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A Legal Analysis of the Complexity of Race and Gender Disadvantage In Terms of the Employment Equity Act of South Africa

Thesis submitted by

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to the School of Law of the University of the Witwatersrand in fulfillment of the requirements for the Doctor of Philosophy

Supervisor: Professor Catherine Albertyn

Submission Date: March 2018

DECLARATION

I declare that this thesis is my own unaided work. This thesis is being submitted for the degree of Doctor of Philosophy at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other University.

_____
Muriel Tapiwa Mushariwa

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I would like to first thank my Heavenly Father who strengthened me through this thesis. A very special thank you to my supervisor, Professor Catherine Albertyn, for her patience and invaluable dedication, guidance and support throughout this project. Thank you also to the Wits School of Law and to my colleagues for their encouragement and assistance. A warm thank you to Ms Gloria Cooper who spent many dedicated hours transcribing each interview. A special thank you to Ms Nadezhda Gianna Cox for her double-checking the citation of sources. Finally, a heartfelt thank you to my family for their love and support, always. My journey into this thesis started in 2003, when as a young Black foreign female sessional lecturer and research assistant, I was designated a white male in terms of the employment equity report of the institution I worked for. The experience motivated me to take a closer look at the meaning of disadvantage in terms of the Act and the implications thereof.

NOTE ON PUBLICATIONS FROM THESIS

During the course of my PhD research, I have published a number of articles arising out of chapters and sections of chapters in this thesis. I have made detailed reference to these published articles, as appropriate, in the body of the thesis. These articles are the following:

- Muriel Mushariwa 'Who are the true beneficiaries of Affirmative Action? - *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC)' 2011 *Obiter Law Journal* 439-452.

- Muriel Mushariwa '*UNISA v Reynhardt* [2010] 12 BLLR 1272 (LAC): does affirmative action have a lifecycle?' 2012 *PELJ* 15(1) 412-428.

- Helen Papacostantis and Muriel Mushariwa 'The impact of minority status in the application of affirmative action: *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)' 2016 19(1) *PELJ* 1-25.

ABSTRACT

Centuries of colonialism and Apartheid created a legacy of inequality in South Africa that the democratic Constitution, 1996, seeks to address. The constitutional mandate in section 9 of this Constitution, enacted through the Employment Equity Act 55 of 1998 (EEA), requires designated employers in the public and private sphere to address the inequality in the workplace through the application of affirmative action. The EEA identifies the beneficiaries of affirmative action policies as black people, women and persons with disabilities. It is clear that these constitute three distinct groups, but that it is also possible for an individual to belong to more than one of these collectives. For example, black women fall within two designated groups on the basis of race and gender, and this dual disadvantage creates a multi-layered, unique and complex type of inequality.

The main aim of the EEA is to create a representative workforce, and designated employers have a duty to break down the barriers that prevent members of the designated groups from entering the workplace. Once employed, employers need to assist members of the designated groups to progress in the workplace. However, having a representative workforce does not translate into a transformed workforce. It will be argued in this thesis that a transformed workplace is representative, but also requires the breakdown of institutional norms, processes and structures that prevent the progression of members of the designated groups. The question to be asked is whether affirmative action, in its current form, is able to transform the workplace.

To answer this question, it is vital that consideration be given, firstly, to the type of substantive equality that is to be achieved in the application of affirmative action. It will be shown that the aim should be a transformative substantive equality of outcome. Focus will be placed on the fact that individuals who fall within the designated groups are not equally placed in terms of their experience of disadvantage. It is submitted that consideration of differing experiences of disadvantage needs to be taken into account so as to avoid the creation of an elite middle class black, and possibly male, group, which benefits from affirmative action to the exclusion of others, thus hampering the achievement of equality in the workplace.

This thesis will show that a transformative form of substantive equality of outcome needs to be applied to affirmative action in the workplace. This transformative form of substantive equality includes a situation sensitive approach to the implementation of affirmative action in the workplace. A situation sensitive approach will apply affirmative action strictly on a case by case basis with regard to the demographic profile of the specific workforce, and the employment equity policy of the particular workplace. A one size fits all approach cannot deal with the complexity of disadvantage that needs to be addressed.

It will be argued that, besides a situation sensitive approach to race, gender and disability, the issues of social, political, economic and educational disadvantage are

factors that should be given consideration in identifying the true beneficiaries of affirmative action. To further illustrate this point, particular attention will be given to women within the designated groups, in order to unpack the nature of disadvantage they experienced in the workplace. Two case studies, focusing on women in male dominated professions, the legal profession and the mining industry, will be used to illustrate this point. This thesis will show that ultimately, the goal of affirmative action must be seen to be to change the workplace by breaking down both the visible and invisible barriers of equality and, in doing so, create an environment where, constitutional values of equality, human dignity and freedom are truly recognized and protected.

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Chapter 1

1 Introduction

1.1 Introduction

The policies and laws of the Apartheid government systematically prevented the economic and social inclusion and advancement of blacks and women. Building on centuries of colonialism and segregation, the separate development policies of the Apartheid government eroded citizenship, further entrenched land dispossession, and deepened segregation in land ownership and residential areas.[1] Apartheid policies intensified separate and unequal education, health and social services systems, and tightened controls on the movement of blacks through extending the pass laws. [2] Although job reservation policies, unequal remuneration and restriction on movement had systematically disadvantaged blacks in the labour market throughout white rule,[3] the Apartheid state further prevented blacks from having rights in the workplace, thus further curtailing their social and economic advancement.[4]

Hofmeyr highlights the various labour related objectives of Apartheid legislation as follows:

[1] C N Patel 'Labour Law and Race' in Alan Rycroft *Race and the Law in South Africa* (1987) at 163. Marie' McGregor 'A legal-historical perspective on affirmative action in South Africa' (Part 1) (2006) *Fundamina* 87, 89 and 92.

[2] Jeremy Seekings & Nicoli Nattrass *Class, Race and Inequality in South Africa* (2006). See also Sarah Liebenberg & Beth Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) *SAJHR* 335. See also P A K Le Roux 'Affirmative action: the industrial court determines some boundaries' (1996) *CLL* vol 5 (12) 117 at 118.

[3] McGregor op cit note 1 at 93. J Seekings and N Nattrass 'Two nations?' Race and Economic Inequality in South Africa Today (2001) *Daedalus* 45 at 51.

[4] The Industrial Conciliation Act 11of 1924 facilitated the exploitation of domestic workers and farm workers as such workers had no rights or job security. In terms of section 77 of the Industrial Conciliation Act 94 of 1979 the Minister of Labour was able to promulgate provisions to safeguard the jobs of Whites, certain Coloured and Indian workers in the altruistic guise of safeguarding against racial competition. The Wage Act 5 of 1957 allowed for differentiation in wage determinations based on race and gender. See also McGregor *op cit* note 1.

> [Apartheid laws] protected the supply of labour available to farmers from competition by industry; protected unskilled White labour from competition from cheaper African labour; protected skilled White labour by preventing Africans acquiring skills or using them in so-called White areas; prevented rural Africans settling in the cities and acquiring permanent residence rights and (controlled) the deployment of African labour in White areas."[5]

In addition, "[t]he State was . . . able to use labour legislation in a quasi-instrumental way to achieve the political objective of dividing the working class along racial lines, thereby inhibiting a class-consciousness and identity emerging."[6] It was only in the 1970's and 1980's, that working class movements gave rise to the limited empowerment of workers through the recognition of unions, the establishment of collective bargaining and relevant court judgments.[7]

Overall, however, Apartheid policies in South Africa meant that black people, regardless of their class position, were "systematically denied equal opportunity".[8] Apartheid's "enduring legacy"[9] of inequality continues to affect the advancement of black people in South Africa.[10]

Disadvantage on the basis of race occurred differently from exclusion on the basis of gender. This resulted in a different kind of inequality for women in comparison to that experienced by blacks.[11] Regardless of race, women were disadvantaged by patriarchal policies and social attitudes which limited their choices of employment, as

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[5] Julian Hofmeyr 'Reform of the labour market in South Africa' (1994) *South African Journal of Economic History* 13.
[6] Explanatory Memorandum to the Employment Equity Bill 1997 Government Gazette GN 1840 GG 18481 of 1 December 1997.
[7] Andre Van Niekerk (eds) *Law@work* (2008) 11.
[8] CN Patel op cit note 1 at 163.
[9] Iain Currie and Johan De Waal *The Bill of Rights Handbook* 6th ed (2013) at 142.
[10] Saras Jagwanth 'South Africa: the inequality challenge' 2000 *Southern Africa Report* 30. See also Karl Hofmeyr and Cindy Mzobe 'Progress towards advancing women in South African organizations: myths or reality' 2012 *African Journal of Business Management* 1276. See also Currie and De Waal op cit note 9 at 142, 241.
[11] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC). See also *South African Police Services v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 153. (hereafter *Barnard* (CC)).

well as their ability to participate equally in both the workplace and the economy. If they did find employment, they would not enjoy equal pay, employment benefits or training[12] and were often subject to hostile workplace cultures.[13]

Furthermore, the particular combination of patriarchal traditions and policies of racial segregation created a more complex disadvantage for black women, who were discriminated against on the basis of their race and gender.[14] As O'Regan notes:

> Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap."[15]

After years of discrimination and inequality, it is extremely difficult for black people and women to compete with their white or male counterparts on an equal footing. This can be seen in all aspects of society and most evidently in the workplace.[16]

South Africa's new constitutional era guarantees everyone the fundamental right to equality. This powerful and robust right recognizes the inequality created by the past[17] and makes provision for positive action by the State as a necessary

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[12] Hofmeyr & Mzobe op cit note 10 at 1276.

[13] Ibid. See also Celina Romany 'Black women and gender equality in the new South Africa: human rights and the intersection between race and gender' 1996 *Brook Journal of International Law* 857.

[14] Catherine Albertyn and Beth Goldblatt 'Equality' in Stuart Woolman (eds) *Constitutional Law of South Africa* (2013) 35-4.

[15] *Brink v Kitshoff* supra note 11 para 44. Women of both races experience disadvantage though different in complexity and degree this will be discussed later in the thesis.

[16] In 2017 StatsSA reported that 63.5% of whites were employed in comparison to 40% of the black population. http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf In 2013 StatsSA reported that 72.6% of white men were employed, 56.1% of white women, 42.8% black men, and 30.8% of black women. http://www.statssa.gov.za/?cat=31 [Accessed on 3 March 2018]. The Commission on Employment Equity report of 2009-2010 indicated the following workforce profile: in top management African men counted for 14.2 percent compared to White men who made up 54.5 percent; African women in the same category were a mere 6.1 percent while White females constituted 9.3 percent. http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2009-2010/10thCEEreport_part1.pdf [Accessed on 3 January 2018].

[17] Section 9(2) of 1996 Constitution. Mokgoro J held that "the unique and stark reality in South Africa is that decades of injustice associated with apartheid gave rise to gross socio-economic inequalities that persist at every

constitutional tool for advancing equality.[18] Equality is also included as a fundamental constitutional value in the Constitution and has particular significance in the historical context of South Africa.[19] In light of this past, South African equality jurisprudence displays a commitment to substantive equality.[20]

If the "separate and unequal policies"[21] of the Apartheid past created socio-economic inequalities that limited the opportunities and advancement of certain groups in South Africa, the removal of these laws and policies does not automatically result in an equal society.[22] Indeed, if nothing is done to address this entrenched disadvantage, inequality in society will remain ever present. It is for this reason that s9 (2) of the Constitution places a duty on the State to implement positive measures in order for an equal society to be realized. This is extended to the private sphere of employment through regulatory state intervention,[23] and an important positive measure in relation to the workplace is the Employment Equity Act 55 of 1998 (EEA).[24] The preamble of

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level of society. The disparities between the beneficiaries of State imposed racial discrimination and its victims which will doubtlessly endure for many years to come makes oppression and discrimination in the private sphere both possible and likely." In the case of Du *Plessis and others v De Klerk and another* (CCT 8/95) at 121 quoted with approval in *George v Liberty Life Association of Africa Ltd* 1996 ILJ 571 (LC) at 590.

[18] Constitution,1996. See also Helen Papacostantis and Muriel Mushariwa 'The Impact of Minority Status in the Application Affirmative Action: *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)' 2016 *PER / PELJ* 1.

[19] Tobias P van Reenen 'Equality, discrimination and affirmative action: analysis of section 9 of the Constitution of the Republic of South Africa' (1997) *SAPL* at 151,152.

[20] As discussed in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 112 (CC) para 61, See also *President of RSA* v *Hugo* 1997 (4) SA 1 (CC) para 41. See also Jan Lodewyk Pretorius 'Constitutional Standards for Affirmative Action in South Africa A Comparative Overview' 2001 *Max Planck-Institut für ausländisches öffentliches Recht und Volkerrecht* at 404.

[21] Albertyn and Goldblatt op cit note 14 at 35-3.

[22] Marie' McGregor 'A legal-historical perspective on affirmative action in South Africa' (Part 2) (2007) *Fundamina* 100 at 101. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004(4) SA 490 (CC) para 74 Ngcobo J stated that "…past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time even indefinitely." See also Tinyiko Sam Maluleke, 'Do I, With My Excellent Ph.D, Still Need Affirmative Action?' 1996 24(3) *Misionalia* 303.

[23] McGregor op cit note 22 at 101.

[24] Explanatory memorandum to the Employment Equity Bill: "Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices and perpetuate discrimination in employment against these disadvantaged groups as well as by factors outside the labour market such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes, and positive action

the EEA recognizes the need to "redress" the "disparities" created in the workplace.[25] The Act seeks to give meaning and content to the right to equality in the workplace in the public and private sectors through regulating unfair discrimination in the workplace and making provision for affirmative action. Affirmative action is an example of state intervention in that it places an obligation on, and is more directly bound by, s 9(2), but the EEA also applies to the state in its role as employer.

The EEA places a duty on the 'designated employer'[26] to implement affirmative action measures for 'designated groups' to 'redress [their] disadvantage in employment'.[27] To achieve this goal, "the EEA seeks to break down barriers to employment experienced by members of the designated groups,[28] to create a representative workforce,[29] and to transform the workplace into an area governed by principles of equality through the application of affirmative action."[30] Despite the role of remedying disadvantage as a central aspect of the Act, surprisingly little has been written on the nature and complexity of the disadvantages encountered by those who fall within the designated groups.[31] Nor has there been much discussion in the case law. Indeed, case law has highlighted the fact that the successful implementation of affirmative action is negatively affected by a lack of understanding of how best to deal

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designed to redress the imbalances of the past are therefore needed" Explanatory memorandum to the Employment Equity Bill GN 1840 GG 18481 of 1 December 1997 at 5, also cited in Ockert Dupper 'Affirmative action and substantive equality: The South African Experience' 2002 *SA Merc L J* 275 at 276. "The concept of affirmative action has its origin in the United States of America where it resulted in various forms of mass action by the Civil Rights Movement against racial inequalities during the 1950s and 1960s"Van Rooyen J 'Implementing Affirmative Action in Nambia' 3ed (2000) 9.

[25] Employment Equity Act 55 of 1998. (hereafter the EEA).

[26] Section 1 of EEA states that "a designated employer means an employer who employs 50 or more employees, or has a total annual turnover as reflected in Schedule 4 of the Act, municipalities and organs of state."

[27] Section 2 of EEA.

[28] Section 5 of EEA.

[29] Section 42(a) of EEA.

[30] Papacostantis and Mushariwa op cit note 18 at 1.

[31] See also McGregor op cit note 22; Ockert Dupper 'Affirmative action: who, how and how long?' (2008) 24 *South African Journal of Human Rights* 425; Muriel Mushariwa 'Who are the beneficiaries of affirmative action? -*Solidarity obo v SAPS* 2010(5) BLLR 561 (LC)' 2011 *Obiter* 439.

with the complexity of disadvantage within and across the designated groups.[32] The impact of disadvantage affects the way in which affirmative action is implemented and determines its failure or success in transforming the workplace. This thesis seeks to fill that gap, and I provide a short overview of its arguments in the balance of this section.

1. In chapter one, I will give an outline of the chapters in the thesis and the main themes within the thesis.
2. In chapter two, I then discuss the theoretical and legal relationship between affirmative action and substantive equality. The question here is what idea of substantive equality should be applied in order to bring about the necessary change in the workplace through the application of affirmative action. Additionally, how do the different understandings of substantive equality relate to the different approaches to affirmative action? Here I develop a conceptual framework for understanding these different kinds of substantive equality and affirmative action.
3. In chapter three, I investigate the complex nature of disadvantage across and within different groups in the workplace and look at whether the current form and application of the EEA is able to address this.
4. Following this, in chapter four, I turn to the nature of disadvantage within a particular designated group. I use the category of women to illustrate the multiple disadvantages they experience, as women, but also as women who differ from each other by race, class, culture, religion and a multiplicity of factors.

[32] See also *Barnard CC case; Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)*; Unisa v Reynhardt*; [2010] 12 BLLR 1272 (LAC).

5. To further illustrate the complexity of gender disadvantage I focus in chapter five on the experience of women within two male dominated professions to see what this reveals with regard to the nature of the disadvantage experienced. The question to be asked here is whether the EEA, as a tool of law, is able to deal with this multi-layered nature of disadvantage.
6. In chapter six I compare the similarities and differences in themes between the legal and mining profession in terms of gender disadvantage
7. Drawing on theses case-studies and the conceptual framework I develop in chapter two, I argue in chapter seven for the application of affirmative action within a transformative understanding of substantive equality in order to enable the full participation of women in male dominated professions. This 'transformed' affirmative action would be applicable to all members of the designated groups in order to ensure the advancement of equality in the workplace.
8. In the final chapter eight, I suggest that this is possible if employers take a "nuanced"[33] broad view of the Employment Equity Plan[34].

The EEA places a duty on designated employers to develop an employment equity plan.[35] Once employed, employers must further assist members of the designated groups to progress in the workplace.[36] The main aim of affirmative action is the creation of a representative workforce.[37] A representative workforce is one that is reflective of both national and regional demographics.[38] However, a representative workforce does not translate into a transformed workforce. A transformed workplace

[33] Dupper op cit note 31 at 428.
[34] *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) para 133.
[35] Dupper op cit note 31 at 428.
[36] *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) para 133.
[37] Ibid.
[38] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 para 79.

goes beyond representivity to require the breakdown of institutional norms and structures that prevent the progression of members of the designated groups. I conclude by considering what the research suggests for addressing this deeper transformation.

In the remainder of this introductory chapter, I introduce the main themes of the thesis in more detail.

1.2 Substantive Equality

The question to be asked is what type of equality framework is necessary in order to transform the workplace? It is evident that affirmative action, in its current form, is not able to transform the workplace.[39] I address this conceptual question in chapter two, by first drawing a distinction between formal and substantive equality. The equality provision in the Constitution leans towards a substantive equality framework, but I suggest that there are two recognized forms of substantive equality: substantive equality of opportunity and substantive equality of outcome/results.

Substantive equality of opportunity[40] is best described "using the metaphor of a race."[41] All persons should be able to participate in the workplace without being hampered by "stereotypes and prejudices."[42] This approach "aims to equalize the starting point"[43] through an accommodation of difference.[44] Substantive equality of opportunity would justify affirmative action in the context of South Africa where

[39] See Commission for Employment Equity Annual Report 2016. http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2015-2016/16th%20CEE%20Report.pdf . [Accessed on 20 November 2017].
[40] Catherine Barnard and Bob Hepple 'Substantitve equality' 2000 *Cambridge Law Journal* 562 at 565.
[41] Ibid. Discussed in detail in chapter two.
[42] Sandra Fredman 'Facing the Future: Substantive Equality under the Spotlight' Legal Research Paper Series Paper No 57/2010 July 2010 at 24. Electronic copy available at: http://ssrn.com/abstract=1649991 [Accessed 15 April 2018].
[43] Sandra Fredman 'Redistribution and Recognition: reconciling inequalities' 2007 *SAJHR* 214 at 216.
[44] Ibid.

historically disadvantaged groups need the means to compete on an equal footing.[45] It has been held that this substantive approach to equality "requires a deliberate acknowledgement and assessment of historical differences and discrimination in order to meaningfully address inequality."[46]

There is, however, debate about what substantive equality amounts to in the end. It is clear that substantive equality of opportunity leads to the inclusion of the designated groups through the creation of a representative workplace. However, there needs to be more than just inclusion; the workplace requires transformation.[47] This is where substantive equality of results[48] is relevant. Substantive equality of results in the context of affirmative action means that not only is there a creation of a workforce that is representative of South Africa, but, there is also a transformation of the institutional structures and policies that perpetuate inequality the workplace.[49] This type of transformation is also envisaged through sections 5, 15 and 20 of the EEA. Substantive equality of results in affirmative action also means that the employer, when implementing affirmative action, needs to avoid a perpetuation of inequality due to the framework in which affirmative action is applied.[50] Affirmative

[45] Dupper op cit note 24 at 275.
[46] Shamima Gaibie 'Employment Equity and Anti-discrimination Law: Employment Equity Act 12 Years On' 2011 *ILJ* 1 at 21. M Mushariwa '*Unisa v Reynhardt*; [2010] 12 BLLR 1272 (LAC): Does Affirmative Action have a Lifecycle?' [2012] *PER* 412 at,420.
[47] See also *Bel Porto School Governing Body and others v Premier of the Province, West Cape and Another* 2002 (2) SA 265 (CC) para 4 "The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights" See also See also JL Pretorius 'Legal evaluation of affirmative action in South Africa' 2001 *Journal of Juridical Science* 12 at 27.
[48] Barnard and Hepple op cit note 40 at 564.
[49] Dupper op cit note 24 at 275, 278.
[50] Papacostantis and Mushariwa op cit note 18.

action is not fulfilling its purpose if it creates new inequalities, or results in inequality, within (between and among) the designated groups.[51]

In chapter two, I argue further that affirmative action, in its current form, is based on equality of opportunity, which only creates an equal workplace to a limited extent. Affirmative action practices are limited by the fact that they emphasize the inclusion of members of the designated group in the workplace.[52] Issues of socio-economic inequalities (class) or those institutional barriers such as the male model of a hard worker that affect the full participation of the designated group are not adequately addressed.[53] Therefore, this form of equality, as argued by Albertyn, remains within "the ambit of inclusion"[54] rather than in challenging and transforming "structures and institutions of society"[55] that tend to perpetuate inequality. A "robust approach"[56] that involves "redistribution and recognition"[57] would, as Albertyn argues, allow for "individuals to pursue their well-being"[58] and thus reach their full "potential".[59] As society and the workplace changes due to the implementation of affirmative action, there is a need to shift the equality framework in which affirmative action is applied in order to avoid the creation of new inequalities and allow for the transformation of the workplace.[60]

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[51] Pierre De Vos 'The past is unpredictable: race, redress and remembrance in the South African Constitution' 2012 *SALJ* 73 at 90; 91. See also Papacostantis and Mushariwa.op cit note 18. Dupper op cit note 24 at 292. Dupper op cit note 31 at 438; Dupper O, Bhoola U, Barbers C *Understanding the Employment Equity Act* (2009) at 131.

[52] Catherine Albertyn 'Gendered transformation in South Africa jurisprudence: poor women and the Constitutional Court' 2011 *Stellenbosch Law Review* 591 at 606.

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] Preamble of the Constitution. See also Pius Langa 'Transformative Constitutionalism' (2006) 3 *Stell LR* 351 as cited by Catherine Albertyn 'Substantive equality and transformation in South Africa' 2007 *SAJHR* 253 at 257.

[60] Papacostantis and Mushariwa op cit note 18.

The need for deeper transformation is evident in one of the main criticisms of affirmative action, namely, that it benefits only the middle class or privileged members of the designated groups, to the exclusion of those who are actually disadvantaged.[61] I advance the argument that transformative substantive equality in the workplace must recognize the multiple disadvantages[62] that arise out of race, gender, disability and class, as well as confronting the complexity of disadvantage where there is an intersection of race and gender.[63]

In order to effect a transformative approach in practice, it is important to investigate the impact of multi-layered disadvantage on individuals in the workplace. Particularly important here, is an understanding how institutional structures and policies limit an individual's ability to compete and progress in the workplace. Unless recognition is given to the different experiences of disadvantage, a substantive equality of results that is truly transformative cannot be realized.

It is important to note that the EEA does not specify a hierarchy amongst the three groups in the implementation of affirmative action. However, it is evident that there

[61] De Vos op cit note 51 at 90.See also Neville Alexander 'Affirmative action and perpetuation of racial identities in post-Apartheid South Africa' 2007 *Transformation* 92. See also Adam Habib and Kristina Bentley *Racial Redress & Citizenship in South Africa* (2008) 339 – 340. Michael Banton, *Discrimination;* 1994, as cited in *George* supra note 17 at 594 points out that affirmative action may lead to rough justice as not all individuals who are members of a designated group are equally placed. He points out that "one of the main criticisms of affirmative action in the United States has been that it has primarily benefited middle-class women and black people who were well able to look after their own interests and less deserving assistance than those trapped in the underclass. The creation of privileged classes benefiting from quota hiring has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define the classes so exactly that only the most deserving benefit, the short-run results may be open to criticism." See also Chitja Twala, 'Affirmative action 1994-2004: a viable solution to redress labour imbalances or just a flat spare tyre?'2004 29(3) *Journal for Contemporary History* 128. See also Archibong, U., & Adejumo, O 'Affirmative Action in South Africa: are We Creating New Casualties?' (2013) *3*(1) *Journal of Psychological Issues in Organizational Culture* 14 at 24.

[62] Marie' McGregor 'Categorisation to determine beneficiaries of affirmative action: Advantages and deficiencies' (2005) 46 *Codicillus* 1 at 5.

[63] Ibid. See also Katherine C Naff and Ockert Dupper 'Footprints through the courts: comparing judicial responses to affirmative action litigation in South Africa and the United States' 2009 25(2) *The International Journal of Comparative Labour Law And Industrial Relations* 157 at 175.

has been a strong emphasis on race, with gender and disability lagging behind, in the workplace as well as in the case law.[64]

Secondly, the EEA does not specifically address the multi-layered disadvantage experienced within and across the groups.[65] For example, it does not provide any guidance as to how an employer can tackle the unique experiences of black woman in terms of race and gender, and the disadvantage that is perpetuated by this intersection.[66] Because the Act does not define disadvantage,[67] or make a distinction within or across the groups, affirmative action is applied in the context of a singular group setting.[68] I argue that there is need to account for all the groups in the implementation of affirmative action equally and fairly.

The lack of definition of disadvantage in section 1 of the EEA also means that the different experiences of disadvantage are unrecognized in law. It is perhaps trite to say that, in reality, there are different experiences of disadvantage within and across

[64] Gerhard Maré 'Broken Down by Race …: Questioning Social Categories in Redress Policies' 2011 *Transformation* 52 at 63. See also Willene Holness 'Employment equity and elimination: Where are women with disabilities in the hierarchy' 2016 Agenda 49. See also *Solidarity obo Barnard v SAPS* (2010) 5 BLLR 561 (LC); *Naidoo* supra note 32. See also O Dupper 'The beneficiaries of affirmative action' in O Dupper and C Garbers (eds) *Equality in the workplace : reflections from South Africa and beyond* (2011) 302. Mathur-Helm, Babita. 'Equal opportunity and affirmative action for South African women: a benefit or barrier?' *Women in Management Review* (2005) 20.1 56 at 63.

[65] Papacostantis and Mushariwa op cit 18 at 3.

[66] McGregor op cit note 62 at 10-11 See also Liebenberg and Goldblatt op cit note 2. Marius Pieterse 'Finding for the applicant? Individual equality plaintiffs and group-based disadvantage'2008 24 *SAJHR* 397 at 406-407.See also Kimberle Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *U Chi Legal F* 139

[67] McGregor 'Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces' 2011 *De Jure* 111 at 115.See also In the *Employment Practices Policy Agreement* adopted by the Durban City Council, "disadvantage" is defined as having: "been adversely affected or excluded from access to education, training and or skill on the grounds of race, gender or physical disability; and/or been adversely affected economically, politically, socially or in occupational mobility on the grounds of race, religious belief, gender national origin, or physical disability; and/or been discriminated against by any form of distinction, preference or exclusion or personal treatment which directly or indirectly restricted development, made separate provision for, or provided less favourable treatment on grounds of race, religious belief, gender, national origin or physical disability." as cited in Alan Rycroft, 'Obstacles to employment equity? The role of judges and arbitrators in the interpretation and implementation of affirmative action policies,' (1999) 20 *Industrial Law Journal* 1411 at 1424.

[68] Ibid .

each group. Crenshaw[69] has argued that a black woman's disadvantage in the workplace cannot be derived from the experiences of black men in terms of race, or the experiences of white women in terms of gender.[70] A black woman's disadvantage is unique and multi-layered.[71] If it is not taken into account by the employer in the implementation of affirmative action, the result is that old inequalities are reinforced and new forms of inequality are created between and within the different members of the designated groups.[72]

1.3 Understanding groups: concepts of disadvantage and representivity

In chapter three I explore in detail the meaning of disadvantage in the context of affirmative action. Using Nancy Fraser's theory of social justice, I suggest that disadvantage or inequality can be understood to take two forms: status based inequality and socio-economic inequality.[73] Status based inequalities are defined as inequalities due to group based characteristics such as gender, race or ethnicity.[74] Socio-economic inequality focuses on poverty or social exclusion "which is not just a temporary phase of poverty, but one that is systemic and often passed from

[69] Crenshaw op cit 66 at 139,140,143.
[70] Crenshaw op cit 66 at 140 See also Angela P Harris 'Race and Essentialism in Feminist Legal theory' 1990 *Stanford Law Review* 581. See also Elsje Bonthuys 'Institutional openness and resistance to feminist arguments: the example of the South African Constitutional court' 2008 *Canadian Journal of Women and Law* 1 at 27.
[71] Harris op cit 71 at 609.See also Chandra Mohanty who details the struggles of a "third world woman" Chandra Talpade. Mohanty, 'Under Western eyes: Feminist scholarship and colonial discourses.' in Chandra Talpade Mohanty et al *Third World Women and the Politics of Feminism* (1991) 51. It is noted that during Apartheid 'white middle-class women's struggles have generally concerned issues of political equality and their legal status, while the political struggles of black women (and the few white women in the liberation struggle) have involved claims for political and economic equality within the transformation of the state." Catherine Albertyn 'Women and the Transition to Democracy in South Africa' 1994 *Acta Juridica* 39 at 42 as cited in Hofmeyr & Mzobe op cit note 10 at 1277.
[72] See *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC). See also Papacostantis and Mushariwa op cit note 18.
[73] Liebenberg and Goldblatt op cit note 2 at 335.
[74] Ibid.

generation to generation and can be self-perpetuating."[75] Due to South Africa's history there is a clear link between race and socio-economic inequality.[76]

Fraser argues that social justice requires social arrangements which make it possible for equal participation on an equal footing or 'parity of participation'.[77] To achieve this she points out that status based forms of disadvantage can be addressed by attending to 'recognition', which seeks to overcome the social and cultural subordination caused by status disadvantage,[78] while socio-economic disadvantages are tackled through 'redistribution', which requires a redistribution of resources, wealth and power, thus empowering people to engage in society fully.[79] Fraser makes it clear that both recognition and redistribution work together to achieve the necessary change, thereby transforming society. Fraser also acknowledges the complexity of disadvantage created by the "intersection of class, race and gender".[80]

Putting this in the context of South Africa: affirmative action in its current form tends to focus on a status-based concept of disadvantage or recognition.[81] The focus on a purely status-based concept of disadvantage will not lead to a transformed workplace as members of designated groups experience disadvantage differently and factors like socio-economic status affect an individual's ability to compete in the workplace.[82] As Fraser argues, there is need to take into account both status and economic

[75] L Wright *Wilderness into civilized shapes: reading the postcolonial environment* 2010 University of Georgia Press 166. Sandra Liebenberg and Beth Goldblatt op cit note 2. See also M McGregor 'Disadvantage and Affirmative action' 2002 (14) *SA Merc LJ* 808 at 810.
[76] J Seekings and N Nattrass 'Class, Distribution and Redistribution in Post-Apartheid South Africa' 2002 *Transformation* 1. See also Seekings and Nattrass op cit note 2.
[77] Nancy Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Axel Honneth and Nancy Fraser *Redistribution or Recognition?* (2003) at 229.
[78] Fraser op cit note 77 at 12.
[79] Fraser op cit note 77 at 13.
[80] Fraser op cit note 77 at 14.
[81] In terms of section 1 of the EEA the designated groups are identified in terms of race, gender and disability.
[82] See also Nomfundo Manyathi-Jele 'Report: Transformation of the legal profession' (2014) *De Rebus* 19.

disadvantage in order to effectively transform society.[83] The exact form of these socio-economic factors will be explored in this thesis.

This links to the nature of the goals of affirmative action, and particularly the goal of representivity. I argue that in order to transform the workplace a certain level of representivity needs to occur. However, I make a distinction between surface representivity and deep representivity. Surface representivity means that a particular workforce comprises members of the designated group who are diverse in race, gender and disability composition only. However, on closer inspection, the group is likely to be made up of individuals who are all from the same class, which is predominately middle class or those with privileged backgrounds. Deep representivity means that the designated group is diverse not only in race, gender and disability but also class, social status, culture and other grounds. The impact of deep representivity in transforming the workplace will be discussed in more detail in chapter three. A transformed workplace deals adequately with multi-layered disadvantages, as well as breaking down institutional structures. In chapter three I further argue that there are factors that influence the application of affirmative action within the designated groups, and the role of the employer to distinguish fairly within and across the groups when more than one member of the designated groups is appointable. These factors are representivity, the lifecycle of affirmative action and the goal of transforming the workplace. Each will be considered in detail in chapter three.

[83] Fraser op cit note 77 at 9,22,25.

1.4 Racism and Racialism

Although this thesis focuses predominantly on gender, it is important to understand the nature of racial inequality and disadvantage. Here I rely on the idea that racism and racialism create an entrenched social ideology that is difficult to dismantle and perpetuates systemic race-based disadvantage.[84] It is important to underline the distinction between racism and racialism. Racialism is the belief that there are certain and peculiar characteristics possessed by members of different racial groups, in such a way that these are believed to be inherent to that group and not shared with members of any other race.[85] Racism is rooted in the belief of racial superiority and inferiority, based on the membership of different racial groups[86]. Racism thrives on racial stereotypes and racial stigmatization, which is institutional and systemic.[87] To use Fraser's terminology, it implies a lack of recognition.[88]

Modiri argues that the "pervasive"[89] legacy of colonization and Apartheid,[90] irrespective of the removal of discriminatory laws, has created a form of "racism . . . so deeply embedded in society that racist practices engendered by law or legal institutions can exist long after the abolishment of the law or the replacement of the government that enacted those laws."[91] This can be seen in the lack of racial and gender transformation in the legal profession,[92] where, for example white, male privilege allows for very limited transformation, with power and control remaining

[84]Joel M Modiri 'The colour of law, power and knowledge: introducing critical race theory in (post) apartheid South Africa' 2012 28 *SAJHR* 405 at 409.
[85] Modiri op cit note 84 at 411.
[86] Ibid.
[87] Modiri op cit note 84 at 413.
[88] Fraser op cit note 77 at 12.
[89] Modiri op cit note 84 at 409.
[90] Modiri op cit note 84 at 405.
[91] Modiri op cit note 84 at 407.
[92] Jonathan, Klaaren 'Current demographics in large corporate law firms in South Africa.' 2014 (7) *African Journal of Legal Studies* 587.

overwhelmingly within the ranks of white, male legal professionals.[93] A complex and nuanced understanding of the "reproduction and maintenance of white supremacy and white privilege as well as the systemic exclusion of black people through direct and indirect forms of racial marginalisation"[94] is needed to tackle this perpetuation of inequality. In relation to affirmative action, this supports the need for a transformative approach to achieve deep representation.

1.5 Gender disadvantage

Chapter four explores the issues around multi-layered disadvantages within the designated groups. Here I focus on gender and the impact that gender has on women's ability to compete in the workplace. The gendered division of labour means that all women are expected to fulfill their responsibilities at work, as well as being responsible for looking after the psychological and physical well-being of children, spouses, and members of the extended family.[95] The reproductive role of women affects their employment choices and the timing of their role as mothers invariably impacts on their progression in a particular occupation.[96] The public and private roles of women thus create a double burden of work[97] which affects their ability to compete

[93] Ibid. See also Shane Godfrey 'The legal profession: transformation and skills' 2009 *SALJ* 91 at 98. Godfrey points to the restricted entry into tertiary institutions on the basis of race, he also notes that "Black attorneys were restricted to practising law in townships and 'the homeland' areas. In order to practice in an 'urban' area a black attorney had to obtain a government permit. Not surprisingly, the legal profession was therefore dominated by whites, in particular white males." See also Transformation of the legal profession: Centre for Applied Legal Studies (hereinafter CALS) (2014) research report https://www.wits.ac.za/cals/our-programmes/gender/transformation-of-the-legal-profession/ at 6 [Accessed 4 January 2018]. See also Commission for Gender Equality: Lack of gender transformation in the judiciary (2016) investigative report http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report-.pdf [Accessed 22nd of November 2018]. See also Goodman, Christine Chambers, Nevertheless She Persisted: From Mrs. Bradwell to Annalise Keating, Gender Bias in the Courtroom 2017(24) 1 *William & Mary Journal of Women and the Law*, 167.

[94] Modiri op cit note 84 at 406. Van Marle points out that 'every day we still experience the legacy of apartheid on many levels' Karin Van Marle 'Jurisprudence, Friendship and the University as a Heterogeneous Public Space' (2010) 127 *SALJ* 628 at 635.

[95] Elsje Bonthuys and Catherine Albertyn (eds) *Gender, Law and Justice* (2007) at 248-249.

[96] Ibid.

[97] Hofmeyr and Mzobe op cit note 10 at 1278.

in the workplace.[98] Pieterse has argued that "individual experiences of power, disadvantage, oppression or harm are varied, contingent and particular both within and across social groups."[99] "Black women experience racial discrimination differently from black men while feeling the impact of gender discrimination differently from white women, and so forth."[100] The disadvantage of black women is evidenced by "limited education opportunities, lack of equal opportunities and racial discrimination."[101] While white women might have lacked equal opportunities on the basis of gender, their race has certainly meant that they have had better educational opportunities, and more workplace opportunities than black women. [102]

Due to the differences in disadvantage between black and white women, and the fact that white women are believed to have benefited more from affirmative action than black women, an argument has been made to remove white women as beneficiaries of affirmative action.[103] Booysen has suggested that this argument is "flawed"[104] as the removal of white women would "slow down the all-important goal of advancing women in general"[105] and this goal should not be overlooked. It is suggested that the success of white women can assist in the inclusion of black women.[106]

However, the role of affirmative action needs to be seen not only as increasing the representivity of women in the workplace, but also as changing entrenched attitudes

[98] Ibid.
[99] Pieterse op cit note 66 at 405.
[100] Pieterse op cit note 66 at 417. See also Jennifer Slater 'The ethical demise of the political policy of affirmative action as a motive for enhancing women and education in South Africa: a double setback of a reverse strategy' 2014 *Studia Historiae Ecclesiasticae* 329 at 330.
[101] Hofmeyr and Mzobe op cit note 10 at 1277.
[102] Albertyn op cit note 71 as cited in Hofmeyr and Mzobe op cit 10 at 1277.
[103] Hofmeyr and Mzobe op cit note 10 a1277.
[104] Lize Booysen 'Queens on colour: should white women still benefit from EE legislation?' http://www.leader.co.za/.See also Hofmeyr and Mzobe op cit note 10 at 1277.
[105] Ibid.
[106] Ibid.

and workplace structures that limit gender equality.[107] This forward looking form of affirmative action[108] displays an understanding that remedying the disadvantages of women requires us to address their double-burden.[109] In other words, affirmative action requires more than just the removal of the obstacles faced by women.[110] Gendered stereotypes, attitudes and structural barriers must also be addressed.[111] To achieve deep representivity, one must not only increase the number of women in the workplace, but also transform the institutional structures that prevent the advancement of women. This is particularly true in male-dominated professions where ideas that women lack ability and are incompetent are often powerful and continues to influence and women's entry and retention within these professions.[112] The institutional view of women, and their expected roles and limitations, also need to change to allow for the required level of gender representivity particularly in leadership positions.[113]

In chapter five, I focus on two male-dominated professions; mining and the legal profession. I explore the visible and invisible challenges that women face in these two professions as discussed in relevant literature and through thirty three qualitative, semi-structured interviews of women in both professions. It has been noted that "too few empirical studies have taken the perspective and reported the experience of

[107] Dupper op cit note 24 at 281.
[108] Dupper 'In defence of affirmative action in South Africa' (2004) *SALJ* 187 at 205-7.
[109] C Koggel 'A feminist view of equality and its implications for affirmative action' 1994 *Canadian Journal on Law and Jurisprudence* 43,48.
[110] Michel Rosenfeld 'Substantive equality and equality of opportunity: a jurisprudential appraisal' *California Law Review* (1986) 1687 at 1689.
[111] Mushariwa op cit note 31.
[112] Rosalie B Levinson 'Gender-based affirmative action and reverse gender bias: beyond *Gratz, Parents involved* and *Ricci*' (2011) *Harvard Journal of Law and Gender* 1.
[113] Mayer, C. H., & Barnard, A. (2015). Balancing the scales of gender and culture in contemporary South Africa in Safdar, Saba and Kosakowska-Berezecka, Natasza (eds) *Psychology of gender through the lens of culture* (2015) 327.

individuals belonging to the historically disadvantaged groups."[114] My research focus is on the unique experience of women to gain insight into the barriers they must overcome to advance in a particular profession, as well as their views on what to do to overcome these barriers. As argued above, members of the designated group experience different and multiple disadvantages. These cannot be tackled adequately without a general understanding of the individual experiences of the members of the designated groups. My research is particularly focused on the experiences of members of the designated group in the context of employment equity plans and their implementation.

In chapter six, I draw on my findings to consider the similarities and differences between the legal and mining professions with regards to gender disadvantage. Lastly, chapter seven focuses on recommendations, as it is now twenty years since the introduction of the EEA. Having assessed the ability of the EEA to transform the workplace, I advance ideas of how best to apply affirmative action going forward in such a way that, in the end, its goal of substantive equality in a transformed workplace is achieved.[115]

1.6 Conclusion

There is no doubt that the legacy of apartheid is still evident in the labour market of South Africa.[116] After many years of implementing affirmative action in South Africa, it

[114] P Zanoni , M Jannens M, Y Benschop , S Nkomo et al 'Unpacking diversity, grasping inequality: rethinking difference through critical perspectives' (2010) 17(1) *Organization* 9 at 14. See also Hofmeyr and Mzobe op cit note 10 at 1277.

[115] Anna Majavu 'Ambiguous application of affirmative action leaves South Africa untransformed' 2015 http://sacsis.org.za/site/article/2312 [Accessed on 25 January 2018].

[116] See Commission for Employment Equity Annual Report 2016 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2015-2016/16th%20CEE%20Report.pdf [Accessed 15 February 2018].

is important to reflect on whether affirmative action as means to an end in its current form can achieve the necessary equality to transform the workplace.

This thesis will show that a transformative form of substantive equality needs to be applied to affirmative action in the workplace. This transformative form of substantive equality includes a situation sensitive approach to the implementation of affirmative action in the workplace. A situation sensitive approach will apply affirmative action through an employment equity plan that is strictly on a case by case basis with regard to the demographic profile of the specific workforce and sensitivity to the complexity of disadvantages in the specific workplace. A one size fits all approach cannot deal with the varying nature of disadvantage that needs to be addressed. I will now explore the kind of equality required to create a working environment where, "constitutional values of equality, human dignity and freedom are truly recognized and protected."[117]

[117] Mushariwa op cit note 46 at 423.

Chapter 2

2 Theory of Substantive Equality and its Application in Affirmative Action

2.1 Introduction

In order to fulfil the achievement of an equal society envisaged by the Constitution, there is a need to explore the meaning of equality and the various forms it can take. Understood within the context of South Africa, equality needs to be viewed as dealing with both past and present inequalities.[118] Equality therefore, needs to be ever-changing in its form in order to tackle the shifting challenges in society and evolving forms of inequality.[119] In this chapter, I explore the meaning of equality, looking firstly at the constitutional provisions that protect and advance the right to equality. I investigate formal and substantive equality and argue for the need for a transformative type of substantive equality. Linking this to affirmative action, I argue that the current state of affirmative action and its application in terms of the EEA Act focuses on inclusion and not transformation.[120] There is, accordingly, a need to have a more holistic and "nuanced approach to affirmative action"[121] to ensure that its transformative goals are met.[122] It is therefore, important to define what equality is and then discuss how it applies in the working environment. Firstly I discuss both formal and substantive equality; I then link substantive equality to the application of affirmative action. Secondly, I identify two types of substantive equality in relation to affirmative action and point out their benefits and constraints. Lastly, I suggest the

[118] Albertyn and Goldblatt op cit 14 at 35-2.
[119] Ibid. For example Fees Must Fall movement highlighted the inequality within higher education and the struggle for access to higher education for the "missing middle". Badat, Saleem. 'Deciphering the meanings, and explaining the South African higher education student protests of 2015–16.' *Pax Academica 1* (2016): 71-106.
[120] Albertyn op cit note 52 at 606. See also Papacostantis and Mushariwa op cit note 18.
[121] Dupper op cit note 31 at 428
[122] Dupper op cit note 64 at 303 , Dupper op cit note 31 at 428.

changes that need to happen in order for affirmative action to contribute to transforming the workplace.

