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TITLE

A critical evaluation of the Affirmative Action policy in South Africa in relation to the case of
South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC).

By Phumzile Ziqubu

Student Number 211513557

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SUPERVISORS:

MS NICOLA WHITEAR-NEL

MR KHULEKANI ZONDI

ABSTRACT

In 1948, colonial rule in South Africa adopted the infamous apartheid system, whose racial segregation policies saw the systematic exclusion of Blacks from key economic, political and social sectors of society, and restricted their freedom of movement. Laws were passed excluding black people from employment positions and restricting them primarily to manual and menial labour. The end of apartheid in 1994 marked a transition to a more inclusive system of government. However, for the new government to move forward, it was imperative that the imbalances of the past be redressed in order to place previously disadvantaged racial group on an even footing with the dominant minority group.

Section 9 of the Constitution enshrines the right to equality for everyone and prohibits discrimination on the basis of sex, race or many other demographic factors. But an important exception to the right of formal equality exists in order to advance substantive equality. It is suggested that “policies and practices put in place to suit everyone may appear to be non-discriminatory, but may not address the specific needs of certain groups of people. In effect they are indirectly discriminatory, creating systemic discrimination.”¹ Formal equality, it is argued, applied without reasonable exceptions aimed to correct existing and historical discrimination, can only reinforce and continue the old discriminatory policy de facto. Affirmative action (AA) is the flagship policy endeavour of a moral philosophy that prioritizes substantive equality over formal.

In the workplace, AA aims to achieve demographic equality in all levels of the labour force, but the application of such policies is complex. Courts have grappled with the implementation of AA measures and with ethical and constitutional consideration. Does the exclusion of non-black racial groups from certain positions, even on the basis of a claim to improve substantive equality, amount to discrimination and is it therefore, in violation of the Constitution? The first Constitutional Court case to deal with AA measures was the 2004 *Minister of Finance and Others v Van Heerden*.² This paper was the *locus classicus* until in 2014, when the *Barnard* case, the focus of this paper, changed the application of law, now the binding judgment with

¹ S Fredman “Providing Equality: Substantive Equality and the Duty to Provide” (2005) 21 SAJHR 163.

² *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC).

respect to AA measures. This paper will critically analyse the judgment of the *Barnard* case and concludes with a discussion of how and where the court erred in its judgment.

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CHAPTER ONE

1.1.BACKGROUND/INTRODUCTION

Prior to 1994, South Africa endured the political system of apartheid. This system placed destructive restrictions on the rights and movements of non-white South Africans, greatly restricting their access to economic resources and to employment. The consequences of these policies remain with us still, despite the abolishment of those discriminatory laws. Previously disadvantaged groups marginalised by the apartheid regime largely remain disadvantaged, and suffer economically. With the demise of apartheid, the widespread economic, social, and human damage of their policies demanded a priority solution.

The Preamble of the Constitution³ recognizes the injustices of the past the need to redress them. One measure aimed to do so and reverse the effects of apartheid is affirmative action (hereafter referred to as AA). According to Higginbotham, an American academic, AA is an integral part of post-apartheid South Africa.⁴

AA involves treating people belonging to a specified demographic group differently in order that they collectively move towards obtaining an equitable share of a specified good, resource or opportunity.⁵ While superficially, this may look discriminatory and a violation of equality before the law, the constitution makes exception for policies needed to redress past wrongs. The economic outcomes of South African demographic groups are unequivocal in demonstrating the problem, and the constitutional duty to provide remedy for those groups is similarly unequivocal. And AA while a highly debated and controversial concept is the primary tool turned towards fulfilling that duty.

In the area of employment, AA seeks to ensure that specified demographic groups are fairly represented in the workforce.⁶ AA has further been defined as policies that take into consideration, factors including race, colour, religion, sex, and national origin in order to benefit an under-represented group in areas of employment, education and business.⁷

³ The Constitution of the Republic of South Africa Act 108, 1996

⁴ FM Higginbotham "Affirmative Action in the United States and South Africa: Lessons from the other side" (1999) 13 (2) *Temp. Int'l & Comp. L.J.* 187.

