discrimination based on race, particularly against blacks, was widespread. Jim Crow laws legalized racial segregation in many southern states. The 1964 legislation was enacted in the midst of the civil rights conflicts of the 1960s. The Act itself has several sections, all of which aim to prohibit discrimination in various parts of society. Title VII applies to employers who have fifteen or more employees, as well as employment agencies and labour unions.

Title VII prohibits employers from basing employment decisions on a person's race, colour, religion, sex, or national origin where employment decisions include compensation, terms, conditions, or privileges of employment. As court cases and legislation have grown up around this law, the legal theory of a protected class has developed that states that groups of people who have suffered discrimination in the past require., and shall be given, special protection by the judicial system. The protected classes are Blacks, Asians, Hispanics, Native Americans, and women.

Occupational and educational differences between the sexes and races coupled with employment discrimination have been given as explanations for differences in earnings. If we compare two occupations with very different levels of earnings, the executive, administrative, and managerial occupation with food preparation and service we find that of those in the higher paying management category forty-nine percent are white males and thirty-nine percent are white females,

while black males are 3 percent and black females 4 percent[8]. This is contrasted with the lower paying food preparation occupation, where white males compose 34 percent, white females 48 percent, and black males and females 54 percent and 74 percent respectively. Females and blacks are more likely to be found in the lower paying of the two occupational categories.[9]

If we compare the percentage of total employment of women, blacks and those of Hispanic origin in these two occupations we find that each of these three groups compose a larger percentage of the lower paying food preparation and service occupation. For the executive occupation women composed 45.3 percent of the total, blacks 7.6 percent and Hispanics 5.4 percent. In the food preparation occupation women composed 57.7 percent, blacks 11.9 percent and Hispanics 17.2 percent.

Employer Obligations under EEO.

EEO implies at least two things:

> Evaluation of candidates for job in terms of characteristics that really do make a difference between success and failure.

Fair and equal treatment of employees on the job.

Specifically two types of discrimination are illegal.

Disparate treatment when an employer treats an employee differently because of his or her protected-class status. This is the kind of treatment one probably thinks of first when considering discrimination or, adverse impact, when the same standard is applied for all applicants or employees, but that standard affects a protected-class more adversely. For example, a height requirement which has an adverse impact on women.

Employers have four basic defenses against a charge of discrimination.

Job relatedness. The employer can show that the decision was made for job-related reasons.

Bonafide occupational qualification. The employer can show that a particular characteristic must be present in all employees for a particular job.

Seniority employment decisions that are made in the context of a formal and well-established seniority system.

Business necessity. Where there is an overriding business purpose for the discriminatory practice.

An affirmative action plan is required of all government agencies and businesses that do a significant amount of work for the government. The first step is to describe the organization's current work force relative to the pool of qualified workers in the labour force and to determine the percent of persons in each protected class working in the organizations classifications and in the available labour market. The second step is setting goals and timetables for correcting underutilization without rigid quotas. The third step is an action plan for recruiting, redesigning jobs, and providing training.

Pros of Equal Employment Opportunity

Society at large, political representatives, government employees, and judges all have different views regarding the best ways to achieve fair employment. One strategy is to make employment decisions without regard to race, sex, or age. A second strategy, affirmative action, is to accomplish the goal of fair employment by urging employers to hire those groups of people who were discriminated against in the past. The main legal struggle has occurred in the Supreme Court. Based on a number of Supreme Court decisions, the following conclusions can be drawn.

The affirmative action strategy has been upheld. Employers are permitted to base employment decisions, in part, on a person's race, sex, age, and certain other characteristics.

The employment decision cannot be made solely on the basis of race, sex, and age. Employers have to be essentially equally qualified first.

The one situation in which affirmative action is not permitted is during layoffs.

Courts may order an affirmative action program with specific quotas when an organization has a history of blatant discrimination.

Cons of Equal Employment Opportunity

Unintended consequences have accompanied EEO legislation[10]. Perhaps the most notable of these is reverse discrimination. That is, discrimination that occurs as the result of an attempt to recruit and hire more people from the protected classes. The Supreme Court has decided over a dozen reverse discrimination cases since the first one in 1977. Although the Court has favoured the affirmative action strategy almost all of the cases were decided by narrow margins.