2.2 Meaning of Equality

Equality is understood within the historical, socio-political and legal context of a country.[123] In South Africa, equality is a core value and an entrenched constitutional right.[124] Under colonial and Apartheid rule in South Africa, a deep, broad and systematic social and economic exclusion of blacks and women was applied over 350 years.[125] The effects of these drastic inequalities are still present today and their impact is complex, multi-layered and widespread.[126] For example, for Black women, an intersection of race and gender creates its own particular inequality, as well as other "masked, reflected and reinforced inequalities"[127] evident on the basis of class, "religion, language, culture, ethnicity and colour."[128] Religion and culture are seen as factors that reinforce patriarchal standards on the role and position of women.[129] Women who are part of such a religious or cultural groups with such standards may find it difficult to assert themselves as they are impacted by such patriarchal standards in the workplace.

In order to deal with these complex inequalities, it is important that the constitutional understanding of equality provides a strong tool for social transformation. As affirmed in *Minister of Finance v Van Heerden*[130]

[123] Albertyn & Goldblatt op cit note 14 at 35.2.
[124] Ibid.
[125] Modiri op cit note 84 at 408. See also Albertyn & Goldblatt op cit 14.See also Dupper op cit note 31.
[126] Albertyn & Goldblatt op cit note 14. See also Dupper op cit note 32 at 427-428.See also C Albertyn and B Goldblatt 'Towards a substantive right to equality' in S Woolman and M Bishop *Constitutional conversations* 2008 at 247.
[127] Albertyn & Goldblatt op cit note 14 at 35-4.
[128] Ibid.
[129] Catherine Albertyn 'The stubborn persistence of patriarchy?' Gender equality and cultural diversity in South Africa'2009 *Constitutional Court Review* 165 at 174.
[130] 2004 (6) SA 121 (CC).

> the achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality and the advancement of human rights and freedom.[131]

Section 9(2) of the Constitution provides that "equality includes the full and equal enjoyment of all rights and freedoms. One such legislative measure that seeks to achieve transformation and ultimately equality in the workplace is the EEA.[132] The EEA places a specific duty on the designated employers to transform their workplace using various provisions in the Act, one of which is the application of affirmative action.[133] A designated employer in terms of the EEA is any organization in the public or private sector which fulfills the criteria detailed in the Act in terms of section 15.[134] The State is also under a constitutional duty in terms of section 195 to create a representative workforce:

> Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past and to achieve broad representation.[135]

The creation of a representative workforce is facilitated through the implementation of affirmative action. In terms of section 15(1) affirmative action is defined as

> ..... measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are

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[131] *Ibid* para 74-76.
[132] EEA.
[133] EEA.
[134] Section 15 (1) of the EEA. Section 1 of the EEA defines a "designated employer" as
a) an employer who employs 50 or more employees;
b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;
c) a municipality, as referred to in Chapter 7 of the Constitution;
d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defense Force, the National Intelligence Agency and the South African Secret Service; and
e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement;
[135] Constitution, 1996 specifically section 195(1)(i).

> equitably represented in all occupational categories and levels in the workforce of a designated employer.[136]

Section 20(3) of the EEA describes when a person is 'suitably qualified':

> a person may be suitably qualified for a job as a result of any one of, or any combination of that person's – (a) formal qualification; (b) prior learning; (c) relevant experience; or (d) capacity to acquire, within a reasonable time, the ability to do the job

In terms of section 42(a)(i) guidance is given as to the demographic parameters that need to be used to create a representative workforce, which is a demographic profile of the national and regional economically active population. It is noted by Gaibie that no guidance is given on what is meant by the definition of 'equitable representation.'[137] However, it is necessary for the employer to take note of both national and regional demographics using census reports.[138]

Section 1 of the EEA, describes designated groups as "black people, women and people with disabilities", who are citizens of the Republic of South Africa by birth or descent or became citizens of the Republic of South Africa by naturalisation. "Black people" are defined as Africans, Coloured, Indians [139] and people of Chinese descent.[140] People with disabilities are defined as people who have a "long term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment."[141] The designated groups are therefore

[136] Section 6(2) (a) of the EEA states that'[i]t is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act"
[137] Shamima Gaibie 'The impact of the Barnard decision' 2015 *28th Annual Labour Law conference* https://www.lexisnexis.co.za/pdf/Breakaway-3-3-The-impact-of-the-Barnard-decision-Ms-Shamima-Gaibie.pdf [Accessed on the 7th of June 2017].
[138] *Solidarity and Others v Department of Correctional Services and Others* supra note 34.
[139] Section 1 of the EEA.
[140] *Chinese Association v Minister of Labour* (59251/2007).
[141] Section 1 of the Employment Equity Act.

identified by virtue of their status-based inequalities, which are defined as inequalities due to group based characteristics such as gender, race or ethnicity.[142]

In order to implement affirmative action a duty is placed on the designated employer, in terms of section 20(1), "to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce." It is therefore crucial that the employer's employment equity plan be formulated in such a way, and implemented in a particular manner, so as to ensure it achieves its transformative goal.

In terms of section 15 of the EEA the designated employer is required to achieve representivity and "equal employment opportunities" by identifying and eliminating employment barriers, furthering diversity in the workplace, "reasonable accommodation" of employees and retention of staff from designated groups. In terms of the Code of Good Practice on Employment Equity Plan states that reasonable accommodation means "Any action, behaviour or modification to job tasks or a working environment done in effort to eliminate a barrier to employment or increase access, participation or advancement of a person with a disability, or other categorically disadvantaged group." Through a consultative process facilitated through section 16 to section 18 of the Act, it allows an employer to better understand the barriers being faced by members of the designated groups, thus permitting a comprehensive analysis of barriers prescribed by section 19. This analysis places the employer in a better position to put measures in place to achieve equality in the workplace. The issues around the application of affirmative action can also be seen in the misinterpretation of the Act or the inadequate application of the

[142] Liebenberg and Goldblatt op cit note 2 335.

Act. This raises the issue whether the monitoring done by the Labour Department through evaluation of employment equity reports and inspections is enough to ensure real transformation within the workplace.

The process of achieving equality requires affirmative action and the outcome of the process to be a workplace based on equity and fairness.[143] The Constitutional Court argued in *Republic of South Africa v Hugo*[144] "that with the recognition that society affords each human being equal treatment on the basis of equal worth, this is not achievable as a goal if we insist upon identical treatment in all circumstances before that goal is achieved."[145] "Equality requires that equals be treated equally and as a corollary that unequals be treated differently".[146] Employers must, therefore, within their employment equity plans, be seen in their implementation to intend the achievement of substantive equality and thus it may therefore be expected.[147] The test is whether the measure is causally linked to the objective of an equitably representative workforce and ultimately the transformation of the workplace.[148]

Equality is a contested concept but remains a desirable goal as well as a means to transformation in the workplace.[149] There is need to recognise the inequalities affecting members of the designated groups so that their access and advancement in the working environment is facilitated. This also implies the creation of an

[143] Ockert Dupper and Christopher Garber (eds) *Essential Employment Discrimination Law* (2004) at 7. See also Mushariwa op cit note 46 at 419.
[144] 1997 (4) SA 1 (CC).
[145] *Republic of South Africa v Hugo* para 41.
[146] Rosenfeld op cit note 110 at 1700.
[147] Smith 'Affirmative action under the new Constitution' 1995(2) *SAJHR* 84 at 94. See also Mushariwa op cit note 46 at 420.
[148] Dupper and Garbers op cit note 64 at 270.
[149] M McGregor 'No right affirmative action' 2006 *Juta Business Law* 16 at 19. See also Currie and De Waal *Bill of Rights Handbook* para 9.5.

empowering or enabling working environment in which members of the designated groups can reach their full potential.[150]

The questions thus become: firstly, what must equality look like to transform the workplace? Secondly, how will an employer know that they have achieved equality in the workplace? And, lastly, what standard can be applied to employment equity plans to ensure that there is a reasonable likelihood that they will achieve equality in the workplace? The first type of equality to be investigated is formal equality which will be discussed below followed by substantive equality. I will argue later in this chapter that substantive equality of opportunity facilitates access to the workplace by members of the designated groups; however, real transformation of the workplace does not occur as substantive equality of opportunity is limited by its inclusive nature. To transform the workplace, substantive equality of outcome is required to dismantle the hierarchical inequalities caused by status-based disadvantage and by the institutional culture in a workplace that perpetuates disadvantage for the members of the designated groups.

2.2.1 Formal Equality

The Aristotelian concept of formal equality means that like persons should be treated alike and unlike persons not alike.[151] There is an assumption within formal equality that all persons with equal rights are able to compete on an equal footing.[152] Formal equality ignores the disparities and differences that exist in people's actual social and economic settings within society.[153] This has the consequence of actually increasing

[150] See also P Langa op cit note 59 as cited by Albertyn op cit note 59 at 257 .
[151] Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15.
[152] Albertyn & Goldblatt op cit note 14 at 35-6.
[153] Ibid.

inequality.[154] The philosophy underlying formal equality views the law as neutral and the state as a neutral force between citizens, and therefore favours no one above the other.[155] Formal equality does not easily tolerate differential treatment required by affirmative action. It has been noted that formal equality facilitates the vertical application of law which must affect equally each member of a group as per legislative classification.[156]

Formal equality is illustrated by the Canadian Supreme Court case of *Bliss v Canada (Attorney General).*[157] In this case a pregnant woman challenged the unemployment insurance legislation for discriminating against her by denying her benefits to which she would have been entitled to had she not been pregnant. Justice Ritchie held that "the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation."[158] The court found that the unemployment insurance legislation did not discriminate against women as the "law did not treat unequally those to whom it applied; (rather the law) treated similarly those excluded from the law's classification, (specifically) pregnant persons."[159] Formal equality is thus the "application of the law with one's eyes shut."[160] The focus of formal equality is the consistent application of the law rather than the social context

[154] Ibid.
[155] Ibid. See also N Coetzer 'Affirmative action: The sword versus shield debate continues' 2009 *SA Merc LJ* at 92, 93.
[156] Anthony Sangiuliano 'Substantive equality as equal recognition: New theory of Section 15 of the Charter' 2015 *Osgoode Hall Law Journal* 601at 619.
[157] [1979] 1 S.C.R. 183.
[158] *Bliss v Canada (Attorney General* supra at 193.
[159] *Bliss v Canada (Attorney General* supra at 190-191.
[160] Sangiuliano op cit note 156 at 622 as cited in see Sheila McIntyre, 'Answering the siren call of abstract formalism with the subjects and verbs of domination' in Fay Faraday, Margaret Denike & Kate M Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* at 103.

in which the law's application takes place. There is a limited application of affirmative action in formal equality, for example, in the United States of America. Affirmative application is only applied if there has been strong evidence of present or past actions by the employer that amounted to discrimination or due to a compelling government interest.[161]

The problem with formal equality is that it ignores the actual social and economic disparities between groups within a country and "it tends to reinforce and entrench rather than eliminate inequalities."[162] The disregard for patterns of disadvantage among social groups makes the achievement of equality centered on the expectations of the dominant group in a particular society.[163] Albertyn argues that consideration of difference and its relationship to disadvantage is required by the concept of substantive equality.[164] This implies a consideration of the "disadvantageous impact" that flows from the difference.[165] As Albertyn notes, the nature and legal framework of substantive equality that can adequately deal with this inequality and create the society envisaged in the Constitution remains contested.[166]

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[161] *Regents of the University of California v Bakke* 98 S. Ct. 2733 (1978); *City of Richmond v Croson* 486 US 469 (1989); *Wygant v. Jackson Bd. of Educ* 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986).See also Pierre De Vos 'Looking Backward, Looking Forward: Race, Corrective Measures and the South African Constitutional Court' (March 4, 2011). file:///C:/Users/Wits-User/Documents/2018%20PhD/De%20Vos%20Looking%20forward.pdf [20 March 2018].

[162] Albertyn & Goldblatt op cit note 14 35-6.

[163] Albertyn op cit note 59 at 253, 259.

[164] Albertyn op cit note 52 at 591,605.

[165] Ibid. See also S Liebenberg 'The value of human dignity in interpreting socio-economic rights' 2005 *SAJHR* 1 at 14.

[166] Albertyn op cit note 14. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 para 61 it was held that:

> We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the

There are two types of substantive equality, substantive equality of opportunity and substantive equality of results which are discussed in more detail below.

2.3 Substantive Equality of opportunity

As mentioned in chapter one, substantive equality of opportunity is best described using the metaphor of a race, it is noted that "true equality cannot be achieved if individuals begin the race from different points."[167] Martin Luther King stated "it is obvious that if a man entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner."[168] If we relate this to inequality in South Africa, which was created by over three hundred years of colonial and Apartheid rule,[169] it is clear why substantive equality of opportunity would be relevant. Equality of opportunity advocates the facilitation of measures to assist those disadvantaged by unfair discrimination in the past.[170]

Equality of opportunity seeks to ensure that each individual should have equal rights and opportunities to develop his/her talents and virtues and that there should be

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constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

[167] Barnard and Hepple op cit note 40 at 566. See also Anne Smith 'Equality constitutional adjudication in South Africa' 2014 African Human Rights Law Journal 609 at 613.

[168] Martin Luther King *Why we can't wait* (1964)147.

[169] R Kahlenberg 'Getting beyond racial preferences: the class-based compromise' 1996 *American University Law Review* 721 at 724. See also M McGregor 'Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law.' 2004 29(3) *Journal of Juridical Science* 122 at 145. See also Najma Moosa 'Promoting minority rights in the context of economic, social and cultural rights in South Africa' 2002 *Codicillus* 37 at 46.

[170] It was held in the Canadian case of *Action Travail des Femmes v Canadian National Railway Company* [1987] 1 SCR 1114 para 41 that "an employment equity programme…is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears."

equal reward for equal performances.[171] There would be a clear balance between objective factors, which an individual is not in control of, such as race, gender and disability that could potentially and unfairly limit their access to the workplace, and the subjective individual factors, such as potential, which is different in each individual but in which there is a choice as to the extent to which the individual performs.[172] Members of the designated groups are appointed not just with regard to their membership of the designated groups but also due to them being suitably qualified for the position.[173] This is a subjective factor unique to each individual. The main thrust of equality of opportunity is the creation of an enabling environment for access to the workplace to those who are suitably qualified.[174]

Access to the workplace is therefore the main goal of substantive equality of opportunity. More broadly, this seeks to create a representative workplace. It may be argued that the inclusion of members of the designated groups and the creation of a representative workforce does, in some, limited way, transform the workplace. As I argue later, this transformation is not enough to bring true equality to the workplace.

Substantive equality of opportunity is affirmed by Dworkin who points out that the right to equality means "to be treated as equals" but this does not always mean the right to receive equal treatment.[175] Treatment as an equal would involve every person being accorded "equal concern and respect."[176] "Equal concern and respect"[177]

[171] J. J. Schaar 'Equality of opportunity' in L Pojman and R Westmoreland Equality: Selected readings 1997 Oxford 137. See also J Nieuwenhuis 'From equality of opportunity to equality of treatment as a value-based concern in education' 2004 *Perspectives in education* 55.
[172] See also Marius Willem Van Wyk *Equal opportunity and liberal equality* (unpublished Doctoral dissertation. RAU 2005).
[173] Section 20 (3) and (4) of EEA.
[174] Dupper describes substantive equality as the government equalizing "the life chances of individuals" who would otherwise be disadvantaged due to their membership to the designated group" Dupper op cit note 24 at 279. See also Dupper op cit note 24 at 275.
[175] Dworkin *Taking Rights Seriously* (1978) 236.
[176] Ibid.
[177] Ibid.

involves considering the particular attributes or impediments of each person in assessing their entitlements.[178] Dworkin argues that a right to be treated as an equal is fundamental but only in certain contexts does this entails the right to equal treatment.[179]

It is clear from the above that the difference in potential is not ignored in the doctrine of equality of opportunity as the critical question is how to assure that all who reach the starting line have the means to compete.[180] Without such means, the opportunity to compete is minimal. This theory of equality therefore understands that talents are not distributed uniformly[181] throughout society; it also recognizes that institutional discrimination exists and has a negative impact on an individual's chances because of their membership to a group.[182] However equality of opportunity's main focus is access and inclusion, as a result, the dismantling of institutional discrimination becomes a challenge, as detailed below.

2.3.1 Affirmative action and substantive equality of opportunity

The aim of equal opportunity in affirmative action is to break down barriers of entry to employment and allow members of the designated groups to be able to have access to the workplace without their race, gender or disability hampering their inclusion in the workplace. The end goal is the creation of a representative work force based on these factors.

[178] Ibid.
[179] Ibid.
[180] J Nieuwenhuis 'From equality of opportunity to equality of treatment as a value-based concern in education' 2004 *Perspectives in education* 55 at 61.
[181] Ibid.
[182] United Nations Economic and Social Council UNESCO Final Report Prevention of Discrimination E/CN.4/Sub.2/2002/21 17 June 2002 para 35.
https://digitallibrary.un.org/record/467997/files/E_CN.4_Sub.2_2002_21-EN.pdf [Accessed 2 May 2018].

Affirmative action in this form tends to focus on a status-based concept of disadvantage.[183] The aim is to allow inclusion and to ensure that these status-based factors do not disadvantage an individual to compete on an equal footing in the workplace.[184] The question, thus, becomes whether or not equality of opportunity is able to transform the workplace into an environment governed by principles of substantive equality.

It is noted by Hepple that:

> the meaning of equality should be seen as the removal of arbitrary distinctions, the widening of formal equal opportunities and the selection of individuals according to their capacities: instead of race or gender or other status determining one's position, the quality of the individual would be decisive in determining his or her wealth and class and job opportunities[185]

The aim of substantive equality of opportunity is to open up opportunities, but it does not guarantee that more members of the designated groups will, in fact, be in a position to take advantage of those opportunities.[186] There are other factors that impact on the ability of members of the designated group to take advantage of the opportunity to access the workplace. Factors such as differences in socio-economic (class) status within the designated groups show that not all members of the designated groups are equally able to overcome their disadvantage and make use of the opportunity given. This lack of ability to take up the opportunity given in affirmative action reveals an inequality within the designated groups.

Access to education, which is largely determined by socio-economic status, has a bearing on whether or not members are suitably qualified or have the potential to

[183] J E Roemer 'Defending equality of opportunity' 2003 *The Monist* 261. In terms of the EEA recognition is given to race, gender and disability, members of the designated group are defined through these specific characteristics which are identified as affecting their ability to enter and advance within the workplace.
[184] B Hepple 'The Aim and Limits of Equality Laws' in Dupper and Garbers op cit note 64 at 6.
[185] Ibid
[186] Hepple op cit note 184 at 5.

become suitably qualified.[187] This inequality within the group itself is not something that equality of opportunity can actually adequately remedy on its own, due to its multi-layered nature. This idea of a multi-layered form of disadvantage is discussed in more detail in chapter three.

Substantive equality of opportunity provides a positive justification for affirmative action in South Africa where historically disadvantaged groups need to be given the opportunity to compete on an equal footing. This goes beyond disregarding race, gender, or disability and towards an understanding of how these have affected an individual's potential and life chances: for example, a middle class, Indian male job candidate (who has had access to private school education and tertiary education) cannot be held to be on equal footing to an African woman job candidate who attended a government school (and due to the legacy of Apartheid received inadequate basic education and therefore struggled throughout her tertiary education, did not complete her degree within the minimum time due to the impact of her socio-economic status having been raised by a single parent who was a domestic worker). Each of the candidates is suitably qualified but the Indian male candidate has an advantage over the Black woman due to his socio-economic status.

It is within the realm of the workplace that the starting points can begin to be equalized as the greatest benefit is given to the least advantaged between the two candidates, in the form of affirmative action.[188] This allows an employer to go beyond race and gender and as, Hepple points out, focus on the potential capacity of an individual to acquire the skills necessary to become suitably qualified within a reasonable time. Therefore, the African woman candidate, who has the potential,

[187] Magubane, B, 'Reflections on the Challenges Confronting Post-Apartheid South Africa.' 1995 Unesco report.
[188] See also Du Toit, Darcy. 'When does affirmative action in favour of certain employees become unfair discrimination against others?.' *International Journal of Discrimination and the Law* 5.2-3 (2001): 147.

would be given an opportunity, by the designated employer, to acquire the skills necessary to do the work required. Affirmative action would facilitate this consideration by the employer, which would otherwise not occur. Equalizing the starting point would involve the employer, within its employment equity plan, ensuring that the barriers to entry, especially, as well as retention and progression of members of designated groups, are adequately identified, monitored and eliminated. It would be out of the employer's power to guarantee socio-economic outcomes however they need to be aware of how socio-economic factors may still impact entry, retention and progression within the workplace. However, substantive equality of opportunity does have its limitations.

2.3.2 Limitations of Substantive Equality of Opportunity

The first limitation of equality of opportunity is that it does not guarantee that more members of the designated group will, in fact, be enabled to take advantage of the opportunities created.[189] This is because the focus of affirmative action is on single status based disadvantage, as the goal is to create a representative workforce in terms of race, gender and disability.[190] This limitation is evident in the fact that the reality on the ground is that a small segment within the target groups, who are better educated and thus able to secure jobs or a promotion, compared to the large majority that is unable to compete due to inadequate education as a result of socio-economic disadvantages.[191] Socio-economic disadvantages, coupled with race, gender or disability, creates a multi-dimensional type of disadvantage within the designated groups which results in members who are better off, or within the middle class of the

[189] Wessels, J. S. 'Equal employment opportunities: a conceptual puzzle.' *Politeia* 24.2 (2005) 125. See also Sandra Fredman 'A critical review of the concept of equality in the U.K. Anti-Discrimination law' Independent Review of the Enforcement of U.K Anti-discrimination legislation workshop Working papers 3 (1999) 3.12-3.16 as cited by Bob Hepple 'The aim and limits of equality laws' in Dupper and Garbers op cit note 66 at 7.
[190] Section 2 of EEA.
[191] Dupper and Garbers op cit note 64 at 308.

designated groups, being able to take advantage of the opportunities made available by affirmative action.[192] This has resulted in an increase in inequality within and across the designated groups.[193] Recognition of the impact of socio economic inequality and the multiple differences in disadvantage it creates needs to be acknowledged by employers.[194] The challenge then becomes how do you create a "nuanced approach"[195] to equalize the starting point as an employer drafting your employment equity plan?

The second limitation, flowing from the first, is the creation of new forms of inequality for members of the designated groups due to the lack of recognition of the multi-layered nature of disadvantage experienced by the members. This creates a new barrier to the equality of opportunity.[196] It has been argued, however, that to focus on the degree of disadvantage within a group would lead to the need for members to prove they were more disadvantaged than the other members of the designated groups and place pressure on members of the group to prove their individual disadvantage.[197] This would undermine the purpose behind creating equal opportunity as the focus would now be on proving one's disadvantage.[198] There is therefore a need to create a balanced approach to equality of opportunity that takes into consideration the inequality within and across the designated groups themselves.

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[192] Dupper and Garber op cit note 64 at 309.
[193] Ocket Dupper and Cristoph Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' 2012 *Acta Juridica* 244 at 259.
[194] Dupper op cit note 24 at 288. This will make the reality on the ground clearer, that members of the designated groups are not on an equal footing with each other both within and across the designated groups, with regard to their ability to take up opportunities available to them.
[195] Dupper op cit note 31 at 428.
[196] Naidoo supra note 32.
[197] Marie McGregor 'Disadvantage in affirmative action' 2002 10 *Juta's Business Law* 143.
[198] M McGregor 'Disadvantage and Affirmative Action' 2002 (14) *SA Merc LJ* 808.

The legitimacy of affirmative action is rightly challenged when it is seen to benefit a few particularly middle class members of the designated group.[199] Employers have a moral duty to ensure that the composition of their affirmative action appointments does not become what is commonly referred to in Indian affirmative action literature as the "creamy layer".[200] Members of the designated group need to be diverse, not just in terms of race, gender or disability, but also with regard to religious, cultural and socio-economic backgrounds, that is when true deep representivity is achieved.[201] The issue of representivity and degrees of disadvantage will be discussed in more detail in chapter three.

The third limitation of equality of opportunity is that it allows for the inclusion of members of the designated groups, but, due to the nature of equality of opportunity it does not provide for the retention and progression in the workplace of members of the designated groups. This is because the institutional barriers in the workplace that negatively affect members of the designated groups cannot be dealt with adequately within the principles of equality of opportunity. Such barriers require a transformation of the workplace, not just the facilitation of inclusion. The constraints of Apartheid and patriarchy are long-lasting in nature and still affect society and the workplace today. Due to the limitations detailed above, it is clear that equality of opportunity alone is unable to fully bring the change required in the workplace.

[199] Rycroft op cit note 67 at 1423.
[200] Jagwanth 'Affirmative action in a transformative context: The South African experience' 2003 *Connecticut Law Review* 725 at 736.
[201] See Papacostantis and Mushariwa op cit note 18. See also Liesl Brookshaw 'Empowerment vs Equal Opportunity' July 2013 *Legalbriefs*: http://www.polity.org.za/article/empowerment-vs-equal-opportunity-2013-07-18 [Accessed 21 September 2017].

2.4 Substantive Equality of Results

Substantive equality of results attempts to provide substance to the concept of equality by investing in "social redistribution to the application of equality".[202] This concept of equality is evident in policies and legal mechanisms such as affirmative action which seek to create a fairer distribution of benefits.[203] The nature of substantive equality of results is described by Dupper as recognizing the "legacy of inequality" [204] left by political, economic and social segregation. Fredman points out that, firstly, there is "no neutrality of state but rather that an obligation is placed on the State to correct the discrimination that results due to the legacy of inequality".[205] Secondly "discrimination of groups that have been previously disadvantaged is different to the discrimination aimed at remedying that disadvantage."[206] This is due to the fact that the consequence of such discrimination is a more equal society. Substantive equality of results is held to be against the "misleading aspiration of individualism"[207] within formal equality which ignores the extent to which "opportunities are determined by an individual's social and historical status, which include gender and race".[208] Substantive equality of results therefore envisages the achievement of equality as being a process of both inclusion as well as a process of transformation. There is recognition of the "[d]ifferent groups in society"[209] who "experience a different mix of political, social and economic inequalities"[210] to facilitate their complete inclusion. Substantive equality of results breaks down the

[202] Sandra Fredman 'Facing the future: Substantive equality under the spotlight' in Dupper and Garbers op cit note 64 at 15.See also Sangiuliano op cit note 156 at 601.
[203] Ibid.
[204] Dupper op cit note 24 at 280.
[205] Sandra Fredman *Discrimination law* 2002 at 126 -128. See also Sandra Fredman 'Equality: A new generation?' 2001 *Industrial Law Journal* 145 at 154.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Albertyn op cit note 59.
[210] Ibid.

barriers of access as well as dismantling those institutional structures which perpetuate barriers to equality. It is submitted that this transforms the workplace by tackling both causes of inequality. Substantive equality of results therefore takes us a step further than equality of opportunity as it is able to facilitate a different layer of transformation.

2.4.1 Affirmative Action and Substantive Equality of Results

Substantive equality of results within the context of affirmative action involves, firstly, breaking down historical and present barriers to employment facing members of the designated groups. It can be argued that this aim is by its nature, a form of equality of opportunity within equality of results. I will later argue that, in the beginning of the lifecycle of affirmative action, it fulfills the need for equality of opportunity however, with the changing society; there is a clear need to evolve into equality of results. Secondly substantive equality of results in the context of affirmative action would aim for the creation of a workforce that is representative of South Africa.

Lastly substantive equality of results would aim to ensure the transformation of the workplace by targeting the institutional structures and policies in the workplace that perpetuate inequality.[211] Substantive equality of results within affirmative action also means that the employer, when implementing affirmative action, needs to be careful to avoid a perpetuation of inequality due to the framework within which affirmative action is applied. Affirmative action is not fulfilling its purpose if it creates new inequalities, or results in continued inequality within the designated groups. [212] For example, if an employer seeks to ensure greater gender representivity in the workplace, the goal should not only be focused on representivity but include

[211] Dupper op cit note 24 at 278.
[212] See also *Solidarity obo Barnard v SAPS* (2010) 5 BLLR 561 (LC); *Naidoo* supra note 32.

management structures and policies that seek to assist women to have a work-home life balance as they fulfil their roles as both workers in the workplace and care-givers within the home.[213] Unless recognition is given to this gender specific difference in disadvantage that is perpetuated by workplace structures and policies, very few women will be able to take up the opportunities available or progress in the workplace to take up management positions. It is also important to look at the inequality experienced by women in male-dominated professions. This, in itself, presents a different challenge to the progression of women in the workplace; this is due to the fact that the work culture and expectations in male dominated professions are usually based on a male model of a good worker which is impossible or extremely difficult for women to fulfil.[214]

2.4.2 Limitations of Substantive Equality of Results

The first limitation in achieving substantive equality of results which is also relevant to equality of opportunity is that it is facilitated by legislation, specifically the EEA.[215] Currently the EEA does not assist in practically enabling employers to adequately define, within their employment equity plans, the members of the designated groups while taking into account the multi-layered nature of disadvantage that exists within and across the groups. This has the effect of creating new inequalities within the designated groups or not transforming the workplace in the way that it needs to be in order for equality of results to be realized. For example, in the *Barnard* case[216] there

[213] Phiona Martin, and Antoni Barnard, 'The experience of women in male-dominated occupations: A constructivist grounded theory inquiry' 2013 *SA Journal of Industrial Psychology/SA Tydskrif vir Bedryfsielkunde, 39*(2) 1.http://dx.doi.org/10.4102/sajip.v39i2.1099 [Accessed 21st September 2017].
[214] Mushariwa op cit note 31. Papacostantis and Mushariwa.op cit note 18.See also *Solidarity obo Barnard v SAPS* (2010) 5 BLLR 561 (LC). Goodman op cit note 93.
[215] Legislation has limited impact due to wording.
[216] *Barnard* supra note 213; *Solidarity obo Barnard v South African Police Service* [2013] ZASCA 177; 2014 (2) SA 1 (SCA). See also K Malan 'Constitutional perspectives on the judgements of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard v South African Police Services.*' (2014) 47 *De Jure* 118.

was a clear non-recognition of the challenge Captain Barnard faced as woman in a male dominated profession and the type of gendered barrier this would cause in her advancement in the police force.[217] The EEA's narrow definition of the designated groups therefore limits its capacity to transform the workplace. A move towards a multi-layered definition of the designated groups is therefore required. This will be discussed further in chapter three.

The second limitation in achieving substantive equality of results is evident in the lack of clarity with regard to its actual nature in relation to affirmative action. It is currently unclear what principles should be applied in the sphere of affirmative action in order to bring about the equality of results required.[218] Ambiguity also exists with regards to whether or not an employer would actually know when they have reached the goal of equality of results and therefore would no longer need to implement affirmative action.[219] There is an attempt by Albertyn to create clarity after the different principles of fairness; proportionality and rationality were applied by the Constitutional court in reaching its decision in the *Barnard* case. [220] Albertyn notes that the court failed to develop "a common understanding for evaluating employment-related affirmative action" [221] under the EEA and within the context of the established provisions of substantive equality in the Constitution.[222]

[217] Mushariwa op cit note 31.
[218] Catherine Albertyn 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act - An opportunity missed? *South African Police Service v Solidarity obo Barnard'* (2015) 132.4 *SALJ* 711. See also Marie McGregor 'Affirmative Action on trial – determining the legitimacy and fair application of remedial measure' 2013 *TSAR* 650-667. See also Andre M Louw 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in Post-Apartheid South Africa) (Part 1)' (2015) 18.3 *PER* (Part 1) 594. Andre M Louw '*The Employment Equity Act*, 1998 (and other myths about the pursuit of "equality", "Equity" and "Dignity" in Post-Apartheid South Africa) (Part 2)' (2015) 18.3 *PER* 669.
[219] Ibid.
[220] Ibid.
[221] Albertyn op cit note 218 at 711.
[222] Papacostantis and Mushariwa op cit note 18 at 10,

The third limitation to achieving substantive equality of results is the reality that it cannot be successfully implemented in the area of affirmative action within a vacuum. A certain state of affairs needs to exist in order to create an enabling environment in which substantive equality of results can be seen to bear fruit. One such necessary factor is the access, by members of the designated groups, to vital socio-economic services; particularly access to good quality education that would enable them to take up available opportunities.[223] Rycroft points out that "the crisis in school education has a direct and ongoing impact on the production of a workforce capable of global competition. Affirmative action will *thus* be on the agenda for many years to come"[224]

Besides these shortcomings equality of results, has a greater potential to transform the workplace than equality of opportunity. It is therefore important to analyze the nature of the equality framework needed to ensure that this goal of transforming the workplace through equality of results is realized.

2.5 Equality Framework

Substantive equality of results may be applied within a particular legal framework that Albertyn describes as facilitating change by emphasizing the importance of understanding inequality in its social and historic context.[225] This framework is usually applied in understanding unfair discrimination claims,[226] but is applicable in understanding how best the designated employer can apply affirmative action in such a way that, in the end, its goal is achieved. The legal framework is a means to an end. Its principles, as outlined by Albertyn, include (a) an understanding of the nature

[223] Jeremy Seekings and Nicoli Nattrass 'Class, Distribution and Redistribution in Post-Apartheid South Africa' 2002 *Transformation* 1. Seekings and Nattrass op cit note 2.
[224] Alan Rycroft 'Transformative failure: The adjudication of affirmative action appointment disputes' in Dupper and Garbers op cit note 64 at 325.
[225] Albertyn op cit note 59 at 258-259.
[226] Albertyn op cit note 218. See also John Grogan 'The chronicles of Barnard affirmative action on trial' 2014 *Employment Law* 3.

of disadvantage within the designated groups[227]; (b) "a recognition of difference as a positive feature of society"[228] and (c) "attention being given to the purpose of the right and its underlying values."[229]

The first principle of facilitating a better understanding of the nature of disadvantage within the designated groups, as pointed out by Fraser would need to include status based inequality as well as any other factors that would cause inequality; such as socio-economic inequality, religion, culture etc.[230] For example, the impact of Apartheid laws and the resultant inequality for an African male is different in nature to the impact of patriarchal policies and the resultant inequality for a white woman.[231] Failure to properly recognize the differences in disadvantage and the resultant impact on each employee could result in the employer failing to provide the necessary changes in the workplace to deal with the differences in disadvantage.[232] Acknowledgment of this impact would mean that different strategies of accommodation, retention and advancement of members of the designated groups could be formulated to ensure equality through an employment equity plan.[233] It is submitted below that this would be a "nuanced"[234] situation sensitive approach to affirmative action by employers. [235]

[227] Albertyn op cit note 59 at 253,258-259.
[228] Ibid.
[229] Ibid.
[230] Fraser op cit note 77 at 9, 22,25.
[231] *Barnard* CC para153.
[232] Papacostantis and Mushariwa op cit note 18 at 14. See also section 16 of EEA consultative process required of employer.
[233] *Barnard* SCA surpa note 217 para 1 "In redressing the skewed situation created by our racist past and to recalibrate and achieve a balanced society, there has to be an accommodation and scrupulous adherence to fairness" See also Pretorius op cit note 20 at 415.
[234] Dupper op cit 31 428.
[235] Kazee notes that the failure by the employer "to act in a rational and fair (or situation sensitive) manner creates a real danger of perverse race and gender rivalry" within the designated groups. Sha'ista Kazee 'Affirmative Action back in the spotlight' 2014 *Without Prejudice* 33 at 34. Naff and Dupper op cit note 63 at 173. See also *Naidoo* supra note 32.

The second principle would be 'recognition of difference'[236] within substantive equality as "a positive feature of society."[237] It is clear from a substantive equality perspective that difference is not the problem but rather the harm that difference creates.[238] In the affirmative action setting, therefore, race, gender, and disability are not the problem, these are positive features of society, but rather it is the harm in the employment setting that is created by this difference. For example, Schneider and Nkoli note that the lack of representivity in the workplace for people with disabilities is not about the disability, but rather the lack of knowledge of how to include people with disabilities in the workplace, coupled with ignorance and fear.[239] The goal of affirmative action is to facilitate and build a diverse and transformed workplace that positively engages with difference in the workplace.

Lastly attention is given to the purpose of the right and its underlying values in a manner that "envisages a direct or indirect concern with remedying systemic subordination and disadvantage,"[240] and which integrates the achievement of human dignity.[241] The aim of affirmative action in the private sphere of the workplace is the achievement of equality which cannot be divorced from the achievement of equality in the society as a whole. Values of dignity and fairness also underlie the pursuit of substantive equality in the workplace.[242] Therefore employers in the application of affirmative action plans should have regard for the values of dignity and fairness. This allows for a balance of interests so as to avoid the creation of new inequalities that

[236] Albertyn op cit note 59.
[237] Ibid.
[238] Albertyn op cit note 59 at 260. Bonthuys and Albertyn op cit note 95 at 89.
[239] Marguerite Schneider and Motsoakgomo I 'Papi' Nkoli 'Affirmative Action and disability' 2011 *Transformation* 90.
[240] Albertyn op cit note 59 at 259
[241] Albertyn op cit note 59 at 253; 259; 260.
[242] 1996 Constitution.

affect members of the designated groups[243] or the application of affirmative action in a way that negatively impacts a non-designated employee.[244] The true achievement of equality cannot be achieved without the balancing of dignity and fairness in the application of affirmative action.[245]

Affirmative action needs to be fluid and able to adapt itself to a changing workplace and evolving society.[246] In the beginning of its life cycle affirmative action seeks to give access to the designated groups in line with dismantling the inequality caused by colonialism; patriarchy and Apartheid. This first cycle of affirmative action will change the workplace in terms of representivity to a certain extent. This is particularly evident in the public service, particularly in terms of the racial and, to a lesser extent, gender composition of the workplace.[247] The first cycle of affirmative action will also change the socio-economic status of some members of the designated groups who now have access to the workplace.[248] It therefore changes the dynamics of difference within and across the various members of the designated groups.[249] But fundamentally the first cycle of affirmative action is about access.

To continue the transformation of the workplace requires the second cycle of affirmative action to include a "nuanced"[250] "situation sensitive approach"[251] to

[243] See also *Naidoo* supra note 32.
[244] See also *Reynhardt* supra note 32.
[245] See also *Barnard CC* case.
[246] Ockert Dupper 'Affirmative action in comparative perspective' in Ockert Dupper and Kamala Sankaran (eds) *Affirmative Action: A view from the Global South* (2014) at 37.
[247] http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2015-2016/16th%20CEE%20Report.pdf [Accessed 21 December 2016]. SAHRC Equality Report 2012. http://www.sahrc.org.za/home/21/files/Equality%20Report%2020%20Oct%202012%20Final.pdf [Accessed 2 April 2018].
[248] Ockert Dupper and Chiristoph Garbers 'Reinventing labour law: reflecting on the first 15 years of the Labour Relations Act and future challenges' 2012 *Acta Juridica* 244.
[249] Ibid.
[250] Dupper op cit note 31 at 428.
[251] *Van Heerden* supra note 131 para 6. See also *Naidoo* supra note 32 para 161. *South African Police Service v Solidarity obo Barnard* supra note 217 para 58.

affirmative action. This second cycle takes note of the differences in disadvantage within and across the groups and realizing that equality of opportunity does not allow the majority of members of the designated groups to take advantage of the opportunity due to other unlisted differences. Members of the designated groups are impacted by class differences within and across the groups. There is a hierarchy between race, gender and disability, within and across groups as evidenced in the *Naidoo* case where a lack of consideration by the employer of the minority status of a certain group within the designated groups which resulted in the Indian female group being unfairly disadvantaged in the application of affirmative action and thus impacting their ability to progress in the workplace.[252] Members of the designated groups are impacted upon by the intersectionality particularly of race and gender. These layers of complexity created by class, hierarchy and intersectionality affect the progress of the second cycle of affirmative action in transforming the workplace.

The situation sensitive approach to affirmative action would also highlight how institutional structures within an organization affect not only access, but also the progression of members of the designated groups. This is evident in circumstances where an employer has a large influx of members of the designated groups in the entry level part of the workforce, but little or no progression among them with regard to the top management level of the workforce.[253] For example the number of top "engendered companies" (comprising 25% or more women Directors and executive

[252]Papacostantis and Mushariwa op cit note 18.
[253]Gender Equity Commission Report 2016-2017. http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/commission-for-employment-equity-report-2016-2017 [Accessed 21 March 2018].

managers) has decreased from 58 in 2008 to 41 in 2010."[254] It has been noted that "it has become apparent in both the public and private sector that there are invisible elements that continue to marginalise women, related to the institutional culture within these demonstrably male-dominated environments."[255]

In terms of the EEA the situation sensitive approach is embedded in sections 13(2) (a) and (b), 17, 18 and 19 as the designated employer is called upon to create an employment equity plan that is workplace specific to address the particular disadvantage experienced by designated groups in each workplace. In terms of sections 5 and 6(1) of the EEA, employment equity plans must also take proactive measures to abolish discriminatory practices on all or any listed grounds.

In order to achieve equality of results, that transforms the workplace, what is needed is a third cycle of affirmative action that deals, firstly, with access for the members of the designated groups, secondly tackles the inequality within and across the designated groups that may be caused by socio-economic difference, minority status etc., thirdly the hierarchy of members and inequality caused by the intersectionality of race and gender as well as dismantling of the institutional structures in the workplace that hamper the access and progression of members of the designated groups.

2.6 Conclusion

In this chapter, I have highlighted the need to have a transformative type of substantive equality of results in the application of affirmative action. In highlighting

[254] Raina Julies 'From the pen: We can do it' 2010 https://www.accountancysa.org.za/wp-content/uploads/issues/2010/ASA-August-2010.pdf [2 May 2017].
[255] Janine Hicks '*Opinion piece: gender transformation in the workplace*.' 2012 Commission for Gender Equality. www.cge.org.za [23 February 2018].

the differences between equality of opportunity and equality of outcome, I have outlined the limitations of each in the application of affirmative action. The goal of affirmative action needs to include a commitment to transform the workplace not just by facilitating the inclusion of the members of the designated groups but also breaking down visible and invisible barriers to employment as well as tackling the barriers created by institutional cultures. This process of transformation requires the recognition of the multi-layered disadvantage experienced by members of the designated groups. The commitment of an employer to transform their workplace is vital as this determines whether their employment equity plan is limited to just the inclusion of members of the designated groups or the actual transformation of the workplace through a nuanced situation sensitive approach. In chapter three, I will be exploring the first principle of the equality framework by focusing on the nature of the disadvantage that substantive equality seeks to dismantle.