⁵ *Ibid* at 189.

⁶ J Faundez "Promoting Affirmative Action" 1994 (11) 4 *Indicator SA* at page 1.

⁷ R Fullinwider "Affirmative Action", Stanford University online Available at <http://plato.stanford.edu/archives/fall2013/entries/affirmative-action/> (Accessed 7 September 2015)

Over the years, the court has explored the principles used to justify the implementation of affirmative action measures. Little opines that “blacks do not occupy stations of political, economic, professional and educational prominence in numbers that are proportional to their representation in the general population.”⁸ It is in the consideration of these demographic ratios that systemic institutionalised inequality is evidenced and that in turn, is the basis for AA. The Constitution makes reference to AA under section 9(2), which argues that in the pursuit of substantive equality measures must be taken to protect persons disadvantaged by unfair discrimination.

The Employment Equity Act⁹ (hereafter referred to as the EEA) was passed to give effect to section 9(2). The Act states that “the focus of the EEA appears different from that of the Constitution which emphasises that people from designated groups should equitably be represented”.¹⁰ The main objectives of the EEA are to eliminate unfair discrimination¹¹ and to train and employ people from previously disadvantaged backgrounds.¹² The Act identifies these previously disadvantaged groups as Blacks (including Africans, Coloureds and Indians), women and the disabled.¹³ A recent High Court judgment¹⁴ concluded that Chinese also fall under the designated groups as envisaged by the EEA.

Fredman contends that since 1998 and the enactment of the EEA, AA has become a pivotal tool in redressing workplace inequalities in South Africa.¹⁵ She further states that AA is a temporary intervention of preferential treatment to rectify the consequences of discrimination in order to enable people to compete as equals for opportunities.¹⁶ According to the EEA, the purpose of AA is the achievement of equality in the labour market. This may be done by the promotion of equal opportunities for the designated groups and fair treatment of employees through elimination of discrimination; and the atonement of the detrimental employment

⁸ JW Little “Affirmative Action: Legal bases and risks in the United States and South Africa” (1994) *Stellenbosch L. Rev.* 263.

⁹ Employment Equity Act 55 of 1998.

¹⁰ M McGregor “Disadvantage and Affirmative Action” (2002) 14 *S. Afr. Mercantile L.J.* 809.

¹¹ Employment Equity Act op cit note 10 section 2(a).

¹² *Ibid.*

¹³ Op cit note 10 Section 1.

¹⁴ *Moresport (Pty) Limited v Commissioner for the South African Revenue Service and Others* (36853/2006) [2008] ZAGPHC 95 (27 March 2008)

¹⁵ S Fredman, “Redistribution and recognition: Reconciling inequalities” (2007) 23 *SAJHR* 214, 220.

¹⁶ *Ibid.*

policies against the designated groups to ensure that there are equally represented in all occupational divisions and grades in the workforce.¹⁷

1.2 STATEMENT OF PURPOSE

The purpose of this dissertation is to define AA in light of the different views offered by academic writers in a South African context. This research will evaluate the AA policy in South Africa in relation to the *South African Police Service v Solidarity obo Barnard* case.¹⁸ A critical analysis of all the *Barnard* judgments¹⁹ will explore how the decision adds to AA jurisprudence.

1.3 RATIONALE FOR THE STUDY

More than 20 years after the demise of apartheid, South Africa continues to be one of the most unequal countries in the world with respect to racial economics. This rationale of this study is to define AA so that the reader can identify its main attributes; then to critically evaluate the impact of the ground-breaking *Barnard* judgment and consider its significance on AA implementation in the workplace.

1.4 METHODOLOGY

This research employs a qualitative methodology. All resources were obtained via desktop research of secondary sources. This research analyses legislation, case law, textbooks and journal articles discussing the topic of AA. Relevant case law was obtained online.

¹⁷ Op cit note 10.

¹⁸ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

¹⁹ *Solidarity on behalf of Barnard v SA Police Service* (2010) 31 ILJ 742 (LC), *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (2013) 34 ILJ 590 (LAC), *Solidarity on behalf of Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as amicus curiae)* (2014) 35 ILJ 416 (SCA), *SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)* (2014) 35 ILJ 2981 (CC).