EEO was imposed by government rather than self-initiated and for the majority of US organizations this means forced change. Therefore, in many cases, there has been grudging compliance consequences and the belief among some managers and employees that organizations have to compromise their standards to comply with EEO[12]. There are also tensions among minorities. Employers may be put in the position of having to decide which minority is most deserving.

CONCLUSIONS

There are several similarities in the efforts to improve equality in employment in SA and the US. Both SA and the US have sought to improve equality in employment through legislation and both countries have focused on the labour market, that is, on improving opportunities in employment. Both countries have designated particular groups to receive remedies. Both require equitable representation of these groups in occupational categories, as well as levels of employment in the internal labour market consistent with the group's representation in the external labour market. Both SA and the US also seek the establishment of employment equity plans by employers. In the US these affirmative action plans are tied to government contracts and funds.

There are also some differences between SA and the US. In SA a non-white majority has gained political power while the US remains majority white. However, there is no doubt that non-whites, particularly Hispanics, are gaining as a percentage of the population. In the US a considerable part of the effort towards employment equity has shifted from the differences between whites and non-whites, to the labour market differences between men and women where there has been extensive gender segregation of the work force by occupation and industry (Aaron and Nikongy, 1986).

Since employment equity legislation has been in force in the US three decades longer than SA there may be some lessons that SA can learn from the US experience. First, affirmative action has been difficult to implement in the US and has had some unintended consequences (Borjas 1996). It has also been very difficult to attribute success in the labour market directly to legislation. Certainly, there has been a narrowing of the gender wage gap in the US during the 1980s. The gap remained constant at about 0.65 for much of the post World War II period. Then, the female to male wage ratio increased by a percentage point per year during the 1980s, reaching 0.72 in 1990. However, in addition to legislation, other factors may have contributed to this narrowing, such as an expansion of women relative to men in the labor market and a closing of the male-female gap in post-secondary education.

The US experience may offer some suggestions for SA. Continuous economic growth is important for improving the employment status of non-whites. However, of equal importance is the improvement in educational opportunities. Success in the labour market, for those groups with historically lower earnings, starts with the availability of educational resources, both in quality and quantity. Diminished labour market opportunities are also associated with differences in housing between groups and the presence of ghettos both in SA and the US. The differences in housing are coupled with segregated schools. Both SA and the US cannot overlook the importance of educational opportunity in addition to employment equity legislation when seeking labour market success for minorities.

FOOTNOTES

[1]The legislative armoury against unfair discrimination is now quite formidable. For example, Chapter 2 of the new Employment Equity Act (1998) in SA prohibits unfair discrimination against designated employees. These include Black people, women and employees with disabilities. Legislative prohibitions against unfair discrimination are also intrinsic to South Africa's Constitution (1996). Chapter 2 (the Bill of Rights) contains an equality clause, and like the Employment Equity Act specifies a number of grounds which constitute unfair discrimination. Additionally, Schedule 7 of the Labour Relations Act (1995) considers unfair discrimination either directly or indirectly as a residual unfair labour practice. Grounds include race, gender, ethnic origin, sexual orientation, religion, disability, conscience, belief, language and culture. Labour laws have been at the forefront of the post-apartheid government's determination to remove unfair discrimination. A new act, The Promotion of Equality and Prevention of Unfair Discrimination Act (1999), seeks to prohibit discrimination in both civil society and in employment practices.

The draft Constitution adopted by the Constitutional Assembly on May 8, 1996 was approved by the Constitutional Court in November of 1996 (Corder, 1996). Section 9(2) of the Bill of Rights in the Constitution states in part:

"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."

Similarly, section 2(2) of Schedule 7 of the Labour Relations Act of 1995 stipulates that

"An employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

More explicitly, section of the EEA sets out the purpose of the Act to achieve equity in the workplace by

(a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) 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 of the workforce."

[2]More than a quarter of African males and 60 percent of African females in the formal sector were in the elementary occupations such as cleaning, garbage collection and agricultural labour. Similarly 41 percent of coloured women were in these elementary occupations while 40 percent of Indian women were in clerical occupations. About 18 percent of African women & 19 percent of coloured women were in managerial or professional jobs while 11 percent of African men, 14 percent of Coloured men and 37 percent of Indian men were in managerial professional jobs (Erasmus & Sadler, 1999).