Chapter 3

3 DISADVANTAGE: IDENTIFIYING THE BENEFICIARIES OF AFFIRMATIVE ACTION

3.1 Introduction

As discussed above, the EEA places a duty on the 'designated employer' to implement affirmative action measures for 'designated groups' to 'redress [their] disadvantage in employment'.[256] How we understand 'disadvantage' is critical to understanding the actual and potential reach and scope of the EEA. It is clear that disadvantage needs to be understood in its historical context.[257] I have previously stated that years of inequality under colonialism and Apartheid are still evident today, and are clearly visible along the racial and gender fault-lines of our society.[258] Race, within South African history, as detailed in chapter one, determined access to, and the quality of, social and economic resources, benefits and services.[259] Patriarchal policies either limited or prevented women from full participation in social and economic activity.[260] The new constitutional era in South Africa seeks to deal adequately with this racial and gender inequality in order to reach the goal of substantive equality.[261]

Disadvantage or inequality can be understood to take two forms: status-based inequality and socio-economic inequality.[262] As detailed in chapter two, status-based inequalities are defined as social inequalities that exist due to group-based

[256] Section 2 of EEA.
[257] Albertyn and Goldblatt op cit note 14 at 35-1. See also M McGregor op cit note 1.
[258] Justice Yvonne Mokgoro 'Constitutional claims for gender equality in South Africa: A judicial response' 2003-2004 67 *Alb. L. Rev*. at 565. It is noted also that disability creates disadvantage.
[259] Albertyn and Goldblatt op cit note 14 at 35-1.
[260] Albertyn op cit note 52 at 595.
[261] Albertyn and Goldblatt op cit note 14 at 35-1.
[262] Fraser op cit note 77. Liebenberg and Goldblatt op cit note 2 at 338.

characteristics such as gender, race or ethnicity, religion and culture.[263] Socio-economic inequality (class) focuses on those structural inequalities which gives rise to distributive, economic questions. The idea of substantive equality recognizes the interrelationship between status-based inequality and class, and is sensitive to the differences in race, gender and disability. Fredman argues that to deal effectively with inequality, status-based inequality and socio-economic inequality cannot be viewed as separate but need to be tackled with an understanding that status-based inequality does have class elements and vice versa.[264] In addition, these inequalities are systemic. To substantiate this assertion, Fredman points out, in relation to the poor, that "social exclusion…is not just a temporary phase of poverty but one that is systemic and self-perpetuating passed from generation to generation."[265] Within the context of South Africa there is a clear link between race and socio-economic inequality.[266] Also, as highlighted in chapter two, the complexity of disadvantage is increased by layers of the intersectionality between race, gender and other status-based characteristics. However, given South Africa's history, the multiple layers of

[263] Fraser op cit note 77. See also Liebenberg and Goldblatt op cit note 2.
[264] Sandra Fredman, 'The Shape of Things to Come: Substantive equality under the Spotlight ' in O. Dupper and C Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (2009)15. See also Liebenberg and Goldblatt op cit note 2 at 341"we accordingly argue that our jurisprudence should take account of the particular and complex interaction between socio-economic deprivation and status-based forms of discrimination." There are various determinants of inequality that influence the application of affirmative action, including the racial differences in income levels, as income levels determine access to education, which affects one's ability to find employment and affects wage differences. Leibbrandt, Murray, et al. 'Employment and inequality outcomes in South Africa.' *University of Cape Town: Southern Africa Labour and Development Research Unit* (2010). at 18.
[265] Fredman op cit note 264. L Wright Wilderness into civilised shapes: reading the postcolonial environment (2010) 166. Liebenberg and Goldblatt op cit note 2. See also for a discussion on the link between disadvantage and vulnerability E Grant 'Disadvantage and discrimination: the emerging jurisprudence of the South African Constitutional Court' 2000 *Northern Ireland Legal Quarterly* 174 at 188-191.
[266] Liebenberg and Goldblatt op cit note 2.

disadvantage also result in a hierarchy within and across the designated groups, with race taking a dominant position.[267]

The designated groups that benefit from affirmative action are identified by race, gender and disability. Affirmative action is therefore defined by status, without reference to the socio-economic position of members of the designated groups.[268] In general, disadvantage in the context of affirmative action is defined within a single group: race or gender or disability.[269] In this chapter, I focus on the area of appointment within affirmative action and on the duty of the employer to transform the workplace in the application of affirmative action. I generally argue that the focus on single group disadvantage might improve representivity at the beginning, but that it also has limitations which affect the overall duty to transform the workplace.

As stated earlier, my points in this respect are threefold. Firstly the application of affirmative action in a group setting is affected by class differences within the group.[270] Secondly, there is a clear hierarchy across all groups with race being dominant factor followed by gender then disability.[271] This hierarchy is not present in the EEA but is evident in the case law[272] and in the application of affirmative action by employers.[273] Lastly, there is a difference in the degree of inequality experienced

[267] Maré op cit note 64 at 63. See also, in relation to race, *Barnard* CC across the designated groups with race versus gender. Within the designated group see *Naidoo* supra 32 in relation to a minority group within the black race group.
[268] O Dupper 'The beneficiaries of affirmative action' in Dupper and Garbers op cit note 64 at 307. See also Papacostantis and Mushariwa. op cit note 18 at 15.
[269] Section 1 of the EEA.
[270] Fraser op cit 77 at 22.
[271] Maré op cit note 64 at 63.
[272] See also *Barnard CC, Naidoo* supra 32, *Reynhardt* supra 32.
[273] EEA report 2016
http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/downloads/documents/annual-reports/employment-equity/2016-2017/17th%20CEE%20Annual%20Report.pdf [21 March 2018].

by members of a particular designated group, due to the intersectionality of race and gender, and other factors, which the EEA does not acknowledge.[274]

Overall, current interpretations of group disadvantage in the EEA do not accommodate differences in inequality between different members of the designated groups.[275] This failure to take into account this difference in disadvantage has created new and different kinds of inequality between members of the designated groups.[276] As discussed in chapter two, substantive equality acknowledges difference, as well as the impact of disadvantage that stems from that difference.[277] The aim of the Constitution is to remedy that disadvantage, whether it is historical or current.[278] The Constitutional Court has recognized that devising a clear test to determine which individuals or groups should fall within the group of "disadvantaged" is a difficult and complex process.[279] However, the Court has, thus far, left open the question of who the members of the targeted group would be. The court argued that this was a concept that would change over time as society was transformed.[280]

After twenty years of affirmative action, it is important to look at how we define the designated group, and whether and how the definition needs to change in order to meet the challenges of a changed and evolving society.[281] It has also been noted in chapter two that there is a distinct lifecycle in the implementation of affirmative action.[282] This lifecycle is affected by the changing society, as well as changes in the

[274] See also Papacostantis and Mushariwa op cit 18.
[275] McGregor op cit note 62 at 11. See also O Dupper 'The beneficiaries of affirmative action' in Dupper and Garbers op cit note 64 at 302. Muriel Mushariwa op cit 46.
[276] *Ibid*
[277] Albertyn and Goldblatt op cit note 14.
[278] Ibid.
[279] *Van Heerden* supra note 131 para 27-28.
[280] *Van Heerden* supra note 131 para 27.
[281] Dupper and Garbers supra note 194 at 244.
[282] Marie McGregor 'Affirmative action –a defence or a right' 2003 *Juta Business Law* 164 at 166. See also Marie McGregor 'Nature of affirmative action: a defence or a right' 2003 15 *SA Merc L J* 421 at 435.

composition of the workforce of a designated employer.[283] This lifecycle also influences the factors that a designated employer would apply in implementing affirmative action.[284] These factors are discussed further in this chapter. In particular, these factors include:

- the inequality caused by *class* both within groups (for example, class differences within the Black group) and across groups (for example difference in class between white women and Black men across the groups defined by race and gender);
- the *intersectionality* of race and gender (Black women); and of race, gender and *minority status* within the designated groups (Indian women within the Black group): and
- the differences between, and the need for, transformation from *surface to deep representivity.*

I will firstly detail the impact of class and intersectionality within the designated group. Secondly, I will focus on how the courts and academic writers have developed an understanding of disadvantage. Lastly, besides the impact of class on the designated group and the differences in experience of disadvantage, it is important for the employer to consider how best to address the situation where more than one member of the designated groups is appointable for a position. How does the employer distinguish fairly between members of the designated groups? Identifying clear criteria to resolve this dilemma is necessary to ensure the employer does not create new inequalities in the application of affirmative action or limit the application of affirmative action to just inclusion and not transformation.

[283] Mushariwa op cit note 31. Naff and Dupper op cit note 63 at 186.
[284] *Ibid.*

3.2 Impact of Class Status on Members of the Designated Groups

The EEA does not account for the impact of class status on the ability of members of the designated groups to take up employment opportunities. One of the aims of substantive equality is to break the cycle of disadvantage associated with membership to a status-group.[285] This is done by empowerment and the facilitation of genuine choice and participation in employment, without the impediment of race, gender or disability. As pointed out in chapter two, affirmative action cannot function in a vacuum, and is dependent on certain internal *and* external factors.[286] Affirmative action needs a certain state of affairs to be in existence in society in order for it to be fully effective.[287] Indeed, the achievement of equality through the application of affirmative action is limited if there is no change in this broader context. The slow pace of transformation that has been evident in some workplaces with respect to affirmative action, especially at management level in both the public and private sector,[288] can be the result of internal factors, such as poor management and implementation, and/or because of external factors, such as the levels of education and skills in the community.[289] It has been noted that inequality in South Africa is closely related to education.[290] Education, particularly tertiary education, is seen as

[285] Albertyn and Goldblatt op cit note 14.
[286] Seekings and Nattrass op cit note 76. Seekings and Nattrass op cit note 2.
[287] A 2012 World Bank economic report on South Africa focusing on "inequality of opportunity"[287] found that by using the Human Opportunity Index a "South African child not only has to work harder to overcome the disadvantages at birth due to circumstances but having done so finds that these re-emerge when seeking employment as an adult." http://www.worldbank.org/en/news/press-release/2012/07/24/circumstances-birth-important-drivers-inequality-south-africa. [21 March 2018]. See also Sulla, Victor; Zikhali, Precious. 2018. Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities (English). Washington, D.C.:World Bank Group. http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities
[288] This is especially evident with respect to gender representivity. Gender Equity Commission Report op cit note 253.
[289] The Commission of Employment Equity Annual Report 2015-2016 http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2015-2016/16th%20CEE%20Report.pdf [21 March 2018]. The commission's annual report shows showed that 68.9% of the top management workforce was white, 14.3% black, 8.6% Indian, 4.7% coloured and 3.5% foreign.
[290] Ibid.

the “route to middle class occupations”[291] and students who fail to complete matric “are usually confined to a lifetime of low-paid employment or chronic or intermittent unemployment.”[292] A better education enhances the ability of members of the designated groups to take up opportunities made available through affirmative action. This points to the reality that group based restitutionary measures are interrelated with socio-economic factors.[293] It is further noted that there is a clear link between “parental class and children’s educational attainment”.[294] There is, therefore, an ongoing need for empowering tools, such as ensuring that a good quality education is in place to facilitate genuine choice of, and participation in, employment.[295]

Affirmative action in employment utilises race, gender and disability as indicators of inequality, and seeks to redress this inequality by providing equal opportunities for members of groups designated by race, gender and disability, as long as they are suitably qualified.[296] However, differences within a designated group, particularly class differences,[297] mean that it is difficult for the different members of that designated group to compete on an equal footing. As a result, the majority of the beneficiaries of affirmative action are the middle-class sector of the designated groups.[298] This can lead to increased inequality within the group: for example, intra-racial inequality is increased when middle class members of this designated group are able to take up affirmative action opportunities due to better access to education

[291] Seekings and Nattrass op cit note 76 at 20.
[292] Ibid
[293] Liebenberg and Goldblatt op cit note 2.
[294] Seekings and Nattrass op cit note 76 at 20.
[295] Ibid.
[296] Preamble of the EEA..
[297] Seekings and Nattrass op cit note 2.
[298] Ibid.

and training.[299] This class-based inequality of opportunities may result in divisions within the group, as the fairness of affirmative action is questioned when it is seen to benefit a minority sector within the designated groups.[300] The legitimacy of affirmative action is judged by its consequences[301] and is negatively affected if affirmative action is seen to benefit one sector within the designated groups.[302]

Albertyn argues for a transformative approach to substantive equality which contributes to the "dismantling of systemic inequalities and the establishment of new norms and conditions".[303] As affirmative action focuses primarily on race, gender and disability as the basis for disadvantage, without the consideration of class inequality, it is limited in its ability to dismantle inequality to the extent needed, and also has the potential to create new forms of inequality between members of the designated groups.[304]

3.2.1 Context of Difference Within and Across the Designated Group

We have seen above that status-based inequality cannot be addressed in isolation from class factors.[305] This is not, however, to say that race, gender or disability are no longer relevant. Status based inequality is still an important and relevant consideration. However, particularly within the context of affirmative action in South

[299] Seekings and Nattrass op cit note 76 at 2. See also Van Der Berg, Servaas. "Current poverty and income distribution in the context of South African history." *Economic History of Developing Regions* 26.1 (2011): 120-140.
[300] Dupper and Garbers op cit note 64 at 249.
[301] Ibid. See also Vermeulen LP and Coetzee M 'Preceptions of the dimensions of fairness of affirmative action: a pilot study' 2006 37(2) *South African .Journal of Business Management* 53.See also Coetzee M and Bezuidenhout M 'The fairness of affirmative action: in the eye of the beholder' 2011 15(2) *Southern African Business Review* 75."The effectiveness and fairness of employment equity is seen in its application and in most cases its "reality" is seen in whether or not a designated employer meets their targets" quoted in Mushariwa op cit note 46 at 428.
[302] Dupper and Garbers op cit note 64 at 249. See also Rycroft op cit note 67 at 1423.
[303] Albertyn op cit note 59 at 274.
[304] Dupper op cit note 31.
[305] J Faundez 'Promoting affirmative action' 1994 *Indicator SA* 1187 at 1194.

Africa, status-based inequality alone cannot be the dominant consideration, class factors also need to be applied.[306]

Besides paying attention to the impact of class, a transformative approach to affirmative action also needs to focus on the types of differences that exist within and across the designated groups. Multiple forms and combinations of difference across race, gender and disability create differences in disadvantage within and across the members of designated groups. To address these, principles need to be developed and applied that will lead to a substantive equality that does, in fact, transform the workplace and society.[307] This requires developing the definition of designated groups to take these multiple, intersecting factors into consideration. Thus, designated groups should not just be defined by race, gender or disability; but also, by factors such as the intersection of race and gender, minority status within the designated groups, and cultural and religious differences, etc. If we do not consider these complexities in the application of affirmative action, we run the risk of creating new layers of inequality.[308]

Finally, we need to account for the effects of the range of institutional cultures in organizations, often defined by the dominant race, class, gender, that affect the access, retention and progression of members of the designated groups in the workplace.[309] These create further layers of disadvantage within the designated groups. One example of this, which is addressed in this thesis, is the unique nature

[306] Papacostantis and Mushariwa op cit note 18.
[307] Dupper op cit note 31.
[308] See also Papacostantis and Mushariwa op cit note 18.
[309] Z Erasmus 'Confronting the categories: equitable admissions without apartheid race classification'2010 *SAJHE* 244. See also J Favish and J Hendry 'UCT's admission policies: is the playing field level?' 2010 *SAJHE* 268. See also E M Mgqwashu "Re-visiting, re-thinking, and re-naming 'educational disadvantage' in higher education' 2009 *SAJHE* 722.

of disadvantage caused by the institutional culture of male dominated professions on women in such professions

In taking account of all the above, l discuss the duty of the employer in identifying beneficiaries of affirmative action and the factors that may influence the employer in distinguishing fairly between two members of the designated groups in the application of an employment equity plan. The nature of the employer's duty to identify beneficiaries of affirmative action influences the type of substantive equality that results in the workplace and whether or not actual transformation of the workplace occurs.

3.3 Duty of Designated Employer in Identifying Beneficiaries of Affirmative Action

The EEA confers on the designated employer a duty to create a representative workforce by implementing an employment equity plan.[310] The achievement of a representative workforce requires the employer to identify members of the designated groups, who are suitably qualified,[311] to be given equal opportunities for employment.[312] In identifying eligible members of the designated group, the issue of defining disadvantage arises.[313]

As detailed in chapter two, the EEA does not provide a definition of disadvantage. However, it is clear that disadvantage is not only defined by race or gender or disability, but that within each of these designated groups, there are groups within groups. Women constitute a designated group, of which both white and black women

[310] Section 20(1) of the EEA.
[311] Section 20(3) - (4) EEA.
[312] Section 15 of the EEA states "Affirmative action measures are measures 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."
[313] McGregor op cit note 75.

constitute a part. Black women by virtue of race also fall within the Black group. [314] This intersection of race and gender creates a difference in the kind of disadvantage experienced by black and white members of the designated group of women. The group, defined by race, is made up of four different racial categories of 'black', distributed unequally across the population, to form both a majority group (African) and different minority groups: Indian, Coloured and Chinese race groups.[315] This minority status is more evident in some provinces of the country than others.[316]

These various differences within and across the designated groups create a complex structure for the employer in the application of affirmative action.[317] The problem is that currently there is no duty placed on the employer to account for this complexity. This results in the creation of new inequalities between members of the designated groups as the employer fails to see that different members of the designated groups cannot be viewed as equal to one another in competing for opportunities.[318] The employer would take account of this complexity within an employment equity plan. This issue takes me into the debate on how to identify beneficiaries of affirmative action. This is discussed in the next section.

3.3.1 Identifying Beneficiaries of Affirmative Action

There are two schools of thought as to who should be a beneficiary of affirmative action. The first holds that it is only necessary for an individual to be a member of a

[314] Dupper op cit note 31 at 426.
[315] See Papacostantis and Mushariwa op cit note 18.
[316] Ibid at 18.
[317] McGregor op cit note 198.
[318] McGregor op cit note 75.

designated group to qualify as a previously disadvantaged person.[319] The second holds that in order to be identified as a beneficiary of affirmative action, the individual needs to have actually been disadvantaged personally.[320]

The argument that membership of the group should suffice, without actual visible socio-economic disadvantage, can be linked to Modiri's point of the structural racism that occurs in the workplace. This structural racism is subtle in nature but manifests itself in the institutional culture that would perpetuate disadvantage through a racism that affects all members of the designated groups. In other words, structural racism is a form of - often hidden social disadvantage - that affects the entire group, even those who are apparently 'middle class'.

The argument for actual individual disadvantage stems from the criticism that affirmative action seems to benefit the few middle class members of the designated group and not those who have truly been disadvantaged by past discrimination.[321] If one links this to the goal of affirmative action, the issue arises whether substantive equality can be reached if members of the designated group themselves are unequal.[322] If members of the designated group are unequal, there is a risk of a

[319] Dupper op cit note 108 at 198. Dupper *et al* op cit note 53 at 98-99. See also Mushariwa op cit note 46. See also Jason Brickhill, 'Testing Affirmative Action under the Constitution and the Equality Act: Comment on *Du Preez v. Minister of Justice & (and) Constitutional Developments & (and) Others*.' *Indus. LJ* 27.

[320]Dupper *et al* op cit note 53 at 99-100. See Mushariwa op cit note 46 at 442. In the case of *Durban City Council (Electricity Department) v Kalichuran*[320] the arbitrator held that" in terms of the applicable affirmative action policy the applicant was required to show that he or she was an actual victim of disadvantage in order to qualify for preferential treatment. In *casu* he found that the Indian applicant had failed to show any evidence of systematic exclusion on the basis of race. However, he notes that this form of interpretation is counter-productive and against the notions of substantive equality as held by the Constitution, which only requires that the beneficiaries of the policy have been disadvantaged by general societal discrimination, whether direct or indirect." As quoted in JL Pretorius op cit note 47.

[321] G Maré 'Race Counts in Contemporary South Africa' (2001) 47 *Transformation* 75 at 90. Rycroft op cit note 67 at 1423. See also Benatar, David. 'Justice, diversity and racial preference: a critique of affirmative action.' *South African Law Journal* 125.2 (2008): 274.

[322] Maré op cit note 321 at 90.

dominant group emerging and benefiting from affirmative action to the exclusion of others.[323]

In understanding the development of the issue of disadvantage and the best approach to adopt in affirmative action, it is necessary to consider case law and academic writing on the issue.

3.3.2 The Issue of Disadvantage: Group or Individual

The question of individual or group disadvantage has been widely discussed by the courts and academics.[324] It has been noted that the EEA does not afford an individual an independent right to affirmative action,[325] and there is no enforceable claim by an individual employee from a designated group for preferential treatment.[326] Since an employee cannot claim a right to affirmative action, the duty is placed on the employer to implement affirmative action.[327] As noted above, there are two schools of thought on this matter: the first argues for group disadvantage while the second argues for individual disadvantage.[328] The question therefore, is whether the employer should identify a beneficiary based on their membership to a specific group or whether the beneficiary must have actually been disadvantaged personally?[329]

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[323] Ibid.
[324] McGregor op cit note 198; Dupper op cit note 31;Mushariwa op cit note 46; Barnard CC case.
[325] In *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC) the court held that the EEA does not afford an independent individual a right to affirmative action, and there is no enforceable claim by an individual employee from a designated group for preferential treatment.[325] Since an employee cannot claim a right to affirmative action, the duty is thus placed on the employer to implement affirmative action. See also Cristoph Garbers, C 'The right of a job candidate to affirmative action selection: a landmark case? *Harmse v City of Cape Town*' 2003 (12) *Contemporary Labour Law* 91.Cristoph Garbers 'Is there a right to affirmative action appointment?' 2004 (13) *Contemporary Labour Law* 61.
[326] Ibid.
[327] Ibid.
[328] Dupper *et al* op cit note 51 at 98-99. See also M Mushariwa op cit note 46.
[329] McGregor op cit note 170. See also M McGregor op cit note 330.

The courts have adopted both sides of the debate with some supporting individual disadvantage and others group disadvantage. But, as discussed in this section, there is a general tendency to support group disadvantage, with some attention to the difference of disadvantage within and across the groups.[330] Besides the debate around group versus individual disadvantage, there are questions about the complexity of the forms of disadvantage experienced. In other words, we also have to think about how to address the effects of the differing degrees of disadvantage experienced by members of the designated groups.

3.3.3 Individual vs Group Disadvantage

In the first case on affirmative action in employment law, in 1996, the courts seemed to side with the individual approach. In *George v Liberty Life Association of Africa Ltd,*[331] the Labour Court held that the focus needed to be on the purpose of affirmative action in identifying the beneficiaries of the programme.[332] Affirmative action was held to be a means of ensuring that previously disadvantaged individuals overcame their disadvantage so that society could be normalized.[333] The Court pointed out that a "rough justice"[334] occurs when members of the designated groups are not equally placed[335] and so those members who are not disadvantaged would benefit by virtue of membership in the designated groups rather than having suffered individual disadvantage.[336]

[330] See also *Van Heerden* op cit note 131; *Barnard* CC case
[331] 1996 17 ILJ 571 (LC)573
[332] Ibid
[333] Ibid
[334] *George* op cit note 332 at 594 quoting M Banton *Discrimination (*1994) 73.
[335] Ibid. See also McGregor op cit note 330.
[336] Ibid.

It could be argued that in the first cycle of affirmative action, where the focus is on representivity more than transformation, this type of "rough justice"[337] is acceptable to facilitate immediate change in the composition of the workforce. However, over time and with a changing workplace, it will become necessary to avoid the creation of such a "creamy layer"[338] and consider a changed view of disadvantage. This requires proactive action on the part of the employer in the application of affirmative action, to ensure that once the first cycle is complete, implementation of the second cycle becomes a reality.

Van Niekerk criticized the judgment in *George*, arguing that to allow disadvantage to be measured on the basis of individual experience would detract from substantive equality, so the focus needed to be on group-based advancement.[339] In 2000, in *Auf der Heyde v University of Cape Town*[340] the labour court agreed and reached the opposite conclusion to *George*. The court held that the term "disadvantage" should not be "narrowly interpreted to require each potential beneficiary to prove that he or she was actually disadvantaged."[341] In doing so, it relied on Kentridge's argument that beneficiaries of affirmative action should be members of the group "that have been disadvantaged by societal discrimination whether direct or indirect."[342] Kentridge argues that a focus on individual disadvantage would be inconsistent with the substantive concept of equality embraced by the Constitution; as this would view disadvantage as a result of isolated instances of discrimination, whereas "our Constitution appreciates the systemic and self-perpetuating nature of discrimination

[337] George supra 332 quoting M Banton *Discrimination* (1994) 73.
[338] Jagwanth op cit note 200 at 736.
[339] Andre van Niekerk 'Affirmative action-three cases two views' 1997 7 *Contemporary Labour law* 1 at 2-3. See also M McGregor op cit note 75 at 813.
[340] 2000 ILJ 1758 (LC).
[341] *Auf der Heyde* supra at 1774.
[342] Ibid. See also Janet Kentridge 'Equality' in M Chaskalson *Constitutional Law of South Africa* 1ed (1996) 14-60. See also as quoted in McGregor op cit note 170 at 141.

in the country and the need to redress such discrimination through positive measures."[343] McGregor points out that substantive equality recognises that opportunities must be determined by an individual's historical and social status as part of a disadvantaged group; this is because discriminatory acts do not occur in isolation, but are patterns of behaviour towards groups which result in disadvantage.[344] The nature of the disadvantage is social, economic, political and/or educational in nature.[345] In contrast, McGregor points out that "formal equality views individual ability and merit as the only relevant factors required in achieving success in society."[346] By understanding that the nature of disadvantage may come in different forms, this allows for the definition of disadvantage to include both clear and direct forms of discrimination as well as subtle forms of discrimination.

The debate around disadvantage within affirmative action was finally tackled by the Constitutional Court in the 2004 judgment of *Minister of Finance v Van Heerden.*[347] The court held that the purpose of affirmative action was to redress the inequality faced by a particular group not an individual.[348] It also recognized the complexity of disadvantage as not only focused on race, but also gender,[349] class and "other levels and forms of social differentiation and systemic under-privilege which still persist."[350] In the court's view, the aim is to "dismantle" "the systemic under-privilege" and avoid the "creation of new patterns of disadvantage."[351] This requires a "flexible and

[343] Kentridge op cit note 342 at 14-39.14-39.See also McGregor op cit note 75 at 811 .McGregor op cit 169 at 141.
[344] McGregor, Marie *The application of affirmative action in employment law with specific reference to the beneficiaries: a comparative study* (Phd dissertation University of South Africa 2009) at 137.
McGregor op cit note 170. *Barnard* CC para 79..
[345] Ibid.
[346] McGregor op cit note 69 at 113-114.
[347] *Van Heerden* supra note 131.
[348] Ibid para 39.
[349] *Van Heerden* supra note 131 para 142. See also Barnard CC para 88
[350] Ibid para 27.
[351] Ibid para 27.

situation sensitive approach"[352] There is a recognition that, in some instances, the application of affirmative action "may indeed be exceptional or "hard cases" or windfall beneficiaries."[353] The latter would be individuals who did not suffer individual disadvantage, but would benefit from affirmative action due to their membership in the group. The court is of the view that if the "overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion then . . . this does not affect the validity of the remedial measure concerned." [354]

In support of this approach, the court quotes *Prinsloo v Van der Linde* where it stated that:

> Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and disadvantage.[355]

The reality is that the Apartheid system metered out "advantage(s) and disadvantages . . . according to one's membership in a group"[356] and so the court is of the view that it is unnecessary to prove individual disadvantage but one should rather focus on group membership. The court noted that "[i]t is sufficient for a person to be a member of a group previously targeted by the Apartheid state for unfair discrimination in order to benefit from a provision enacted in terms of section 9(2)."[357] However, it also cautions that the application of section 9(2) needs to be used "only

[352] Ibid para 27.
[353] Ibid para 39.
[354] Ibid para 40.
[355] 1997 (3) SA 1012 (CC) para 72.
[356] *Van Heerden* note 131 para 85.
[357] Ibid.

in appropriate cases and with great circumspection. The vision of substantive equality and the need for transformation cannot be underestimated."[358]

The focus of substantive equality in advancing a particular group should always be balanced with the transformation of the workplace. Transformation of the workplace requires that employers consider the impact of the varying degrees of disadvantage experienced by members of the designated group. This is to ensure that the application of affirmative action reaches the level of deep representivity.

3.3.4 Complexity of Disadvantage

The debate on individual versus group disadvantage also points to the complexity of disadvantage and raises questions about how to deal with complex forms of disadvantage. Prior to the 2004 Constitutional Court case of *Van Heerden,* the labour court had recognised the complexity of disadvantage in *Auf der Heyde*. Here the court pointed to the difficulty of proving individual disadvantage given the complexity that was evident in the differing nature of disadvantage. Those who defend the approach based on single group disadvantage also point to the fact that race and gender discrimination are different in nature, and the extent of individual disadvantage cannot be measured either within or across such different groups.[359] If one is subjected to race discrimination, there is no standard of measuring that such an individual suffered more disadvantage than one who is subjected to gender discrimination.[360]

[358] *Van Heerden* supra note 131 para 87 Judge Sachs infers that should individual disadvantage be required, historical, social and legal evidence would be required in differentiating between members of the designated group para 149.
[359] McGregor op cit note 318.
[360] McGregor op cit note 318 at 267.

The individual versus group disadvantage debate thus gives rise to a number of questions. Firstly, in applying individual disadvantage should those who have suffered more than others be the beneficiaries of affirmative action? Secondly, how does one measure degrees of disadvantage within and across the members of the designated groups? Thirdly, if the disadvantage suffered is due to institutional culture, how does one measure the disadvantage created by institutional culture? This shows the difficulty of attempting to measure individual disadvantage. Indeed, it is possible that one member of the designated groups may have experienced layers of disadvantage, which are impossible to measure.

In applying a group-based approach, it still remains important for the employer to adopt a "situation sensitive"[361] approach to take account of the direct and indirect forms of disadvantage experienced by members of the designated groups.[362] Especially in instances where members of the designated group occupy more than one group, for example a Black woman is part of the race group as well as the gender group, a situation sensitive approach would be necessary to understand the nature of her disadvantage in the workplace. In other words, in adopting a group-based approach, an employer must not only focus on a single group, or single status, but recognize that people might occupy intersectional spaces where their disadvantage is shaped by their membership to different intersecting groups. I discuss this in more detail in the next sections.

[361] *Van Heerden* supra note 131 para 27; *Barnard* SCA para 57.
[362] See also Papacostantis and Mushariwa op cit note 18.

3.3.5 Degrees of Disadvantage

The Constitutional court judgement of *South African Police Service v Solidarity obo Barnard*[363] is an example of the failure to recognise different kinds of disadvantage across and within the designated groups. Treated largely as a case of race discrimination, it was only the minority judgment of Justice van der Westhuizen that spoke to the nuances of race and class implicated by the case. Van der Westhuizen recognises that Captain Barnard was a white woman in a male-dominated profession who "sit[s] at the intersection of privileged and under-privileged identities."[364] The disadvantage to which she was vulnerable meant that:

> ... she might suffer harm in unique ways compared to members of other groups, designated or not. A woman in her position had probably not suffered the unfair discrimination that black women did, but had also not enjoyed the privilege of white men. Her position and history of privilege are undeniably different from that of a black man and may require more promotion in some contexts and less in others[365]

This *Barnard* minority judgment illustrates the difference in disadvantage that might be experienced by members of the designated groups. The question thus becomes whether an employer should give any consideration to the degrees of disadvantage created by the differing experiences of members of the designated groups.

Several scholars argue against the idea of taking account of degrees of disadvantage. Rycroft, for example, finds that it would be “difficult to calculate degrees of disadvantage and thus it is preferable to focus on the broad social purpose of the EEA, namely, demographic representivity, regardless of whether or not a person in the designated group comes from a wealthy background and has

[363] [2014] 11 BLLR 1025 (CC).
[364] *Barnard CC* para 153.
[365] Ibid.

received the best education".[366] Chris Albertyn also argues that it is unnecessary to look at the degree of disadvantage; suggesting that to do so would be unnecessary and wasteful, and would give "rise to worsening conflict and division as individuals within the designated group try to prove historical discrimination".[367] He further argues that such a stance would "focus more on the wrongs of the past,"[368] than the hopes of the future, and that "it promotes an unhealthy social ethic"[369], as one "endeavours to prove oneself a victim"[370], "which is far removed from the aim of affirmative action."[371]

The idea of deep representivity, that is discussed earlier, acknowledges, and indeed requires, an understanding of differing degrees of disadvantage to avoid creating new inequalities. An example of this can be found in *Naidoo v Minister of Safety and Security*, a 2013 case where a new form of inequality was created by the employer due to their incorrect application of national demographics. The new form of inequality created meant that due to the minority status within the larger designated group, a zero target for Indian females was put forward. The employer was not sensitive to the position of the Indian group within the larger black group in terms of national and regional demographics. It is clear that the EEA has the aim of diversity in mind when it focuses on the EEA goal of creating a representative workforce, the question that arises is what 'representivity' means in this context.

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[366] Rycroft op cit note 67 at 1423 as cited in McGregor op cit note 198 at 143. See also op cit note 64 at 10. McGregor notes that "multiple discrimination is not recognized in the Employment Equity Act" at 1. In *Public Service Association-Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 May 1998(unreported) the commissioner reasoned "while there is no doubt that white women have been discriminated against, it would be fair to say that it is not nearly to the same extent as experienced by blacks in South Africa." See also McGregor op cit note 170 at 139. See also J Partington 'The development of defences in unfair discrimination cases" 2005 (2) *Obiter* 595 at 600.
[367] McGregor op cit note 198. McGregor op cit note 75.
[368] Ibid. McGregor op cit note 69 at 124.
[369] Ibid.
[370] Ibid
[371] Ibid. McGregor op cit note 69 at 124.

3.3.6 Unequal Disadvantage within a Single Designated Group and Measuring Unequal Disadvantage across Groups

How do we understand and address different degrees of disadvantage within a particular designated group? And how do we evaluate degrees of disadvantage across two groups? This section discusses these questions in relation to the designated group defined by race, and in relation to the relationship between single categories of disadvantage defined by race (of a black man) and gender (of a white woman).

Du Toit points out that: "South Africa's past policy of Apartheid has been branded a crime against humanity and its devastating effect on black communities has been documented so amply as to require no additional proof".[372] However, he does point out that disadvantage may not be presumed for South African blacks born and educated outside South Africa, who at no point suffered the disadvantages which the EEA seeks to redress.[373] In my view McGregor correctly disagrees with this point, arguing that such persons could have suffered disadvantage in numerous ways.[374] For example, they would have grown up in a foreign country while being separated from family.[375]

However, if we fail to make any distinction between those members of a designated group who have suffered disadvantage and those who have not suffered individual disadvantage, we are unable to account for how unequal different members of a designated group might be when competing for employment. This point can be illustrated by way of an example: Two black candidates apply for an affirmative action

[372] Du Toit op cit note 188 at 166. See also McGregor op cit note 77; McGregor op cit note 170 at 139-140.
[373] Ibid.
[374] McGregor op cit note 198 at 144.
[375] McGregor op cit note 198 at 143.

post. Candidate X is a South African citizen, who lived in exile in the United Kingdom, received a good education and worked there for several years before returning to South Africa. Candidate Y is a South African citizen, who spent their whole life in South Africa, was displaced by the Group Areas Act 14 of 1950, received a sub-standard education, and thus struggled considerably for years to get a qualification at University and has no work experience. Candidate X would most likely be employed, due to being more suitably qualified by virtue of education and experience than Candidate Y.

This example raises two issues. Firstly, who should be the true beneficiary of affirmative action in this case? And, secondly, what are the consequences of ignoring the differences between the two candidates? For efficiency purposes the employer will employ the candidate who is better qualified. This indicates that where members of the designated group are not equally placed, it is more likely that the stronger members of the designated group will enjoy the benefits of affirmative action to the exclusion of those who rightly need it more. The second issue raised by the above example is the fact that the difference in disadvantage, if not acknowledged correctly, will result in increased division within the designated groups and the creation of a 'creamy layer'.[376]

The question of differences in disadvantage within a designated group was first addressed by courts in *Motala v University of Natal*.[377] This case deals with the issue

[376] Albertyn and Goldblatt op cit 14 at 35-36; see also Menski 'The Indian Experience and its Lessons for Britain' in Hepple and Szyszczak *Discrimination: The Limits of the Law*(1992) 330; and Nair 'Search for Equality through Constitutional Process: The Indian Experience' in Jagwanth and Kalula (eds) *Equality Law:Reflections from South African and Elsewhere* (2001) 255).

[377] 1995(3) *BCLR* 374 (D). See also *Regents of the University of California v. Bakke, 438 U.S. 265* the Supreme Court of the United States of America ruled that race should be one of the several factors influencing college admission policy.

of differences in degrees of disadvantage in applying affirmative action in University admissions. The case involved a challenge to a University admissions policy that only admitted 40 Indian students annually. The policy was designed to admit more African students, and thus redress the educational disadvantages that they suffered under Apartheid. The policy accordingly allowed African students with lower results to be admitted. Motala, an Indian applicant, argued that the policy unfairly discriminated against her. The High court noted that Apartheid was based on a hierarchical system of race,[378] with the most advantaged group being whites and the most disadvantaged being African and Coloured people, with Indians situated in the middle.[379] In recognizing the relative disadvantage of Africans vis-à-vis Indians, the court concluded that the measure did not go against the provisions of equality enshrined in the Interim Constitution.[380]

The High court made an important distinction in the degree of disadvantage experienced by members of the Black group, in comparison to each other, as well as with the white group. However, it did not necessarily go far enough in testing whether these distinctions were justified in this particular case. Indeed, a criticism levelled at the judgment was the lack of consideration of the actual effect of the measure on other members of the designated group, who were also victims of discrimination.[381] It has been argued that the matter was taken at face-value and the proper enquiry was

[378] *Motala* supra note 377 para 28.
[379] Ibid.
[380] "While there is no doubt whatsoever that the Indian Group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the {apartheid} system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of {the equality provision of the Interim Constitution}"*Motala* supra note 377 at 383.
[381] Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) para 9.5.

whether such a "programme was rational and carefully constructed so as to achieve equality."[382]

The enquiry into the differing degrees of disadvantage experienced by members of the designated group cannot lose sight of the aim of the measure and should evaluate affirmative action in terms of its stated purpose. Here, the educational context is slightly different from the employment sphere. The focus in *Motala* was to give a greater equal opportunity of entry to African students due to their level of disadvantage. The aim in the employment sphere goes further than this; it seeks the creation of a representative workforce, where recognition of differing experiences of disadvantage are taken into account, without losing sight of the goal to transform the workplace. As a result, the focus in case-law on affirmative action in employment has been on representivity rather than degrees of disadvantage. I describe this further below.

One measure of the degrees of disadvantage is to adopt a nuanced and contextual understanding of, and set of goals concerning, representivity in the workplace. In the 2004 case of *Fourie v Provincial Commissioner of SA Police Service (North West Province),*[383] the Labour court pointed out that "the issue of degrees of disadvantage could not be decided in a vacuum, but consideration needed to be given to the history of South Africa and the imbalances of the past."[384] This case raised the question of relative disadvantage across groups, between a white woman and a black man. The applicant, a white woman, though suitably qualified was not appointed as, in the circumstances, there were no black officers at the police station

[382] Ibid. See also Pretorius op cit note 47 at 24.
[383] (2004) 25 *ILJ* 1716 (LC).
[384] *Fourie* supra note 384 1736A-B.

in question and the target for white women had been exceeded.[385] However, this case did not focus on whether one member of the designated group was more or less disadvantaged than the other, but rather on the need for the employer to ensure proper representivity in the workforce.[386] The need for representivity is a factor to be taken into consideration in deciding which applicant to appoint, especially where two different members of the designated group are competing for a particular post. If representivity is sensitively defined, then it can be a useful measure for guiding appointments and avoiding difficult considerations of relative and intersectional disadvantage.

It is clear that the majority of cases dealing with affirmative action have focused on representivity based on group disadvantage rather than individual disadvantage. The cases above are also predominantly within the public sector. It is also noted that, besides the reasons given above for the application of group disadvantage, group disadvantage is easier to apply, as well as easier to monitor, from the perspective of the employer seeking to increase representivity.[387] I would argue that in the first cycle of affirmative action group disadvantage is necessary for the application of affirmative action. However, as society and the workplace evolves, in order for transformation to occur at the level of equality of results, it will become necessary for the employer to closely inspect who the beneficiaries of affirmative action are, taking into consideration the differing experiences of disadvantage.

[385] *Fourie* supra note 384 1737C.
[386] *Fourie* supra note 384 1737B.
[387] McGregor op cit note 198.

3.4 Deficiencies of Single Group Disadvantage

The Constitutional Court has given judicial notice to the concept of disadvantage in cases such as *Pretoria City Council* v *Walker*[388], *Brink v Kitshoff,*[389] *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others*[390] and *President of the Republic of South Africa v Hugo*[391] by clarifying the historical injustices of the past that now affect present inequalities.[392] However, in the area of affirmative action case law, there is little precedent on how to evaluate the differences in disadvantage, within and across the designated groups, which can influence the achievement of equality. Group disadvantage, as it is currently defined, has deficiencies which cannot be ignored if the end result is to be the achievement of substantive equality.

Firstly, degrees of disadvantage, within and across the designated groups cannot be ignored as affirmative action is viewed as legitimate when it is seen to advance persons who are clearly disadvantaged.[393] However, the reality is that it is benefiting a larger percentage of those who have actually not suffered from unfair discrimination or been disadvantaged by the effects of past discrimination.[394] The difference in inequality is no longer growing between white and black, but rather intra-racially with inequality between blacks increasing.[395] This creates socio-economic divisions within the disadvantaged groups. The question thus becomes: how does one ensure that

[388] 1998(2) SA 383 (CC).
[389] 1996 (4)SA 197 (CC).
[390] 2004(4) SA 490 (CC).
[391] *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 74. See also *Brink v Kitshoff* 1996 4 SA 197 (CC) par 40.
[392]McGregor op cit note 69.
[393]McGregor op cit note 63. Mushariwa op cit note 46.
[394] Dupper *et al* op cit note 53 at 99-100 See also Mushariwa op cit note 46 at 442.
[395] Murray Leibbrandt, Arden Finn & Ingrid Woolard *Describing and decomposing post-apartheid income inequality in South Africa* 2012 Routledge. See also McGregor op cit note 69 at 125. See also M Leibbrandt, I Woolard, A Finn & J Argent 'Trends in South African Income Distribution and Poverty since the Fall of Apartheid' (2010) OECD Social, Employment and Migration Working Papers No.101, OECD at 18. http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=delsa/elsa/wd/sem(2010)1&doclanguage=en [Accessed 3 March 2017].

more members of the designated group, who are at the bottom end due to factors that create differences in disadvantage, are able to take up the opportunity of affirmative action?

Secondly, the focus on single group disadvantage creates unintended consequences, particularly when the employer is specifically aiming for representivity in the workplace. It could be argued that there is too much focus on the racial designation to the exclusion of the other designated groups (gender and disability).[396] This is illustrated by the *Willemse* case, dealing with disability. In this case, the employer overlooked the disability of the white male and failed to recognize his status as a member of the designated group, by virtue of his disability. Instead, the court focused on his race.[397] In a more recent case of *Singh v Minister of Justice and Constitutional Development (SA National Council for the Blind as Amici Curiae)*[398], the Equality Court gave an order to the Magistrate's Commission to amend its short-listing criteria in deciding which magistrates to appoint. The court emphasized the need for the Commission not only to ensure representivity in terms of race and gender, but also to promote persons with disabilities.[399] As highlighted before, the lack of recognition of gender disadvantage in a male dominated profession was evident in the *Barnard* case.[400] The representivity of employees in the workforce, on the basis of gender or disability, does not receive equal attention as most employers are focused on a single group framework, which is primarily race. The legitimacy of affirmative action is threatened when it is seen to benefit one group to the exclusion

[396] Maré op cit note 64 at 52.
[397] *Willemse v Patelia NO and Others* [2007] 2 BLLR 164 (LC).
[398] 2013 (3) SA 66 (EqC).
[399] Holness, Willene. 'Employment equity and elimination of discrimination: Where are women with disabilities in the hierarchy?.'*Agenda* 30.1 (2016): 49-64.
[400]McGregor op cit note 63 at 10.

of the others. This creates a type of internal group hierarchy, as not all the groups are treated equally in the application of affirmative action.

Thirdly, single group disadvantage fails to fully accommodate the complexity and intersectionality of disadvantage within the group. As a result, affirmative action policies become over-inclusive,[401] with individuals within the group, who are not needy, benefiting at the expense of those who have been most disadvantaged by discrimination and, therefore, are in most need of advancement.[402] The complexity of disadvantage creates inequality when the application of affirmative action by an employer fails to recognize, and effectively accommodate, layers of disadvantage experienced by members of the designated groups. This may actually result in new forms of inequality within the designated groups which affects the success of affirmative action in adequately transforming the workplace.[403]

An example of this new form of inequality is evident in the case of *Naidoo v Minister of Safety and Security.*[404] In this case, Naidoo claimed unfair discrimination as a result of her minority status as an Indian woman within the designated sub-group of Black women. As a result of a rigid application of affirmative action, her employer allocated a zero target of representivity for Indian females. This was based on national, rather than regional figures. This target of zero meant that there were no employment and promotion opportunities for Indian females in the South African Police Force.[405] In upholding Naidoo's claim, the Labour court held that a 'situation sensitive approach'[406] needed to be applied to understand the disadvantage that might be created by the incorrect application of national demographics, without

[401] McGregor op cit note 62 at 9. See also M McGregor op cit 169 at 126. Naff and Dupper op cit note 63 at 177.
[402] Naff and Dupper op cit note 63.See also JL Pretorius op cit note 20.
[403] McGregor op cit note 63.
[404] 2013 (3) SA 486 (LC).
[405] *Naidoo* supra note 32 para 221.
[406] *Naidoo* supra note 32 para 160 and para 167.

consideration of regional demographics, as well as the under-targeting for the designated group of women (30% rather than the actual 51% of the population).[407] This demonstrates two problems: an abstract and undifferentiated focus on race and a failure to take account of intersectional disadvantage within the racial group and across the groups defined by race and gender.