1.5 RESEARCH PROBLEM AND QUESTIONS

The following questions are considered in this dissertation.

1. What is affirmative action?
 - What prompted this policy?
 - What are its goals?
 - What is substantive equality?
 - How is AA implemented?
2. What principles regarding AA can be learned from the *Barnard* case?
 - What was said at the initial Labour Court hearing?
 - On appeal, did the Labour Appeal Court change the decision of the Labour Court, and if so, how?
 - Was the opinion of the Supreme Court of Appeal (hereafter referred to as the SCA) any different?
 - Finally, what principles did the Constitutional Court establish?
3. What impact does the *Barnard* decision have on AA in the workplace?
4. Was the court right, and should the principles developed in the *Barnard* case be followed by future courts?

CHAPTER TWO

2.1 What is affirmative action?

Nelson Mandela, the late former President of the Republic of South Africa, once said

“To millions, Affirmative Action is a beacon of positive expectation. To others it is an alarming spectre which is viewed as a threat to their personal security and a menace to the integrity of public life.”²⁰

Such is the divisive nature of AA, a policy which at its core involves advantaging one group over. The term AA originated in the United States of America (USA) and comprises “a range of programmes directed towards targeted groups in order to redress inequalities due to discriminatory practices.”²¹ Affirmative action policies, as practiced in the USA, usually have the following attributes:

- a) They are imposed by authority of law, either state (provincial) or federal.
- b) They require schools and employers to give preferential consideration for educational and job opportunities to persons of designated demographics.²²

Dupper states that AA has two primary aims; to alter the labour force and to increase demographic representation in government, public committees, and educational institutions²³. Faundez summarizes AA as “treating people belonging to a specified group differently so that they obtain an equitable share of a specified good”.²⁴ In the workplace, AA is aimed at ensuring that the selected group is equitably represented in the work force of an employer. For Adams the term AA means both racial preferential treatment, and also the redistribution of resources and opportunities.²⁵ According to the Green Paper on the Conceptual Framework for Affirmative Action Management of Diversity in the Public Sector, AA was defined as:

“a strategy for the achievement of employment equity through redressing imbalances in:

- i. organisational culture
- ii. staff composition,
- iii. human resource management practices and

²⁰ P Andrews *Gender, Race and Comparative Advantage: A Cross-National Assessment of Programs of Compensatory Discrimination* 1999, 102.

²¹ O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *S. African L.J* 189.

²² Little op cit note 9 at 262.

²³ Dupper op cit 22 at 189.

²⁴ Faundez op cit note 7 at 1.

²⁵ C Adams *Affirmative Action in a Democratic South Africa* 1993, 1.

iv. service provisioning

and thereby ameliorating the conditions of individuals and groups in the workplace”.²⁶

From these definitions it is clear that AA policies are aimed at redressing inequalities of the past. South Africa and the USA share a history of racial inequalities and discrimination, albeit with enormous historical different contemporary challenges. Unsurprisingly, their AA policies also differ from ours. While AA policies are imposed by the government, they are often directed at places of employment, the education sector, public and private offices, and even government representatives.

2.2 What prompted the policy?

Inequality in the South African labour market arose out of statutory discrimination in the workplace, and other policies of the apartheid regime. Little’s 1994 study it found that “blacks do not occupy stations of political, economic, professional and educational prominence in numbers that are proportional to their representation in the general population”.²⁷ While this picture has changed drastically in political and public sector positions, it remains true in the private economic, professional and educational sectors. In these economic and social areas Blacks are greatly under-represented in management, while being over-represented in low level positions. South Africa’s discriminatory history has also left women and those with disabilities behind. Opportunities for education, employment, promotion, and wealth creation have been denied to these disadvantaged groups, who together constitute a majority of South Africans.²⁸

The ‘apartheid workplace regime’²⁹ introduced job reservation, and denied organising rights to black South Africans.³⁰ During the colonial and apartheid eras, successive governments used legislation to curtail the economic advancement of Blacks, while allocating vastly disproportion resources towards the development of Whites through education, housing and health facilities, to name only a few. This history demonstrates why the need for positive and constructive measures to redress the imbalance of racial discrimination should not be underestimated.³¹

²⁶ Green Paper on the Conceptual Framework for Affirmative Action Management of Diversity in the Public Sector: Department of Public Service and Administration, (1997) 16.

