

"I am not a number! I am a free man!"

THE EMPLOYMENT EQUITY ACT, 1998 (AND OTHER MYTHS ABOUT THE PURSUIT OF "EQUALITY", "EQUITY" AND "DIGNITY" IN POST-APARTHEID SOUTH AFRICA) PART 2

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SUMMARY

The author critically examines the organising principle of the affirmative action provisions of the *Employment Equity Act* (or EEA), as well as the implications of the recent judgment by the Constitutional Court in its first case involving the application of affirmative action in the employment context (and in terms of the EEA) – *SAPS v Solidarity obo Barnard*. While reiterating the need for restitutionary measures such as affirmative action in South Africa, the author concludes – probably quite controversially - that the EEA's treatment of affirmative action has nothing to do with the equality right in the Bill of Rights, and that the Act pursues a different (and omnipresent) social engineering agenda by the state. The author calls for this realisation to prompt future affirmative action cases arising from the application of this Act to be removed from the scheme of (and potential defences available under) the equality jurisprudence, and for the courts to critically interrogate the constitutionality of the EEA's affirmative action scheme within its own context. The author believes that Chapter III of the Act is unconstitutional in this sense, and he calls for the scrapping of its provisions. He also calls for a (more) constitutionally-compliant exposition from the Constitutional Court of the parameters of legitimate affirmative action under the Bill of Rights, and adds his voice to the numerous calls for reconsideration of the "rationality test" expounded in *Minister of Finance v van Heerden*. More generally, the author considers the apparently all-pervasive application of the government ideology of the pursuit of demographic representivity

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in "transformation" of employment and other contexts (expressing grave doubts about its constitutionality along the way).

In Part 1 of this piece (which precedes this article in this edition), the author considers the constitutional requirements for a legitimate affirmative action programme or measure. He then examines the affirmative action scheme of the *Employment Equity Act*, and explains his views on why such scheme is, in fact, unconstitutional.

This article forms Part 2 of this piece and the author continues to critically evaluate the Constitutional Court judgment in the *Barnard* case, and he highlights the biggest areas of disappointment of this judgment within the context of South Africa's equality jurisprudence. After a very brief consideration of the recent amendments to the *Employment Equity Act*, the author concludes by providing reasons why the Act's approach to affirmative action needs to be rejected, and soon.

KEYWORDS: affirmative action; (substantive) equality; (demographic) representivity; *Employment Equity Act*, 1998; section 9 Bill of Rights; unfair discrimination; quotas; numerical targets; *SAPS v Solidarity obo Barnard*; *Minister of Finance v van Heerden*; "rationality test".