By using national demographics only in the development of its employment equity plan, the calculation for the target of representivity of Indian females was zero. Yet regional demographics showed a clear shortage of Indian females in this particular workforce. The employer's sole focus on race and national demographics in the employment equity plan ignored the effects of the minority status of the Indian group and actually created inequalities within the group defined by race meaning that Indian women were now excluded from employment or progression within the SAPS. In addition, what resulted in a zero target for representivity of Indian females within the SAPS was due to the miscalculation of the representivity required, which was based on an unequal equation of 70% male and 30% female.[408] The impact of the intersection of race, gender, minority status coupled with the layers of disadvantage within a male dominated profession was not recognized by the employer. Overall, the failure to account for the intersection of gender, race and minority status resulted in significant disadvantages for the group of Indian women.

The court in *Naidoo* was able to identify these layers of disadvantage by taking a 'situation sensitive approach'[409] and by looking at the specific circumstances of the SAPS, its historical context and the position of the Applicant as a minority member

[407] *Naidoo* supra note 32 para 160.
[408] *Naidoo* supra note 32 para 135 & 187.
[409] Gaibie does criticize the court for not clearly establishing the "parameters of such an approach" Shamima Gaibie 'Making sense of Affirmative Action cases' 26th Annual Labour Law Conference, Employment, the Economy & Growth: The Implications for Labour Law, Sandton Convention Centre on 30 July – 1 August 2013.

within the designated groups in terms of race, as well as being a female within the designated groups in a male dominated profession.[410] The goals set in the employment equity plan, although catering for the designated groups did not recognize the treble disadvantage that minority groups may suffer.[411] The Applicant had treble disadvantage by virtue of her gender, race and minority status.[412] Shaik J argued that "a properly crafted affirmative action measure should promote and protect her as a vulnerable minority." Her minority status means that she is not on an equal footing with other members of the designated group.[413] Moreover, the court found that the "SAPS's traditionally male dominated workforce is part and parcel of what the affirmative action policies are trying to redress."[414] The appointment of a male candidate, where a female candidate from the designated groups was not only on par, but better qualified, in terms of the scores of the assessments, highlights the tendency to create new forms of discrimination.[415] The overemphasis of race in the application of affirmative action will not achieve the substantive equality required, but rather create new forms of inequality.[416]

Minority status within the designated group is not a factor identified by the EEA. There is no uniform, agreed definition of minority.[417] "Minority group can be defined in terms of 'age, sexuality, sexual preference, gender, religion, culture, race, or ethnicity'.[418] The group is held to be a distinct group in a larger society.[419] "A minority

[410] paras 172.
[411] McGregor op cit 63 at 11.
[412] *Naidoo* supra note 32 para 142. See also Papacostantis and Mushariwa op cit note 18.
[413] *Naidoo* supra note 32 para164.
[414] Papaconstantis and Mushariwa op cit note 18 at 9.
[415] *Naidoo* supra note 32 para 184.
[416] *Naidoo* supra note 32 para 175.
[417] Najma Moosa 'Promoting minority rights in the context of economic, social and cultural rights in South Africa' 2002 *Codicillus* 37 at 41.See also Papaconstantis and Mushariwa op cit note 18.
[418] Desmond Mochwanaesi, Hendrik Steyn and Johannes van der Walt 'Education for minority groups: a case study' 2005 *South African Journal of Education* 287.
[419] Mochwanaesi, Steyn & van der Walt ibid at 287, see also Moosa op cit 413 at 41.

group is also 'numerically inferior to the rest of the population of a state and, therefore, in a non-dominant position'."[420] It is however noted that 'minority status is not always based on number and is sometimes based on inferior social and political position.'[421] National statistics on demographics of the economically active population show that Indians are clearly a minority within the larger designated group of Black members, in comparison with Africans and Coloureds.[422]

The *Naidoo* case demonstrates that it is necessary to consider inequality on broad and narrow grounds, from the group perspective and with due attention to the 'individual and community' inequality in that group or community.[423] Employers need to be mindful of this in their application of affirmative action to ensure that they account for the complexity of disadvantage within and across designated groups. In the *Naidoo* case, the employer did not pay attention to the disadvantage created by an intersection of race and gender, coupled with minority group status, within the race group. This minority issue arose due to a lack of consideration for regional demographics, with only national demographics being used to set targets. By ignoring the position of Indians as a minority group, within a larger designated race group, the SAPS created a new inequality. It is apparent that the issue of representivity in the context of regional and national demographics must be considered in more specific terms as opposed to the broader terms currently employed.[424]

[420] Ibid.See also Papaconstantis and Mushariwa op cit note 18.
[421] Moosa op cit note 418 at 41.
[422] http://www.statssa.gov.za/publications/P0211/P02111stQuarter2016.pdf [Accessed on 12 September 2017]
[423] Albertyn op cit note 54 at 595.
[424] See also Papacostantis and Mushariwa op cit note 18.

A recent illustration of this is in the Constitutional court case of *Solidarity v The Department of Correctional Services*[425] where the court found that the employer's focus on national demographics, without considering the uniquely different regional demographics within the Western Cape, resulted in unfair discrimination for Coloured applicants in the department.[426] "The regional demographics were significantly different from the national demographics.[427] Thus the court held that in the context of the Western Cape the department needed to consider both national and regional demographics."[428]

It is clear that the question thus becomes: how does an employer avoid the creation of new inequalities in the application of affirmative action, considering the issues that arise within a singular designated group setting? This is most relevant in particular instances where an employer seeks to distinguish fairly within and across the designated groups. The factors to be considered will be dealt with in more detail below.

3.5 Factors to be considered in Distinguishing Fairly Within and Across the Designated Groups

The previous sections of this chapter considered the different experiences of disadvantage by members of the designated groups in the workplace environment. This raises an important question of how a designated employer can distinguish fairly between members of the designated groups in the application of affirmative action,[429] in circumstances where two candidates, who are both members of the same or

[425] 2016 (31) ILJ 1995 (CC).
[426] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 para 45.
[427] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 para 46.
[428] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 paras 45 & 46.
[429] See also Pretorius op cit note 47. Naff and Dupper op cit note 63 157 at 181. In *Solidarity on behalf of Christaans v Eskom Holding Ltd 2006* (27) ILJ 1291 (ARB) the commissioner held that section 42 of the EEA mandates the employer to distinguish between groups within the 'designated groups.'

different designated groups, are identified by the employer as suitable for appointment. It will be argued that the first factor is representivity which is linked to the aim of affirmative action in the EEA. The second factor is the stage of the lifecycle of affirmative action. The third factor is the application of affirmative action in a manner that transforms the workplace. These three factors will now be discussed in turn.

3.5.1 Representivity in the workplace

Distinguishing fairly between members within the designated group in the interest of representivity is acceptable, as representivity is a goal of the EEA.[430] The Act is guided by the racial categories created during Apartheid to identify the members of the designated group. One criticism is that groups are still defined within Apartheid parameters.[431] As Bentley argues:

> if the post-Apartheid project is successful, and segregation between the races fades (or even disappears altogether), it will become impossible to enforce policies and laws that rely on racial classification, because the hard and fast racial segregation that Apartheid relied upon is supposed to disappear".[432]

However, until substantive equality is achieved, this categorization is necessary to be able to identify beneficiaries of affirmative action. In the 2001 case of *National Education Health & Allied Workers Union on behalf of Thomas v Department of Justice,*[433] it was held that the goal of improving the Department's representivity would not be easy if the Department was unable to differentiate between candidates who all fall within and outside of the designated groups. This differentiation would be

[430] EEA s 2(b).
[431] K Bentley 'Rethinking the Ultimate Goal of Affirmative Action: Who and What is it for', paper prepared for the 61st Harold Wolpe Memorial Trust Open Dialogue (19 July 2007) 2.as quoted in Dupper op cit note 31 at 429.
[432] Ibid. De Vos op cit note 51 at 76.
[433] (2001) 22 *ILJ* 306 (BCA).

based on the purpose of the EEA which is the achievement of equity in the workplace by:

> "Implementing affirmative action measures to redress the disadvantages in the employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."[434]

The point was further made in the case that if "only Indian people or only African people, for example, were to be employed in the public service the equitable representation of other designated groups would not be achieved"[435] It is clear that representivity of all recognized members of the designated groups is necessary and not to confine it to a selective few.[436] I would also argue that the representivity of the white group is also crucial to creating balance in representivity. This is supported by the findings in the Constitutional court judgment of Barnard[437] and confirmed by the Constitutional court decision in *Solidarity and Others v Department of Correctional Services and Others*[438] where the court held that both members and non-members of the designated group could be denied appointment at the discretion of the employer "if he or she belongs to a category of persons that is already adequately represented at the relevant occupational level".

Dupper notes that the aim of the EEA is the creation of a representative workforce and this, therefore, is the one criterion for distinguishing between members of the designated groups.[439] This means that the degree to which persons of a particular

[434] Ibid at 312.
[435] Ibid.
[436] See also McGregor op cit note 75.
[437] *Barnard* CC case.
[438] *Solidarity and Others v Department of Correctional Services and Others* supra note 34.
[439] Dupper op cit note 31at 425.

race, gender or disability are underpresented in a particular occupational category or level in the workplace is the actual guide to implementation of affirmative action.[440] A conscious effort needs to be made by the employer to ensure that the representivity of all members is achieved.[441] In the 2013 Constitutional court judgement of *South African Police Service v Solidarity obo Barnard the* court held that

> "We should also be careful not to allow race to become the only decisive factor in employment decisions. For this may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race. Over-rigidity therefore risks disadvantaging not only those who are not selected for a job, but also those who are. Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race."[442]

In *Naidoo v Minister of Safety and Security,*[443] Shaik AJ cautioned employers who did not comply with national and provincial demographics within their employment equity plans. Failure to do so, he suggested, would lead to instances where minority groups

[440] Dupper op cit note 31 at 427.. In *SAPU OBO Siegelaar and Others v SAPS* (2002) 11 BALR 1201 (CCMA) at 1208 the commissioner held that "the need to address representivity necessitates discriminating between members of the designated group(s)." See also In *Public Servants Association v Free State Provincial Administrator,* (CCMA 21 May 1998 (case no FS 3915) unreported)., it was held that degrees of disadvantage need to be considered as a limiting criterion, when a decision is being made between two candidates who both fall within the designated group(s). See also In *Durban Metropolitan Council (Parks department) v SAMWU* 1998 7 ARB 6.9.5. Pretorius quotes the arbitrator as holding that "in terms of the applicable affirmative action policy, no automatic preference is given to a particular class of disadvantaged persons" Pretorius *op cit* note 47 at 25.The arbitrator also held that the relevant criterion that should be used to determine the decision to be taken are the nature of the position, the demographic profile of the department, the qualification and work experience of the candidate."

[441]Section 42 of the Employment Equity Act states that in determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General of Labour must take into account all other factors mentioned in section 42 which includes the "demographic profile of the national and regional economically active population" and the "pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees". It is unclear when regional demographics can be used instead of national demographics. In brief, designated, internal employees have an effective right of recourse against their employers for failing to account for their demographic statuses in the employers' appointment and promotion procedures, but designated, external applicants do not." Emma Fergus and Debbie Collier 'Race and gender equality at work: The role of the judiciary in promoting workplace transformation' (2014) 30.3 *SAHJR* 484 at 498.

[442] Barnard CC para 80-81.

[443] *Naidoo* supra note 32.

within the designated groups would be excluded from benefiting from affirmative action policies, creating a new type of inequality resulting in valid claims of unfair discrimination.[444] The court held that a situation sensitive approach was needed so as not to unfairly discriminate against members of the designated groups, who were the minority within the larger group. A situation sensitive approach would take account of context within which a specific employer is implementing their affirmative action policies and how these policies would have the potential of eradicating existing inequalities but also mindful and sensitive to not creating new forms of inequality due to the way in which the affirmative action policy was applied.

In the 2012 case of *Solidarity v Department of Correctional Services,*[445] this position was affirmed. The court ruled that, in the application of an employment equity plan, consideration needed to be given to both national and provincial demographics. This is in consideration of the fact that, in the Western Cape for example, there is a provincial demographic majority of Coloureds which is different to the national demographics, where Black Africans are held to be in the majority and Coloureds in the minority.[446] According to the Department of Labour, "51 per cent of the economically-active population of the Western Cape is Coloured with the African population comprising 33.9 per cent, followed by the white population at 14.8 per cent and lastly the Indian population with 0.3 per cent of the economically-active population".[447] The rigid application of national demographics in this case led to minority inequality being created for Coloured applicants. The court's consideration of

[444] *Naidoo* supra note 32 para 230.
[445] 2014 (1) *ILJ* 76 (LC).
[446] *Solidarity and Others v Department of Correctional Services and Others* supra note 446 para 45 and 127.
[447] See *http://www.labour.gov.za/DOL/media-desk/media-statements/2013/department2019s-equity-road-shows-hits-the-western-cape*. [Accessed 14 August 2017].See also Papaconstantis and Mushariwa op cit note 18.

the regional demographics in this case, embodied the situation-sensitive approach to employment equity in the Western Cape. It is clear therefore that, the employer in the exercise of their discretion need to be mindful of the issues raised in the cases above.

3.5.2 Lifecycle in the Application of Affirmative Action

Alongside representivity, a second factor in distinguishing between members of the designated groups is the lifecycle of affirmative action. The issue of how representivity is affected by the lifecycle of affirmative action in a particular workplace is evident in the case of *UNISA v Reynhardt.*[448] Here it was held that once an employer has reached his employment equity targets, it is no longer justifiable for them to apply affirmative action. The principle to be then applied is that of the most suitably qualified candidate.[449]

In the Constitutional court decision of *Barnard*, the non-appointment of Captain Barnard was held to be lawful and in line with the principles of substantive equality due to the fact that her appointment would have "worsened the representivity in salary level 9 and the post was not critical for service delivery" even though she had attained the highest score in the selection test. It was all at the discretion of the Commissioner who also did not appoint the other two Black male applicants who were members of the designated groups and would have improved representivity.

The *Barnard* principle therefore means that, in the interest of representivity, members of the designated groups can also be denied appointment at the discretion of the

[448] 2010 12 BLLR 1272 (LAC) 1276.
[449] *Unisa v Reynhardt* supra note 448 para 1281.

employer. This principle was also confirmed in *Solidarity and Others v Department of Correctional Services and Others* where the court held that:

> the application of the *Barnard* principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the *Barnard* principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must broadly accord with its level of representation among the people of South Africa.[450]

The future non-application of affirmative action is subject to an employer's commitment to meeting employment equity targets set in its employment equity plan, as well as the recognition by the employer that once these targets are reached they must be maintained within the organization. Consequently, once a disparity exists affirmative action must again be applied resulting in a distinct lifecycle to the application of affirmative action.[451] Failure on the part of the employer to do this would have the potential of creating reverse discrimination on employees who are not beneficiaries of affirmative action.[452] The reality of affirmative action is the controversial manner in which it seeks to remedy unequal treatment through further

[450] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 para 40.
[451] Mushariwa op cit note 46.
[452] *Unisa v Reynhardt* supra note 448 at 1287. See also Dupper op cit note 51 at 132.

unequal treatment.[453] Its integrity cannot be retained if the dignity of an applicant, who is not a beneficiary of affirmative action, is unfairly infringed, as in the *Reynhardt* case.[454]

In its analysis of the facts of the case, the court was clear on the constitutionally justified discrimination that would occur in the application of affirmative action.[455] This was necessary, the court held, to achieve the aim of redressing the imbalances in South Africa arising from its Apartheid past.[456] It is noteworthy that, in the *Reynhardt* case, the emphasis is on race and the racial composition of each post level of Dean and Vice Dean.[457] No mention is made of the gender composition of the occupants of these posts or of the appointment of persons with disabilities to these posts, and of whether or not any targets had been set in that regard.[458] The aim of affirmative action is to create a representative workforce with respect to race, gender and disability,[459] yet there is a clear focus in this case on race alone.[460] The quest for representivity requires an investigation into the gender and disability composition of incumbents also.[461]

It is important to note that not only did the employment equity plan of the University need to be of "a standard that would be able to withstand constitutional scrutiny, but it also needed to set targets describing how it was to create this representative workforce."[462] "A clear commitment to transformation may be seen within the

[453] Rosenfeld op cit note 110.
[454] Mushariwa op cit note 46. See also J Grogan 'Reynhardt too far, too fast' 2011 *Employment Law Journal* 18.
[455] *UNISA v Reynhardt* supra note 448 at 1279. See also *Van Heerden* supra note 130 at para 96.
[456] Ibid.
[457] Mushariwa op cit note 46 at 416.
[458] Ibid.
[459] Ibid.
[460] Ibid.
[461] Mushariwa op cit note 46 at 417.
[462] Mushariwa op cit note 46 at 413.

University, as the targets had been reached."[463] "The issue in question was the continued application of the employment equity plan, once those targets had been reached. The employment equity plan clearly stated at what stage employment equity would no longer be applied and when individuals would be appointed on the basis of merit, irrespective of race. In this case the most suitably qualified individual was Professor Reynhardt."[464]

"It has been held that affirmative action remains a means to an end and it is therefore justified by its consequences,[465] which are the achievement of equality.[466] The assertion is that need for affirmative action will end when past imbalances are rectified.[467] Which begs the question, how it will be possible to identify the point at which past imbalances have been rectified and affirmative action can thus cease.[468] Action to be taken by an employer once targets were reached was discussed in *Willemse v Patelia NO.*[469] In this case, the court held that if an employer has met its employment equity targets, the only consideration with regards to appointment or promotion should be merit, and each applicant should be treated equally."[470]

This position was supported in *Alexandre v Provincial Administration of the Western Cape Department of Health,*[471] where the court pointed out that once targets were reached, consideration of whether or not to continue to apply affirmative action needed to ensure that the continued application of affirmative action would 'advance

[463] Mushariwa op cit note 46 at 417.
[464] Mushariwa op cit note 46 at 417. *Unisa v Reynhardt* supra note 448 1280.
[465] Mushariwa op cit note 46 at 417. Currie and De Waal op cit note 9 *para* 9.5. See also McGregor op cit note 150 at17.
[466] Ibid.
[467] Mushariwa op cit note 46 at 417. McGregor op cit note 150 at 419.
[468] Mushariwa op cit note 46 at 417.
[469] *Willemse v Patelia* 2007 28 ILJ 428 (LC), Mushariwa op cit note 46 at 417.
[470] *Willemse v Patelia* 2007 28 ILJ 428 (LC) para 50. Mushariwa op cit note 46 at 417.
[471] *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 26 ILJ 765 (LC). Mushariwa op cit note 46 at 418.

the spirit and purpose of employment equity and the notion of substantive equality as endorsed by our legislative and constitutional framework. "[472]

"The *Reynhardt* case gives us an indication of the circumstances when affirmative action can cease to the applied, but it is clearly an instance that is specific to a particular employer and the wording within that employer's employment equity plan.[473] The employer must have a comprehensive employment equity plan that is able to withstand constitutional scrutiny.[474] Clear targets must be set to increase representivity in the workplace.[475] The *Reynhardt* case also points to the reality that the legacy of Apartheid and the disparity it created will take time to eradicate through the application of affirmative action."[476]

> "Within the process of applying affirmative action, the goal must not only be the advancement of individuals previously disadvantaged.[477]Another goal which employers must always have in mind is the creation of a workplace where substantive equality is a reality and where, over time, appointments will be based on merit.[478] This also places a duty on employers to ensure that that once they have reached their targets in applying affirmative action they maintain the equitable representation."[479]

Maintenance would require that, should there be a shift in representation, then affirmative action would be applied again.[480] By implication this would mean that another "lifecycle" of affirmative action would begin.[481]

> "In South Africa affirmative action has always been recognised as a temporary measure,[482] but the disparities created through the application of Apartheid will

[472] *Alexandre v Provincial Administration of the Western Cape Department of Health* 2005 26 ILJ 765 (LC) para 33. Mushariwa op cit note 46 at 418.
[473] Mushariwa op cit note 46 at 418-419.
[474] Ibid.
[475] Ibid.
[476] Ibid.
[477] Ibid.
[478] Ibid.
[479] Ibid.
[480] Ibid.
[481] Ibid

take time to be fully eradicated.[483] Through the *Reynhardt* case, though, it is clear that within the context of a specific employer, affirmative action does have a lifecycle.[484] The factors that influence the lifecycle are: (i) the wording of the employment equity plan of an employer, (ii) the employer's commitment to reaching specific targets of representation within a predetermined period of time, and (iii) the understanding that the representivity reached must still be monitored and maintained so that the further application of affirmative action does not amount to reverse discrimination.[485] It is therefore clear that the life span of affirmative action is determined by its justification. Once that justification falls away it can no longer be fairly implemented."[486]

3.5.3 Transforming the workplace

The concept of substantive equality of results within the lifecycle of affirmative action means that a third goal must always be to transform the workplace. The creation of a transformed workplace takes time. Employers seeking to create such a transformative environment need to take certain factors into consideration in the application of affirmative action such as: a recognition of multi-layered nature of disadvantage, and how this disadvantage affects workplace practices with regard to appointment, retention and promotion as well as the effects of institutional culture on the norms, processes and structures of the workplace which in turn impact on the accommodation, retention and progression of members of the designated groups. The employer needs to first recognize the multi-layered disadvantage experienced by members of the designated group. Dupper points out that the forward-looking rationale of affirmative action is that it is:

> a way of overcoming prejudice by changing widely held attitudes towards members of disadvantaged groups as well as being a tool for integrating disadvantaged groups into a democratic society, thereby

[482]Mushariwa op cit note 46 at 422. See also McGregor op cit note 69 at 114. See also Naff and Dupper op cit note 63 at 186.
[483] Dupper op cit note 31 at 443.
[484] Mushariwa op cit note 46 at 422.
[485] Ibid.
[486] Mushariwa op cit note 46 at 423.

> breaking down what would be an endlessly continuing cycle of poverty, subservience and social inequality.[487]

This can be linked to the goal of deep representivity with the inclusion of class in identifying members of the designated group. Once there is recognition of multilayered disadvantage, the employers must make an effort to understand the impact of the difference in disadvantage in terms of selection, appointment, retention and promotion, or progression in the workplace. This reflection by the employer on the impact of disadvantage ensures that, in their application of affirmative action employers are not creating new inequalities for certain members of the designated groups. Employers by focusing on impact will also be able to ensure that the application of affirmative action does not result in surface representivity but the deep representivity that will be evident in the diversity of the workplace.

Lastly the effect of institutional culture needs to be investigated by the employer to look at how this impacts on the appointment, retention and progression of members of the designated groups. Institutional culture is an invisible and subtle barrier to the transformation of the workplace. It will be shown in the next chapters how institutional culture has a real effect on the retention and progression of women in male dominated professions. There is uniqueness to the gender disadvantage suffered within a male dominated profession, which, if not recognized by the employer, impacts the representivity of women and ultimately impacts the transformation of the workplace.

3.6 Conclusion

To promote transformative substantive equality in the workplace,[488] it is the duty of the employer, within the letter and spirit of the EEA, “to systematically develop the

[487] Dupper op cit note 24 at 281. See also cited in Mushariwa op cit note 46 at 421.

workforce out of a life of disadvantage. Disadvantage of all kinds is targeted by the EEA".[489] It is clear that the single group setting of identifying members of the designated group has created issues. However, the employer, through a 'situation sensitive approach'[490], can ensure that new inequalities are not created in the application of affirmative action. In the fair implementation of affirmative action, it must be clear that, when an employer does distinguish between two members of the designated groups, it is based on three factors. Firstly, it arises from the need for representivity. Secondly, while fulfilling the need for representivity, the employer must maintain an awareness of where they are in the lifecycle of applying affirmative action. Thirdly, the employer's employment equity plan must display a commitment to transforming the workplace. In circumstances where the employer is unable to find anyone within the underrepresented groups, consideration must be given to the right to equality and dignity of other members of the designated groups.[491] Affirmative action is a means to substantive equality; this goal can only be reached through proper, fair and consistent application. In order to be fair, affirmative action needs to be applied case by case, with a 'situation sensitive approach'[492] with regard to national and regional demographics and the specific profile of the workforce and the employment equity policy of that particular workplace with considerations of the impact of class, gender, disability and intersecting group factors.

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[488] A van der Walt and P Kiutri 'The equality court's view on affirmative action and unfair discrimination: *Du Preez v The Minister of Justice and Constitutional Development* (2006) 5 Sa 592 (EqC)' (2006) 27 *Obiter* 675,681.
[489] *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* (2007) 28 *ILJ* 1774 (LC) 1798.
[490] *Van Heerden* supra note 131 para 27, *Naidoo* supra note 32 para 160.
[491] Barnard CC para 108.
[492] *Van Heerden* supr note 131 para 27, *Naidoo* supra note 32 para 160.

Chapter 4

4 GENDER DISADVANTAGE: THE MULTI-LAYERED NATURE OF DISADVANTAGE

4.1 Introduction

In previous chapters, it has been argued that the beneficiaries of affirmative action are not equally placed in terms of their disadvantage and inequality. This difference in disadvantage affects their ability to enter and compete in the workplace and needs to be taken into consideration if the aims of affirmative action are to be realized. These aims include breaking down barriers to employment experienced by members of the designated groups; the creation of a representative workforce and the transformation of the workplace into an area governed by principles of transformative substantive equality.[493]

Differences in inequality are important factors for the employer to consider in implementing affirmative action. In this chapter, I explore the distinct nature of disadvantage created by gender, as well as the inequality created when gender intersects with other factors such as race, socio-economic status or minority status etc, within the designated groups. I consider how this multi-dimensional difference in disadvantage might affect the implementation of affirmative action. I point to the challenges that are faced by women in the workplace and examine how a transformative understanding of substantive equality may assist in integrating and empowering women in the workplace. Finally I will begin to unpack the context of two male dominated professions, the legal profession and the mining profession in order

[493]See also McGregor op cit note 283 at 435. See also Van der Valt and Kiutri op cit note 488 at 681.Papacostantis and Mushariwa op cit note 18 at 1.

to identify the themes in literature with regards to gender disadvantage within the two professions which will further be investigated in empirical research in chapter five.

4.2 The Complexity of Gender Inequality

Gender inequality refers to the inequality of women vis-a-vis men and is influenced by various factors within society and in the workplace. Gender inequality is different to the inequality experienced due to race or disability, and each woman experiences inequality differently to other women within the gender group. The multi-layered and complex nature of this inequality results from the intersection of gender with other factors such as race, socio-economic status, minority status etc. It will become clear in this chapter that women as a group are not equal in accessing and pursuing opportunities made available to them by affirmative action. Due to the multi-dimensional nature of disadvantage experienced by women, it cannot be said that there is equality of opportunity within and across this specific designated gender group. There is a need for due consideration by designated employers of this multifaceted inequality and how it affects women with respect to entry, integration and progression within all levels of the workplace.

4.2.1 Deeply Entrenched Layers of Patriarchy

Gender inequality is, in large part, a result of patriarchy. Walby notes that patriarchy is "a system of social structures and practices in which men dominate, oppress and exploit women."[494] Patriarchy is thus a social system that enables the dominance of men and the subordination of women, in the private and public spheres.[495] Women are not able to exist as separate and autonomous individuals but are defined through

[494] Sylvia Walby *Theorising Patriarchy* 1ed (1991) 20. See also Anton Roberts 'South Africa: A patchwork quilt of patriarchy' 2010 *Skills@Work,Theory and Practice Journal* 59 at 63.
[495] Ibid.

their reproductive roles of motherhood and maintaining the family.[496] Within this context patriarchy determines the social roles and behaviours expected of women.[497] In particular, it reproduces the traditional view that men's sphere is paid work and women's sphere is looking after the family and the home.[498] Men are thus placed in a social and economic position of authority over women.[499]

The division of labour created by patriarchy perpetuates what is commonly referred to as the public-private dichotomy.[500] This dichotomy is held to contribute to, maintain and reproduce gender inequality in the workplace.[501] It is argued that the structures of the division of labour are maintained with the activities of the domestic sphere being performed predominately by women.[502] Patriarchal societies thus promote and reinforce an ideology of motherhood which places the sole responsibility to nurture and rear children on women.[503] This ideology affects women's ability to be fully integrated or accommodated within the public world of work which is based on a model of the male worker.[504] The activities of the public sphere of work thus tend to be restrictive to women and accommodating to men.[505] It means that existing divisions between labour and care, and between paid and unpaid work, are based on, and reinforce, a hierarchy between men and women that places women in a perpetual subordinate position.[506]

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[496] Ibid.
[497] Ibid.
[498] Morrell, Robert. 'Youth, fathers and masculinity in South Africa today.'2005 30(8) *Agenda* 84 at 85.
[499] Ibid.
[500]Bonthuys and Albertyn op cit note 95 at 202; 247-248. See also Amanda Gouws (ed) *(Un)thinking Citizenship: Feminist Debates in Contemporary South Africa* 2ed (2017) 117.
[501] Ibid.
[502] Ibid.
[503] Bonthuys and Albertyn op cit note 95 at 20 "Patriarchal ideas blur the distinction between *sex and gender* and assume that all socio-economic and political distinctions between men and women are rooted in biology or anatomy" Andrew Heywood *Political Ideologies*: An *Introduction* 3ed (2003) 248.
[504] Bonthuys and Albertyn op cit note 95 at 247.
[505] Ibid.
[506] Bonthuys and Albertyn op cit note 95 at 253.

These gender roles are based on beliefs and attitudes about the real and perceived differences between men and women and the idea that, due to these differences, men and women have different social roles and functions.[507] The nature of patriarchy is influenced by the society within which it operates, therefore South Africa's divided past, as well as its current state, influence women's different experiences of patriarchy.[508] Patriarchy is common to all social and racial classes, Justice Sachs described patriarchy as "one of the few profoundly non-racial institutions in South Africa."[509] Patriarchy is further compounded by culture[510] and religion[511] as both have set norms and attitudes regarding the role of women within society, the home and in the workplace.[512] Most cultures and religions affirm the division of labour that has made the domestic sphere the responsibility of women and the public sphere that of men.[513]

Patriarchy also imposes societal roles, expectations and stereotypes on men regarding masculinity. Masculinity is held to be a fluid and ever-changing social construct and "is a form of identity that influences and shapes attitudes and behaviours, but also it is an ideology that represents the cultural ideals that indicate the expected roles and values that men must adhere to."[514] For example, the idea that a man's role as head of household must be respected and affirmed. This ideal is

[507] Bonthuys and Albertyn op cit note 95 at 202.
[508] Justice Sachs described patriarchy as one of the few "profoundly non-racial institutions in South Africa." Albie Sachs 1993 'Preparing Ourselves for power' 1993 9(2) *Southern African Report* 13.
[509] Bonthuys and Albertyn op cit note 95 at 20.
[510] Albertyn op cit note 129 at 169.
[511] Ibid.
[512] The impact of culture cannot be underestimated. Culture is seen to "determine the way in which people live , how they define themselves within a group or community" For women particularly "it encompasses their private and public lives" Albertyn op cit 129 at .170 The impact of culture is clear in that it "shapes women's identity and the way they experience the world and how they view their roles and responsibility" which is inferior and dependent on men. Albertyn op cit note 129 at171.
[513] Bonthuys and Albertyn op cit note 95 at 167.
[514] Morrell op cit note 498 at 85.

applied "at the expense of women's autonomy and their attempts to become decision-makers in the family."[515] This masculine ideal of authority is also prevalent in the working world.[516] Patriarchy therefore reinforces beliefs about masculinity which are particularly evident in male dominated professions.[517] Women therefore, face specific challenges in these male dominated professions.[518]

Cross and Bagilhole[519] note that "occupational segregation by gender remains the most pervasive aspect of the labour market." For example, policemen are men, nurses and teachers are women. Men's reaction to women participating in male dominated professions is either to maintain "a traditional masculinity by distancing themselves from female colleagues"[520] or accommodating the inclusion of women in the workplace without changing traditional roles.[521] For example, in the police force studies have shown that male police officers find it difficult to accept the authority of female officers.[522] There is also evidence of the prevalence of beliefs that female officers are incompetent and there is a stereotyping of women which results in an "intimidating working environment"[523], (the presumption of incompetence against women in male dominated professions will be discussed in more detail later in chapter five).

[515] Ibid.
[516] Bonthuys and Albertyn op cit note 95 at 250.
[517] Bonthuys and Albertyn op cit note 95 at 89; 203.
[518] Bonthuys and Albertyn op cit note 95 at 203. Martin and Barnard op cit note 213 at 6.
[519] Simon Cross and Barbara Bagilhole 'Girls' Jobs for the Boys? Men, Masculinity and Non-Traditional Occupations' 2002(9) *Gender, Work & Organization* at 204.
[520] Ibid.
[521] Ibid.
[522] CJ Morrison 'Gender discrimination versus equality in the police.' *Acta Criminologica: Southern African Journal of Criminology* 18.3 (2005): 20.
[523] Morrison op cit note 522 at 22. See also M Montesh 'Transformation in the South African Police Service: the implementation of affirmative action and employment equity in SAPS' 2010 *SACJ* 55 at 73-75.See also Papacostantis and Mushariwa op cit note 18 at 17.

However, patriarchy alone cannot explain gender inequality. Indeed early liberal feminists like Wolf[524], Brittain[525], Millet[526], Mitchell[527], Hartmann[528] and Eisenstein[529] are criticised for their failure to recognize the intersectional nature of gender inequality and for ignoring the ways in which "women are subordinated in different social institutions, different societies and at different times."[530] In particular, these feminists failed to consider the "effects of class, race and colonialism which privileged some women"[531] over others and even over some men.[532]

Bonthuys uses the example of white middle class women in South Africa, who have generally not been oppressed by African working class men, as they (white women) participated in the economic exploitation of black men and women.[533] It is noted by Bonthuys that the "privilege and power exercised by white woman is connected to their family and class connections to powerful white men to whom they are subordinate within the private sphere."[534] It is clear that the historical effect of patriarchy on white women is different in nature to the influence of patriarchy on black women.[535] This determines the ability of white women, compared to black women, to take advantage of opportunities made available by affirmative action.[536]

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[524] Naomi Wolf, Naomi *The Beauty Myth* (1990).
[525] Vera Brittain *A Feminist Life* (1996).
[526] Kate Millett *Sexual Politics*.(1970).
[527] Juliet Mitchell *Psychoanalysis and Feminism* (1975).
[528] Heidi Hartmann, Heidi 'The unhappy marriage of Marxism and feminism: Towards a more progressive union.' 1979 3(2) *Capital & Class* 1.
[529] Zillah R Eisenstein *Capitalist patriarchy and the case for socialist feminism* (1979). See also Gender Bonthuys and Albertyn op cit 95 at 20.
[530] Bonthuys and Albertyn op cit 95 at 20.
[531] Ibid.
[532] Ibid.
[533] Ibid.
[534] Ibid.
[535] *Barnard* CC para 153 "Privilege often manifests in an individual in a multiplicity of different, intersecting and mutually constructive or destructive ways. One must account for interactions between the different aspects of identity and privilege when reviewing whether an affirmative measure was acceptably implemented. Because Ms Barnard's traits sit at the intersection of privileged and under-privileged identities, she might suffer harm in unique ways compared to members of other groups, designated or not. A woman in her position has probably not suffered the unfair discrimination that black women did, but also not enjoyed the privilege of white men. Her

4.2.2 Multi-Layered Nature of Gender Disadvantage

There is a clear commonality amongst all women, irrespective of race or class, in their experience of some form of male dominance which results in one way or another in their subordination. However, within South Africa disadvantage is differently experienced by black women and white women, but also between black women themselves, including African, Coloured, Indian and Chinese women. For example, the cultural undertones of patriarchy that impact on an African woman would be different to the religious undertones of patriarchy that are experienced by Muslim women. Black women struggle to assert themselves or challenge the authority of black men particularly due to cultural beliefs.[537] While Muslim women may struggle to interact with male colleagues due to underlying religious beliefs surrounding the interaction between men and women.[538]

Brown and Misra argue that "intersectionality" maintains "that gender and race are not independent analytic categories that can simply be added together. Instead . . . [r]ace is 'gendered' and gender is 'racialized,' so that race and gender fuse to create unique experiences and opportunities for all groups, not just women of colour."[539]

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position and history of privilege are undeniably different from that of a black man and may require more promotion in some contexts and less in others." Also cited in Papaconstatis and Mushariwa op cit note 18 at 15-16. See generally Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

[536] Hofmeyr and Mzobe op cit note 10 at 1276, 1277.

[537] Albertyn op cit note 129.

[538] The Quran says *'Awrah* (all parts of a woman's body except for the face and hands) must be covered as prescribed by Islamic law [Quran, Surah An-Nur 24:31] It also states that men and women who are strangers to one another have to lower their gaze" [Quran, Surah An-Nur 24: 31] If a man and woman talk to one another they must be respectful of one another. An atmosphere of dignity with *Taqwa* (piety) of Allaah must be maintained during the whole period of interaction [Quran, Surah An-Nur 24:31]. The Quran says what means, *"Help one another in virtue, righteousness, and piety; but do not help one another in sin and transgression."* [Quran, Surah Al-Ma'ida 5:2] Any Muslim woman who chooses to work must know Islamic laws regarding men-women interaction and do her best to let others be aware of them and maintain them. http://islamweb.net/en/article/148886/ [Accessed on 30 April 2018].

[539] Irene Browne and Joya Misra 'The Intersection of Gender and Race in the Labour Market' 2003 *Annual Review of Sociology* at 487-488. See also Collins who refers to the "interlocking system of race, class and gender" as constituting a "matrix of domination." "Within this matrix, an individual can simultaneously experience disadvantage and privilege through the combined statuses of gender, race, and class". Patricia Hill

For black women in South Africa, a particular inequality stems from race, due to the legacy of Apartheid, and from gender, which is affected by patriarchal traditions and religious or cultural norms and expectations which are different to those experienced by white women. It is therefore clear that, the inequality experienced by black women, has both historical undertones as well as present realities.[540]

Crenshaw[541] has argued against "the tendency to treat race and gender as mutually exclusive categories of experience and analysis"[542] as this clearly limits the enquiry into a "single axis framework".[543] Crenshaw emphasizes this single axis enquiry tends to focus on the most privileged members of the group and marginalizes those who are multiply burdened.[544] Focusing specifically on the experience of black women in the USA, Crenshaw points out that black women's experience of discrimination is forced to either be defined by white women's, or black men's experiences.[545] However, black women experience discrimination in different ways that are both similar and different from those of white women and black men.[546] Sometimes they experience discrimination that is "not the sum of race and sex discrimination but as black women".[547] Pieterse has argued that "individual experiences of power, disadvantage, oppression or harm are varied, contingent and particular both within and across social groups."[548] He further points out that "Black

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Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (Boston: Unwin Hyman, 1990) at 221.
[540] Bonthuys and Albertyn op cit note 95 at 41.
[541] Crenshaw op cit note 66 at 139.
[542] Ibid.
[543] Ibid.
[544] Ibid
[545] Crenshaw op cit note 66 at 149.
[546] Ibid.
[547] Ibid.
[548] Pieterse op cit note 66 at 397, 405.

women experience racial discrimination differently from black men while feeling the impact of gender discrimination differently from white women and so forth."[549]

It is well documented in South Africa that "the most disadvantaged and marginalized of our society are black women"[550] For example, according to Statistics South Africa's gender report of 2017, with regards to education, 25% of Black women (aged 25 and above) have had no access to formal education compared to less than one percent of white women who have had no form of education. With regards to employment, 56.1% of white women are employed within South Africa; this is compared to only 30.8% of black women.[551] It is evident that the combination of inequality on the basis of race and gender has created a greater disadvantage for black women. The disadvantage of black women is "evidenced by limited education opportunities"[552] which translate to a lack of equal opportunity to take up employment in the workplace.[553] Due to the difference in disadvantage, white women are held to have benefited more from affirmative action than black women.[554] For example, the Gender report entitled *Women and gender relations in the South African labour market* notes that white women earn up to three times more per hour than their black counterparts.[555]

The Employment Equity Report of 2016 to 2017 notes that white women make up 10.9% of top management positions while African females make up only 2.8% of top

[549] Pieterse op cit note 66 at 406. See also Crenshaw op cit note 66 at 149-150.
[550] Justice Yvonne Mokgoro op cit 259 at 565.
[551] http://www.statssa.gov.za/?cat=15 See also http://www.news24.com/SouthAfrica/News/More-women-struggling-Stats-SA-20130704 [Accessed 30th October 2017].
[552] Hofmeyr and C Mzobe op cit note 10 at 1276, 1277.
[553] Ibid..
[554] Ibid.
[555] Liesl Orr and Tanya van Meelis. 'Women and gender relations in the South African labour market.' 2014 *Bargaining Indicators* 31 at 49.

management jobs.[556] There is therefore, an argument put forward to remove white women as beneficiaries of affirmative action.[557] This is held to be an argument that is "flawed"[558] as the "all-important goal of advancing women in general"[559] should not be overlooked.[560] The success of white women can assist in the inclusion of black women.[561] This is because the struggle between the private and public roles and the obligations and responsibilities faced by women, which affect their ability to enter the workplace as well as affects their advancement in the workplace, are experienced by both races of women and affects their representivity in the workplace.[562] If white women are in positions of leadership, they are better able to create an environment that is sensitive to the dual role of women.[563]

However, from an employer perspective, it is still important that there is an understanding and recognition of differences in the experience of disadvantage between women as a group. Representivity of women within the workforce should not be over-inclusive of white women to the disadvantage of black women, as this would not result in the required gender representivity across races. It is vital that the representivity of both black and white women is catered for adequately.[564]

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[556] Commission for Employment Equity Annual Report 2016-2017 http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/downloads/documents/annual-reports/employment-equity/2016-2017/17th%20CEE%20Annual%20Report.pdf [Accessed 22nd of November]

[557] Hofmeyr and Mzobe op cit note 10 at 1277.

[558] Ibid.

[559] Ibid.

[560] Ibid.

[561] Lize Booysen Queens on colour: should white women still benefit from EE legislation? http://www.leader.co.za/article.aspx?s=1&f=1&a=519 as cited in Hofmeyr and Mzobe op cit note 10 at 1277. See also Babita Mathur-Helm op cit 64.

[562] Hofmeyr and Mzobe op cit note 10 at 1277.

[563] Ibid.

[564] See also Papacostantis and Mushariwa op cit note 18.