²⁷ Little op cit note 9 at 263.

²⁸ CCMA Employment Equity in the Workplace Jan 2002 *CCMA Info Sheet*.

²⁹ Ibid.

³⁰ Little op cit note 9 at 263.

³¹ Adams op cit note 26 at 1.

Under apartheid, government passed sweeping laws with huge effect on the labour landscape. Black access to employment and economic resources was severely restricted.³² These laws and regulations militated against Blacks in the workplace, in government, and in other corridors of power.

Section 77 of the Industrial Conciliation Act³³ allowed the Minister of Labour to restrict the entry of Blacks into designated fields. The Bantu Laws Amendment Act³⁴ introduced the power to implement job reservations against African workers in any field of employment. The Minister of Bantu Administration and Development was empowered to end and prohibit Bantu labour in a specific area, class of employment, trade, or in service to a specified employer or class of employers.³⁵ The Minister had all but complete power in reserving any job he felt was threatened by African labour.³⁶

According to the Employment Equity Bill, black people have suffered as a result of job reservation and lack of access to skills and education under apartheid,³⁷ leaving many inadequately trained and economically disempowered. Adams justifies the introduction of AA policies by stating that if nothing is done to

“.... change social relations and to provide blacks with access to resources and means to overcome the economic marginalization of the past, the patterns of economic control, ownership and management that have been produced by the apartheid system will remain unchanged even in a non-racial, non-sexist democratic South Africa.”³⁸

As a result of the workplace laws and regulations against Blacks during apartheid, the employment statistics for top positions make for alarming reading. In the private sector in 1994, the top 5% of South Africans owned 88% of the country’s wealth, and 95% of managerial positions were held by white males.³⁹ Blacks accounted for only 2% of a total of 2550 directorships in the top 100 companies listed on the Johannesburg Stock Exchange.⁴⁰ In 1998, a survey discovered that Blacks held only 6% of managerial positions whilst Indians and

³² Ibid at 2.

³³ Industrial Conciliation Act of 1956

³⁴ Bantu Laws Amendment Act 42 of 1964.

³⁵ A Kaye “Apartheid Labour Legislation in South Africa” 1976-1977 (5) *Indus. & Lab. Rel. F.* 13

³⁶ Ibid

³⁷ Employment Equity Bill 1997:6

³⁸ Adams op cit note 26 at 2.

³⁹ Available at

<http://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment%2016%20September.pdf> Accessed on 16 November 2015.

⁴⁰ Adams op cit note 26 at 11.

Coloured held 8%.⁴¹ Top managers were 86% white. In a 2000 survey, it was found that of the 560,000 workers employed by South Africa's 161 largest companies, 10% of managers were black and 5% Coloured or Indian.⁴² This meant that an overwhelming 80% of managers were white. And with respect to gender, only 21% of managers were female.⁴³

At the time, the public sector showed a similar pattern. Senior public sector positions were 58% white to 31% Black.⁴⁴ The October Household Survey confirmed this underrepresentation of black and overrepresentation of white workers in top management and professional positions.⁴⁵ And the Breakwater Monitor Report of 1999 found that Whites received 74% of management promotions and 54% of skilled promotions. The report went on to find that the recruitment rate for white male managers was 46%, followed by white females at 19% and black males at 18%.⁴⁶

Tinarelli⁴⁷ discusses major reasons for the necessity for employment equity legislation, the first being discrimination, and the resultant inequalities. The rationale for employment equity laws arises from the need to eradicate inequalities still visible in the South African labour market. According to the Green Paper, employment equity legislation aims to:

“Help redress the disadvantages emanating from past racial policies and as far as possible, to ensure the accommodation of differences between people in the workplace”⁴⁸

Tinarelli argues that discrimination is prevalent in the following areas:

- Employment seclusion ;
- segregation in the appointment, promotion, training selection, transfer and dismissal of employees;
- unjustified disparities in relation to benefits and pay; and
- shortage of training and advancement opportunities⁴⁹

⁴¹ 'Employment, unemployment, skills and economic growth' available at http://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf, accessed on 19 October 2015.

