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THE SAHRC EQUALITY REPORT - LIGHT AT THE END OF THE TUNNEL FOR MINORITIES?
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The South African Human Rights Commission (SAHRC) recently published its 2017/18 Equality Report (the Report), which was submitted to Parliament. This has probably not attracted much attention, due to processes around expropriation without compensation (EWC), the Zondo State Capture Commission of Inquiry and other current news. One exception was the Solidarity Movement. They announced that the Report means that the country's affirmative action legislation is unlawful and does not comply with international requirements. Solidarity is to approach the Courts for a declaratory order to clarify how employers and the Department of Labour should handle the situation until the law (as proposed by the SAHRC) is amended.

The subtitle of the Report is insightful: "Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa". The SAHRC thus uncritically accepts the political policy of the ANC government and tries to strengthen it by giving it a human rights basis. On several occasions the Report concludes that because so little progress has been made with greater equality in South Africa, radical socio-economic transformation is essential. The question about why so little happened (e.g. that the education system has hopelessly failed) is never asked or answered.

The equality clause in the Constitution, section 9(1) states that everyone is equal before the law, while (2) states that 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 *Employment Equity Act* of 1998 (the Act) and affirmative action are based on this clause. Section 9(3) of the Constitution prohibits the State from "*unfairly [discriminating] directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*" Subsection (5) states that "*discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair*."

The Constitutional Court in the *Van Heerden* case *(Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC))* found that any application of section 9(2) (i.e. special measures to promote equality) is automatically fair and not subject to the tests of subsections (3) and (5). This means that according to this judgment, all corrective action - without any test of its fairness - should be regarded as fair. The only limitation is that a measure shall not constitute abuse of power and that it may not cause substantial and unintended damage and thereby threaten the country's long-term constitutional goal of a non-racial and non-sexist society. This interpretation has serious negative consequences for, and has even led to harm of, minorities.

What Solidarity has rightly pointed out is that the SAHRC finds that the Act does not comply with the requirements of the United Nations *International Convention on the Elimination of*

All Forms of Racial Discrimination (ICERD) and the Constitution of South Africa. This is because the Act is only considering race and not socio-economic need (or disadvantage). This is something that has frequently been seen in practice: a privileged black South African (who grew up in Sandton and went to a private school and studied at a good university) will be appointed ahead of an impoverished Coloured or white South African - because he is black.

The SAHRC in specific found that the Act's definition of "designated groups" and the breakdown of the State's data into racial categories (African, Coloured, white and Indian) does not comply with constitutional or international legal obligations. These groups should be determined in a more nuanced way, by looking at socio-economic needs. In addition, the SAHRC found that the current implementation of affirmative action may amount to "rigid quotas" and "absolute barriers". It may therefore lead to "new economic imbalances and patterns of exclusion based on race, ethnicity, gender and disability".

These SAHRC findings (which carry the same authority as those of the Public Protector) are very important. This is the first time that a Chapter 9 institution has made such critical and thorough findings about affirmative action and how it is applied. The Report also asks the question of how long remedial measures should still apply and concludes that international law states that special measures cannot be permanent and that as soon as the goal of "substantive" equality is reached, they must be discontinued.

The SAHRC also ordered the Department of Justice and Constitutional Development, the Commission for Employment Equity and the Department of Labour to provide feedback to the SAHRC - within six months from July 2018 - on steps taken to amend the Act.

Will these important findings make life easier for minorities? They could, but it will not happen soon. At a political ideological level, the Act's "designated groups" are fully part of the ruling party's ideology of "Africans first" and demographic representativity. This means that all organisations and all divisions in these organisations should reflect the national demographics (80% African, 9% Coloured, 9% White and 2% Indian). Whether the ruling party will easily distance itself from this ideology (intended to capture all "levers of power") remains to be seen. The fact is, there exists a clear tension between race-based affirmative action and redress based on socio-economic needs.

The second condition is that the State must have the capacity to achieve redress according to the more nuanced "socio-economic needs", including the ability to measure people's socio-economic needs. This is already done on a limited scale by NSFAS with student loans - students whose parents earn more than R600 000 per year, do not qualify. However, it is doubtful whether the State will have the capacity to do so across the board. The irony is that this lack of capacity must at least be based in part on the manner that affirmative action has been applied thus far.

A third factor is the courts, and specifically the Constitutional Court. Will the courts be prepared to overturn their interpretation of unfair discrimination as per the *Van Heerden*

case? Because even if the Act were amended, labour cases can end up in the Constitutional Court and the *Van Heerden* precedent will apply.

A fourth factor is the duration of affirmative action measures. According to international law, it should be discontinued as soon as equality is achieved. The Constitutional Court established the principle of "substantive" equality. We have already achieved formal equality before the law. The exact meaning of substantive equality and when it will be achieved has not yet been clarified by the courts. An ideological view would be that it is only achieved when 80% of all positions in all organisations are occupied by Africans. The SAHRC calls for a more nuanced approach, which takes socio-economic needs into account. However, when substantive equality can then be achieved is also not clear. It depends on its definition and measurement.

In summary: the findings of the SAHRC that affirmative action should be done in a more nuanced manner should be welcomed. It is closer to the letter and spirit of the Constitution and international law. Only time will tell whether the race-based system of affirmative action, based on ANC ideology, will easily change.

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