It is also important to consider the dynamics of the group of black women as it comprises of black African, Coloured, Indian and women of Chinese descent. Each has different experiences of disadvantage and this impacts on their entry and progression within the workforce. Coloured, Indian and women of Chinese descent can be seen as a minority within the black gender group. Minority status in itself creates disadvantage within a larger designated group. This is evident in the case of *Naidoo v Minister of Safety and Security* [2013] 5 BLLR 490 (LC) where the Labour court ruled that the Police Employment Equity Plan which set up a zero target for Indian women unfairly discriminated against Captain Naidoo on the basis of race, gender and minority resulting in her not being chosen for promotion although she was the best candidate.[565]

4.2.3 The Consequences of Patriarchy and Apartheid in the Workplace

As noted in chapter one, the gendered division of labour means that most women are expected to fulfil their responsibilities at work, as well as being responsible for looking after the psychological and physical well-being of children, spouses, and members of the extended family.[566] The reproductive role of women affects their employment choices and the timing of their role as mothers invariably affects their progression within a particular occupation or profession.[567] The public and private roles of women thus create a double burden of productive and reproductive work[568] which influences their ability to enter and compete in the workplace.[569] This is particularly evident in

[565] This was as a result of the SAPS applying a zero target for representativity of Indian females within the SAPS due to a calculation that was based on an unequal equation of 70% male and 30% female. It was noted by the court that Naidoo suffered disadvantage due to her membership of a minority group within the designated groups as she was not on an equal footing with other members of the designated groups. See also Papacostantis and Mushariwa op cit note 18.
[566] Bonthuys and Albertyn op cit note 95 at 248.
[567] Ibid.
[568] Hofmeyr and Mzobe op cit note 10 at 1278.
[569] Ibid.

instances where the expected standard of a good worker is based on a male worker standard.[570]

Patriarchy creates visible, subtle and invisible consequences to the inclusion and progression of women in the workplace.[571] One visible consequence is the high rate of unemployment experienced by women.[572] It is noted that the high rate of unemployment, especially amongst, black women partly reflects women's care responsibility.[573] Numerous studies have shown "that women devote on average more than twice as much time to household work as men."[574] Another consequence is the type of employment women are able to find. Studies have shown that women's employment patterns seem to be concentrated in casual or contract work.[575] Due to child care and household work, some opt for part-time as opposed to full-time work.[576] It is also noted that women's employment too often remains within the traditional female occupations[577] or within the domestic and farming sectors.[578] Women struggle to integrate and progress within what are commonly referred to as male dominated professions.[579] In terms of the levels of unemployment and domestic

[570] Bonthuys and Albertyn op cit note 95 at 250.
[571] See Hofmeyr and Mzobe op cit note 10.
[572] Of the 4.9 million South African's who are unemployed women account for 54 percent of that number. www.statssa.gov.za (2015) [Accessed 3 November 2017] .
[573] https://www.oecd.org/southafrica/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf [Accessed 3 November 2017] This is due to the fact that "women devote, on average, more than twice as much time to household work as men and make 97% of caregivers who qualify for the Child Support Grant."
[574] https://www.oecd.org/southafrica/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf [Accessed 3November 2017] Also women make up 97% of caregivers who qualify for the child care grant. 3 www.statssa.gov.za [Accessed November 2017]
[575] Bonthuys and Albertyn op cit note 95 at 256.
[576] Bonthuys and Albertyn op cit note 95 at 28.
[577] Bonthuys and Albertyn op cit note 95 at 268. See also https://www.oecd.org/southafrica/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf
[578] https://www.oecd.org/southafrica/Closing%20the%20Gender%20Gap%20-%20South%20Africa%20EN.pdf "These positions are low paying and have high rates of turnover." [Accessed 3 November 2017]
[579] Bonthuys and Albertyn op cit note 95 at 252.

and farming occupations, black women are in the majority at this level of disadvantage.[580]

Another visible consequence of patriarchy is evident in the salary gaps between men and women doing the exact same job.[581] It is important to note that there is no positive legislation enforced against companies to remunerate women the same as they do men.[582] In the majority of instances employees are not aware of the difference in remuneration and there is no statutory regulatory body to monitor whether or not there are such salary gaps.[583] Another visible consequence of patriarchy is seen in the few women in positions of authority, for example in the private senior management sector, where, for example, women make up only 13% of board membership.[584] African women account for only 0.8% of top management.[585] This inequality is linked to the invisible hurdles created by the norms and attitudes about women and their competence in the workplace.[586]

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[580] "Black African women are more vulnerable in the labour market, with larger employment shares in low-skilled occupations. The proportion of black African women employed in low-skilled occupations was around 43% in both Q3: 2015 and Q3: 2016. White women were more likely to be employed in skilled occupations (57,9%); while only 18,6% of black African women were employed in these occupations in Q3:2016." http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2016.pdf [3 November 2017].

[581] A DTI report notes that in some ranges of employment there is nearly a 60% negative difference for women at the lowest earning level 25 per cent differential at the highest level, and in no earnings category do women earn the same or more than men. DTI report See also a World Economic Report in 2013 which found a 33% difference between men and women employed in South Africa for the same task compared to a worldwide statistics of men earning around 13% more than women. https://www.gov.za/sites/www.gov.za/files/Status_of_women_in_SA_economy.pdf [Accessed 3 November 2017]

[582] Commission for Gender Equity and Employment report: labour inspections op cit note 254. Equal work for Equal pay has been considered as an amendment to the EEA.

[583] s 6 (4) of the EEA (the 'equal pay for work of equal value' provision) is that of *Pioneer Foods (Pty) Ltd Workers Against Regression* (C 687/15) See Nicci Whitear-Nel 'When women earn less than male colleagues – How to tackle it'2016 http://www.sowetanlive.co.za/news/2016/07/14/when-women-earn-less-than-male colleagues---how-to-tackle-it. [Accessed 3 November 2017]

[584] Viviers, Suzette, Nadia Mans-Kemp, and Rebecca Fawcett. 'Mechanisms to promote board gender diversity in South Africa.' *Acta Commercii* 17.1 (2017): 1-10.

[585] Ibid. See also Davidson, Marilyn J and Ronald J. Burke, eds. *Women in management worldwide*. Vol. 2. Aldershot: Gower, 2011.

[586] See also V Naidoo and M Kongolo 'Has affirmative action reached South African women?' 2004 *Journal of International Women's Studies* 123 at 131.

Patriarchy clearly underpins the questioning of women's capabilities,[587] as well as the institutional culture that suits a male model worker and disregards the barrier this creates for women.[588] A culture of masculinity tends to shape the attitudes and behaviours towards women by men in the workplace. The reaction of men to women entering the workforce has been noted by Morrell as defensive, accommodating or responsive.[589] The defensive and responsive reaction of men is particularly evident in male dominated professions.[590]

4.2.4 Institutional Culture

The pervasive nature of patriarchy is evident in the workplace where social relations between men, regardless of race or class, create an "interdependence and solidarity among men that enable them to dominate women".[591] These norms and attitudes in the workplace are seen to perpetuate the subordination of women.[592] For example, studies show that women placed in managerial positions are confronted with doubts about their capabilities and a fear that they may reduce intellectual standards by male colleagues.[593] This is perpetuated by the attitude that sees women only as caregivers not leaders.[594]

The world of work is therefore dominated by men, the norms and standards of the world of work therefore take the view of a male centered dynamic that does not take into consideration the time needed by women to fulfil their family responsibilities.[595] Work place structures and policies which are drafted by men, may profess to be

[587] Martin and Barnard op cit note 213. See Bonthuys and Albertyn op cit note 95 at 250.
[588] See Bonthuys and Albertyn op cit note 95 at 250.
[589] Morrell, Robert. *The times of change. Men and masculinity in South Africa* (2001).26-27.
[590] Ibid.
[591] D Coetzee 'South African education and the ideology of patriarchy' 2001 21(4) *South African Journal of Education* 300 at 301.
[592] Coetzee op cit note 591 at 301.See also Albertyn and Bonthuys op cit note 95 at 50.
[593] Ibid.
[594] Martin and Barnard op cit note 213. See also Coetzee op cit note 591 at 301.
[595] Ibid.

gender neutral but actually create inequality for women.[596] For example, seemingly gender neutral but rigid time structures in the workplace set worker expectations within the standard of a male norm negating the impact that family responsibilities have on women's time.[597] Institutional culture has been defined as how employees define their environment and how they construct that environment in terms of a "sense of belonging" or, instead a perpetuation of "disenchantment, discrimination, and alienation".[598] Institutional culture may also be governed by suppositions made about what gender roles are in the workplace as well as dictating what males and females should and can do. [599] In the case of *Woolworths* v *Whitehead*[600] the judgement of Willis AJA also speaks to the conservative attitudes and norms,[601] that once a woman gives birth her place is no longer in the workplace as she bonds with her newborn child.[602] The potential and capacity of a pregnant woman to work is thus seen as not up to standard and her reproductive role supersedes her role as an employee.[603]

4.2.5 The Consequence of Pregnancy in the Workplace

Pregnancy is a biological condition unique to women,[604] and it impacts on a woman's ability to be employed as well as progress within employment.[605] Besides women's

[596] Bonthuys and Albertyn op cit note 95 at 20.
[597] See also J Smit 'A comparative perspective of gender discrimination in the workplace (including discrimination due to pregnancy and family responsibilities.' 1998 *TSAR* 494 at 510-511.Bonthuys and Albertyn op cit note 95 at 20.
[598] J Higgins 'Institutional culture as keyword. Review of Higher Education in South Africa' 2007 Council for Higher Education report.
http://www.che.ac.za/sites/default/files/publications/Review_HE_SA_2007_Complete_0.pdf [Accessed 3 November 2017] as quoted in Niemann, R. "Transforming an institutional culture: An appreciative inquiry." *South African Journal of Higher Education* 24.6 (2010): 1003,
[599] Martin and Barnard op cit note 213.
[600] (2000) 21 ILJ 571 (LAC).
[601] Para 143. Willis JA pointed out "l also think we should be astute not to cultivate the idea that motherhood is entirely secondary to the greater glories of job satisfaction." See also *Manyetsa v New Kleinfontein Gold Mine* (Pty) Ltd [2018] 1 BLLR 52 (LC).
[602] *Woolworths* supra 601 at para 143
[603] *Woolworths* supra 601 at para 136
[604] Bonthuys and Albertyn op cit note 95 at 87.

roles as mothers and care-givers mentioned above, pregnancy therefore, adds to the complexity of the work/life balance mentioned above and creates a different dimension to the disadvantage in the workplace that is applicable to women both during and after pregnancy.[606] Within South Africa, legislative protection is provided to women with regards to non-discrimination provisions on the basis of pregnancy. Besides the legislative protection given, the nature and framework within which this protection is given is not always clear.[607] For example, there is no duty on the employer to pay an employee while on maternity leave. This situation can result in circumstances where women are forced to go back to work much earlier than the time allowed in terms of the law, in order not to lose their income. The reality on the ground is that it is not enough to have legal protection for pregnant women, there needs to be an enhancement of laws in terms of their enforcement against employers to avoid the situation where the law is able to respond to the disadvantage that pregnancy creates.[608] Judge O Regan has noted that:

> If women are to experience the full richness of life as citizens of our country we shall have to think more deeply about the issues of motherhood and parenting than rely on narrowly focused rules of law"[609]

It is clear that the laws need to be more specific in creating a duty, on the employer, to accommodate pregnancy and motherhood in the workplace. If the application of affirmative action policies does not take account of the differing experiences of patriarchy, and how the public and private dichotomy perpetuates this, as well as the impact of race within the gender group, the domination of men within the world of

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[605] See also Joanne Conaghan 'Pregnancy and the workplace: a question of strategy' 1993 20(1) *Journal of Law and Society* 71.
[606] Bonthuys and Albertyn op cit note 95 at 272.
[607] Section 25 and 26 Basic Conditions of Employment Act 75 of 1997.
[608] Bonthuys and Albertyn op cit note 95 at 293.
[609] *Woolworths* supra note 601 para 139. See also *Manyetsa v New Kleinfontein Gold Mine* (Pty) Ltd supra note 601.

work will remain and women's subordination will continue.[610] It's clear that as long as duties of care are not recognized as a joint responsibility of men and women, or of society as a whole, but as the individual responsibility of women, women will continue to struggle with the public and private dichotomy.[611] The lack of shared care responsibilities will continue to limit women's ability to enter and progress within the world of work. As long as employers do not take account of this responsibility placed on women and the influence it has on their performance in the workplace,[612] the transformation required in the workplace will not become a reality.

4.2.6 Socio-economic Status and Race

There is also a difference in the experience of disadvantage within the designated group in relation to the socio-economic status of women, largely defined by race. Firstly, the difference in socio economic status is racialised and exists between white women and black women. However, there are also differences in socio-economic status between black women. Each segment of this group has different socio-economic positions, as well as the differing impacts of religion, culture and language. For those enjoying higher socio-economic positions, there is a clear advantage in access to education and basic services putting such women in a better position to compete in the workplace.[613] For example, a study has shown that there is clear and strong racial underpinning to inequality in South Arica.[614] In looking at the difference

[610] Albertyn and Bothuys op cit note 95 at 272.
[611] Albertyn and Bothuys op cit note 95 at 202.
[612] M Verloo *Multiple Meanings of Gender Equality* (2007).
[613] Lomofsky, L. and Lazarus, S 'South Africa: First steps in the development of an inclusive education system.' 2001 *31*(3) *Cambridge journal of education* 303.White women are viewed to have benefited more from affirmative action than Black women. African women seen to have benefited more from affirmative action compared to Indian, Coloured and Asian women. See Mathur-Helm, Babita op cit note 64 at 63.See also Kahn, S. B., and V. Louw. 'Women's representativeness in the South African public service.' *Journal of public administration* 46.1 (2011): 669 at 677
[614] http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1142:rising-inequality-in-south-africa-drivers-trends-and-policy-responses-&catid=87:african-finance-a-economy&Itemid=294 [Accessed 3 November 2017]. See also Kehler, J., 2013. Women and poverty: the South African experience. *Journal of International Women's Studies*, *3*(1), pp.41-53

between the population and income, white-headed households had an income roughly 4, 5 times larger than black African-headed households and 3 times larger than the average national income. In comparison to other races, in terms of income decile composition Africans are spread relatively evenly across the lower deciles, while the other racial groups are concentrated around the upper deciles. Almost 60% of Asians/Indians and 25% of Coloured people are in the top two deciles whereas the corresponding share for the white population stands at over 80%." It is clear that Indian, Coloured, and women of Chinese descent do have a socio-economic advantage over their Black African counterparts.[615] This socio-economic disadvantage impacts on equality of opportunity for members of the gender group to compete on an equal footing in the workplace.[616]

The intersectional nature of this disadvantage creates complex[617] and multifaceted[618] forms of inequality which are difficult to understand and frame.[619] The case of *National Coalition for Gay and Lesbian Equality and others v Minister of Justice*[620] proposes a nuanced approach to dealing with such disadvantage is required, focusing on context and impact rather than focusing on categories in the abstract.[621] This approach seems to be strengthened by the words within the equality provision of the Constitution; "on one or more grounds" in terms of section 9(3) meaning that precise, intersectional difference should be considered. Within the context of

[615] Armstrong, Paula, Bongisa Lekezwa, and Krige Siebrits. 'Poverty in South Africa: A profile based on recent household surveys.' *Matieland: Stellenbosch Economic Working Paper* 4.08 (2008).
[616] See also Malamud, Deborah C. 'Affirmative Action, Diversity, and the Black Middle Class.' 1997 (68) *U. Colo. L. Rev.* 939. Fallon Jr, Richard H.'"Affirmative action based on economic disadvantage.' 1995 (43) *UCLA L. Rev.* 1913. http://www.statssa.gov.za/publications/P0310/P03102014.pdf. [Accessed 22nd of November 2018]
[617] H Botha 'Equality, plurality and structural power' (2009) *SAJHR* 1 10.
[618] See also J Conaghan 'Intersectionality and UK equality initiatives' (2007) Vol 14 *SAJHR* 317-334. See also J Conaghan 'Intersectionality and the Feminist project in law' in D Cooper (eds) *Law Power and the politics of subjectivity: Intersectionality and beyond*. 2008 at 22.
[619] C Albertyn and B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) Vol 14 *SAJHR* 248; 253. See also Liebenberg and Goldblatt op cit note 2 at 347.
[620] 1999 (1) SA 6 (CC) para 113.
[621] Ibid

employment it would require employers to take note of the "'true experience of disadvantage"[622] experienced by different black women, in particular, so as to not perpetuate the inequality already experienced.

To avoid the creation of new inequalities within affirmative action the focus would need to be on the consequences that the difference in inequality of women produces, as well as the degrees of disadvantage between black and white women, and among women who make up the black designated group. It is important to be aware of the fact that "the legal recognition of gender distinctions is more likely to reduce or to reinforce racial disparities in political power, social status and economic security."[623] It has been noted for example that when the law attempts to speak for all people it tends to silence those without power.[624] This is evident in the past when mainstream feminist theory was in danger of silencing the voices of black women as it did not take account of the intersection of race and gender.[625]

Having an understanding of the multi-layered nature of disadvantage experienced by women, it is important to now focus on how the law has sought to respond to women's disadvantages specific to the area of employment. It is important to reflect on the effect of the law when dealing with the multi-layered nature of gender disadvantage. As noted before the legislative protection given may not always mirror the realities on the ground experienced by women on a day to day basis within the working world.

[622] Pieterse op cit note 66 at 397; 406-407; 420-422.
[623] Deborah Rhode *Justice and gender* (1991) 83.
[624] Ibid.
[625] Bonthuys and Albertyn op cit 95 at 20.

4.3 Legal Responses to Women's Disadvantage in the Workplace

Women have an enshrined right to equality in section 9 of the Constitution. Within the employment sphere various pieces of legislation have been enacted to protect the rights of women and to ensure that their status as women does not result in discrimination against them. These legislative provisions are contained within, the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998 and the Basic Conditions of Employment Act 75 of 1997. They address areas such as maternity rights, pregnancy, sexual harassment and the entry and participation of women within the workforce. This thesis is interested in the latter but it is useful to set out other protections briefly as pregnancy and sexual harassment issues are important for the transformation of the workplace.

4.3.1 Maternity Leave and Implications in the Workplace

Women have extensive leave protection with regards to maternity leave, in terms of the BCEA; a female employee is entitled to at least four months maternity leave.[626] An employee may not work for six weeks after the birth of her child.[627] In circumstances where an employee miscarries in the third trimester of pregnancy or who has a still born child, she is entitled to six weeks' leave after the miscarriage or still birth.[628] However, as noted above the BCEA does not impose an obligation on an employer to remunerate their employee during maternity leave.[629] The only right to income during maternity leave is provided by the Unemployment Insurance Act 63 of 2001 which provides a maternity benefit of 38% to 60% of average earnings in the last six months, depending on the insured employee's level of income. Maternity

[626] Section 25 and 26 BCEA (hereafter BCEA)
[627] Section 25 and 26 BCEA
[628] See *Woolworths* supra 601.
[629] Van Niekerk op cit note 7 at 113. Right to income provided for by Unemployment Insurance Act 63 of 2001 during maternity leave.

benefits are paid for a total of 17 weeks or (six weeks in the event of a miscarriage or a stillborn child).[630]

This means that many women cannot afford to take maternity leave especially if the employer is not going to supplement their income. The benefits from UIF are not enough with the added expense of a new born child. This reinforces the inequalities between women as full pay is usually provided for in higher income jobs.[631] The socio-economic impact of pregnancy and the influence it has on the choice to take maternity leave on women is evident in the empirical study detailed in chapter five. There is a clear limitation on the influence of the law in assisting women in exercising their rights to maternity leave in the workplace without disadvantage.

Another example of the limited legal protections concerning pregnancy in the workplace is evident in the *Woolworths v Whitehead*[632] case. Ms Whitehead got an offer for a permanent position with Woolworths. A few days after the permanent offer was withdrawn and replaced by a fixed-term contract for five months. The reason for the change was Whitehead's pregnancy, which came to the employer's attention in the interim; Whitehead claimed she was unfairly discriminated against on the basis of her pregnancy.

In the Labour Court the court ruled that the discrimination was unfair, however, the Labour Appeal Court ruled instead that the discrimination was fair due to the employer's need for continuity of service. The court noted that as an employer Woolworths had proved that, due to the problems it was experiencing as well as the nature of the job, it was necessary that an employee be available for duty for an

[630] Section 24 of Unemployment Insurance Act 63 of 2001.
[631] http://www.usb.ac.za/Shared%20Documents/SABPP_Womens_Report_2017_web.pdf [15 December 2017].
[632] *Woolworths* supra 601.

uninterrupted period of 12 and 18 months. Due to her pregnancy M s Whitehead was unable to fulfil this requirement and therefore the offer of permanent employment offer was withdrawn.

This case was ruled on a finding on the facts of the case and its specific circumstances.[633] The court did not engage with the issues around pregnancy or the legal framework within which discrimination on the basis of pregnancy would occur.[634] The court failed to properly investigate whether or not Ms Whitehead could continue her duties while on maternity leave.[635] There was no legal precedent set on the factors to be taken into consideration in the accommodation of pregnant women in the workplace.[636]

The decision has received widespread criticism. For example it has been argued that there was a clear "use of stereotypes of pregnant women to glorify motherhood at the expense of working women",[637] resulting in "women's need for pregnancy leave detracting from their status and desirability as employee."[638] This case points to an issue that needs to be addressed in the workplace, besides the legislative protection, pregnancy in practice is seen as expensive and results in inefficiency.[639] The *Woolworths* case clearly reinforced this institutional culture.

A more recent case of *Manyetsa v New Kleinfontein Gold Mine* (Pty) Ltd[640] highlights the long road still to be travelled with regard to pregnancy and maternity rights, particularly in male dominated professions like mining. The issue before the court

[633] Bonthuys and Albertyn op cit note 95 at 293.
[634] Ibid.
[635] *Woolworths* case.
[636] *Woolworths* supra 601.
[637] Bonthuys and Albertyn op cit note 95 at 28.
[638] Bonthuys and Albertyn op cit note 95 at 250. See also Smit, Nicola, and Marius Olivier. 'Discrimination Based on Pregnancy in Employment Law.' 2002 *JS Afr. L.* 783.
[639] Bonthuys and Albertyn op cit note 95 at 293.
[640] [2018] 1 BLLR 52 (LC).

was whether in terms of section 26(2) of the BCEA an employee should be given "suitable, alternative employment" in circumstances where due to the employee's pregnancy their normal work duties posed a danger to her health and safety and in turn the health and safety of her child. The court came to the decision that no such guarantee existed. *Manyetsa* was an underground mining electrician who fell pregnant and as a result could not work underground. Manyetsa's employer could not find suitable alternative employment for her during her pregnancy. She was later offered a job as a receptionist for R5000 per month, her normal salary as an electrician was R32 000 per month. When Manyetsa withdrew her application for the receptionist position, she was put on suspension without pay for the rest of her pregnancy and was later given four month paid maternity leave. She was expected by her employer to claim UIF during her maternity leave. The amount of UIF she received however was reduced due to her being on suspension. The financial loss to Manyetsa was staggering; she lost her residence and vehicle and had to rely on her family for financial support until she was on maternity leave.

The court ruled that there was no duty in law that existed to guarantee that Manyetsa's employer find her alternative suitable employment, her suspension was therefore not unlawful and she was therefore left to rely on the meagre UIF benefits that were available in terms of the law when she was on maternity leave.[641] The *Manyetsa* case highlights two important issues; firstly that the progressive or transformative development of our law with regard to pregnancy and maternity rights is virtually non-existent. This lack of progress impacts on the ability of women to find employment, to be retained within employment as well as their progression in their chosen profession. Secondly the *Manyetsa* case also gives us insight into the unique

[641] Ibid.

nature of the gender disadvantage experienced by women within a male dominated profession like mining.

The legal framework for the application of transformative substantive equality of results to the issue of pregnancy requires a clear understanding of the disadvantage created by pregnancy in the workplace. There should be recognition made of the nature and scope of the disadvantage that results from pregnancy and the impact it has on an employee's ability to progress in the workplace. Employers need to understand the nature of the disadvantage that pregnancy creates and balance this with efficiency.[642] There is a need for employers to focus on the social value of pregnancy and the role that men need to play in the accommodation of women within the workplace.[643] This breaks down the patriarchal attitudes regarding the roles of men and women and transforms the institutional culture of the workplace in the process.[644] By recognizing the difference in disadvantage created by pregnancy, employers would be better able to accommodate women both before and after their pregnancy in the workplace. The accommodation of pregnancy in the workplace would also assist employers in upholding the values of dignity and fairness for employees impacted by pregnancy.[645]

Besides the existing duty of employers to protect an employee's right to return to work after pregnancy there is also a need for employers to ensure that where possible, if an employee is able to perform any necessary duties while on maternity leave, this needs to be accommodated by the employer. This would allow employees

[642] Frances Anderson 'Skirting the issue: a critique on the judgment in *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Trust Intervening*) 2000 (3) SA 529 (LAC)' 2000 *De Rebus* 44. See also Bonthuys and Albertyn op cit note 95 at 293.
[643] See Bonthuys and Albertyn op cit note 95 at 293.
[644] Ibid.
[645] See Frances Anderson op cit note 642.

to fulfil their required duties without negatively impacting on their professional progression in the workplace due to a long absence caused by maternity leave.

4.3.2 Sexual Harassment

Protection for employees against sexual harassment is enshrined in the EEA.[646] The amended Code of Good Practice on the handling of sexual harassment cases in the workplace aims to eliminate sexual harassment in the workplace, and provide mechanisms and procedures to deal with sexual harassment and the creation of a workplace based on the values of integrity, dignity, privacy and equity.[647] Sexual harassment is defined by Prince Mofajane as ", unsolicited and unwanted sexual advances or suggestions by one person to another."[648] The courts have been clear as to what sexual harassment amounts to.[649] The main issue with regards to sexual harassment in the workplace is the lack of empowerment women feel to speak out against this form of abuse and have the perpetrator arrested. Sexual harassment

[646] Amended code of good practice on the Handling of Sexual Harassment Cases in the Workplace Notice 1357 of 2005. https://www.acts.co.za/employment-equity-/n1357_notice_1357_of_2005 [15 January 2018]
[647] Ibid.

[648] Prince Mafojane 'Sexual harassment in the workplace' 2014(4) *Without Prejudice* 39. Item 4 of the Code of Good Practice on Handling Sexual Harassment Cases defines sexual harassment as : "unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

> a. Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
>
> b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
>
> c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
>
> d. Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases."

[649] Ibid.

disempowers women and creates a hostile working environment; this is also evident in the empirical study detailed in chapter five.

Case law highlights that employers are not proactive in carrying out their duty of ensuring that, once they are aware of sexual harassment occurring in the workplace, they act immediately to engage with the parties involved to prevent further acts of harassment. This was clear in the case of *Liberty Group Limited v M*[650] where the court held that Liberty contravened section 60(1) of the EEA by failing to take reasonable steps to protect an employee who had reported her sexual harassment by her immediate manager.

Besides accommodation by the employer, women feel disempowered to speak out against acts of sexual harassment and "suffer in silence"[651] due to fear of "losing their job, stigmatization, fear of not being supported by workplace colleagues or supervisors, fear of facing "abusive retaliation"[652] from the perpetrator and fear of undergoing an investigation with an "unsympathetic employer"[653]

Sexual harassment results in "absenteeism increased turnover, poor job performance and low productivity."[654] This impacts on women's retention and progression in the workplace. It is therefore important for employers to have, in place, effective systems and procedures to empower women against sexual harassment and to act decisively when sexual harassment is reported.[655]

[650] (2017) 38 ILJ 1318 (LAC).
[651] Kotie Geldenhuys 'Violence, bullying and harassment in the workplace –more than a slap in the face' 2017 *Servamus* 10 at 15.
[652] Ibid.
[653] Ibid.
[654] Ibid.
[655] *Liberty v M* supra 651.

4.3.3 Increased Representivity of Women in the Workplace Due to Affirmative Action

Affirmative Action, through the EEA, has facilitated the entry of women into the workforce, as a result of which, the representivity of women has increased over the years.[656] For example, in 2007 women comprised 37.3% of skilled workers in the workplace and by 2011 this number had increased to 44.4% in 2015 this figure is now 52.1%. However, there is a low representivity of women within both the private and public sector specifically within top management positions.[657] For example, only 3.6% of South African Chief Executive Officers are women.[658] Also, of the 19.1% of women who make up top managers, white women make up two thirds of these women.[659] The lack of representivity of woman within top management positions has been linked to various obstacles. For example, the stereotyping of woman who are seen to be incompetent and lacking in the temperament needed to be in a leadership position.[660] If a woman is placed in a leadership position and fails her failure in management is unfortunately viewed as representative of all women.[661]

Regardless of race, women are recognized as beneficiaries of affirmative action[662]. The aim is to increase gender representivity at all levels of the workforce.[663] There is recognition of women's difficulty in entering the workplace as well as staying and

[656] Commission on Employment Equity Report (2015-2016) at 9.
[657] The report of the status of women in South Africa economy https://www.gov.za/sites/www.gov.za/files/Status_of_women_in_SA_economy.pdf [Accessed 22nd of November 2018].
[658] Ibid.
[659] *http://www.sapromo.com/fresh-proposals-to-strengthen-companies-compliance-with-the-employment-equity-act/873.* [Accessed on 15 December 2017].
[660] Levinson op cit 112 at 23.
[661] DM Mello and K Phago 'Affirming women in managerial positions in South African public service' 2007 *Politeia* 145; 148.
[662] Papacostantis and Mushariwa op cit note 18.
[663] Ibid.

progressing in the workplace.[664] The role of affirmative action needs to be seen not only as increasing the representivity of women in the workplace, but also as changing entrenched attitudes and workplace structures that limit gender equality.[665]

Dupper points out that a forward looking form of affirmative action displays an understanding of gender to address the double-burden imposed on women rather than a perpetuation of disadvantage.[666] A forward looking form of affirmative action requires more than just the removal of the obstacles faced by women,[667] but that stereotypes and attitudes are addressed.[668] Deep representivity would thus be achieved, as not only would the representivity of women be increased but, the institutional structures that prevent the retention and advancement of women would also be addressed. This is particularly true in male-dominated professions where ideas that women lack ability and are incompetent may be powerful.[669] The institutional view of women and their expected roles and limitations need to change in order to attain the required level of gender representivity particularly in leadership positions. An important consideration to be highlighted here is the limitation of the law in dealing with gender inequality within the private realm of women's lives so as to eradicate the double burden to which women are subjected. The question then becomes; can and how will the law transform effectively the private lived realities of women?[670] The law's inability to change women's private reality means that for the most part the double burden remains an obstacle and challenge to employment.

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[664] Mathur-Helm, Babita op cit note 64 at 62. See also Margaret Thornton 'Work/life or work/work? Corporate legal practice in the twenty-first century' 2016 *International Journal of the Legal profession* 13 at 25; 27.
[665] Dupper op cit note 24 at 281.
[666] C Koggel 'A Feminist View of Equality and its implications for affirmative action' 1994 *Canadian Journal on Law and Jurisprudence* 43 at 48.
[667] Rosenfeld op cit note 110 at 1687.
[668] Mathur-Helm, Babitan op cit note 64. See also Thornton op cit note 664.
[669] Levinson op cit note 112.
[670] Martin and Barnard op cit note 213.

Affirmative action policies need to recognize the unique and complex nature of gender disadvantage in order to adequately ensure the inclusion and advancement of women in the workplace.[671] Recognition of their difference and the different experiences of disadvantage is crucial to putting in place the means necessary to assist women in being capable of reaching their full potential in the workplace. This will have an impact on both their professional and private lives. In the next section of the chapter I will begin to unpack the context of two male dominated professions, to better understand the nature of disadvantage that they experience, and to establish a framework for empirical research in the next chapter.

4.4 Unpacking Gender Disadvantage in the Legal and Mining Professions

4.4.1 Introduction

The legal and the mining professions are viewed as especially male dominated, due to their history,[672] as well as the way in which the professions are currently structured and practised.[673] This section of chapter four details the history of each of these professions in terms of the participation of women, as well as the current statistics with regards to gender representivity and the necessary qualifications needed to progress within each profession. The aim of the section is to show that women, in male dominated professions, experience a difference in disadvantage due to the male dominated nature of the specific profession. I will show that this type of disadvantage is multi-layered and difficult to dismantle. It is for this reason that I chose to look specifically at the legal profession and mining profession, because both have similarities and differences in the disadvantages experienced by women within each profession. I will also explore what the academic literature has shown with

[671] Ibid.
[672] See Martin and Barnard op cit note 213.See also Menkel-Meadow, Carrie. 'Exploring a research agenda of the feminization of the legal profession: Theories of gender and social change.' 1989 *Law & Social Inquiry* 289.
[673] Ibid. *See also* Klaaren op cit note 92.

regard to unpacking the gender disadvantage in each profession as well as using empirical research in chapter five to see whether or not this reflects the gender disadvantage noted in literature.

4.4.2 Legal Profession

Before 1923 no women could be a lawyer. Between 1909 and 1912 Ms Madeline Wookey unsuccessfully challenged the Cape Law Society's refusal to admit her to practice the law. [674] The Law Society argued that Roman Dutch law excluded women from civil and public offices, which included the office of attorney.[675] This clearly limited the work women were able to do, perpetuating a patriarchal stereotype of gender specific work that women would be allowed to undertake. This is an early example of the stereotype that limited women's opportunities. The stereotype is still perpetuated in the present day.[676]

The court ruled that Roman Dutch law did indeed exclude from legal practice persons who could be termed 'unfit and improper' which included, "the deaf, the blind, pagans, Jews, persons who denounced the Christian Trinity, and women."[677] The court further held that the word "person" as contained in the Cape Charter of Justice did, in fact, not include women. The court held that legislative reform would be required to allow women into the profession.[678] RPB Davies J[679] argues in an article about the case that "the law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the world... all life-long callings of women, inconsistent with these radical and sacred duties of their

[674] In *Incorporated Law Society v Wookey 1912 AD 623*.
[675] *Wookey* supra 625,629,634.
[676] Transformation of the legal profession' CALS 2014 report op cit note 93 at 52.
[677] *Wookey* supra 623.
[678] *Wookey supra* 642.
[679] RPB Davies 'Women as Advocates and Attorneys' 1914 (31) *SALJ* 383 at 384.

sex, as is the profession of law, are departures from the order of nature and when voluntary, treason against it."

In 1923 women were allowed admission into the legal profession, progressive statistics will now be detailed.[680] Since 1923, there has been a gradual increase in the number of women within the profession. By 2011 the LSSA recorded that 55 percent of South Africa's law graduates were female, while 61 per cent were black. Although more female attorneys were admitted to the profession in the same year (56 per cent), only 47 per cent of the attorneys registered were black, while 53 per cent were white. In the 2018 Law Society report of the 26 701 attorneys registered, 6063 are white females and 4610 are black females.[681] From the statistics it would seem that entry currently into the profession is reasonably possible for law graduates, however, the issue is their retention and progression within the profession up to senior level.

A Plus 94 Research project[682] commissioned by the legal profession regulatory body, the Law Society of South Africa (LSSA) revealed that in, 2013, 53.4 percent of legal practitioners were females. Of those, white females constituted 26 percent at equity partner level, while only 5 percent of the female partners were black Africans. Men constituted 46.6 percent of employees at firms participating in the survey, 45 percent of the salary partners, 72 percent of the managing partners and 80 per cent of the CEOs were all white males. Therefore, the issue is not necessarily the entry of women into the legal profession, but rather the barriers that are presently limiting

[680] Women's Legal Practitioner's Act 7 of 1923.
[681] LSSA statistics http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession [Accessed on 22nd of November 2018].
[682] LSSA statistics http://www.lssa.org.za/upload/LEAD%20STATISTICS%20FOR%20LEGAL%20PROFESSION%202015_2016_2.pdf [Accessed on 22nd of November 2018].

their progression and retention within the profession.[683] In March 2013, the LSSA reported that of the total number of practicing attorneys registered (21 463), 64 per cent were white males, while only 12 per cent were black females. "In the period 2008 to 2014, the number of women attorneys has grown by 3%, which is more than the growth in the number of male attorneys, with white male attorneys dropping by 7% and black male attorneys showing 1% growth."[684] The statistics show a clear issue of entry into the profession for women but this issue seems greater for Black women than White women.

In a 2016 LexisNexis report on the Attorneys profession in South Africa 60% of the attorneys were male and 40% were female. White male attorneys made up 37% of the group, while white female attorneys made up 23%; Black male attorneys made up 25 percent of the group and black females made up 15% of the total. One of the goals of the Legal Practice Act in terms of section 3(b) (iii) is to transform the legal profession through "measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic." It is important to note that no survey was conducted on the number of attorneys with disabilities.[685]

The Bar, which regulates South Africa's advocate profession, and from which a pool of judges is primarily selected, has much lower rates of representation of women, and particularly black women.[686] In 2014 "the General Council of the Bar, reported that only a quarter (645) of our country's total 2571 advocates at the Bar are female. Of

[683] H Brenner 'Expanding the pathways to gender equality in the legal profession' 2014 *Legal Ethics* 261 at 269.
[684] Keynote Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP, at a Seminar on Gender Transformation in the Legal Profession, hosted by NADEL Western Cape, 6 October 2014 - See more at: http://www.justice.gov.za/m_speeches/2014/20141006_Nadel.html#sthash.k4bWzYlb.dpuf [15 December 2017]
[685] http://www.lexisnexis.co.za/pdf/LexisNexis%20-%20Infographic%20Report2016.pdf. [15December 2017]
[686] Keynote Address by the Deputy Minister of Justice and Constitutional Development op cit note 682.

these only 4, 5% (116) are African females. Of the silks, or senior counsel, only 27 are female, of which only 4 are African. That is less than 1% of our country's 451 senior counsel. This is a concern, particularly since many of our judges come from the ranks of the advocates' profession."[687] In a 2018 CGE report, it is noted that 73% of advocates are male while only 27% of advocates are female.[688]

4.4.3 Mining Profession

Historically mining has been viewed as a "man's game." [689] The exclusion of women was entrenched legislatively in the Mines and Works Act 12 of 1911 which expressly prevented women from being employed underground.[690] The Colour Bar Act 25 of 1926, Mines and Works Amendment Act 25 of 1926 and the Mines and Works Amendment Act 27 of 1956 reinforced the colonial and Apartheid governments' agenda of racial segregation by limiting the persons who could take up employment within the mines.[691] This prevented a person of any racial group other than whites, Cape coloureds and Cape Malays from obtaining a blasting ticket. The lack of a blasting ticket would stifle a miner's ability to progress within the mining industry.[692] In effect "black mineworkers were thus in the main, kept to the position of labourers whereas whites in the main were able to rise through the ranks to manager status."[693]

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[687] Ibid.

[688] Gender Transformation: Judiciary http://www.justice.gov.za/legislation/notices/2018/20180713-gg41766_gen394-CGE-GenderTransformationJudiciary.pdf [Accessed on 22nd of November 2018].

[689] J A Cruise 'The gender and racial transformation of mining engineering in South Africa' 2011 *The Journal of the Southern African Institute of Mining and Metallurgy* 217. See also D Botha and F Cronje 'Women in mining: a conceptual framework for gender issues in the South African mining sector' 2015 *South African Journal of Labour Relations* 10 at 11. See also Doret Botha and Freek Cronje 'Occupational health and safety considerations for women employed in core mining positions' 2015 *SAJHRM* 1. D Botha and J Cronje 'The physical ability of women in mining: can they show muscle' 2015 *Journal of the Southern African Institute of Mining and Metallurgy* 659. Botha C, Fourie JD, Botha D and C Bischoff 'Progress in implementing the Mineral and Petroleum Resources Developoment Act 28 of 2002 (MPRD) provisions for the employment of women in mining' 2012 *Journal of the Southern African Institute of Mining and Metallurgy* 395.

[690] The Mines and Works Act 27 of 1956 states in terms of Section 8 "no person shall employ underground on any mine a boy apparently under the age of sixteen years or any female."

[691] Cruise op cit note 689.

[692] Ibid.

[693] Cruise op cit note 689 at 218

It is within this context that women were actively discouraged from enrolling in engineering degrees at University, especially mining engineering, as the legislation clearly prevented any further progression within the profession.[694] In 1988 the racial discrimination in the Mines and Works Act were repealed, but sections preventing women working underground were only repealed in 1996.[695]

In 1992 the first woman in South Africa graduated as a mining engineer; and it was only in 2004 that the first black woman graduated as a mining engineer.[696] Besides the duty of transformation placed on the mining sector through the EEA,[697] the Mining Charter of 2010 required that 10 per cent of the total workforce in a mining company be female.[698] It soon became evident that representation had occurred within the lower levels of the industry, but it has not occurred sufficiently at top level management positions in the industry.[699] For this reason new levels of representation are required, as a result the 2016 draft Mining Charter announced by the Ministry of Mineral Resources stipulates that:

> at executive management level with exercisable voting rights representation there must be 15 per cent black female representivity in line with the employment active population (EAP). Executive directors must be 25 per cent black female in line with the EAP. Senior management (EXCO) needs to have respresentivity of 30 per cent black females in line with the EAP. Middle management level needs to be made up of 38 per cent black female employees in that category in line with EAP. At Junior management level representivity needs to be 44 per cent black female in line with the EAP.[700]

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[694] Ibid.
[695] Ibid. Doret Botha 'Women in Mining :An assessment of workplace relations struggles.'2016 *Journal of Social Sciences* 251.
[696] Cruise op cit note 689 at 218.
[697] Employment Equity Act 55 of 1998.
[698] The broad aim of the Mineral and Petroleum Resources Developoment Act 28 of 2002 is to "redress previous inequality and disadvantage in mining" which includes gender representivity. Botha et al op cit note 689.
[699] Cruise op cit note 689.
[700] Reviewed Broad Based Black -Economic Empowerment Charter for the South African Mining And Minerals Industry, 2016.https://www.gov.za/sites/default/files/40923_gon581.pdf [Accessed 22nd of November 2018]

A study in 2011 revealed that, in a population of 496 professional engineers, the current racial demographics are 91.3 percent white, 8 .3 percent African and 0.4 percent Coloured. Similarly, the gender demographics are 99.4 percent male and 0.6 percent female.[701] It is against this background that the challenges of gender representivity in the mining profession and in the legal profession can be investigated. Both are evidently male dominated professions, the mining profession however, tends to be more dominated by white males than the legal profession. The removal of legal barriers does not necessarily mean the inclusion of women is facilitated to arrive at the necessary equality in the workplace. It is clear that social barriers of patriarchy filter through into the professions adding to the struggle for women to progress within the two professions.

4.4.4 Focus on Qualifications and Training within the Two Professions

The study described in the next section focuses on attorneys and engineers in terms of their professional qualifications (focus in the study of the legal profession was given to attorneys). In order to qualify as an attorney, an individual needs to have a law bachelor's degree with two years of articles with a Law firm.[702] During articles an attorney is referred to as a candidate attorney. During the two years of articles candidate attorneys are required to write the board exams for admission to the practice of law. Specialized, exams such as the notary and conveyancing exams can also be written. After completion of articles the candidate attorney is usually promoted to the position of Professional Assistant followed by Junior Associate then

[701] Cruise op cit note 689 at 221. See also Siyabonga Mkhwanazi 'Engineering crippled by shortage of graduates' November 2015 Engineering Council of South Africa (Ecsa) reported that "Out of the 16 423 local professional engineers, 13 794 were white and 1 496 black. This left only 967 registered professional Indian engineers and 166 coloured engineers." "In a report issued by Ecsa last year, it said the country had one engineer per 2 600 people. This has been compared with international standards where one engineer serves 40 people" **http://www.iol.co.za/business-report/economy/engineering-crippled-by-shortage-of-graduates-1939423**. [Accessed 5 November 2017]

[702] Section 26 of the Legal Practice Act 28 of 2014.

Senior Associate followed by the position of Director and finally Partner[703] in a law firm.

Cruise notes that to qualify as a mining engineer one needs to study for a minimum of four years to get a mining engineering degree. The average student currently studies for about five years to graduate. A minimum of three years of applicable postgraduate engineering experience is required before a graduate can apply for professional registration.

> "The average time period from graduation to professional registration for black mining engineers from South African universities has historically been nine years with a minimum of six years. It probably takes a further ten or so years before an engineer attains the stature and gravitas to be elected to committees on the vocational institutes or committees on the Engineering Council. Therefore, it will take approximately a minimum period of twenty years from placing a matriculant into university to being ready to take his or her place in the professional and vocational committees of the engineering community."[704]

In the empirical study, women in mining with other professional qualifications were targeted, this included women with legal, human resources, accounting and financial qualifications. It is noted that women who did have an engineering background felt that after "serving their time in the mines underground"[705] a desk job allowed them to balance family and work commitments.

4.4.5 Barriers to the Legal and Mining Professions for Women

The gendered nature of the workplace was discussed above in relation to how gendered stereotypes of the roles of men and women in the workplace are

[703] There are two types of partners, an equity partner and a non equity partner. An equity partner gains the right to share in the profits of the firm. A non-equity partner is generally a law firm employee who has been promoted from director level and does not share in the profits or capital of the firmhttps://www.lexisnexis.com [accessed 8th January 2018]

[704] Cruise op cit note 689. See also for discussion on skills shortage in mining C Musingwini, J A Cruise, H R Philips 'A perspective on the supply and utilization of mining graduates in the South African context' 2013 *The Journal of the Southern African Institute of Mining and Metallurgy* 235.

[705] Participants in empirical research M1006.

perpetuated and enforced within its institutional culture. Such stereotyping is particularly evident in male dominated professions. The male dominated workplace creates a unique institutional culture where the standard set for a good worker is a male worker standard which inevitably disadvantages women in several ways detailed below.