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ October Household Survey 1994: Statistics South Africa, (2014) 7.

⁴⁶ Breakwater Monitor Report July, 1999.

⁴⁷ S Tinarelli *Employers' Guide to the Employment Equity Act 2000*, 3

⁴⁸ Green Paper on a Conceptual Framework for Affirmative Action and the Management of Diversity in the Public Service: Department of Public Service and Administration, (1997) 30.

Tinarelli's next argument rests on the need for economic growth, suggesting that income and occupation inequalities by race and gender have adverse economic consequences and that economic growth might be stimulated by addressing social inequalities. This may be achieved by improving access to jobs, training and promotion opportunities for previously disadvantaged groups.⁵⁰

The third rationale for employment equity in Tinarelli's argument is the fulfilment of the requirements of the Constitution and the International Labour Organisation. The Constitution contains an equality clause in section nine⁵¹ providing that every person is equal before the law and is therefore entitled to equal treatment and not be subject to any form of discrimination. But the constitution limits this with a clause that imposes an obligation on the state to legislate to protect and advance previously disadvantaged groups of people.

Section 39 of the Constitution asks the courts to consider international law in interpreting the provisions of the Constitution.⁵² It follows that AA must be implemented in accordance with international law. When South Africa ratified Convention 111 of the International Labour Organisation⁵³ it took on the obligations of its provisions. The Convention requires member states to take special measures to provide special protection and assistance to those who need it.⁵⁴ The International Convention on the Elimination of All Forms of Racial Discrimination⁵⁵ provides guidelines to determine whether or not affirmative measures are acceptable and how they should be formulated.⁵⁶ It sets out important limits of: "(a) necessity; (b) proportionality to the aim to be achieved; and (c) time limits for affirmative action measures"⁵⁷. Article 1(4) of the Convention unequivocally states that:

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and

⁴⁹ Tinarelli op cit note 48 at 1.

⁵⁰ Ibid.

⁵¹ The Constitution op cit note 4 section 9.

⁵² Ibid section 39.

⁵³ Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁵⁴ Ibid.

⁵⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

⁵⁶ M McGregor *The application of affirmative action in employment law with specific reference to the beneficiaries: A comparative study* (unpublished LLD thesis, UNISA, 2009) 32.

⁵⁷ Ibid

that they shall not be continued after the objectives for which they were taken have been achieved.”⁵⁸

The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights⁵⁹ and the Convention on the Elimination of All Forms of Discrimination against Women⁶⁰ also require state parties to adopt and implement policies to eliminate discrimination and to further affirmative action. In view of the South African constitution, and the numerous international conventions mentioned above, it should be clear that fulfilment of Constitutional and international obligations requires and justifies affirmative action, provided that it is necessary, proportional, and limited.

2.3 How was AA implemented?

Adams stated that deliberate and practical steps would have to be implemented to eliminate inequalities created by deliberate design.⁶¹ Steps to implement AA were first promulgated by the interim Constitution section 8(1)⁶² which guaranteed every person the right to equality before the law and to equal protection of the law. However, section 8(3) (a) of the same Constitution states that,

“This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.”⁶³

This means that while affirmative action policies may violate the right to equality before the law and equal protection, they are justified under this provision. The final Constitution⁶⁴ adopted a similar approach. From the outset, the Constitution acknowledges that apartheid has had long term effects on social, economic and political relations. Notably, the preamble states that

⁵⁸ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965.

⁵⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.

⁶⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979.

⁶¹ Adams op cit note 26 at 1.

⁶² The Constitution op cit note 4

⁶³ Section 8(3)(a) of the Constitution of the Republic of South Africa.

⁶⁴ The Constitution op cit note 4.