[3]Sex vs. Gender: A person's sex refers to the biological characteristics, which make them male or female. Biological differences between men and women are that: 1) only women can get pregnant and that 2) women menstruate and men do not. Gender refers to the characteristics that society expects a person to have, based on their sex. It refers to economic, social and cultural roles, behaviours, attributes and opportunities which are associated with being female or male such as women are meant to do certain types of work, for example, and men other types of work.

[4]There is also a concentration of managerial control through a system of interlocking directorates where the same person(s) serve on the boards of several corporations. This social closure has limited the upward mobility of black managers and women. However, SA's re-entry into the international business community has forced awareness about its relative competitiveness in the manufacturing and services sectors. Recently, statutory and governmental tender requirements have been towards employment equity and diversity at all levels. Several black directors have been appointed to boards of directors. Although less than 15 per cent of SA's company directors are black or women, this is likely to change significantly by the year 2005 (Erasmus & Sadler, 1999).

[5] The Employment Equity Act does not set quotas, but rather enables individual employers to develop their own plans. Criteria regarding enhanced representatively include national and regional demographic information and special skills supply/availability. Section 27(1) of the Employment Equity Act requires designated employers to submit a statement of remuneration and benefits received in each occupational category and level to the Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act (1998). Section 27(2) requires that where disproportionate income differentials are reflected in the statement, a designated employer must take measures to progressively reduce such differentials. Section 27(3) indicates that these measures may include: (a) collective bargaining; (b) compliance with sectoral pay determinations made by the Minister of Labour in terms of Section 51 of the Basic Conditions of Employment Act; (c) applying norms and benchmarks set by the Employment Conditions Commission; and (d) relevant measures in the Skills Development Act (1998). The Employment Conditions Commission is required to research and investigate norms and benchmarks for proportionate income differentials and advises the Minister on appropriate measures for reducing disproportional differentials. The Commission is not allowed to disclose information pertaining to individual employees or employers. There is likely to be considerable public and organisational policy debate around what constitutes an acceptable pay curve in respect of differentials within organisations, and indeed whether such pay structuring is possible in a market driven global economy.

[6] There are a number of other pieces of legislation and orders that relate to discrimination. These include the Thirteenth and Fourteenth Amendments of the U.S. Constitution, Civil Rights Acts of 1866 and 1871, Immigration Reform and Control Act of 1986, Family and Medical Leave Act of 1993; Executive Orders 11246, 11375, 11478, Rehabilitation Act of 1974, and Uniformed Services Employment and Reemployment Act of 1994.

[7] There is another category of employment equity called comparable worth. Advocates of comparable worth argue that rates of compensation established in unregulated labour markets are frequently inequitable. This approach is different from the market forces argument and implementation of a comparable worth plan is proposed to reduce the gap, usually between men's and women's earnings.

[8]From unpublished Table, Current Population Survey, annual average 2000.

[9]Median weekly earnings in 2001 were $865 for the executive, administrative, and managerial occupation and $330 for food preparation and service (Bureau of Labor Statistics, household data).

[10]The unintended consequences have been wide ranging and if we were to consider all of the pieces of EEO legislation there would be a long list of examples. For example, the Americans with Disabilities Act was primarily intended to increase the possibility of employment for people with physical and/or mental disabilities. However, since the law has gone into effect, its applicants have filed relatively few complaints. Rather, current employees have filed the majority of complaints and for injury on the job. The prohibition of sex-based job discrimination has also moved far beyond job opportunities to include the broader issue of sexual harassment.

[11]Among the cases are United States Workers of America v Weber 99S Ct.2720 (1979) and Regents of the University of California v. Bakke, 438 U.S. 365 (1978).

[12]Courts may order, and employers voluntarily may establish, affirmative action plans, including goals and timetables. These plans need not be directed solely to identified victims of discrimination but may include general class-wide relief. While the US courts will almost never approve a plan that would result in whites losing their jobs through layoffs, they may sanction plans and impose limited burdens on whites in hiring and promotions. Numerically based preferential programs should not be used in every instance, and they need not be based on actual findings of discrimination.

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