4.4.5.1 Legal Profession

The legal profession, as a male dominated profession, perpetuates a patriarchal culture within the legal profession and stereotypical ideas of women's place and role.[706] This is evident in case law and the practice of law [707] and the way in which the profession is organized and operates.[708] There is a body of literature, particularly in the United States, that discusses the nature of the disadvantage experienced by women within the legal profession. However, very little research has been conducted within South Africa on this issue.[709] In the empirical research undertaken for this thesis, it is clear that some of the issues highlighted in the American literature mirror those confronted by women within the legal profession in South Africa.[710]

These themes are summarized here as context for the case studies in the next chapter: Firstly, the male standard of a "good lawyer", secondly, subordination of women due to patriarchal stereotypes of women's role in society and work. Thirdly, the marginalization of women due to their family responsibilities and duties resulting in their slow, or none, progression within the legal profession. As Grant argues, the

[706] Transformation of the legal profession (2014) CALS op cit note 93.
[707] For example in an American case *Bradwell v. Illinois* 83 U.S. 130 (1873) Justice Bradley held that "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." Similar sentiments within South Africa were voiced in the case of *Law Society v Wookey* 1912 AD 623.
[708] Menkel-Meadow op cit note 672.
[709] Transformation of the legal profession(2014) CALS op cit note 93. See also Zanoni et al op cit note 114.
[710] M R Payne-Pikus, J Hagan, R L Nelson 'Experiencing discrimination: Race and Retention in America's largest law firms' 2010 *Law and Society Review* 553.

male dominated nature of the profession produces a male standard of a "good lawyer". This is further perpetuated by a client expectation or bias to have male lawyers representing them.[711] There is a clear presumption of the incompetence of women due to their gender.[712] She points out that "a man is naturally taken as competent while a woman must demonstrate what she can do."[713]

According to Menkel-Meadow clients of legal firms overall believe that good work can only be performed by a male legal practitioner.[714] This bias is greatly influenced by the "old boy network"[715] which enables men to interact more in business, politics and socially and creates fewer opportunities for women to meet potential clients and therefore be "rainmakers."[716] This means that besides being suitably qualified for the position as an attorney, women must work twice as hard as men to earn the respect of both clients and their male co-workers as to their capabilities , in order to ensure their retention after articles but also more importantly their progression within the profession. The systemic nature of this male standard of a good lawyer is very much engrained within the profession creating a distinct institutional culture that is both subtle and difficult to dismantle.[717]

The male standard of a good lawyer is further fueled by the institutional culture of long working hours which are expected to yield large amounts of money in billable

[711] Cynthia Grant Bowman 'Women and the Legal Profession'1998 *Journal of Gender, Social Policy and the Law* 149 at 167.
[712] Bowman op cit note 711. See also Coetzee op cit note 591 at 301. Coetzee notes that "If women are mainly, through measures such as affirmative action, appointed in managerial positions, their capabilities are often doubted, and the fear exists that they may reduce intellectual standards"
[713] Bowman op cit note 711 at 157.
[714] Menkel-Meadow op cit note 672.See also Bowman op cit note 711 at 167
[715] Maria Pabon Lopez 'The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends' 2008 *Hastings Women's Law Journal* 53 at 74
[716] Valerie Fontaine 'Progress report: women and people of color in legal education and the legal profession' 1995 *Hastings Women's Law Journal* 27 at 33
[717] Ibid.

hours.[718] This makes it difficult for women to progress within the profession as pointed out by Valeire Fontaine who comments that "law is a jealous mistress" and both men and women lawyers must work extremely hard to be successful and get promoted.[719] The reality is that billable hours equate to profits for the firm. The economic consideration creates an environment where one's value as an attorney is linked to the amount of fees you bill rather than the quality of work produced. This is one theme that adversely affects both genders however; this is felt more strongly by women who must still balance home and family responsibilities.[720] This is due to the fact that society still places most of the burdens of child-rearing[721] and homemaking on women. A life in the law is even harder on women than men.[722] The balance between work and family life is one theme that focuses employers on the difference in disadvantage based on gender as the retention and progression within the majority of professions is linked to this difference in disadvantage. It is a reality that is not going to go away but requires both economic sacrifice and reasonable accommodation by the employer.

Epstein explains that part of the problem in the "position of women in law results from internal barriers that are caused by the persistence of sex roles, stereotypes and norms dictating that women should be subordinate to men in public and in private life."[723] Success in the legal field is therefore defined and its structure is reinforced by

[718] Cynthia Fuchs Epstein 'Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors.' 2000 *Kansas Law Review* 733 at 751. Epstein argues that night time work often "counts for more" and is regarded as "more heroic." See also Thornton op cit note 664.
[719] Fontaine op cit note 716 at 33.
[720] Ibid.
[721] Janet Taber et al. 'Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates.' 1998 40(5) *Stanford Law Review* 1203 at 1228. "Torn by family pressures it is often difficult for women to maintain the appearance of total dedication to their careers that is necessary to compete in settings such as law firms."
[722] Fontaine op cit note 716 at 33.
[723] Epstein op cit note 718 at 733. See also Martin and Barnard op cit note 213 at 12.

men's dominance in the practice of law.[724] Menkel-Meadow points out the disadvantage experienced by women who have family responsibilities, as decisions around promotion to 'partnership' seem to 'coincide' with their 'childbearing' years.[725]

Brockman, Evans and Reid argue that the women who take maternity leave and extended leave are "marginalized as lawyers"[726] thus preventing their progression to partner. In not being present at work they "fail to live up to the male constructed image of the dedicated lawyer."[727]They are therefore viewed as not taking their work seriously. Upon return to the profession they are given minimal work described by Brockman, Evans and Reid as "dog files" that inevitably leads to the departure of women from the legal profession.[728]

This particular theme points to the institutional culture of billable hours as any time away from work for maternity or family responsibility is seen as a loss for the law firm and a lack of commitment by the attorney to their profession. The empirical chapter will seek to link the above themes to test whether or not that is the reality on the ground. It is important to investigate if the issues raised in the literature still remain in the workplace in order to develop strategies to tackle these issues and the question thus becomes what needs to happen within the transformation of the legal profession to allow women in the profession to define their own roles and still be successful in the profession.

[724] Bowman op cit note 711 at 168.
[725] Menkel-Meadow op cit note 672 at 907.
[726] Joan Brockman, Denise Evans ad Kerri Reid 'Feminist perspectives for the study of gender bias in the legal profession'1992 *Canadian Journal of Women and Law* 37 at 54.
[727] Ibid.
[728] Ibid

4.4.5.2 Mining Profession

As with the South African legal profession literature, there is very little literature in South Africa on mining.[729] A Swedish study into the mining profession, details the themes which impact the participation and progression of women within the mining field. The role of masculinity in the workplace was introduced above. In the mining profession there is a common type of "mining masculinity"[730] that is concrete and "dominates structures, practices and procedures within the industry."[731] Miller notes that this type of masculinity tends to "exclude interactions with women" and promotes "values and beliefs that reinforce gender divisions."[732] According to Somerville and Abrahamsson the extreme expression of this masculinity is a form of macho-masculinity which sees women as the "other."[733] This masculinity creates an institutional culture that is detailed below.

The "one dimension of the masculinity associated with mining is the difficult working conditions"[734] and therefore the stereotype is that women cannot cope with mining work[735] and "belong at home where they can take care of the household and children."[736] This stereotype is further fueled by historical myths; for example, it was noted in South Africa that "a woman underground brings misfortune"[737] and in Sweden and India there was the belief that "the presence of women in mines leads to

[729] Cruise op cit note 689.
[730] Lena Abrahamsson et al. 'Gender, Diversity and Work Conditions in Mining.' (2014) Mining and Sustainable Development working paper Lulea University of Technology [Accessed 1st of November 2016] http://ltu.diva-portal.org/smash/get/diva2:995297/FULLTEXT01.pdf at 22. [Accessed 31st of March 2017]
[731] Ibid
[732] Abrahamsson op cit note 730.
[733]Ibid. See also Kuntala Lahiri-Dutt 'Roles and status of women in extractive industries in India: Making a place for a gender sensitive mining development' 2007 *Social Change* 37 on the invisible status of women in mining at 47.
[734]Abrahmasson op cit note 730 at 23.
[735] Ibid.
[736] Botha op cit note 695.
[737] Asanda Benya 'New Forms of Power: A Case Study of Women in Mining' available at *http://www.global-labour-university.org/fileadmin/GLU_conference_2011/papers/Asanda_Benya.pdf* [Accessed 6th December 2016].

accidents and deaths."[738] This dominant view of masculinity in mining creates a hostile working environment[739] in which women are made to feel they do not belong and that their presence will lead to negative consequences for workers underground.

With the literature available the following themes are present within the mining profession. Firstly, there is the theme of an institutional culture that mining masculinity creates that questions the ability and capability of women to work within the mining industry.[740] This creates a hostile working environment for women that impacts their accommodation and retention. Secondly, the theme of home and work balance, as mining companies set stringent targets which results in women having to work long hours and due to the long distances between home and the mine, this has an impact on home and work balance. The third theme is with regards to the safety of women within the mining industry due to the lack of ablution facilities underground and the vulnerability of women underground to sexual harassment. The fourth theme is the impact of pregnancy on the retention of women due to the physical effect that mining can have on a pregnant woman and her unborn foetus.

4.5 Conclusion

In this chapter I have detailed the complex nature of gender disadvantage and the need for employers to understand its multi-layered nature in order to tackle it appropriately. The challenges faced by women are clearly not the same, adding to the difficulty of dismantling this type of disadvantage in the workplace. I have also highlighted the context of two male dominated professions and the comparative literature detailing the nature of gender disadvantage within these two professions. In

[738] Abramsson op cit note at 728 at 20 the study described a group of mine workers who discussed "an old tale: the rock is a whimsical woman who does not accept the competition of other women and this jealousy causes falls and accidents in mines."
[739] Martin and Barnard op cit note 213 at 12.
[740] Botha op cit note 695.

Chapter five focus will be placed on investigating the reality of gender disadvantage in the legal and mining profession through empirical research and identifying the tools that may be effective in addressing such gender disadvantage.

Chapter 5

5 THE NATURE OF GENDER DISADVANTAGE IN TWO MALE-DOMINATED PROFESSIONS IN LAW AND MINING: FINDINGS FROM RESEARCH

5.1 Introduction

In chapter four, the literature on the nature of gender disadvantage was reviewed with patriarchy, institutional culture, pregnancy and various socio-economic factors identified as affecting women's ability to enter and progress in the workplace. It is important to test this literature through empirical research in the South African context, to see whether or not what was identified in the literature is reflected and confirmed by the experiences of women in the workplace. This is to enable a more "nuanced"[741] and localized understanding of gender issues in the workplace. This chapter starts with a description of the method used to gather the responses of 18 women in the legal profession and 15 women in the mining profession across various occupations and racial categories. The findings are then grouped into distinct themes that reflect similarities and differences across both professions. The empirical research seeks to investigate whether or not gender disadvantage is present, and its nature and extent within the mining and legal profession.

5.2 Empirical Research

The empirical research consisted of semi-structured interviews in which women were asked a set of questions designed to draw out their perceptions of gender issues generally and their lived workplace realities based on race, gender, socio-economic status, culture, religion etc. The questions focused specifically on the nature of

[741] Dupper op cit 31 at 428.

gender disadvantage within the two professions and how this affected women's recruitment, retention and promotion. The women were also asked to share their views on how gender issues could be dealt with in the workplace setting. I chose this form of study as it allows for the participants to share, in detail, their experiences from which various themes could be drawn on the challenges faced by women within a male-dominated profession. Research of this kind within the legal and mining profession is limited.[742] This empirical research allows for a better understanding of the issues affecting women within each profession.

5.2.1 Methodological Approach

This study has employed qualitative research methods to elicit participant perceptions of challenges to gender representivity within their profession, which they had either personally experienced or had witnessed, and also to identify what solutions they had in mind to address these challenges. This was done through specifically set questions that were asked of all participants in the study, to help draw out the specific challenges. It is noted that qualitative methods enable an open and in-depth understanding of the experiences faced by women within each of the two professions. Ritchie and Lewis have noted that "those practising qualitative research have tended to place emphasis and value on the human interpretation of the social world and the significance of both participants' and investigator's interpretations and understanding of the phenomenon being studied."[743]

This is not to say that qualitative research is not without its limitations with regard to reliability and validity.[744] For example, participants may only present certain aspects

[742] See also Zanoni et al op cit note 114.
[743] Jane Ritchie and Jane Lewis et al, (eds) *Qualitative research practice: A guide for social science students and researchers*. (2013) at 11.
[744] See Miles, M. B., & Huberman, A. Michael. *Qualitative data analysis: An expanded source book.* (1994).

of themselves to the researcher. It was hoped that by asking questions on gender issues in the profession in general, and not just questions particular to the participants, a realistic picture of women's lived reality within the two professions would emerge. To facilitate this process, semi-structured interviews were conducted. The questions focused, firstly, on the background of the participants; secondly, on the challenges they saw in terms of gender disadvantage within their profession and thirdly, on the solutions they could identify that might assist in addressing gender disadvantage within their profession.

Differences in race, socio-economic status, culture, religion, ethnicity within the sample group, are likely to have influenced the information gathered, in terms of the kind of gender inequality experienced by the women. Through a process of coding the data was broken down into comprehensible concepts and themes, to assist in answering the research questions posed earlier. It has been argued that "all researchers need to be able to organize, manage and retrieve the most meaningful bits of our data."[745] Focus was therefore placed on those aspects of the data that are relevant and most meaningful to the study.

5.2.2 Participant Selection

A non-probability purposive sampling method was initially planned in this study. Non-probability sampling focuses on sampling techniques where the group that is investigated is based on the judgement of the researcher. The researcher chose to focus on professionally qualified women within the mining and legal professions. In order to involve subjects who would be sufficiently informative, participants with

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[745] Amanda Jane Coffey and Paul Anthony Atkinson 'Concepts and coding' in Amanda Jane Coffey and Paul Anthony *Making sense of qualitative data* (1996) at 26.

varying work experiences within each profession and from a diverse racial, socio-economic, cultural and religious profile were selected.

The selection criteria were as follows:

1. Women of all races within the mining and legal profession (African, Coloured, Indian, White). The racial profiles of particular law firms and mining companies approached were used to create a sample. The sample included women in various levels within the companies and law firms.
2. Women with a professional qualification (attorney and engineer (geologist, electrical engineer, accountant, human resources officer)
3. Between ages 20 and 65
4. Currently working within a legal profession or mining profession and having done so for more than one year.

Below is a table showing the number of participants in each of the two professions and the racial groups represented in the research.

Sample size table[746]:

Racial group	**Legal Profession**	**Mining Profession**	**Total**
African	7	5	12
Coloured	0	1	1
Indian	2	0	2
White	9	9	18
Total	18	15	33

[746] The researcher was unable to find a Chinese participant in both the legal and mining profession.

It is noted that the majority of the participants in the study were white females with a total of 18 followed by African women totaling 12, Coloured 2 and 2 Indian females. The total number of participants was 33 individuals, 18 women in the legal profession and 15 women in the mining profession. The racial profile is reflective of the legal profession generally where White females are in majority in comparison to Black females.[747]

The process started with the researcher approaching Human Resources managers of five law firms and five mining companies to assist in identifying participants for the interviews. However, the legal firms and mining firms who were approached either declined to be involved or did not respond to the request. This was partly due to the fact that, in one instance, the law firm approached was, at the time, busy with its own employment equity training and assessment survey and they felt it would be a strain on their employees to take part in another survey as well. Another law firm displayed a distinct distrust, fearing that the information acquired through the interviews would be harmful to the reputation of the law firm.

A different strategy of snowballing was then used where the researcher approached particular participants and then asked for referrals. Snowballing is defined by Ritchie and Lewis as "an approach which involves asking people who have already been interviewed to identify other people they know who fit the selection criteria." [748] This method allowed a quicker response time to invitations to participate in the research. Participants had the right to accept or reject the invitation to take part in the interviews. Participants were able to contact the researcher directly or through

[747] LAWSA: Attorneys profession in South Africa: 2016 LexisNexis Review. http://www.lexisnexis.co.za/pdf/LexisNexis%20-%20Infographic%20Report2016.pdf [30 April 2018] See also 'Transformation of the legal professionCALS 2014 report op cit note 93.
[748] Ritchie and Lewis op cit note 743 at 94.

telephonic and email means to respond to the request. After the interview had been conducted participants were asked, by the researcher, for the contact details of colleagues or friends who worked in the same profession and who would be willing to take part in the interviews. Three participants were unable to meet the researcher, so an email with the questions was sent to them, as well as the consent form to be signed for the collection of the data from the participants.

It is noted that due to the unwillingness of employers the purposive sampling was not achievable. In the end due to the snowballing method being used, participants in differing numbers were found across seven law firms and seven mining companies. This was different from the method first adopted but it yielded a good sample of candidates.

5.2.3 Data Collection and Questions

The interviews were audio recorded after getting the written consent of participants and a professional transcriber was contracted to transcribe them. The transcriptions were then sent back to participants to ensure they were correct reflections of their responses. Semi-structured interviews are held to be useful if the aim of the study is to understand how participant conceptions emerge through their narrative.[749] The questions used in the interview were open-ended so as to allow the participants to give in-depth and informative answers and to allow for deeper exploration of particular points of interest.[750]

The questions first focused on the participants' education and professional background. Further questions, focused on the participants' perceptions of what if any, in their opinion, were the barriers to the progression of women within the mining

[749] Ritchie and Lewis op cit note 743 at 110.
[750] Ibid.

or legal profession. Where appropriate, participants would share their own personal experiences of barriers and opportunities. The final questions focused on how challenges could be addressed so as to tackle any gender issues in the workplace.

Interview Questions

The following questions were used during the interview:

Background questions

1. What is your understanding of employment equity within your profession?
2. Explain what your understanding of race, gender and disability in terms of employment equity is.
3. In your opinion how would you rank the importance of race, gender and disability in the implementation of affirmative action.
4. Do you consider yourself to have come from a disadvantaged background?

Questions specific to gender disadvantage within specific profession

5. Do you think there is a good representivity of women within the legal/mining profession across all levels of the workforce? Give reasons for your answer
6. What, if any, do you see as the challenges/barriers to gender representivity in the legal/mining profession?
7. What clear achievements if any have you seen in the implementation of employment equity within your profession or workplace?
8. Discuss any prejudices against women which you have come across or personally observed?
9. Do male or female lawyers treat women candidate attorneys differently from men? Do male and female engineers treat women trainees differently to men? If so in what ways?

10. What expectations does the profession have of its male and female members?
11. Are these expectations different for men and women?
12. How do you respond to these expectations?
13. Will the profession change women or will women change the profession?
14. What do you see as the challenges to employment equity within your specific workplace in the area of gender?

Ideas on how gender disadvantage can be addressed

15. How can the challenges you mentioned before be addressed?

5.2.4 Reflexive Considerations

The participants all related positively to the researcher, it is important to acknowledge that the researcher is female and the participants were all female. However, due to differences in race, the participants related to the researcher in different ways and this may have had an effect on the types of answers given. For example, black participants were more comfortable with the researcher in discussing issues such as race relations in the workplace, whereas, white participants tended to be guarded in their responses about race. The researcher was mindful of her influence in terms of personal opinion that could impact the answers given.[751] There was, therefore, a conscious effort made by the researcher not to impose her opinion on the participants but to instead do what was best to understand the participants' point of view.

5.2.5 Ethical Considerations

The participants signed consent forms which detailed that there was no direct benefit for their participation in the study. They were informed, through the consent form that they could withdraw from the study at any time or refuse to answer any questions posed to them with no negative consequences. The necessary consent was also

[751] See Ratele et al *Self, community and psychology* (2004).

obtained to record the interviews on a digital recorder and participants were assured that the information would only be used for academic purposes. The confidentiality of the participants was ensured through the use of numbers and letters; M for mining 1000 to 10015 and L for the legal profession L1000-L10018. The digital recorder and the recordings were kept in a secure location by the researcher and they will be destroyed upon completion of the research. All interviews were conducted in a location which allowed for privacy during the interview. Ethical approval was obtained through the University of Witwatersrand, Human Research Ethics Committee (non-medical) in order to conduct the research for academic purposes **Protocol Number H13/03/13**. The transcribed interviews will be kept in a locked alarm protected office.

5.2.6 Results and Interpretation

Once the research was completed, the researcher underwent a process of coding the themes using the interview transcripts. Once the themes were identified they were analysed. The interpretation of the results focused on the identification and development of themes that could be generated within and across the legal and mining profession with respect to the challenges faced by women in each profession and the possible mechanisms in dealing with gender disadvantage within each profession. The themes in the legal profession are dealt with separately to the mining profession. Chapter six draws out similarities and differences between the legal profession and mining profession and puts forward recommendations to dismantle gender disadvantage.

Within the legal profession the dominant theme was the male centred tone of the profession which translated into the theme of what the ideal worker model within the profession would embody, which was a male standard. Due to this male standard

gender stereotypes emerged as a theme that focused on what legal work women would be better suited for due to their gender. The theme of work and family balance was evident in the work due to its male standard of performance as well as the theme of differences of experience between black women and white women.

The dominant theme in the mining profession is the hostile working environment created through the masculine workplace institutional culture created by mining through its heavily physical workload that is not accommodating to women who struggle to meet the male standard of a good worker. The challenge of a balance between home and work as well as a push against gender stereotypes that view mining as not an industry fit for women was also a factor. In both professions, there were differing experiences of disadvantage for women of different races with Black women having the added disadvantage of racial prejudice besides the gender disadvantage.

5.3 Legal Profession

The themes and issues identified by Bowman[752], Menkel-Meadow[753] and Fontaine[754] mentioned above in chapter four were evident in the research conducted, indicating that the challenges experienced by women in the US are relevant to South Africa and are still present. The data analysis involved the identification of themes which are highlighted under thematic headings, which will now be detailed below.

[752] Bowman op cit note 711.
[753] Menkel-Meadow op cit note 672.
[754] Fontaine op cit note 716.

5.3.1 Male Centered Profession

The legal profession is described as an "old boy network"[755] which creates various barriers for women within the profession.[756] This reflects trends in the literature which notes the fact that this reality permeates how the legal profession is structured and dictates who dominates the profession.[757] For example men interact with other men more in business so they tend to attract more clients and particularly male clients.[758] Male clients are in the majority, especially in commercial law firms.[759]

Male clients tend to prefer to be represented by male attorneys and will specifically request that they have male representation.[760] This therefore, disadvantages women in "their ability to bring in business because they possess fewer contacts than men, have less time to devote to client development, and are not part of the networks in which business is generated."[761] The inability to be a "rainmaker"[762] therefore stifles women's abilities to progress within the profession as the number of clients they bring will impact on the number of billable hours they are able to charge to make money for the firm.[763]

The perception of participants in the study is that clients prefer male attorneys and do not trust female attorneys:

> *…it's based on that stereotype and also from a client perspective, it's also difficult, because clients also tend to trust men more than women and you*

[755] Fontaine op cit note 716 at 33.
[756] Lopez op cit note 715 at 74. This permeates all aspects of the profession from how it is structured to who dominates the profession. Fontaine op cit note 716 at 33.
[757] Fontaine op cit note 716.
[758] Fontaine op cit note 716 at 33.
[759] Ibid.
[760] Lopez op cit note 715 at 90.
[761] Ibid.
[762] Fontaine op cit note 716 at 33.
[763] Ibid. Another significant element of the old boy's club manifests itself in older men struggling to interact with younger women professionally, this will be discussed later.

find that the work flow comes to men more than women and therefore women can't then account for their performance because they're not getting as much instructions as their male counterpart…[764]

Participants believe, as female attorneys, they are viewed as less competent in handling cases than their male colleagues. Female attorneys need to prove themselves first before being held to be competent:

…a lot of people would rather give work to a male colleague than to a female, and I see that a lot when we have to deal with advocates, because most of the time and from the previous teams that I've been in, the instruction would always go to males. If it's a female, there'll be a lot of questions, so, what do you think about this woman? Do you think she's good? Have you used her before? The same questions wouldn't be there for the male counsel… [765]

An interesting observation made by some interviewees is that the stereotypes around the competence of female attorneys differs with the age of clients and fellow attorneys, with older clients or fellow attorneys being more skeptical about the competence of a female attorney than younger clients or younger fellow attorneys[766]:

So you'll go to a meeting of clients, etc. If the clients are younger they understand why you're there, if the clients are older, or if you go to a consultation of counsel, they don't seem to get why, what are you doing here,

[764] L10012.
[765] L10012: "it's so subtle… so let's say there's two guys, because you find that at a very junior stage, we actually sit together in offices and we share offices. But you would notice the way in which a specific person is asked to work. So if you are not necessarily given an opportunity to work with this person and they say, oh no, I do not like the way you work, therefore I will not work with you. But you realise that there's a constant thing, where they will not work with you, they will work with a person of a different gender. It will be like that. With some of them it's very specific, where some will say it, but with some of them it's really subtle. You kind of pick up on it eventually and when you do work with them, you feel, you feel undermined."
[766] See also Manyathi-Jele op cit note 82 at 21.

you should be in the office making photocopies. I think most clients do prefer male candidates versus female candidates. As to why I really don't know, but because most of our clients are male, so you'll find that they have more connections with male candidates versus female candidates…"[767]

Female attorneys' potential and competence is only seen once proved. This translates to a higher standard of performance required from female attorneys in order to be seen as competent:

Once you've actually spoken to somebody and they can see that you know something, and then they take you seriously, from there, when you have actually spoken to them and they've heard that you at least have a brain, but I think, at first sight they just think no.

I think really, the truth of the matter is when the attorney on the other side is hearing a man speaking then they listen. It's like, you know, but I mean, the truth of the matter is, women, you need to prove yourself before you get taken seriously, that's really the gist of it. You don't get taken seriously by just walking in.[768]

A recurring theme evident from the quote below shows how some female attorneys also share the same view with regards to the competence of women.[769] This is an example of the lack of support between women in the profession that sometimes exists. This adds a different layer to the disadvanta*ge experienced:*

[767] L1003: "I do think that the giving of work thing is an issue. It's a huge issue because even from Candidate Attorney level you'd see that the manual work is given more to the female Candidate Attorney . So, making copies, you know like the admin type work, whereas more substantive work would be given to a male Candidate Attorney. And irrespective of whether we're in the same year or not, it seems like it just happens like that."
[768] L1008
[769] Emily C. Wilson 'Call Me Queen Bee' 2015 *Women Law Journal* 10.

…women are not as good as men. I don't see many high profile cases being entrusted upon female legal representatives.[770]

The stereotype of women lacking competence within the profession is evident in the above quotes. This is a distinctive challenge that impacts on women's ability to progress within the profession, as progression is linked to one's ability to procure clients, as well as tackling high income generating cases. If women, due to this stereotype, do not get to display their competence, their development within the profession is stifled.[771] This challenge can be linked to the male standard of what makes a good legal practitioner.[772] The challenge of clients also viewing female legal practitioners as less competent makes finding new clients even more difficult.[773] Women's involvement in tackling high income generating cases is therefore limited to being part of a team, but not necessarily leading the team.[774] This again affects women's ability to display their competence within the legal profession. Lopez argues that, due to its subtle nature, this stereotype is both difficult and complex to identify or point out, as well as to dismantle.[775] In part, it is hard to dismantle because, at times, it comes with real social and cultural realities or undertones about the roles of men and women.[776] As pointed out by Bowman, "a man is naturally taken as competent while a woman must demonstrate what she can do"[777]

[770] L1004: "Male lawyers tend to treat male CAs more harshly, but at the same time also treat them as one of the team. Male lawyers tend to treat female CAs less harshly but also seem to treat them less equally and almost have lower expectations of them. They are not treated as "one of the boys" in the same way as male CAs are treated. Female lawyers generally tend to treat CAs similarly, regardless of gender, in my experience."
[771] Fontaine op cit note 716.
[772] Bowman op cit note 711 at 171
[773] Fontaine op cit note 716 at 33.
[774] Lopez op cit note 715 at 98.
[775] Lopez op cit note 715 at 90. Bowman op cit note 711 at 157.
[776] Ibid.
[777] Bowman op cit note 711 at 157.

5.3.2 The Ideal Worker Framed in Male Terms

As pointed out in chapter four, a male dominated world of work creates an institutional culture that is based on a male view of a good worker.[778] A "good attorney" therefore is able to work long hours and is able to charge for those hours.[779] The reality of running a successful law firm is accruing billable hours which translate to money for the firm.[780] Women who take time off or finish work early in order to fulfil their family responsibilities are seen as not fulfilling the ideal worker model.[781] They will not be able to bill as many hours and therefore not meet the targets, which results in the firm losing potential revenue.[782] This challenge affects women's progression within the legal profession[783] as promotion criteria are based on meeting targets for hours billed.[784]

Lopez notes that woman's "dual roles as lawyer and mother created enormous hurdles to their success in an environment that was unwilling to support their Herculean efforts to do both well."[785] This was predominantly due to "the heavy billable hour requirements and the organizational structure of law firms which only evaluates and promotes lawyers based on the number of hours they bill yearly in comparison to their co-workers."[786]

This rigid work structure is very difficult to dismantle.[787] Epstein highlights the "symbolic meanings of time"[788] that work against women's recognition. Full time work

[778] Menkel-Meadow op cit note 672 at 310. Bowman op cit note 711 at 168. Janet Taber et al. op cit 721 at 1228. Lopez op cit note 715 at 77.
[779] Ibid.
[780] Ibid.
[781] Thornton op cit note 664 at 15.
[782] Ibid
[783] Lopez op cit note 715 at 77.
[784] Lopez op cit note 715 at 79.
[785] Lopez op cit note 715 at 78.
[786] Lopez op cit note 715 at 98.
[787] Fontaine op cit note 716 at 33. J M Heminway and S White 'Wanted: Female Corporate Directors' 2009 *Pace Law Review* 249,288-289.
[788] Epstein op cit note 718.

is regarded as inadequate and only a "workaholic time dedication is seen as the measure of a star performer"[789] It is, however, noted that due to women's family responsibilities "balancing work and family is crucial to the progress of women within the legal profession."[790] But the rigid time structures means that this will never be possible unless the very nature of the profession changes.[791]

This distinct challenge for women within the legal profession is evident in the responses to the questions in the research.

> *The normal hours of work, you have to bill at least 7 hours a day, but there you are seen to be under-performing, even though it's the standard requirement. So, people who bill like 10 hours upwards, then you are seen to be working. My argument has always been, you know I can stay here for 10 hours, but not be doing billable work and how do you actually see that this person was here genuinely doing billable work, So I think that the requirement is not genuine because I think people should be measured according to the standard of the work they produce.*[792]
>
> *I think the legal profession needs to kind of move away from, the fact that hard work is about long hours. It's not. That's the first thing. It's not about long hours. It's more about, what you put in, how much you get done. It's not about you staying long hours to impress and to show face. In that way, there will be very little to compare between our male counterparts and us. Because I'm not leaving early necessarily because I've got children to take care of, it's*

[789] Epstein op cit note 718 at 751.
[790] Lopez op cit note 715 at 77.
[791] Epstein op cit note 718 at 751.
[792] L10012

because I'm done with my work and I'm going home and I would like to go home.[793]

An important point is made by the above participants in wanting to be assessed on the quality of work produced rather than the hours spent at the office. The current rigid time-based structure does not guarantee that quality work is actually produced, nor does it allow quality to be the measure.

Women who have chosen to work fewer hours in an attempt to ensure they also fulfill their family responsibilities are paid less[794] and their progression within the profession is affected negatively as the quotation below indicates

I know of a colleague of mine, she works until, well she had to renegotiate and she's earning, obviously a reduced salary because she has to knock off at 3 o'clock so that she can go and be with the children. But she tells me that her boss sends her emails, even at that time, when she knows that she's not in the office, and therefore she can't access any work, but she will send requests and then she must just see how she juggles to do that … [795]

This is also an example of a female attorney boss who is clearly indifferent to a flexi-hour employee's time commitments between work and family responsibilities

One result of the rigid time-based structure is that employees will find dishonest ways to show that they are fulfilling this rigid time standard:

[793] L10013.
[794] Thornton op cit note 664 at 23.
[795] L10012.

At some stage someone would program their emails to go out at 12 o'clock at night so people think you are at work.[796]

Another is that the employer may make arrangements for employees to stay at work for as long as possible:

I heard that now because we're moving to new offices next year, I heard that they'll be putting beds somewhere, so do you understand how much pressure that is going to be… So it means that if you want to stay in the office until 12 and then maybe have a nap, you can wake up and then the shower's downstairs, so basically you can have your whole life here, because they offer you supper, now they are going to be offering you a bed, so you can go and sleep and then if you, in the morning you can go and shower and go back to your office.[797]

The institutional culture of measuring hard work in terms of hours spent in the office and the hours billed to the client is a harsh reality of the structure of legal practice and it poses challenges to all lawyers, but particularly women. The research literature confirms this, Justice Steven Breyer agreed with one practitioner that "the profession's obsession with billable hours is like drinking water from a fire hose; the result is that many lawyers are starting to drown."[798] It is therefore argued that "the billable hour structure, prevalent at nearly every law firm, discourages efficiency and innovation, destroys attempts at work-life balance, and drives women out."[799]

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[796] L10012.
[797] L10012.
[798] ABA Commission On Billable Hours Report 3 (2002), available at http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf [Accessed March 2017].
[799] Lisa Lere 'The Scourge of the Billable Hour: Could law-firm clients finally kill it off? Slate' (Jan. 2008). *http://www.slate.com/articles/news_and_politics/jurisprudence/2008/01/the_scourge_of_the_billable_hour.html* [Accessed 20 April 2018].

The challenge is to create an enabling environment where time in the office is not the only measure of hard work.

> *It's all about, how many clients you bring in, and how much you make at the end of the month and at the end of the financial year. It shouldn't necessarily be about when I pitch, mainly the focus should be on my work and how I actually produce my work.*[800]

5.3.3 Masking Male Standard of Good Lawyer

There is a gender stereotype within the legal profession of what type of character makes a good lawyer which is based on a male model. The ideal lawyer persona is a person who is "hard, harsh, assertive, arrogant, and able to work long hours."[801] Women who are seen to try and emulate these characteristics are viewed as "bitchy" and "losing their femininity."[802] Interviewee L reflects on her experiences in regard to male and female stereotypes:

> *In my experience, male lawyers are expected to be more ambitious and tougher than female lawyers are expected to be. Women are either expected to be softer and less ambitious or to be extremely hard and bitchy to succeed. There seems to be no middle ground. I believe that women are not expected to want to be directors or partners as much as their male counterpart as their focus is expected to be more on their families than their careers. It seems that the expectation is either that women are very career-driven and ambitious to the exclusion of family, or*

As quoted at: 'An investigation of the billable hour' https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/careerguidance/archive/2012/10/04/an-investigation-of-the-billable-hour.aspx#sthash.ehvJK9eF.dpuf [Accessed 16 February 2017]

[800] L10013

[801] See Bowman op cit note 711 at 149. Brockman op cit note 726.

[802] Ibid.

not ambitious at all and content to have mediocre careers and have more of a focus on their families. There seems to be no middle ground in this respect either."[803]

Bowman highlights the dilemma above in noting the challenge that women face:

> "shall she model herself upon the stereotypical male image of an attorney and risk being accused of inappropriate aggressiveness or shall she heed the advice given to Ann Hopkins to act more femininely, talk more femininely, walk more femininely and risk the judgement that she is passive and unsuited to the life of the courtroom"[804]

An analysis of the responses of the female lawyers interviewed for this study, suggests that there is clearly a struggle about which persona to exude in order to be successful in the profession. Women who are successful in the "soft law" areas of family law and conveyancing feel a better sense of balance between family and work, as well as being in a "safe environment", compared to the hard, litigious, fighting environment of civil and criminal litigation. Women also feel better equipped within a" soft law" arena to use their mediation skills to resolve issues.[805] Women with their own law firms in this area of law are also able to work normal hours to balance work and family and to bill what they want.

I do think the women are almost better with Family Law because we have kids and we've got more sympathy for especially our women clients, you know, if they're having problems and stuff.[806]

While acknowledging a real situation, such statements, nevertheless tend to reinforce the stereotype that women cannot cope with the hard areas of law and should therefore resign themselves to only doing work in family law. The areas of law, that

[803] L1006.
[804] Bowman op cit note 711 at 149.
[805] L1002.
[806] L1002.

allow for flexibility in working hours and described as “safe environments”[807] for women to work in are family law and conveyancing. These areas of law though important, are valued differently[808] from the corporate areas of law. This is, in part, due to the fact that the corporate areas of law require more working hours and in turn generate more income.

5.3.4 Work and Family Balance

The current reality in South African law firms is that a woman is required to change, not the workplace. The inability to meet the standard of a good worker framed in male terms inevitably affects a woman’s progression within the legal profession.[809] The world of work has standards and structures that are male based and influence a woman’s ability to look after her job, as well as family, due to a lack of sensitivity to the reality of women having to juggle the two.[810]

One of the major challenges of work/family balance, for women in the legal profession is taking time off work after pregnancy. Although maternity leave is a legal right, absence from work negatively impacts a woman’s ability to progress within the profession:

> *What I've seen with maternity leave, is that, it also puts you in a bad spot, because there's a colleague of mine who took maternity leave and, because she came back just in time for consideration of promotions and she fell off because she was on maternity leave. And even though they say it won't prejudice you, it won't, put you in a bad place, but they do it indirectly.*[811]

[807] See Bowman op cit note 711. Brockman op cit note 726.
[808] See Bowman op cit note 708.Brockman op cit note 726.
[809] Lopez op cit note 715 at 77.
[810] Lopez op cit note 715 at 77.
[811] L10012.

The idea that women are always interested in getting married and having children is commonly used as a factor in deciding the employability of a female candidate in a law firm:

> *I also think women, because of the whole maternity, pregnancy, is a huge issue still…….Especially with this industry, because I won't tell you how many interviews I went on, …that was always a question. When do I think I will have children, or get married? Always a question and that bothered me, because that certainly shouldn't affect whether I get the job or not*[812]

This illegal question is not asked of men, revealing deeply held gender stereotypes and assumptions that only women will have to manage the work/family balance. Women who are already in the profession are excluded from opportunities not because they are insufficiently capable, but due to the fact that they are seen not to be committed enough to their profession. Women are seen as unavailable to take up the opportunities due to their family responsibilities.[813] These opportunities that exclude women may also affect their retention and progression within the profession:

> *…..And even the way people talk, when you go out and when you plan conferences and things, it's always something they're considering their female colleagues with children. You know, they won't select them because, oh well, you know, she's got dependants at home, so she won't be able to go for these trips, you know, wrong candidate…..Because you know, if it's just top management, it's males, it's very difficult to convince them that you are still able to do your job and that maternity leave is reasonable.*[814]

[812] L10012.
[813] Thornton op cit note 664 at 25. See also Manyathi-Jele op cit note 82.
[814] L10012.

Women are therefore faced with the dilemma of having to choose career over family or vice versa, knowing that in, both instances, it will negatively impact either their career or family life:

> *As I said, for women, if you want to have a sort of life outside of the law firm and get married and have a family, it's very tough, because from the get-go you are told that that is a no-no. And you always have that fear of, if I pursue my career wholeheartedly or do I pursue family life wholeheartedly. And can you give both wholeheartedly. Even before you go on maternity leave, the sort of work that you get is not the same and you may come back and the kind of work that you're just getting is not the same and then you know.*[815]

In one particularly disheartening case a participant detailed how, on two occasions, she was unable to take full maternity leave due to her employer not wanting to pay her a salary while on maternity leave. In the second instance, she was the only person available to do the work required and therefore could not take full maternity leave:

> *I never had maternity leave. I never, I took 7 days,…my situation also changed, and was different, when, I got my first child … I was very young. So I'd just finished nearly with articles, and the lady said... she's only going to give me unpaid maternity leave. And I couldn't… we couldn't afford it. So I had to, I think I started working as, my baby was born in December, so I just had to then… go back, ja, it was awful.*[816]

[815] L10012.
[816] M1009.

My second child, I went back immediately, after 5 days, but I could take the child with. It was a different situation, but again, I went back immediately because they didn't have a conveyancer, so I was the only person that could sign … a document and sign certain things.[817]

As mentioned in chapter four, maternity leave is regulated under section 25 of the Basic Conditions of Employment Act.[818] Female workers are allowed to at least take four consecutive months of maternity leave and must take at least 6 weeks off after the birth. However, it is not a requirement that the employer pay the employee during her maternity leave. Workers, while on maternity leave can claim from UIF (Unemployment Insurance Fund[819]) if they have contributed to the Fund for more than four months. A more progressive stance would be provision being made by the employer to facilitate full pay while on maternity leave, so as to not force employees to return early from maternity leave due to financial constraints. It is important to note, that as legal practitioners, one would expect employers to be well versed in the rights of workers and, as custodians of the law, to protect those rights. However, as seen above, there is a clear insensitivity to women's challenges with regard to maternity leave, as the rigid time structure takes precedence over workers' rights.

From the above it is clear that a critical issue affecting women's progression within the legal profession is their inability to balance family and work commitments. The long hours needed to earn a promotion or appointment does not accommodate family responsibilities.[820] There is a clear need for a shift in the male standard of an ideal worker so that the focus is on the work produced by an attorney rather than the time

[817] M1009.
[818] Section 25(1) of Act 75 of 1997.
[819] Unemployment Insurance Act 63 of 2001.
[820] Lopez op cit note 715 at 77.

spent in the office and recognition that all workers are parents with care responsibilities.[821] This raises the issue of the parental rights of all employees which law firms are currently not acknowledging.

Lopez argues that a change in law firm culture would focus on

> the quality of work produced and the number of projects completed rather than billable hours. Such a system could also promote transparent career evaluation and advancement. Lawyers would be considered for promotion once they completed a certain number of projects, and provided that their work product was of a high enough quality[822]

This difficult culture shift is evidently the only way that female attorneys would stay on the partner track without losing time due to family responsibilities or the decision to start a family. The "culture and values"[823] of the law firm would change as "work quality is preferred over face-time."[824] The culture change in the workplace is facilitated through a change in the beliefs and values of the firm. The catalyst for this change is seen through the leadership of the law firm addressing the issue of time versus quality of work. This positive outcome of this change in culture would result in improved growth and development of employees which would inevitably improve the work produced by the law firm and therefore increasing its revenue. In the end the targets required are met and all employees are able to progress on an equal playing field.[825]

[821] Ibid.
[822] Lopez op cit note 715 at 98.
[823] Ibid.
[824] Ibid.
[825] Fiona M Kay and Elizabeth H. Gorman. 'Developmental practices, organizational culture, and minority representation in organizational leadership: The case of partners in large US law firms.' 2012 *The ANNALS of the American Academy of Political and Social Science* 91.

5.3.5 Intersection of Race and Gender

The intersection of gender and race creates a unique type of disadvantage[826] for black women as detailed in chapter four. One finding of this research is that Black women feel more disadvantaged than their white counterparts not only due to gender stereotypes but also racism with regard to their competence to practice.[827] These women face the challenge of proving themselves fully as women and then the additional challenge of proving themselves as black women as each of these quotations below illustrate:

> *I think as a woman first of all, you already have to fight the male mentality at the top, that because you're a woman you don't know much and you're going to fall pregnant and have babies and walk into the sunset once you're married. So I mean as a woman you have to prove yourself from that perspective as a Black woman, I think you face even more prejudices and you have to prove yourself even more and I think that's when you are disadvantaged per se that as a Black woman you've got a whole lot more work to do than your White female counterpart.*[828]

> *To be fully honest with you, my interview here, the first time I dealt with the Senior Partner, she says to me, I don't like Black people, Black people are lazy, and I've had bad experiences with them, so what is going to make you a different Black person? Why should I hire you?*[829]

There are clear assumptions made about what Black women are capable of, without them being given an opportunity to do the work. Often times the assumptions are not

[826] See Browne and Misra op cit note 539.
[827] Manyathi-Jele op cit note 82 at 19.
[828] L1008.
[829] L1008.

as clear as the quote above. The difficulty in combating this stereotype is that often times it is subtle in nature as seen below.

> *you do not need to be timid, but you can still be humble, you can still be who you are and how you've been raised, but still be able to win cases and work very hard. I find it very weird, rather, and I actually find it very offending, that people tend to think that because you are a female of a certain background rather a black female, because that even if white females get in comparison to black female, it's different. It's the most difficult thing to actually understand because at the end of the day, if you don't give me an opportunity, I think our profession is a lot about confidence and about opportunities given to you for you to build your client base and your confidence. But if you are not going to do that because I come from a background where I did not have the same things, if you don't equip me with those tools, you will never know what I'm able to do. So I find it very, sad that in actual fact that's normally what happens. People tend to put you in a box immediately. If you're not giving me the tools how are you going to know that I have the ability to do it?*[830]

> *And it's very subtle, no, no, it's completely subtle. I think it would be easier when it was overt. Here when you're just looking and you're thinking, are you talking to me like this because I'm a woman, or… because I'm younger. It's difficult because I'm also a younger female. In South Africa there are you're not sure if how you're talking to me because I'm a younger black woman, so you can never pin point. There have been isolated incidents where I've felt that this might be attributed to more an inclement characteristic, than I think*

[830] L10013.

my abilities as a lawyer,"[831]

Bonthuys points to the "historical and structural privileges which continue to favour white people"[832] and are thus enjoyed by white women making their experience within the legal profession different from black women.[833] Black women in the profession are not trusted by clients or fellow legal practitioners due to gender and racial stereotypes of their ability to do the work.[834] This mistrust is rooted in stereotypes about black women in roles such as domestic work.[835] US literature points to the same struggle experienced by minority women who "often lack the presumption of competence enjoyed by white men and feel pressure to work harder to achieve the same results"[836] In order to succeed, the standard required of female black attorneys has to be an "exceptional standard of excellence"[837] which is not applied to white men.[838] There are fewer race-based responses due to fewer black women respondents.