“We, the people of South Africa, Recognise the injustices of our past.... We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...”⁶⁵

Section 9(2) of the final Constitution states that,

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”⁶⁶

The court in *Brink v. Kitshoff NO*⁶⁷ affirmed the importance of the right to equality. The Constitution⁶⁸ acknowledges that South Africa has a past of institutionalised inequality and seeks to redress this by promoting the right to equality. However, the same Constitution contains a limitation clause in section 36.⁶⁹ According to this section, no right is absolute, including the right to equality, and limitations of constitutional rights are permitted to the extent that it is "reasonable and justifiable in an open democratic society based on . . . equality and freedom." The question then is whether or not affirmative action is a justifiable limitation of the right to equality. Abdelrahman states that it is the duty of the court to determine the degree to which affirmative action programs may be undertaken, without conflicting with the Constitution's core principle of equality.⁷⁰ The provisions in the final Constitution were subsequently given effect by the EEA.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ *Brink v. Kitshoff NO* 1996 (6) BCLR 665 (CC) at 33.

⁶⁸ The Constitution op cit note 4.

⁶⁹ Ibid section 36.

⁷⁰ A Abdelrahman "Affirmative Action in the United States and South Africa: Why South Africa should not follow in our footsteps" (1999-2000) 19 *N.Y.L Sch J. Int'l & Comp. L* 200.

2.4 Substantive equality

One of the key goals of affirmative action is the achievement of substantive equality, but in doing so they compromise formal equality. Both are central constitutional principles, therefore it is imperative to make the distinction between them clear. Formal equality requires that all persons, under the same situation and circumstances be accorded similar treatment. But in a society with a history of formal inequality, and a remaining social and economic impact, formal equality is insufficient to remove deeply entrenched patterns of social disadvantage.⁷¹ Formal equality requires restraint from the state, but substantive equality imposes a positive obligation to put different demographic groups on equal footing.⁷² A policy of substantive equality ensures that laws do not buttress the “subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating people’s differences.”⁷³

The South African Constitution aims to achieve substantive equality by first eliminating existing discriminatory laws and secondly to implement “measures designed to protect and advance those people disadvantaged by past discrimination.”⁷⁴ Dupper identifies three aspects of substantive equality.⁷⁵ Firstly, it requires the state to act positively to address the inequalities of the past. Secondly, substantive equality is asymmetrical,⁷⁶ meaning that there is a distinction made between discrimination against previously disadvantaged groups and discrimination aimed at remedying that very disadvantage. Finally, substantive equality rejects the notion of individualism, as AA policies by their design, will sometimes treat individuals unfairly in order to achieve a larger social and economic transformation. From these characteristics, one can observe that the Constitution and the EEA seek to give effect to substantive equality.⁷⁷

⁷¹ Fredman op cit note 1 at 163.

⁷² Ibid

⁷³ A Smith “Equality constitutional adjudication in South Africa” (2014) 14 *AHRLJ* 613.

⁷⁴ O Dupper “Affirmative Action and Substantive Equality: The South African Experience” (2002) 14 *SA Merc LJ* 275.

⁷⁵ Ibid at page 280

⁷⁶ Ibid

⁷⁷ Ibid

2.5 The Employment Equity Act⁷⁸

The EEA gives effect to the constitutional provisions relating to affirmative action in the workplace.⁷⁹ Section 2 of the Act states that its purpose is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination⁸⁰ and to implement AA policies so as to redress the disadvantages in employment experienced by designated groups. These efforts would help to ensure the equitable representation of the designated groups in all occupational categories and levels of the workforce.⁸¹

The Act goes on to define the meaning of designated employer and designated groups. These definitions tell us to whom the provisions of the act apply. The act designates these groups as black people, women and people with disabilities. Furthermore, the Act defines designated employers as organs of the state, or private employers with 50 or more employees.⁸² The Act does not apply to members of the National Defence Force, National Intelligence Agency or the South African Secret Service.⁸³

The EEA also imposes duties on employers necessary to fulfil their obligations under the Act. One of these main duties is to prepare an employment equity plan as set out in section 20. According to Grogan, the plan must be aimed at achieving reasonable progress towards employment equity.⁸⁴ Section 20 sets out the form and requirements of an employment equity plan, which include a yearly set of objectives, the AA measures to be implemented, a timeline and duration for the plan, and internal procedures to resolve any related disputes.⁸⁵ Grogan states that the aim of these measures is to identify and eliminate employment barriers that affect people from the designated groups.⁸⁶ These measures are designed to foster diversity in the workplace based on the principle of equal dignity and respect for all people⁸⁷ as well as the

⁷⁸ The Employment Equity Act op cit note 10 section 36(1).