White women also noted the greater disadvantage of black women.

"At the top there are very few women… and if they are, there are mainly white women."[839]

"I don't see that many black ladies in court, no not as many black ladies, or

[831] L10017.
[832] Elsje Bonthuys 'Gender and race in South African judicial appointments' 2015 *Feminist Legal Studies* 127 at 133. Also cited in Tabeth Masengu 'It's a man's world: barriers to gender transformation in the South African judiciary. Perspectives from women advocates and attorneys' 2016 *International Journal of the Legal Profession* 305 at 314.
[833] Bonthuys op cit note 832 at 133. See also as cited in Masengu op cit 832 at 314.
[834] Masengu op cit note 832 at 312. This mistrust is rooted in a stereotype against black women of being incompetent.
[835] Transformation of the legal profession (2014) CALS report op cit note 93 at 12.
[836] Deborah L Rhode 'From platitudes to priorities: diversity and gender equity in law firms' 2011 (24) *Geo. J. Legal Ethics* 1041 at 1050. See also Goodman op cit 93.
[837] Transformation of the legal profession (2014) Centre for Applied Legal Studies research report op cit note 94 report at 10.
[838] Ibid.
[839] L10014.

even worse I never see coloured ladies, I don't think I even know any coloured lady attorneys at all, in actual fact."[840]

I think there is the gap between women and men appears to be narrowing. At very senior level I would say there does still exist a gap, in that I would say white men are still more prevalent than women or in fact more prevalent than black men or black or white women. But I do see the gap has slowly narrowed and I can only of course refer there to my own experience in this firm. When I started here L was much wider. But now there are several senior partners represented at board level and exco level who are female, white, some Indian women and one or two black women. So definitely black women, the gap is still prevalent. I would say it's where white women were 10 years ago.[841]

Direct racism is seen in circumstances where black female attorneys are referred to as "window dressing" for the firm.[842] This focuses on a "person's race and gender rather than their capability."[843] This window dressing is referred to as "show horse and mascot roles"[844] in American literature as firms use lawyers of colour to create the right "look" in "courtrooms, client presentations, recruiting and marketing efforts"[845]

Black women feel isolated and alienated as they lack the social currency to fit in with white male counterparts. They do not have what Masengu describes as "cultural capital"[846] borne of "elite private education, playing golf, membership of the local

[840] L1001.
[841] L10015.
[842] Transformation of the legal profession (2014) CALS op cit note 94 report at 11.
[843] Ibid.
[844] Rhode op cit 836 at 1055.
[845] Ibid.
[846] Masengu op cit note 832 at 312.

country club and access to various holiday homes."[847] This "cultural alienation"[848] can indirectly affect work given to female attorneys and in turn impact their chances of promotion. The above barriers clearly influence the retention and progression of black women in the legal profession.

> *My view is still that there is a disparity and I think the, one of the main, or one of the things is it, to some extent, it is still a boys' club, a white male club. And it's in such subtle ways, it's not in anything overt, but I do see that the connection, the white male connection, the connections they have with each other, is still very advantageous to them. And I don't think white women, or certainly not black women in the legal profession, definitely not; white women haven't quite got to that level of having those connections that they can use to protect each other. Black women, I don't think have those connections, hardly at all. I do see change, I do see it, so for example, there, in the last, maybe 2 years, 3 years, I've seen more black women become Equity partners in this firm and I've seen the result of that, is that they've started to form connections with other black female attorneys and there's work sharing going on there. But it's at such a small level. White women a little bit better, but not nearly as much as the white male connections. It's still much stronger and that could just be a function of having had years and years and years to build that and there hasn't quite been the catch up.*[849]

> *I don't know if white women have much room to complain anymore. Although I understand that generally speaking, their salaries are still, across the population, lower. In a professional legal services firm such as this, a big firm,*

[847] I bid.
[848] Transformation of the legal profession (2014) CALS op cit note 93 at 10.
[849] L10015.

I can't talk about small firms, I think women, and white women don't have much to complain about. I think black women; it's still a tough crowd that they're facing,[850]

5.3.6 Impact of Cultural Expectations

Black women tend to also face the challenge of asserting themselves in the workplace due to cultural expectations of subservience:

You were raised serving the men in your family and your dad and everyone else, so there is…, that thing that's in you to say, I'm the one female in here, let me serve these men, it's fine and you don't feel in any way degraded or humiliated by it. It is what it is.[851]

Young black females are taught usually when we grow up, you taught to be more humble, more timid and whatever, but when you come out here, and then you're taught, if you're not going to be assertive, if you're not going to put yourself out there, you will not get the same work, you will not get this, you won't get that. You become more; I don't know if I can say it's more industrial[852]

The disadvantage experienced by women, either black or white in a male dominated profession is clear in the themes detailed above. However, there is a distinct layer of disadvantage experienced by black women due to their race. The disadvantage relates to stereotypes and expectations specific to black women. Focus will now shift to the themes of disadvantage experienced by women within the mining profession.

[850] L10015.
[851] L1008.
[852] L10013.

5.4 Mining Profession

This section considers the themes that emerge in understanding the barriers to the inclusion, retention and progression of women within the mining profession. Firstly, as in the legal profession, a boys' club mentality exists which, in turn, perpetuates a male standard of a good worker. Secondly, a clear difference from the legal profession is the undeniable physicality of mining work which affects women physically and, more so, when they decide to have children.[853] Thirdly, similar to the legal profession, the balance between work and family is also problematic for women due to the long hours required to meet mining targets. Fourthly, due to the work environment there is a particular vulnerability to sexual harassment and safety concerns, which also acts as barriers to the inclusion and retention of women in mining.[854]

5.4.1 Institutional Culture: "Boys Club Mentality"

Patriarchal attitudes about the role of women and their place within society noted in chapter four are clearly evident in the experiences of women within the mining profession.[855] It is clear that men find it difficult to adapt to working with women in the mining industry.[856] This masculine institutional culture translates into overt and subtle discrimination by men in terms of what they consider to be the appropriate role of

[853] Botha and Cronje op cit note 689 at 3.
[854] Botha et al op cit note 689 at 402.
[855] See also T Dlamini 'Gender in the Mining Industry' http://roape.net/2016/02/10/gender-in-the-mining-industry/ [Accessed 16th August 2016].
[856] Martin and Barnard op cit note 213 at 11. See also T le Roux and AME Naude 'Communicating with diversities: female employees in the South African platinum-mining industry' 2009 *Communicare* 24.

women in mining. This discrimination was described by women in the study as a "boy's club mentality."[857] :

> *the mining sector is notoriously hard, it's very much big boys club*.[858]
>
> *Going right up high levels there still tends to be a bit of a boys club mentality.*[859]
>
> *I think a lot of that, has to do with a little bit of an old boy's club. So that is a bit of a barrier,*

The "boy's club mentality" translates into a resistance to the inclusion of women in the mining industry, as well as a lack of sensitivity or understanding of the challenges that women face in their participation and progression.[860] It is also evident that white males dominate the mining profession.[861] Women's representivity, particularly in the senior management positions, is either very limited to non-existent.[862] As was the case for women in the legal profession, women in mining stated that, only when women are included in the senior management structures, will there be a change in the institutional culture of the workplace.

> *the mining industry …… comes from a history of predominantly being a white dominated industry and over and above that being male dominated, because of this within the mining industry there aren't many, of any colour, it doesn't*

[857] Yvonne Du Plessis and Nicole Barkhuizen 'Exploring the career path barriers of women professional engineers in a South Africa context' 2015 *South African Journal of Labour Relations* 38 at 40-42.
[858] M1001.
[859] M1006.
[860] Martin and Barnard op cit note 213 at 7.
[861] Dimakatso Motau 'Willingness for gender transformation from industry, but women remain underrepresented' 2011 *Mining Weekly* available at http://www.miningweekly.com/print-version/women-still-need-to-benefit-from-bee-2011-04-08 [Accessed 6th December 2016].
[862] Ibid.

matter if they're yellow, black, blue, you don't find women in positions of influence that can make decisions and make things happen.[863]

Women working in such circumstances feel marginalized and experience feelings of the "other"[864] as the only woman in the group. This is reflected by the participants who indicate that change would only happen if more women were employed:

I mean, it's not uncommon for me to have functions with my team, I mean we went away for a strategy session earlier this year, there were 20 people, and 19 of them were men. My express comment at the end of the session was, in future I'm choosing who we recruit because we need more women.[865]

It's the same with mining. And it's very difficult to work, I found when I was consulting, to sit in a board room of 30 men and you're the only woman and you're the only environmental person as well and then you've got to tell them, actually no, you can't put that railway there because, or that conveyor there because it's going to cross over that , so you need to move it, and they don't like to hear that, so, you know, we're not breaking good news to them, generally.[866]

The age of male colleagues, as in the legal profession, affects their attitude towards women in the mining profession. There is also a desire from the older generation to keep the status quo as is, with a clear resistance to change. This is held to be linked

[863] M1006.
[864] Abrahamsson op cit note 730. See also Lahiri-Dutt op cit note 730 at 47 on the invisible status of women in mining.
[865] M1007.
[866] M1008.

to traditions and perceptions borne out of male solidarity within the mining industry.[867] For example one interviewee stated the following:

> *The older generation, my age group, the males are still very domineering, they're a special elite class, they're like a boy's club, they're family orientated, this one comes, in because, there's a father that's worked here for years and years so he's got a nepotism thing.*[868]

As in the legal profession, women in professional positions in mining feel that their role within the mining industry is not being taken seriously and that they are only taken seriously once they have proven themselves to be competent.[869]

> *And I'm a professional woman, I don't know, you walk into a meeting and they assume you're there to take the minutes.*[870]
>
> *I think being a woman and being an ecologist it's, I've had to really prove myself, there's no time, you know, you can't coast through. If you work hard, but you've got to really work on the people and you've got to build relationships, so you can get there, but it's not easy."*[871]

> *I remember when I was working on one of my projects, it's like male dominated, and then you have to meet with the guys and I'm a Project Geologist, I'm the one who's running the rig and making sure everything is okay. And then you get these new people, coming to visit and they sort of like,*

[867] Abrahamsson op cit note 730 at 21; 22;24.
[868] M10010 "I do think that women are held back in the mining industry, both by male chauvinist men as well as by women's inherent timidity, I think. Ja, I think especially when you get higher up in a company..." M10011.
[869] M1008.
[870] M1006.
[871] M1008.

don't understand that you are the one who is running the rig, they automatically just want to speak to the guy around who's working in your team, and then after, it's like you have to prove yourself a little bit more than if it was a guy in charge, and it's only after you've done your presentation, you've showed them everything and then it's like, you can see, it's like, oh okay, you get what I mean, like, she's the one who's doing she's competent.[872]

It is difficult to think of ways in which an overt and systemic institutional culture can be dismantled. As noted, in the legal profession, part of the problem is that it is an accepted norm, that women are perceived to lack competence, it will require individuals in the workplace to be aware of instances when it does occur in order to tackle it decisively. One suggested solution is strength in numbers as more women join the profession they will bring about the necessary change instead of expecting men to change the situation.[873]

5.4.2 Male Generational Differences

As in the legal profession, older men are seen to harbour different attitudes to women in the mining profession compared to younger men. As seen by the participant below, older men tend to take a paternal, and sometimes patronizing, attitude towards the women they are required to work with, whereas younger men tend to treat women as equals.

[872] M10012.
[873] Nanette Fondas 'Feminization of work: career implications' in Michael Bernard Arthur and Denise M. Rousseau (eds) *The Boundaryless Career: A New Employment Principle for a New Organizational Era* (1996) at 284-285.

So honestly speaking, like, I remember this, he was German, on the board, you know, very, very nice guy, you know, in his 60s and everything, you know. You know, he was old, you know, and to me, and he used to refer to me as, you know, 'my child', you know, and his child at home does this things, you know, so, I couldn't antagonize him because he's not doing it, you know, maliciously.[874]

When I first started working, a lot of the guys, I was the same age as their daughters, you know, and so they immediately take on a very paternal role, which is actually sometimes quite convenient. When you're working underground and you forgot to get a sample, it's great, because you say, ah please, and they help. So, it's pros and cons. I think, girls can sometimes get away with more than guys because, particularly if it's an older person who has a daughter a similar age to you, you can generally get away with a lot more. But on the other hand there are guys who will see you as their daughter and can't picture their daughter doing what you're doing and you just never break through.[875]

From the quote above it is clear that this parental attitude does have the effect of reinforcing the stereotype that women are not capable of working within the mining industry and so breaking down such barriers becomes more difficult for women. It is however, positive to note that the younger men in mining are seen as being more open to treating women as equals.

[874] M1002.
[875] M1007.

The younger guys are fine, I don't really experience very much sort of, any kind of inequality or sort of, prejudice from them,[876]

The younger generations are far easier and just open too, to give people a chance and to give other people opportunities.[877]

Several participants also noted the difference in treatment of women by men of different racial groups with Black and Afrikaner men being more antagonistic towards women as compared to foreign men.

but the older guys and the older they are, the worse they are and the more difficult they are. And also I think, I find, it's a bit of a cultural issue as well, so Afrikaans men are the worst. Obviously they know everything better than you do.[878] (white female participant)

I think it is definitely from older generation and they do, they still treat us like women, no matter, I mean, for example, I was in the field the other day right? The passenger opens the gate, but the Geologist with me, an older guy, wouldn't let me open the gate because I'm a girl. Girls don't open gates. Okay for him, very gentlemanly, for me, it's like, I can actually do it, it's a gate, you know. I do feel within my generation, the black guys are very much against women, much more so than the white South Africans, who are more chauvinistic than foreign guys.[879] *(white female participant)*

[876] M1008.
[877] M10010.
[878] M1008.
[879] M10011. See Also M1002 : "I remember this, he was German, on the board, you know, very, very nice guy, you know, in his 60s and everything, you know. You know, he was old, you know, and to me, and he used to refer to me as, you know, 'my child', you know, and his child at home does this things, you know, so, I couldn't antagonise him."

Generational differences have both negative and positive implications for women in the workplace. Men are either accommodating or empowering to women, or they resist the inclusion of women in the workplace and have antagonistic attitudes towards them. It is important to note the distinction in the treatment of women by South African men as compared to foreign men. This clearly shows the impact in the workplace of social patriarchal attitudes.[880] It is therefore crucial that a change in society happens first before a change can be evident in the workplace.

5.4.3 Masking Male Behaviour to Succeed

Similar to the legal profession, women are seen to have succeeded in the male dominated mining industry because they have become "masculine" in their approach in order to make it to the top.[881]

> *The girls who've made it in X and Y mask masculine behaviour; bottom line; it my observation. There must be some research around, there has to be.*[882]

> *I think that there is still a masculine dominated ideology for workplace and what I mentioned earlier is that the women who make it to the top mask masculine behaviour. So the women who make it to the top are comfortable with showing aggression, comfortable with showing a lot of the masculine competency. Women who don't make it to the top are actually displaying more feminine competency in their daily execution of their work, so they're overlooked, because they're not seen as being capable. Because they're not demonstrating, they're not putting out the behaviour, they're not verbalising it, and they're not putting out the body language that masks male characteristics.*

[880] See also Lize Booysen 'Societal power shifts and changing social identities in South Africa: Workplace implications: management.' 2007 10(1) *South African Journal of Economic and Management Sciences* (2007) 1.
[881] See also Martin and Barnard op cit note 213.
[882] M10005.

> *That for me, in my working career of 22, 23 years has been the most interesting observation. The minute I start masking male masculinity, I get more attention. When I actually am just myself and I'm comfortable with what I'm doing, I get overlooked.*[883]

The profile of an ideal worker within the mining profession is framed in male terms; therefore success of women is, in part, based on masking this ideal male worker. This is clear from the quotes above. This ideal male worker is a challenge that is both subtle and overt depending upon the circumstances. Like institutional culture, the sometimes-subtle nature of this challenge makes it difficult to dismantle. The problem of the ideal male worker model is similar to the legal profession; the only difference as per respondents' submissions is that women who try and mask male behavior in the legal profession are in turn looked down upon as not being feminine by both men and women.[884] Within the mining profession women are able to use it to be taken seriously by men and therefore progress within the profession.

5.4.4 Gender Stereotypes and Reality of the Physical Nature of Mining Work

Le Roux and Naude described the nature of mining as follows:

> mining is hard labour under conditions of extreme discomfort, deafening noise, intense heat and humidity and cramped space – exacerbated by tension stemming from the need to watch constantly for signs of potential hazard. Every miner can recount several experiences of accidents or near accidents.[885]

[883] M10005.
[884] See also Brockman op cit note 726 at 57.
[885] T. Dunbar Moodie and Vivienne Ndatshe *Going For Gold: Men Mines and Migration* (1996). See also K Mostert and G R Oldfield 'Work-home interaction of employees in the mining industry' 2009 *SAJEMS* 81. M de Klerk and K Mostert 'Work-home interference: examining socio-demographic predictors in the South African context.' 2010 *SAJHRM* 1. See also Dlamini op cit note 855.

The masculine institutional culture discussed above[886] perpetuates the stereotype that women are not physically suited to mining and the hard-working environment that it involves.[887] However, one of the interviewees stated that the work environment is challenging for both men and women:

> *And mining is hard and not every guy can deal with it, I know a lot of guys that would never set foot underground. So it does take a special type of person, man or female to deal with the rigors that are the mining sector. And that's why some people, they just bond with it and some people can't stand it.* [888]

That being said, the challenging physical demands of mining[889] cannot be ignored and studies have shown that the retention of women within the mining profession is affected by this unavoidable reality.[890] Part of the institutional culture in mining is the expectation that a person cannot hold a senior position until he or she has "earned his or her keep" underground. Lahiri-Dutt notes that "mining is seen as a job in which men go down into the mines endangering their lives to earn the daily bread for their families."[891] Therefore ideas of masculinity in mining are constructed around "mystery, history, braveness, manual hard work close to the ore face". It is not seen as an environment fit for a woman. The requirement of this particular type of masculinity is therefore seen as "a gatekeeper towards women"[892] as noted by one participant:

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[886] Le Roux and Naude op cit 856 at 29.
[887] See also Dlamini op cit note 855. See also D Botha 'Women in mining: engaging men in the dialogue' 2016 *Journal of contemporary management* 954 at 963-4. See also Martin and Barnard op cit note 213 at 7.
[888] M1001.
[889] See Botha and Cronje op cit note 689.
[890] Ibid.
[891] Lahiri-Dutt op cit note 730.
[892] Ylva Fältholm & Lena Abrahamsson 'Cracks in the workers' collective - windows for change towards gender equal mining workplaces' 33rd *International Labour Process Conference*, Athens, April 13-15, 2015.

> *It really comes down to the physicality of the job and to be fair there are some things that women and some men, slighter less physical men, can't do in a mining operation. And if there's not some sort of engineering design that allows for a person who's slightly smaller or thinner or not as muscular and strong, quite honestly there's nothing that can be done about it. And it requires a big physical person to be able to do that job.*[893]

Women's ability to work underground is further challenged by the reality that a mine has daily targets to meet.[894] There is no accommodation of strength differentials and women need to work just as fast as men underground to meet targets as explained by one of the interviewees:

> *I think on the ground, it's hard work, if we're looking right from, you know, stopes and phases and things, I think its hard work. And I'm not saying women can't do it, they can, it might just take them a little bit longer, which then affects productivity,*[895]

There is a similarity between mining targets and the legal profession's billable hours. In both professions one is not viewed as a hard worker if targets are not met. Consequently, due to the difficult physical nature of the work, the role and competence of women is questioned by male miners who would rather do the work themselves and leave the women to fetch water and organize food.[896] Several partici*pants* articulated this:

[893] M1006.
[894] Botha and Cronje op cit note 686 at 660.
[895] M1001.1
[896] See Benya op cit note 737.

There is a "deeply entrenched mistrust on the part of male miners about the ability of females to perform these "manly tasks"[897]*. Women in mining therefore constantly feel the need to prove themselves in order to be taken as part of the team. Some are forced to take up stereotypical gender roles instead of the tasks they are required to do.*[898]

As a woman you have to constantly prove yourself harder than men. It takes a while before people actually recognise that you know what you're talking about. A lot of the guys, once you get to that point, then you've got their backing and they'll work with you, but it takes a while to get there[899]

they have this macho tendency, you know what I mean, their women don't work, you know, so they have a very hard time in treating you as an equal because at home my wife does this, why can't you do it for me and anyway, who tells you that you are better. So you find gender roles now flowing in, when a woman should be drilling she's now fetching water or bringing food.[900]

"Look, I won't lie, like, it's difficult to work with men. At the end of the day your superiors are men and miners, so they're, like, engineers and some of them are a bit stubborn, but it's also new for them to learn to work with women and to listen to a woman's opinion."[901]

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[897] M1007.
[898] M1002.
[899] M1002; M1015: "Yes, I don't think ubhuti, if it was a man obviously they were going to think ubhutini, he's know what he's doing. Noma bona (whether they can see), they don't know if he knows or not. But they will have that thing ubhuti, no, he knows his job, because he's a man he knows what he's doing, so. But because of it was like, me, I think that's why they had that thing."
[900] M1002
[901] M1003: "So one day he looked at me, you know, I think the first time when they looked at me I said, oh, wait, wait, wait, wait, sorry, sorry guys, you know, a minute. I went out, Tutu, just come and serve the gentlemen, you know. She's the tea lady, I'm not the tea lady. I went to school for Christ's sake. Then she comes and do, and does her job, you know, then that's also sensitising them without offending."

"when a woman is part of the team she still has to work that much harder to prove herself."[902]

Women in the mining profession therefore need to ensure that they are not boxed into specific gender roles due to the mistrust male miners may have as to their competence. One of the ways in which this can occur is if the employer is more accommodating of gender differences through the facilitation of innovation in machinery that would assist women physically to mine. This would ensure that they are able to do the work just as well as men and not be forced to do unproductive work like fetch food and water for male miners.

5.4.5 Physical Barriers

In addition to the social and cultural barriers women face, the mining industry is physically structured around men from the equipment used to toilets. A practical barrier is the lack of ablution facilities underground. A lack of women underground for so many years has meant that many mines have yet to build the ablution facilities necessary for women underground.[903] As Eveline and Booth[904] note that women have to deal with "subtle sexism and open hostility" to their advancement in mining.[905] For example, "men at the mine openly opposed discussions about gender equality, the demand for women's toilets in work areas, and the provision of small-sized safety gloves."[906] Resistance to the accommodation of women in the mines perpetuates an atmosphere of exclusion and reinforces the idea that women are the

[902] M1007: "So you do sometimes come across that, I try not be offended by that because they do put in effort and it's also a new concept for me to interact with a man that's, like, 30 years older than me that's been working in mining for years and years and who knows what he's doing and for me to be able to relate my knowledge or my expertise in finance or whatever and try and make myself relevant to his environment."
[903] See also Dlamini op cit note 855.
[904] Eveline, J & Booth, M 'Gender and Sexuality in Discourses of Managerial Control: The Case of Women Miners' 2002 (9) (5) *Gender, Work and Organization.*Vol. 9 No. 5 November 2002 at 558. See also Abrahamsson op cit note 730 at 21.
[905] Ibid.
[906] Ibid.

"other"[907] and do not belong in a mine. This lack of accommodation creates a harsh working environment affecting the access, participation and progression of women in the underground workforce. Participants noted the lack of facilities, clothing and equipment:

> *Ablutions underground is non-existent*[908]

> *Ablution facilities, some of the mines have no ablution facilities at all. For men, we are physically different. For men, they can turn, if they want to pee, they can turn around this way and pee. For me as a woman, I'm wearing an overall. …..So men can turn around and pee. You as a woman, what do you do? You have to take off the overall*[909]

The quote above also illustrates that the mining industry has also not accommodated women with regard to the design of worker clothing,[910] which is a one piece overall made with men in mind.[911]

Several interviewees described problems faced in working underground without the provision of changing rooms. The absence of women's change rooms influences whether women are able to actually go underground to work[912]:

> *Also when you go underground, you've got to change, but no change rooms designed for women, I mean separate change rooms for women*[913]

[907] Ibid.
[908] M1002.
[909] M1002.
[910] LI Zungu 'South African guideline for the selection and provision of personal protective equipment for women in mining' 2013 *Occupational Health Southern Africa* 4.
[911] See also Dlamini op cit note 855. Botha and Cronje op cit note 686 at 4.
[912] Martin and Barnard op cit note 213.
[913] M1002.

> *When I started on the Gold mine they didn't have a change house for me. I had to use the manager's change house, which meant I could only go underground, when the manager or the visitors weren't using his change house because there was nowhere for me to change.*[914]

The lack of ablution facilities, appropriate work clothes and change rooms underground is an environmental issue that creates a stressful working environment for women.[915] To create an enabling working environment for the access and participation of women in mining, the industry needs to accommodate these specific needs and be sensitive to the challenges they face without such facilities and appropriate clothing. This accommodation of women will increase their presence underground and in turn lead to the necessary transformation of the mining industry. These are low cost issues that can be easily dealt with and can go a long way towards improving conditions underground; however there seems to be a clear lack of leadership commitment to facilitate the changes necessary.

5.4.6 Sexual Harassment and Safety against Gender Based Violence

Joan Brockman has suggested that sexual harassment is "women's most dangerous occupational hazard."[916] "It takes (the woman) out of that professional context and focuses attention on her as a woman, to be appraised for her appearance rather than her ability."[917] Within the confines of underground work, where limited security is available, women are exposed to a greater risk of sexual harassment.[918] Their only

[914] M1006.
[915] See also Dlamini op cit note 855.
[916] Booth op cit note 901 at 21. Brockman op cit note 726.
[917] Brockman op cit note 726. It has been argued that sexual harassment "threatens our paycheque, it undermines our health and self image" Brockman op cit 726 at 58.
[918] Botha and Cronje op cit note 686 at 11. See also D Botha 'Women in mining still exploited and harassed' 2016 *SA Journal of Human Resource Management* http://dx.doi. org/10.4102/sajhrm. v14i1.753. [Accessed 15 December 2017] See also Du Plessis and Barkhuizen op cit note 857 at 43.

protection is men who are part of the team they work with, as the next quotation from an interview expresses in graphic detail:

> *We would have to get into the horizontal transport, the locomotives and when you go into these, you generally sit with your knees interlocked to fit more people in. An understanding sort of unwritten rule was always that I would get in first, such that I could sit against the end with my legs together and then the guys would sit with their knees interlocking into one of them. And the one day the guy that we all had problems with came in and he forced my legs open and he shoved his knee in-between my legs and he said, I've been so looking forward to sitting like this with you. Fortunately my crew came in next and they heard what he had said and they said to me get out now and they carried me over the laps of these guys to where I could stand and they turned me around and they said, Don't turn around. That guy had an accident underground that day he didn't walk out from underground that day.*[919]

Two further comments from interviewees illustrate the extent of this occupational hazard:

> *There's a lot of sexual harassment, as well, which make even women professionals at the end of the day, you know, uncomfortable, you know……You get into this lift to go down, you know, especially the deep level... then you're all squashed, sometimes, even if you are squashed, you know, you can literally feel when someone is invading your space, you know, and then they'll start touching your breasts, you know, and you feel, no,*

[919] M1001.

no…… And you know you can't really complain because it's a lift you know, you are all squashed, but you feel this is assault.[920]

However, we constantly hear stories of, particularly underground, where women are just taken advantage of, and it's sexual favours to get work done, and you know, I'm not exposed to that on a daily basis,[921]

It has been argued that gender affirmative action creates hostility and leads to an increase in sexual harassment in the workplace because women are entering men's turf.[922] It is submitted that this cannot be the reason why it is not implemented but rather the issue of sexual harassment needs to be confronted by the affected employer.[923] The steps necessary for the employer will be discussed in more detail in chapter six.

The physical environment within mining creates safety issues for all miners[924]. However, women are vulnerable in ways that male miners are not.[925] One safety issue arises out of the working hours of women.[926] In order to meet production targets, normal working hours are extended placing women at risk. This is clearly evident in the views of the participant below:

Women work shifts, in some of the mines, you know, we work shifts, and then the transport problems become an issue. Lots of women that I know were raped. You have to leave home very early. Let's say your shift would start at

[920] M1002.
[921] M1007.
[922] Levinson op cit note 112 at 44 See also Nina Berezowski, Hazel Bothma, and Suki Goodman. 'Reverse discrimination. A facet of sexual discrimination? A micro-focus on the legal profession: forum.' 2003 27(3) *South African Journal of Labour Relations* 107.
[923] Brockman op cit note 726.
[924] Botha and Cronje op cit note 686 at 11.
[925] Ibid. See also Botha and Cronje op cit note 686.
[926] Ibid.

around 4am or, you know, because you've got to be, okay maybe it starts at 6. It's a whole thing in safety thing, one hour of safety and everything, so you've got to be at work probably you leave home at 2am to get to work at 4, and then you go through the safety issues and those sorts of things, then to be underground by 6 o'clock, you know. How do you take that?[927]

The strict institutional culture of work shifts to meet targets presents a challenge for women who must find their way to work in the early hours of the morning.[928] This again creates a stressful working environment when the safety considerations based on gender are not taken into account.[929]

5.4.7 Work and Family Balance

The masculine institutional culture in mining translates into long working hours which make it difficult for women trying to balance their responsibilities at work and at home.[930] The family and work balance thus becomes a real barrier in the progression of women in the mining profession.[931] The hard structure of set schedules (shift work), for targets and profits to be achieved, make it very difficult for women to balance their family responsibilities.[932] Meeting deadlines and achieving production targets within the mining industry are the standards used to measure a good worker and such measurements are used to judge an employee for promotion.[933] The

[927] M10002.
[928] Botha and Cronje op cit note 686 at 9.
[929] D Simonovic 'Submission to the Special Rapporteur on Violence Against Women: Country Visit to the Republic of South Africa 2015' available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/Submisison%20Rapporteur%20on%20violence%20against%20women%20CALS%20submission.pdf [Accessed 30 April 2018].
[930] Martin and Barnard op cit note 213.
[931] Mostert and Oldfield op cit note 885. De Klerk and Mostert op cit note 885. See also Du Plessis and Barkhuizen op cit note 857 at 42.
[932] See Botha and Cronje op cit note 686.
[933] See Botha and Cronje op cit note 686. Botha op cit note 884 at 964.

expectation of long working hours linked to targets in revenue is similar to the legal profession. However, unlike the legal profession where work could possibly continue while one is at home, in mining the work has to be done at the mine, underground.

Participants in the research admitted they would delay having a family because they do not view their working environment as being conducive and enabling for them to balance both family and work:

> *Look, I'll be honest I'm in finance so, by nature it's a very deadline driven environment, and there are a lot of late nights and you can't just like, just pack up and leave sometimes, so that's the main reason, I haven't started a family, or we haven't started a family yet because, because of work and like I know my boss is very nervous that I want to start a family, obviously because I think he'd have to find, like, a replacement or whatever. But for me at the moment it's what's stopping me because I just practically don't know how I'm going to do it, like doing what I'm doing now. And I mean, my work load won't get less, it'll just, the responsibility will just increase, so I just don't know how I'm going to be able to like cope, and from what I see, if I look at people who do have children in my sort of, similar type of environment, like, I don't know how they do it. Maybe they manage, with nannies or whatever. I don't know, I just wonder, because I can see them working late and I know they have, children at home and how just, how does that work.*[934]
>
> *The work and family, I would say absolutely, because, in my case I've travelled a lot, and as a woman, I don't have a family yet, but I sort of, I don't know, I*

[934] M1003.

couldn't say for the future, but it's something I think about, like, when I start having a family and how is it going to work, because I go away for a month sometimes and so I think that's a huge challenge, whereas if it's a male they can go anywhere.[935]

There is an unavoidable reality of long work hours in mining due to it being deadline driven in order to meet the productivity targets of the mine to ensure the mine makes money. This is the same rigid time structure of the legal profession. However, the quality of work argument cannot be made within the mining profession as the reality is that targets are met or not as detailed by the respondent below:

If you're on a mine, I really do see that as a cap and a barrier and a real limitation to women on a mine, because production shifts are set, operational shifts are set and you can't, you know, if you're working on a rotation where every 3 weeks you're working night shift, you know, how do you now structure your family life? So it is definitely, I would say, that's the core challenge to gender issues on operations, is the fact that, for the sake of having productivity and for the sake of producing your ore, and to be able to make profits you have to have those very structured shifts.[936]

Women who do have families feel the pressure of trying to be a good worker as well as balancing their family responsibilities. As shown in the response by the interviewee below:

I'm married so, like, … my priorities aren't limited to just the work ethic. I have to be wife and so for them, like, I find that they all have, their wives don't work and they get home a cooked meal is ready. I still have to balance that, I find,

[935] M10012.
[936] M1006.

but they can work late and it's easy and they go home and stuff's sorted but for me it's difficult to balance, like, the pressure of work and the working late and the deadlines, with still having to manage home it's, like, so when they leave here they are done for the day. When I leave here I'm not done for the day, for me that's difficult...[937]

It is important to note that the work and family responsibilities pressure is experienced by both genders within the mining profession as well as the legal profession as observed by the interviewee below:

I think this is obviously the major issue and it's something that I've started thinking about now as well, thinking about having kids, is that, I don't think it's necessarily something that's imposed on women. I see quite often we have a lot of single dads, we have a lot of divorcees, who the dads really take care of the kids most of the time, and it's more coming from an aspect of, oh you're leaving work early again, oh you have to go and pick up your kids from school again. So I don't see it as a gender issue, I see it as an issue where the company is equating time spent behind your desk to productivity to how far you can progress and what promotion you are going to get based on your productivity. [938]

There is also a subtle insensitivity towards what I would describe as the "challenge of a sick child" within the institutional culture of mining. Two interviewees noted the difficulty they had to tend to a sick child:

And then also, again men, you know, you have to take your sick child to the doctor and men look down on that I think, our directors are all older and one of

[937] M1003.
[938] M1006.

their mantras is, 'never be absent'. You know, you go on a holiday, you come back, you're project's gone, kind of thing, and somebody else is doing it. So, ja, 'never be absent'. Mm?[939]

Most men have got families. They don't worry about that. They go to work, they do their jobs, and they advance in their careers because they have a wife looking after the kids. Okay, so they don't think about it. Even if you say,… my child's sick, I've got to take my child to the doctor, it's like, of course, but you can always feel that, well can't you get somebody else to do it, kind of feeling, you know. I think guys just don't think about it.[940]

5.4.8 Pregnancy: Issues of Participation

The mining industry has implemented a policy of not allowing women who are pregnant or breastfeeding to work underground due to the strenuous working conditions underground which pose a potential health risk.[941] It has been noted that, after giving birth the majority of women would fail the heat resistance test needed for them to continue working underground.[942] Pregnancy therefore has an impact on the participation of women who either leave mining to start a family or take up a desk job where possible.[943] There is some scientific uncertainty on the effects of underground mining on women who are pregnant due to two limitations.[944] Firstly the "workplace hazards are generally studied in the non-pregnant employee population"[945] and much

[939] M10011.
[940] M10011.
[941] Occupational Health and Safety Act (OHSA) 85 of 1993 and the Mine Health and Safety Act (MHSA) 27 of 1996 'Guide to Healthy Pregnancies in the Mining Workplace' (Laurentian University) available at https://crosh.ca/guidebooks/guide-to-healthy-pregnancies-in-the-mining-workplace/ [Accessed 6 December 2016] See also Botha and Cronje op cit note 686 at 3. Botha and Cronje op cit note 686 at 662.
[942] 'Guide to Healthy Pregnancies in the Mining Workplace' op cit note 941. at 395.
[943] Benya op cit note 737 at 11.
[944] 'Guide to Healthy Pregnancies in the Mining Workplace' op cit note 941.
[945] Ibid. See also C J Badenhorst, C. J. 'Occupational health and safety considerations for the employment of female workers in hard rock mines.' *Hard Rock Safety Conference*. Sun City Johannesburg: Southern African Institute of Mining and Metallurgy, 2009.

of the knowledge on the "reproductive effects of hazardous agents in pregnant employees"[946] has largely been gathered from animal studies.[947]

This is not to say pregnant and breastfeeding women are not susceptible to workplace hazards while working underground.[948] The limited research has shown that this is one instance where the difference in treatment of men and women is unavoidable due to the risks involved.[949] Pregnancy is not only a biological barrier; it is also a social one to the progression of women within the mining industry. One participant made her frustration clear from the standpoint of management trying to include women within the workforce:

> *I have a slightly different standpoint with this from personal experience where from a management role you put a lot of money into women, you train them up, you relocate them internationally, you spend a lot of money on them and then they don't take care of themselves and they have been in a city for a week and they fall pregnant and then they can't work anymore.*[950]

It is clear from the participant below that the choice to have a family does affect the work a woman is given and therefore potentially impacts her progression within the profession:

> *Some companies, they will give you a desk job. Well a lot, actually most companies will give you a desk day job, but, you are actually made to feel idle.*[951]

[946] 'Guide to Healthy Pregnancies in the Mining Workplace' op cit note 941.
[947] Ibid.
[948] Ibid. See also Benya op cit note 737.
[949] Ibid.
[950] M1001.
[951] M1002.

It would require some statistical analysis to see if the lack of retention of women working underground is in part due to a choice they make to start a family as evidenced below:

> *So the women come in, they become mining geologists, become mining engineers, become metallurgical engineers, they go through their graduate training, they do a bit of their time on a mine and then they want to have children, and then they generally exit the profession. So the mining industry has now invested heavily because a lot of those females previously disadvantaged, so they're black females as opposed to white females. They then say, okay, cut my teeth, done my part, earned my spurs, I'm now in my late twenties, early thirties, I want to go and have my family, I need a corporate office job, I'm not going to be at the mine anymore*[952]

It is clear from the participant above that there is no accommodation of women who want to start a family within the mining industry. There is a strong resistance from men within the industry to accommodate women who fall pregnant as shown in the quote below:

> *I had a lady work for me who fell pregnant and, now she was new into the role, she was an internal candidate moved from one of the mines into my team and she could have told us earlier that she was pregnant but that's fine, she didn't, anyhow, these guys had a meltdown. And I said to them, just hang on a second. I can tell you tomorrow that I'm pregnant and what are you going to do about it. Deal with it.* [953]

[952] M1005.
[953] M1007.

MM: Was the issue, she can't go underground now, or?[954]

Well, in the project environment you don't go underground but the issue was that, she's going to be off for four months, and what's going to happen to the project and she should have told us. And I thought, but guys the world's not going to come to an end. It's fine. But it's that kind of thing, you know, there's still like, issues around, women will go off and now have babies and they're not as effective in their job and they're going to take time off.[955]

Due to the reasons stated above it is clearly difficult to then accommodate pregnant women underground. The decision to have a family is a barrier to their participation and progression within the mining industry. The only concession is that women are allowed to return to underground work after their maternity leave if they wish to do so. This requires a concerted effort by the employer to ensure retention of women after maternity leave.

5.4.9 Differences between White Women and Black Women in the Workplace

As detailed in the legal profession section,[956] the intersectionality of race and gender means that black women in mining experience a complex layer of disadvantage that relates to race, gender and different religious or cultural ideas of the way a woman should behave towards men.[957] This means that black women experience a disadvantage linked to their gender but also linked to their race. They experience this disadvantage from both white and black men. From black men, black women's authority is challenged due to cultural beliefs that they should be subservient and not be assertive in their interaction with black men. Racial stereotypes dominate the

[954] M1007.
[955] M1002.
[956] Masengu op cit note 832 at 314.
[957] Benya op cit note 737.

relationship between white men and black women who treat black women differently to their white counterparts.

Studies have shown that black men, due to culture, find it "particularly hard to take instructions from young African female learner officials" [958] One of the coping mechanisms chosen by women to deal with this challenge is highlighted as submitting to the men's authority.[959] The women, if they are in a position of authority, grant the men the "authority" and respect demanded to ensure a functioning working relationship. Participant M spoke about the culture of respect that is cultivated between Black women and Black men working underground and the help that mentors gave her.

> *That's definitely true. Let me give you an example with Black men. When I started in the underground section, it was black men only, and that's the rule, really underground its black men only. And really I started out, from the… black person culture of respect,… and they were really as old as my dad, to be honest. So then I started out with the culture of respect,…*
>
> *It's just that having not grown up here I knew how, I had mentors who had gone through it and mentored me through the process, you know, so that I could, I could reach the top echelons of the mining industry without necessarily stepping onto the toes of my elders , you know, I understood the gender issues, you know? "*[960]

These cultural differences in race do have an impact on the way black women are treated and their progression within the profession as a result.

[958] Benya op cit note 737 at 1.1
[959] Benya op cit note 737 at 12.
[960] M1002.

It is important to note that two white interviewees pointed out below that, in their opinion, black women were not as assertive in the workplace when faced with gender discrimination and stereotypes.[961] Both interviewees linked it to differences in upbringing:

> *I think it's quite hard, again, sorry I'm bringing up race, but I do think it's quite hard for young black women especially because they have been brought up in a different culture and I think they get bullied a lot. So, that's one of the things I try and teach my mentees. I've got two young black Geologists, ladies, as mentees and I just try and teach them to stand their ground, and they're both tiny, I mean they're about this big, you know. Stand your ground. People either look at them and go, oh you're so sweet, or, I can just run all over you. They get bullied, you know, and men just make them do menial stuff when they're more than capable to do other stuff*[962]

> *I experienced a lot of things underground, but fortunately as I say, because I've just been brought up to stand up for myself, and I do, and I can see it, there's a demographic difference, a cultural difference, from my Caucasian upbringing we aren't necessarily told that we can't speak out and I do see that a challenge in a lot of my Black colleagues and things like that where they do struggle at first to speak against authority or to just speak against men, so I completely appreciate that and I try and mentor a lot of people in terms of how to, you know, you're entitled to speak up for yourself but you don't have to be*

[961] See reference to participants below.
[962] M10011.

subservient or you don't have to be rude about it, but there is a way of standing up,[963]

There were several black interviewees who did identify cultural undertones as having an impact on how gender issues within the mining profession were to be handled.[964] One participant clearly linked it to how children are raised in the home. Affirming what the two white participants had pointed out above:

I think, the culture at home, like, how women raise their, how we raise our kids should change. Like, our sons and daughters shouldn't judge women, like, because I think it comes from like, a long time ago when women just had to stay at home and ja, that days is not the case anymore, and I think, although it might take time I think starting it from home, the mindset actually.[965]

Besides the issues of culture, the influence of race was also highlighted with regards to the difference in treatment towards white women and black women by both black and white men. It needs to be noted that the first observation below is from a white women and the second observation is from a black woman:

its definitively pervasive in the South African work place, but it's an intuitive feeling, it's often not what's demonstrated functionally and we know that the emotions and sub-text and body language are generally what rule things. You've also got positional authority. So if that black male is the mine captain and he's got a string of little girls under him, he's definitely going to push the boundaries and he's going to test. If it's a white girl, he might not as much, a young girl maybe who's from the same village or something like that, he's

[963] M1001.
[964] See reference to participants below.
[965] M10012

definitely going to say to her, listen here, you respect the cultural norms, I don't care that we're in the work place, but you and I understand each other, we're from the same ethnic background. You do find that. It's very hard for people to disengage who they are, to what they are doing. At a corporate environment there's a better disengagement"[966]

It is clear from the above that part of the interaction between black men and black women is going to have cultural undertones regarding the roles of men and women, which would place black women at a specific disadvantage to their white counterparts.

As detailed in the quote below, Black women also experience different treatment in how they are trained as compared to their white counterparts especially in instances where the individual in a position of authority is a white male:

Black women and white women have different experiences? Definitely! And I had it, because when I started out there was actually a white woman who was also there. You'll find that more in the leadership positions there were the white guys who were there, so generally you feel more protective of your own, it's a natural instinct and I found that, I felt that's it, she wasn't working as hard as me, she never worked shifts. I just felt like I was thrown in the deep end, that's what it really felt like, whatever. So generally your experiences are vastly different because it depends on who's on top really. So if I, I would love to believe it was black people who were in leadership, in the area where I was, they would have assisted me. I would have liked to believe that, because they would have identified more with me. But you definitely have very different experiences, but one thing that's worked to my advantage with that scenario

[966]M1004.

over there was that when you do the dirty job, is that even at a senior position, I can still relate and that's one of the strengths of just, also just by being a woman you relate to people better, but also having done the work. I relate so much better to the people on the ground than I ever would, because I really understand what they do. You know what? Because I did it. So it would work in your favour. And … especially with a black male.[967]

The quote below shows that both white and black women suffer disadvantage but there is disadvantage specific to a black woman:

No, you're already double prejudiced. Okay, so you're prejudiced as a woman and then you're prejudiced, most of the time you've got to (18.15) ... sometimes as a woman, and I mean, a woman in general whether black or white, and then you're also prejudiced as a black woman. So as a black woman you actually have double prejudices; the gender aspect and then the race.[968]

From the above it is evident that one clear way in which women are able to learn how to assert themselves in the workplace is through mentorship. Mentorship by other men or women helps women to gain the confidence to assert themselves in the workplace so that they do not have their progression stifled by stereotypes about how

[967] M1013 "One of my first experiences when I went underground, my shift boss was a white male, he was probably about 52 years old. And the first thing he told me that I want to be honest with you, I don't want to be taking you underground, I don't believe you should be working for me, if really it was up to me, you wouldn't be here. I will show you what you need to do and I will talk to you, but don't think that me and you are going to, actually it shocked me at first to be honest, but later on, maybe it was after I enlightened, I respected the honesty and whatever. And I think his words were to me, it was, if you were to ever become a manager I will resign, I will leave. That's what he said to me, so it was a very harsh way even."
[968] M1002.

they should behave in the workplace. Mentorship will be discussed in more detail in chapter six.

5.4.10 Conclusion

The findings in this chapter show the complex and multi-layered nature of gender disadvantage in two male dominated professions. The nature of the disadvantage is evident with regard to women's entry, retention and progression within each profession. One of the aims of affirmative action is to break down the visible and invisible barriers to employment faced by members of the designated groups in order to facilitate their inclusion and progression in the workplace. In order to accommodate the challenges faced by women in the workplace, it is important to understand the type of workplace they find themselves.

Male dominated professions, like the legal and mining professions present systemic and universal barriers to the inclusion and progression of women. The male dominated nature of the professions creates specific expectations, stereotypes, and perceptions that create barriers for women in the workplace. The surface representivity of women would involve focus on the inclusion of women in the workplace without regard to their retention and progression. Deep representivity would ensure both the inclusion of women in the workplace as well as providing them with an enabling environment in which to thrive as employees. Deep representivity would focus the employer to tackle the nature of gender disadvantage within their specific workplace and highlight the visible and invisible barriers. This situation sensitive approach would ensure better accommodation of access and participation in the workplace.

Having demonstrated the nature of gender disadvantage specific to two male dominated professions it is important to now identify tools that are effective in facilitating the access and participation needed, that is specific to gender disadvantage. It is clear that a better understanding of the nature of gender disadvantage specific to male dominated professions where female representivity is still lacking will allow for improvement in the inclusion and progression of women in the workplace. Identifying this unique disadvantage and re-evaluating how to tackle it will facilitate the transformation of the workplace. In the next chapter I will focus on the differences and similarities between gender disadvantage in the legal and mining profession.

Chapter 6

6 COMPARING THE THEMES OF THE LEGAL PROFESSION AND THE MINING PROFESSION

6.1 Introduction

Having explored the nature of gender disadvantage within two male dominated professions through literature and empirical research, this chapter focuses on the differences and similarities between the legal and mining profession with regards to the gender disadvantage experienced by women. This is followed up by chapter seven which is a discussion of the recommendations put forward in each profession on how to deal with the gender disadvantage. Focus is placed on how to facilitate the access, participation and progression of women within the respective professions. Integration of these recommendations within an employment equity plan will assist in the transformation of the workplace. The recommendations will be drawn from both literature and the empirical research.

The emergence of South Africa's new democracy and the introduction of the EEA brought about an increase in racial and gender diversity in the workplace. However the level of transformation is limited as shown in the literature and empirical research.[969] Critical mass alone does not change systemic and institutional barriers that prevent women's inclusion, progression and advancement in the workplace.[970] Rather women are required to adapt, change and assimilate into the workplace in order to cope with the institutional structures in place.[971] Affirmative action applied within the framework of equality of opportunity gets women into the workplace, but falls short in giving the needed transformation to facilitate their inclusion, retention

[969] Hofmeyr & Mzobe op cit note 10; Cruise op cit note 689; Masengu op cit note 832; Bonthuys op cit note 829.
[970] Jagwanth op cit note 200 at 743. Kevin Woodson 'Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms' *(2014-2015) 83 Fordham L. Rev. 2557.*
[971] Menkel-Meadow op cit 672 at 310.

and progression. The focus is achieving a critical mass to include as many members of the designated groups as possible without transforming the workplace.

The question thus becomes what the nature of affirmative action applied within the equality of outcome needs to be in order to yield the necessary transformation. It is clear in the research that women experience different kinds of disadvantage to men and amongst themselves. The difference in disadvantage is complicated by layers of race, socio-economic status, working within a male dominated profession etc. The definition of designated groups in section 1 of the EEA does not account for this multi-layered disadvantage. I, therefore, suggest three requirements to ensure the effective transformation of the workplace within the context of multi-layered disadvantage.

Firstly, the employer must recognize the differences in disadvantage and their impact within the designated groups. The employer needs to commit to gaining a better understanding of difference in disadvantage within their specific workplace, in order to tackle it. This is in line with the duty outlined by Fergus and Collier[972] that employers have a duty to "pre-empt discrimination in their workplace, rather than merely respond to it."[973] This is also in line with section 15(2) of the EEA which requires the employer to identify and eliminate barriers to employment. However, the emphasis of the Act and case law has been a focus on appointment.[974] It is clear more needs to be done in formulating employment equity plans that also focus on barriers of retention and progression in the workplace.[975] For example, mining companies need to include, within their employment equity plans, clear guidelines of

[972] Fergus and Collier op cit note 442 at 484.
[973] Fergus and Collier op cit note 442 at 487.
[974] *Barnard* CC; *Naidoo* supra note 32; *Reynhardt* supra note 32.
[975] *Naidoo* supra note 32.

how to ensure the retention of women within the mining industry during and after pregnancy. This pre-emptive action would avoid the discrimination that is currently occurring.[976]

Secondly, once there is an understanding of the nature of disadvantage in the workplace, the employer is better placed to investigate the impact of the disadvantage on members of the designated groups in terms of appointment, inclusion, retention and promotion as required by section 20 of the EEA. The focus by the employer will not just be equality of opportunity but rather equality of outcome which will lead to transformation of the workplace as inclusion alone is not the only consideration.

It is important that in the application of the EEA, the employer does not lose sight of the goal of transformation.[977] One of the ways in which the EEA assists in this is through the constant review of the effectiveness of EEA plans through section 20 and 21, as the employer is obligated to report the application of affirmative action within their workplace. As detailed before in the beginning of its lifecycle the application of affirmative action focuses on inclusion, but, over time it becomes necessary to shift the lifecycle to one of transformation

Lastly, the employer must ensure a situation sensitive approach to the application of affirmative action which involves identifying the visible and invisible layers of disadvantage that impact the participation of members of the designated groups as required by section 15. This involves the facilitation of the elimination of disadvantage or accommodation of inequality in order to allow for the progression of the members

[976] *Manyetsa* supra note 601.
[977] Rycroft op cit note 224 at 313.

of the designated groups;[978] but, most importantly, avoids the creation of new inequalities within the application of affirmative action. More focus is therefore needed to facilitate diversity through the application of deep representivity as well as ensuring retention and progression through a situation sensitive accommodation of the different layers of disadvantage experienced by members of the designated groups.

I will now detail the similarities and differences within the legal and mining profession. There is a clear link between the literature on disadvantage and the disadvantage experienced by women in the empirical research. The empirical research reaffirms the nature of the gender disadvantage. Specific themes can be seen in both the legal and the mining profession. There are also distinct differences between the two professions. By comparing the two professions, it will become clear what the nature of gender disadvantage unique to male dominated professions is. The differences in the professions will highlight the need for employers to have a situation sensitive approach specific to their workplace.

6.2 Comparing the Legal Profession and the Mining Profession Themes

It is important to note that besides the difference in the work done within the mining and legal profession, there are overlaps between the two male dominated professions that need to be taken into consideration. The similar themes illustrate the impact of gender disadvantage on the inclusion and participation of women within male dominated professions. It can thus be argued that the disadvantage created by male dominated professions is universal, systemic and unique in its nature as evidenced by the clear overlaps.

[978] McGregor op cit note 170 at 138.

Besides the common themes between to the two professions showing the distinct nature of gender disadvantage within a male dominated profession, the different themes between the two professions show the clear context that each profession brings. This difference in context points to the need for the employer to have a situation sensitive approach to the nature of gender disadvantage experienced within their particular employment settings which may or may not be linked to a male dominated profession. It further points to the fluid and multi-layered nature of gender disadvantage which is not necessarily the same within or across various professions.

The overlaps are firstly evident in the themes of the institutional culture created by the "old boys club" theme. The second overlap is the challenge faced by women to balance home and work commitments, linked to this is the third overlap of the impact of pregnancy on the retention and progression of women in the workforce. The difference is clear between the professions in the physical nature of work undertaken within the mining profession which is not an issue in the legal profession.

It is noted that the theme of the "old boys club" creates a systemic institutional culture that reinforces stereotypes against women with regards to their work competence and ability. The "old boys club" institutional culture also creates a lack of sensitivity to accommodate the family orientated roles of women, that has an impact on how they balance home and work commitments.

The "old boys club" institutional culture also creates a male standard of what a good worker is within each profession. This results in a very difficult situation for women who are torn between either leaving the profession or having to mask male behaviour

to succeed. The “old boys club” is present regardless of the race of men within the working environment. It is noted that some participants felt the older men tended to doubt their competence more than younger men. The institutional culture created by the “old boys club” is sometimes very subtle, making it a challenge to dismantle; added to this is the reality that has been noted before of how some status quo attitudes and cultures may remain purely because they privilege men.[979]

In both professions women found it very strenuous to manage both work and family commitments due to the working hours expected to meet targets. This overlap theme is linked to the male standard of a hard worker who is required to work long hours, which, for women, with family responsibilities, is a near impossible standard to fulfil. The clear disadvantage is that the non-fulfilment of the male standard of a hard worker impacts women in terms of participation and promotion within both professions. Unlike mining, the legal profession is more accommodating in providing flexi-time for women to work in some parts of the profession. However, flexi-time does still impact women’s ability to progress within the legal profession as the expectation to be available even at home remains.[980]

The impact of pregnancy is a clear barrier to participation and promotion in both professions. In the mining profession there are clear health risks identified which are an unavoidable reality for the inclusion of women. However, in both professions women are in a sense punished for their choice to start a family in subtle ways, when coming back to the profession after maternity leave opportunities for progression are stifled or made difficult all due to the decision to start a family being looked down

[979] Abrahamsson op cit note 730 at 23;26.
[980] Fontaine op cit note 716 at 33.

upon as a lack of commitment to one's work or profession. In certain instances as seen in chapter five, the choice to have a family may impact one's chances of being employed in the first place.

The main difference in themes between the mining and the legal profession is the nature of the work done and the gender disadvantage created by this theme.[981] The mining profession is very physical and this limits women's participation due to physical and biological differences.[982] The concerns over women working underground while pregnant are valid; there is need for these concerns to be better investigated.[983] Another aspect of the physical nature of the mining profession, particularly work underground is that it creates a more vulnerable and hostile working environment for women with regard to instances of sexual violence that occur underground.[984] In terms of class dynamics, it is noted that the legal profession and the mining profession is a middle class profession although the mining industry as a whole has a mixture of both middle and working class.

6.3 Conclusion

In order to tackle the challenge of gender disadvantage in the application of affirmative action it is important that the approach of the employer is firstly, the actual recognition of the multi-layered nature of gender disadvantage that exists for women in the workplace; and secondly, a commitment by the employer to break down the barriers through the implementation of a multi-faceted process in tackling the inclusion, retention and progression of women in the workplace. This is only possible

[981] See also Botha and Cronje op cit note 686; Masengu op cit note 832.
[982] Ibid.
[983] Badenhorst op cit note 945.
[984] Botha op cit note 915.

through a “nuanced”[985] approach to the formulation and implementation of an employment equity plan, whose focus is just not on appointment but retention and progression in the workplace. The recommendations that follow highlight both suggestions in literature and feedback from participants in interviews as to how to tackle the issue of gender disadvantage particularly in male-dominated professions.

[985] Dupper op cit note 31 at 428.

Chapter 7

7 THE WAY FORWARD RECOMMENDATIONS

7.1 Introduction

As detailed above the complexity of gender disadvantage is clearly evident within the mining and legal profession. Its various layers need to be recognized to allow for the improved access to the two professions, as well as the meaningful participation of women within each profession which will, in turn, assist in the transformation of the two male dominated professions. There are several recommendations put forward by participants and academic literature about how access, participation and transformation of the two professions can we achieved. One recommendation that applies to both the mining and the legal profession is the need for a well-planned and implemented transformative employment equity plan. Recent research has shown the difficulty faced by employers both in the public and private sector in ensuring effective gender representivity within all occupational levels but most especially senior management.[986] The transformation of the workplace is highly dependent on the effectiveness of the implementation of the employment equity plan.[987] Nugent AJ in *Solidarity and Others v Department of Correctional Services and Others* pointed out that the "goal (of transformation) is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests."[988] This balancing act though difficult for the employer is necessary to achieve the transformation required.[989]

[986] SAHRC Equality report op cit note 247.
[987] *Solidarity and Others v Department of Correctional Services and Others* supra note 34.
[988] *Solidarity and Others v Department of Correctional Services and Others* supra note 34 para 133.
[989] John Grogan 'Reynhardt Too far, too fast' 2011 26(6) *Employment Law Journal* 18. Mushariwa op cit note 46.

The recommendations listed below can therefore be linked to the duty of the employer in drafting an employment equity plan. The recommendations allow for the employer to think of innovative ways to ensure that the implementation of the employment equity plan allows for access, participation and ultimately transformation of the workplace. The recommendations for each industry are detailed separately below.

7.2 Recommendations for the Legal Profession

Faundez defines affirmative action as "treating people belonging to a specified group differently so that they obtain an equitable share of a specified good".[990] Gender affirmative action seeks to ensure the equitable representivity of women in the workplace through access and participation that allows for the progression of women within each level of the workplace.[991] Transformation would require not just inclusion of women in the workplace but also the breaking down of visible and invisible barriers to the inclusion of women in the workplace by the designated employer.[992]

The recommendations below will be categorized in terms of those which facilitate access, participation and transformation of the legal profession. The transformation of the "legal profession involves more than the mere increase in the numbers of women legal professionals."[993] There needs to be a sensitivity and understanding of the differing experiences of women within the legal profession and the challenges they encounter to progress within the legal profession. It is noted "that women's perspective(s) enriched by diverse gendered, racial and ethnic experiences."[994] This allows for the "possibility of reconstructing certain aspects of the legal system and

[990] Faundez op cit note 305 at 1187-1194.
[991] Vannie Naidoo 'Has Affirmative Action Reached South African Women' in Linda Lucas *Unpacking Globalization: Markets, Gender, and Work* (2007): 177.
[992] Ibid.
[993] Menkel-Meadow op cit note 672 at 312.
[994] Ibid.

legal practice beyond the change of doctrine that is, in some sense, tied to women's particular lived experiences."[995] This would result in the law firm culture changing rather than women having to change to fit into the law firm culture.[996] The law firm culture would change to accommodate the needs of women and place greater value on the work produced rather than the hours spent at the office.[997] There would be a change in the values that dictate the legal profession from the current male centred ideals of a good worker.[998]

7.2.1 Access: Tackle Institutional Barriers to Appointment and Promotion

It is important to alter recruitment patterns and eliminate institutional practices that limit or discourage females' access to the legal profession.[999] The question to be asked by a designated employer should be: "do our processes and attitudes and structures reinforce gender stereotypes or produce positive results for both male and female workers."[1000] For example, as pointed out by several interviewees, questions around whether or not an applicant plans to start a family. Besides such questions being against the law, they create a clear indication that an applicant will not be appointed though suitably qualified if they decide to have a family in future. Employers must accommodate employees who decide to start a family once appointed.

Employers need to restructure the goalposts for promotion to allow for the progression of women and men based on the quality of work produced and not the time spent on the work done.[1001] This would assist in breaking down the institutional

[995] Menkel-Meadow op cit note 672 at 318.
[996] Menkel-Meadow op cit note 672 at 318-319.
[997] Ibid.
[998] Ibid.
[999] Naidoo op cit note 988.
[1000] Martin and Barnard op cit note 213.
[1001] Menkel-Meadow op cit note 672 at 312.

culture of what a good legal professional is, which is currently based on long hours at the office without sufficient consideration of the quality of work produced.[1002]The quality of work criteria would focus not on time but the skills of the employee and what they in turn bring to the organization because of their skills. The quality of the work would increase clients without impacting on the revenue of the firm.[1003]

Lopez suggests that this is achievable through a project based system. Where a lawyer would be able to apply for promotion after "a certain number of projects, and provided that their work product was of a high enough quality."[1004] The end result would be that the institutional culture within a firm would change with regard to the standard of the "ideal lawyer."[1005] Lopez argues that the standard of an ideal lawyer would go from "a constantly available and inefficient one to one who produces the highest quality of work and has a balance of work and life."[1006]

7.2.2 Participation: Increasing the Representivity of Women in Management in Order to Engage with Women's Lived Experience.

It has been argued that whether in business or politics having diversity in leadership positions does make a difference in women's lives.[1007] In business, it has been shown that women in corporate governance can bring a "fresh approach to leadership as well as diverse life experiences."[1008] Several interviewees pointed out that a sensitivity to the challenges faced by women in balancing work and family

[1002] See Lopez op cit note 715 at 98. Masengu op cit 832 at 315. Transformation of the legal profession (2014) CALS op cit note 93 at 68.
[1003] Ibid.
[1004] Ibid.
[1005] Ibid.
[1006] Ibid.
[1007] Levinson op cit note 112 at 29 argues the "value of eliciting the viewpoints of females with their unique life experiences". In the context of politics, for example, "India launched a radical political experiment whereby one third of the seats in the village governing bodies would be reserved for women a study showed that female village leaders were more likely to invest public funds in community projects linked to the concerns of women such as education and health."
[1008] Levinson op cit note 112 at 27. See also Heminway and White op cit note 787.

could be cultivated within the legal profession as an increase in women's presence in management structures would give management a better understanding of the challenges women face and how best to assist them. There is a power in numbers as displayed by the participant below:

> *Like I say, it's so difficult to change the way people think. Again I just think it would mean to encourage more women to step into that industry and then I suppose, as opposed to one woman sitting there feeling as if she needs to adapt, if there's five, you know, you'll be a lot more encouraged to speak up. So we've got to encourage more women to step into the industry and again I say especially in the insurance side of it. It is very, very male dominant, ja.*[1009]

Lopez also recommends that the change needed in the institutional culture of the profession would be possible although by no means guaranteed,[1010] if there was an increase in female representivity within the management structures and committees of the law firms.[1011]

7.2.3 Participation: Flexi-time Work Schedules and Work from Home

Due to the double burden of women in balancing work and family, it is important that employers allow for work schedules that accommodate women who become pregnant or have to attend to family responsibilities during working hours. Through flexi-time work schedules women are better able to take care of both professional and personal needs.[1012] It is clear that both professional and personal needs are

[1009] L1003.
[1010] Lopez op cit note 715 at 71.
[1011] Lopez op cit note 715 at 71.
[1012] Lopez op cit note 715 at 79. Transformation of the legal profession (2014) CALS op cit note 93 at 55.

woven into the fabric of women's daily lives.[1013] There are benefits for both the firm and the employee by allowing for flexi-hours. These benefits include higher levels of productivity; less time spent commuting to work, and the better health of employees.[1014]

The research conducted showed that firstly there is a stigmatization of flexi-hours. Secondly it is noted that currently flexi-hours seem to only be available to directors and partners or not at all.[1015] The benefit of flexi-hours, if given, seems to be quite limited however as seen by the quote below:

> *Come to work at 6am to be able to leave at 4pm instead of the usual 6pm (not really flexi-hour) as she still responds to emails when she gets home.*[1016]

One clear challenge to the flexi-hour model is the dominant model of law firms focusing on billable hours which in turn translates into legal fees which becomes income for the firm. The more hours spent working the higher the legal fees charged. There is therefore a need to change how the working model is structured and how the law firm earns money.

The use of technology in making flexi-hours work to the benefit of working mothers is a crucial consideration. As seen through the responses of interviewees, it is important to note that flexi-hours can only work if the law firm culture transforms so that the standard of work produced is judged with respect to the quality of work and rather

[1013] Rhode, Deborah L. 'The unfinished agenda' *Report prepared for the ABA Commission on Women in the Profession* (2001) 6. See also Lopez op cit note 715 at 79. Transformation of the legal profession(2014) CALS op cit note 93 at 55.
[1014] See also Lazar, Ioan, Codruta Osoian, and Patricia Ratiu. 'The role of work-life balance practices in order to improve organizational performance.' 2010 13(1) *European Research Studies* 201.
[1015] Lopez op cit note 715 at 97. Fontaine op cit note 716 at 33.
[1016] L10014.

than how much time it took to get the work done.[1017] This change in culture would result in a transformation of the workplace that would allow for the meaningful participation and progression of women within the profession.[1018]

7.2.4 Access and Participation: Mentoring programmes

It is also important to implement mentoring programmes that can assist women to advance as they realise their strengths and weaknesses. This will also assist in the retention of women in the legal profession.[1019] The majority of attorneys interviewed did not have mentors. It is noted that "mentoring is a key component to an attorney's advancement in a law firm environment."[1020] "While mentoring is generally available to men and women, it is not equally accessible across gender and ethnicity."[1021] Fontaine notes the importance of positive role models as more women are placed in influential roles within the management structures of the firm.[1022]

7.2.5 Participation and Transformation: Flexible Models of Career Development

New career models and work options need to be accepted as viable and valuable alternatives to the hard-working, single-minded race to partnership so that women lawyers are not penalized for pursuing them.[1023] Employers must take steps to retain,

[1017] See Lopez op cit note 715 at 98. Masengu op cit 832 at 315; Transformation of the legal profession (2014) CALS op cit note 93 at 68.
[1018] Ibid.
[1019] M10009: "And that's the thing that I saw as well, that there are a lot of female attorneys even at University. There are many more female students than there are males, but then, and then we all graduate and then we all get into the profession and then we just disappear. Because what I've realised as well is that a lot of females come in, then they have this thought that I'll be able to manage, I will manage, I will be fine. And then after, like, 3 children, you've got 3 small children, now you have to go to work and this and that and the other. And then they just decide to let it all go. Because the hours are too long and the stress, etc., and in reality you do want to see your children and all of that, so ja."
[1020] See Transformation of the legal profession (2014) CALS op cit note 93 at 57, See also Lopez op cit note 715 at 90.
[1021] Ibid.
[1022] Fontaine op cit note 716 at 37.
[1023] Ibid.

develop and promote female and Black attorneys in order to maximise their contribution to the firm.[1024] It is noted that at a minimum, it is essential that these attorneys be given the same opportunities and resources as other lawyers in the organization in order to progress.[1025] This would allow for the development of women within the profession without a one size fits all approach to retention and progression. This goes back to the need to focus on the quality of the work produced by an attorney rather than time spent within the office.

7.2.6 Participation: Gender Sensitivity training

A recommendation from literature points to the need for affirmative action to be complemented by interventions that will assist the influx of women within the profession and then progression of women to top management positions. For example, gender sensitivity training to assist the promotion of women's advancement into managerial positions.[1026] As deeply entrenched stereotypes and subconscious gender bias concerning female competence persist, they create a significant barrier to women obtaining management and leadership positions.[1027] It is necessary that employers are committed to providing appropriate training to prevent negative stereotyping occurring as well as profiling successful woman so as to breakdown preconceived ideas of women's competence.[1028]

This would assist with the prevention of both subtle and sometimes overt forms of discrimination based on gender stereotypes or sexual harassment. Below, two

[1024] See also Lopez op cit note 715. Masengu op cit 832.
[1025] Fontaine op cit note 716 at 37.
[1026] Mello and Phago op cit note 661 at 968.
[1027] Naidoo op cit note 988.
[1028] Naidoo op cit note 988. See also Shanya Reuben and Shadia Bobat 'Constructing racial hierarchies of skill-experiencing affirmative action in a South African organization: qualitative review' 2014 *SA Journal of Industrial Psychology* 1. See also Botha et al op cit note 687.

participants give examples of overt and subtle discrimination based on gender stereotypes.

> *And ja, just as well as, a lot of comments are about female strength and sensitivity, you know, they're not going to select that woman because you know, women tend to overreact and be sensitive…*[1029]

> *And it's very subtle, no, no, it's completely subtle. I think it would be easier when it was overt. Here when you're just looking and you're thinking, are you talking to me like this because I'm a woman, or …, because I'm younger. It's difficult because I'm also a younger female. In South Africa …, you're not sure if how you're talking to me because I'm a younger black woman, so you can never pin point. There have been isolated incidents where I've felt that this might be attributed to more an inclement characteristic, than I think my abilities as a lawyer,*[1030]

In the end the change necessary will be slow and incremental as what is needed is a fundamental change for women within the profession with regards to work and family life balance.

7.3 Recommendations for the Mining Profession

The mining profession poses challenges of a different nature to the access and participation of women as well as the transformation of the workplace. This is largely due to the physical nature of the work as well its male dominated nature. As seen within the legal profession, there is a clear difference in disadvantage experienced by women in a male dominated profession. To facilitate access, participation and

[1029] M1003.
[1030] M1017.

progression within the mining profession, there is need for a real commitment to understanding the challenges faced by women and a breaking down of the barriers created by the masculine institutional culture of mining which would transform the profession into a place where women could flourish.

It is noted that there are certain physical realities listed above that cannot be ignored and would limit the participation of women, for example, the ability to cope with heat stress exercises[1031] and the risk of underground work for both mother and child during pregnancy.[1032] Both these challenges require reasonable accommodation by the employer to assist in the retention of women within the industry, without compromising the need to reach targets. Through recognition and accommodation of women's challenges the transformation of the mining industry would be facilitated more effectively. Below recommendations will also be categorized as dealing with access, participation (which includes progression) and the transformation of the mining profession for the benefit of gender representivity.

7.3.1 Participation: Stakeholder Forum

The change of law is not enough alone to tackle the effects of a patriarchal society in the workplace[1033] and the resulting institutional culture that is created within an organization as a result.[1034] In literature several academics have noted the need for stakeholder forums to fully understand women's experience on the ground. This type of forum would be conducted by each individual mine. It is argued that "mining organisations should 'keep their fingers on the pulse' of their female employees."[1035] The forum would include all the stakeholders in mining "management, the unions and

[1031] Botha and Cronje op cit note 686 at 3.
[1032] Ibid
[1033] Fredman op cit note 202. See also SAHRC Equality Report op cit note 247 at 22.
[1034] Niemann op cit note 598.
[1035] Le Roux and Naude op cit 856 at 47. See also Botha and Cronje op cit note 686at 666.

government…women mineworkers, academics and researchers."[1036] Govender is quoted as emphasising that "this sort of forum will help us to ask the right questions and plan the best way forward towards sustainable solutions within our context."[1037] She further adds that "we need to go beyond policy, reflect on both the direct and indirect consequences for women in this unique workplace, and use this evidence to inform current and future practice."[1038] It is noted that the goal is not just the employment of women but also their retention within the mining sector and affording them the opportunity to have "fulfilling and meaningful careers"[1039] This cannot be achieved in isolation of the specific circumstances within a particular mine, and engaging with stakeholders in mining would give direction to an organization of its specific issues and possible solutions. Therefore, the law seeking to increase the representivity of women within the workforce through the EEA cannot create the transformation needed alone; there is need for an enabling environment within each particular workplace.

The participant below noted the gradual changes that would be facilitated through discussions with women about their lived realities through the forums[1040]:

> *When I was in one of the WIMSA meetings, it was raised up that people who work in the mines should actually, the women who work in the mining industry, should sort of like, have discussions with the people they work with, in terms of, like their clothing, because that's also very important. I visited the mines once, not once, but I mean, recently, last year, we were doing due diligence in one of the mines, and ja I agree with them though, clothes that were given,*

[1036] Le Roux and Naude op cit 856 at 47.
[1037] 'Women underground: a hard hitting reality' *Inside Mining* 05/201376-77.
[1038] Ibid.
[1039] Le Roux and Naude op cit 856.
[1040] See also Leigh Johnstone, Anil Bhagwanjee and Shaida Bobat 'Women's narratives about identity, power and agency within mining organizations in South Africa' 2016 *Psychology and Developing Societies* 280.

they were like so big,…. So if women could actually tackle it from that angle, starting from there, you could have woman facilities in the mines, you could have, I think it could change. And if people could work around, like considering family and not making women, …sound like women are the weaker vessel because, face it,… these things do happen, …., there's a time when people, women have to become mothers and all those things, …, because I think we're very strong people, if we could tackle those issues and work around it rather than against it, I think it would work.[1041]

This links to the duty placed on employers through section 6.1.2 of the Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan, to consult with employees before drafting an employment equity plan to see how best equality and diversity in the workplace can be achieved. Women's voices need to be heard during these processes.

As with the legal profession participants pointed out that real change can only occur if women are in top management of mining companies.

so it's important that you have women coming in and sitting at an executive level, that way they are responsible for the day to day running of the operation and the only way to ensure that there is a consistent stream of women coming in, and to be consistent with where the country is going is to make sure that you train up and make sure that people stay in the system and then have the rules and the laws to impose, that[1042]

[1041] M1012.
[1042] M1004.

I think they must have more women in higher positions and put there because they deserve to be put there, not just put there to get equity numbers up." …… "Women will change the profession. Without a doubt. Women will change the profession.[1043]

I think women are a lot more empathetic and their management styles are generally quite different as well. So, I think, it's a bit of a generalisation, but I think on the whole, women are more inclined to empower people and grow people and nurture people, whereas men in terms of …the job…its get there, you know, make you own way, sort yourselves out.[1044]

The creation of a representative workforce is required by the EEA at all levels of the workforce as well as fulfilling the commitment in mining for representivity in line with the Mining Charter. Therefore, there is a need to ensure equal representivity of women in top management position. Women in top management in mining would be able to provide an environment in which the changes needed would occur. The different management style[1045] that women are more inclined to give which is nurturing of growth would be best placed to facilitate the transformation necessary within the mining profession.[1046]

[1043] M1010.
[1044] M1008.
[1045] Janine Hills 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation' 2015 *Deakin Law Review* 153 at 156.
[1046] Ulrike Schultz and Gisela Shaw (eds) *Women in the World's Legal Professions* (2003) at 238. It has been noted that a majority of women in management would create a "uncontested, majority to create a new majority culture" which would change the dynamics of the legal profession. The same would apply in the mining profession.

7.3.2 Participation: Mentorship

Like the legal profession mentorship is seen as a means of retaining women in the mining profession due to the support it provides.[1047] Some participants preferred mentors that were not part of the company that they worked for. The gender of the mentor was also important to the type of support they would be able to provide. However, a formal mentorship programme was not always taken up by women.[1048]

> *if your mentor works for the company that you're working for, they can never give you an objective decision so that's why I prefer to have someone who's not, they are solely interested, in my missions, they're nothing to do with the company, they are not associated and they don't care about the company, they care, they can give you an honest opinion at that particular point in time.*[1049]
>
> *We've got an option that you can choose a mentor. But a mentorship is not something that you can just initiate and put together, it's a natural thing. So I've got a, this lady, this friend of mine who's the Head of the Legal Department of Glencore now, that used to be Xstrata. She, if I've got a problem I speak to her, because…, she doesn't have children, she only works so, but I speak to her and get some guidance from her and she usually is correct, surprisingly enough. Ja, so, you can choose a mentor but it's a natural process, you*

[1047] M1013 "I think one of the things we're failing to do and are probably also contributing to this, that we're not, mentorship, forget it if you're a woman or you're a man, whatever. Everyone needs someone who's been there before, who can tell you the ropes and whatever. And to equi increase the representation of woman in the mining industry, all of the women that you have, they actually fall by the wayside in the very early years because it's very difficult." See also Du Plessis and Barkhuizen op cit note 857 at 53. See also Martin and Barnard op cit note 213.

[1048] M1003 "To be honest, I've heard that there is, like, you choose someone like, a senior person and you're supposed to like, go speak to them if you need to, if you need career advice or whatever. Like, so I just haven't like, formally done something like that but if I do need, like, advice, or about anything, like, there are lots of people that I can go to and say, listen I'm in this position, what do you think I should do? So for, like, I've heard that there is a formal policy, I'm not doing that, but I can, like I do."

cannot, you need, like for example, my boss, he's an introvert, so he's a very good manager, he's a very good boss. He taught me everything he knew, very well, you know. But he's not, I don't relate to him personally. I don't, we don't talk children, we don't, I don't ask about his, because he's an introvert, I don't think he likes it or, I don't know. We don't, we only speak work, nothing else, and it's really weird. With my colleague next door, he's also a man, but he recently had a baby, you know, so we can talk about what his holiday was about, what does his wife does. So it's a personality thing, so you cannot just put two people together.[1050]

7.3.3 Participation: New Technologies

The physical challenges that women face in the mining industry would be assisted by the development of new technologies that would assist in the accommodation of women underground. This would result in the accommodation of women's physical abilities to work underground.[1051] The success or failure of such initiatives would require the commitment of the employer to incur the costs necessary for the new technologies to be realized. In order for this to materialize there is need therefore for research and development of such technologies.[1052]

They have to understand that every woman, I have limitations, you know what I mean? I'm not as strong as my male counterpart, you know, this is a thing that I can't do and there are certain things like, I mean, we spoke earlier about

[1050] M1009; M1008 "X has a great mentoring type of program and there's some really, you know, we do have a lot of women in senior positions, so, you know, it's nice to have that and also having Cynthia Carroll, I think made a big difference as well, it made women think, you know, or feel confident that there is that, sort of, opportunity, that there is the possibility that they can get there and I think that that's a good first step and then, ja, I think just being able to, to have people to talk to within the organisation and that support. And I think having women in senior positions now also helps to change the culture"

[1051] 'Women underground a hard hitting reality' *Inside Mining* 05/2013. Botha and Cronje op cit note 686 at 3.

[1052] 'Women underground a hard hitting reality'*Inside Mining* 05/2013. See also Le Roux and Naude op cit 856 at 2.

ablution. Services, or infrastructure that needs to be put in place to make it comfortable for me, you know.[1053]

There are, however, limitations to the changes mining would be willing to make to accommodate women as cost seems to be the driving force, as well as a perception that women cannot be retained in mining and such changes would not be worthwhile.

You see mining was never designed around women, because, you know, overalls you can just whip out your penis and pee. Now we've got to take the whole thing off, so it's also been an expensive exercise for mining to remodel to accommodate women and to what end? The women don't stay.[1054]

7.3.4 Participation: Pros and Cons of Special Programmes

An interesting observation of special programmes for women in mining was made by several of the participants. It needs to be noted that all three participants below are white females. There are two groups of women identified by all participants those who want support and those who don't want support. This poses a challenge for an employer to ensure they are creating an enabling environment for all women.

The tension created by women who do not want assistance and those who do impacts on the sustainability of the programmes as detailed below:

You know the difficulty has been in mining, is you've got a camp of women who really don't want to be seen as different. So they don't want another separate less in (29.46)..... So what you've got in the mining industry is the tension between women who say, you know what? The fact that I'm female and a mining engineer is irrelevant, I can compete with the best, I'm physical, I'm capable, I'm doing it, so don't put me in a program which kind of

[1053] M1009.
[1054] M1005.

marginalises me or makes me the BEE deal, you know women are. And then you've got another camp of women who are saying, no, we need to be affirmed, so let's have the mentorship program. But we've started this twice in De Beers and it's kind of died out. The women in mining is not the mentorship stuff, the women in mining is an aggressive, we've identified those job categories, these are the skills you want, let's go and let's find them, let's train them, let's keep them, ja. You know, mentor, let's harness them; maybe not mentor is not the right word. We started this mentorship at two (30.41) transits in the late 90s (nineties) we had a women's program and women's get togethers and women's this. And it was great, but what happens is the senior ranked women move on, so there isn't continuity in them, so Barbara Masakela moved on, Debbie Farnaby moved on and then no programs, no leadership …[1055]

The solution to the sustainability of programmes requires a constant shift in focus by the employer with regards to empowerment programmes. This can be achieved through consultation with women to get a sense of what they feel is relevant and necessary for these programmes to include. As seen above, under the section dealing with mentorship, the availability of special programmes is important especially for women who are in the early stages of their career and need guidance. This finding also points to the difference in needs that white women and black women would have in programmes to assist in their participation, retention and progression within the profession. The programmes need to be effective in dealing with the specific disadvantages experienced by different women.

I just personally I feel, and that's why I've stepped away from WIMSA as well,

[1055] M1005.

is that I feel that the gender issue is addressed in the wrong way….. It's this whole, you know, help us out, give us a hand up, feel sorry for us, we're women, and my view is that, just get on with it, prove yourself, prove that you can do the work and that way you will reap the rewards. You know, I suppose it's the same with any sort of, inequality issue that is an underlying current in an organisation or a country or a region or whatever it may be, is that, you reach a point and I feel that women in mining or women in professions have reached a level where there are enough women infiltrating into the organisation and it's more just, you're there, you're doing a job, you've been hired for a reason and, you know, we're beyond the point now of getting, I can't even remember what it's called, transformation numbers, you know, I think we've superseded that level now and now it's really just, get on with your job and do it.[1056]

I think women in mining are doing themselves a disservice with the whole Kumbaya women in mining story but there are people I think who feel that they need that, that's fine, I have been to one or two things. I think you've got to rather work at, on a day to day basis, do your job. Organisations need to understand where the barriers are, such as salaries, such as perception, and a lot of work has been done, but I also think that if you focus on something too much, it becomes a big issue when it doesn't need to be a big issue. You know the more you talk about, ah women in mining and this and this and this …. And then you lose sight of the actual goal. There's a few things actually when I think of barriers, one of the little things, PPE, okay PPE not designed, women have different bodies, African women have different bodies. Australia's been

[1056] M1006.

on a big thing where they've actually designed clothes that suite female bodies better. Brilliant! That's the kind of thing to do, practical day to day things. Recognising that there are differences, whether it's personalities, whether it's physical differences and just deal with it in a practical way. Constantly there are issues in safety shit. Now there are only men's clothes, uni-sex. I don't wear it, I can't. A small comes to my knees. It looks terrible; I'm not going to wear it. So rather if you're going to spend that money, do it properly and recognise the differences and account for them.[1057]

As detailed above, through continuous consultation, the mining industry, as required in terms of section 16 of the EEA, would be able to identify the needs of women specific to their employer and design programmes that would empower the access and participation of women and make the necessary changes for transformation in line with the reasonable accommodation provision of the EEA Code. This is again another example of the fact that changes in law cannot operation in isolation. There is need to ensure that on the ground the employer is aware of the specific challenges faced by women in the organization so as to have the necessary programmes to transform the workplace. This is extremely evident in the case of *Manyetsa* which shows the complete lack of consultation to ensure the accommodation of women, during and after pregnancy in mining, which severely impacts their retention within the industry. If Manyetsa's employer had had an employment equity plan that clearly identified this barrier, she would have been given appropriate alternative duties while pregnant and still been able to earn a salary consistent with her qualifications or the employer could have been progressive in the payment of maternity benefits.

[1057] M1007.

It is evident in the recommendations given by women and the literature in both the mining and the legal profession that an increase in representivity of women within these two male dominated professions as well as the transformation of the workplace, needs to be supported by efforts by the employer that facilitate access, create an enabling environment of participation, and empowering women to progress in the professions to top management.

7.4 Conclusion

It is clear from the findings above, both in the literature and the feedback given by participants that the implementation of affirmative action focusing on gender representivity cannot yield successful results, unless there is a clear understanding of the nature of the disadvantages experienced by women within a particular workforce. Disadvantage experienced by women in a male dominated profession has clearly been demonstrated as multi-layered, complex and unique, thus making it difficult to dismantle. The understanding of this unique type of disadvantage will allow an employer to better plan and implement a variety of strategies within their employment equity plan that will both ensure the appointment and progression of women in a particular workforce. The application of gender affirmative action cannot operate to the exclusion of other means of accommodation of difference in the workplace. A combined multi-faceted effort will ensure the breakdown of barriers to the participation and retention of women and transform the male dominated workplace. In the application of affirmative action the aims of the EEA must not be lost sight of, which is to break down barriers to employment; create a representative workforce and ultimately transform the workplace.

Chapter 8

8 CONCLUSION

Affirmative action measures in the "workplace seek to ensure equal employment opportunities and create a workforce that is representative of South African society."[1058] I have argued that this entails more than achieving demographic representivity in appointments but entails true transformation of the workplace. I have further argued that it is possible, through the EEA both in term of appointment and promotion to break down the barriers faced by members of the designated groups and specifically within this thesis, the barriers faced by women. "Employers need to ensure that the substantive goal of equality is achieved when implementing affirmative action."[1059] Chapter one asked the question, what this type of substantive equality needed to look like and how employers would know they have achieved it. It was argued that, "to achieve equality, the EEA seeks to break down barriers to employment experienced by members of the designated group; create a representative workforce and transform the workplace into an area governed by principles of equality."[1060] The EEA of South Africa identifies beneficiaries of affirmative action in terms of race, gender and disability. As designated groups of race, gender and disability present multi-layered and complex forms of disadvantage within the designated groups. I argued this affected the way in which equality would be reached in the workplace.

Chapter two explored the difference between formal and substantive equality and addressed the lifecycle of affirmative action. In the beginning, the application of

[1058] Papacostantis and Mushariwa op cit note 18 at 1.
[1059] Ibid.
[1060] Papacostantis and Mushariwa op cit note 18 at 2.

affirmative action allowed for substantive equality of opportunity to be applied which focused on inclusion. Over time and as the society evolved and changed due to the application of affirmative action, substantive equality of results would then be applied as it would accommodate the complexity of disadvantage as well as dismantle the restrictive institutional cultures of the workplace and result in its transformation. There is a need to ensure that employers understand this cycle so that their application of affirmative action is not limited to inclusion, but moves to the transformation of the workplace through the application of affirmative action within the framework of substantive equality of outcome.

Chapter three investigated the multi-layered nature of disadvantage within the designated groups and how this affected designated member's ability to take up the opportunities afforded them through affirmative action. The EEA does not adequately define disadvantage and the layers it contains. Failure to recognize this difference results in a limited achievement of equality and in certain cases the creation of new inequalities in the workplace due to the manner in which the EEA is applied.

Chapter three shows a clear link between race and socio-economic (class) inequality. However, members of the designated group are defined in terms of race, gender and disability. Socio-economic status is not considered. The designated group setting has limitations which impact on the transformation of the workplace due to the differences in disadvantage experienced by members of the designated groups. Transformative substantive equality of outcome requires not only an acknowledgment of difference but also an acknowledgement of the impact of such difference. The intersection of class and status-based disadvantage therefore cannot be ignored.

Chapter four moved beyond an acknowledgment of difference in disadvantage and the impact it has on access to employment, to exploring and gaining an understanding of the nature of disadvantage, by focusing on one group, the gender group within the designated groups, exploring the nature of gender disadvantage within the context of employment. There is an acknowledgment of the deeply embedded and entrenched structures of disadvantage within society and the workplace, with layers of race, socio-economic status, culture, religion that all affect the nature of gender disadvantage. This focus on gender disadvantage further shows the complexity of implementing affirmative action within the context of a singular group.

Having unpacked the nature of gender disadvantage in chapter four, in chapter five, I then focused on the nature of gender disadvantage, specific to two male dominated professions through empirical research which added its own systemic layer to the nature of gender disadvantage in this specific workplace. This again illustrated the complex and systemic nature of gender disadvantage.

The focus in chapter six was to interrogate the differences and similarities of disadvantage for women within the mining and legal profession. This chapter further highlighted the need to have a situation sensitive employment equity plan drafted through consultation conducted by the designated employer to ensure that its focus is not just on appointment, but also on dealing with barriers that prevent members of the designated groups from being retained or progressing within a particular workplace.

Chapter seven, I was able to pull out, through literature and the empirical research, recommendations of how the disadvantage experienced in the legal and mining

profession could be tackled. There is focus, in this chapter, on access and participation and ultimately both work hand in hand to transform the workplace. In using gender as an example of disadvantage in the workplace I have been able to show that a situation sensitive approach to the application of affirmative action is needed to achieve the desired result in transforming the workplace. A situation sensitive approach allows employers to understand the multi-layered nature of disadvantage specific to their workplace. A situation sensitive approach requires a commitment to tackle the visible and invisible barriers to employment so as to avoid the creation of new inequalities. A situation sensitive employment equity plan will lead to transformation of the workplace, not just through the inclusion of members of the designated group, but also through breaking down institutional culture that perpetuate disadvantage with regard to access, retention and progression.