⁷⁹ McGregor op cit note 11 at 809.

⁸⁰ Employment Equity Act op cit note 10 section 2(1)

⁸¹ Op cit note 10 section 2(2).

⁸² Op cit note 10 section 1, The term also includes a municipality and a person who employs fewer than 50 employees but has a total turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the Act.

⁸³ Employment Equity Act op cit note 10 section 4(3)

⁸⁴ J Grogan Workplace Law 2001, 251.

⁸⁵ Employment Equity Act op cit note 10 section 20(2)(a-i)

⁸⁶ Employment Equity Act op cit note 10 Section 15(2)(a).

⁸⁷ Employment Equity Act op cit note 10 section 15(2)(b).

making of reasonable accommodation towards these aims.⁸⁸ Section 15 describes AA measures as “designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.” The section goes on to state that such measures may include the retaining and the “development of people from designated groups and the implementation of appropriate training measures.”⁸⁹

Grogan further states that the employment equity plan should not be compiled unilaterally.⁹⁰ According to sections 16 and 17, the employer must take reasonable steps to consult and reach agreement with a representative trade union or if none exists, with its employees or representatives nominated by them.⁹¹ The employer must consult with all employees including those not from the designated groups, as such consultations must reflect the interests of all groups.⁹² The consultations, explained in section 17⁹³ must include the analysis, preparation and implementation of the employment equity plan and the report referred to in section 21. Furthermore, the plan must be made available to all employees.⁹⁴ Employers are bound to report to the Director-General on their progress implementing its employment equity plan. However, as there are no punitive measures in place for those who fail to submit their reports the EEA does not provide sufficient mechanism for enforcement.

Section 21 draws a distinction between employers at or above the 150 employee’s threshold, and those below, with respect to their report submissions. Larger employers, those above the threshold, were given a year from the date of implementation of the EEA⁹⁵ to submit progress reports, and thereafter must submit progress reports once every two years at the beginning of October.⁹⁶ Those smaller employers below the 150 employee threshold were given six months to submit their first report,⁹⁷ and requiring a progress report every 6 months thereafter.⁹⁸ The Act then requires employers to assign personnel to monitor and manage the implementation of

⁸⁸ Employment Equity Act op cit note 10 section 15(2) (c). The term reasonable accommodation means “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or to participate or advance in employment.”

⁸⁹ Employment Equity Act op cit note 10 section 15(d)(2).

⁹⁰ Grogan op cit note 87 at 251.

⁹¹ Employment Equity Act op cit note 10 Section 16(1)(a)-(b)

⁹² Employment Equity Act op cit note 10 section 16(2)(a)-(c).

⁹³ Employment Equity Act op cit note 10 section 17 (a)-(c).

⁹⁴ Employment Equity Act op cit note 10 section 25.

⁹⁵ Ibid

⁹⁶ Employment Equity Act op cit note 10 section 21(2)(b).

⁹⁷ Employment Equity Act op cit note 10 section 21(2)(a).

⁹⁸ Employment Equity Act op cit note 10 section 21(1)(b).

the employment equity plan.⁹⁹ The employer must “provide the managers with the authority and the means to perform their functions and take reasonable steps to ensure that the managers perform their functions.”¹⁰⁰

Regarding enforcement of AA provisions, any employee may alert the labour inspector, the Director-General of the Employment Equity Commission, the employer himself, other employees and/or trade unions of any alleged violation of the provisions of the Act. According to Grogan, Labour Inspectors appointed under the Basic Conditions of Employment Act 75 of 1997 are responsible for inspecting progress and ascertaining compliance with the Act.¹⁰¹ A company that is not in compliance is issued a compliance order and subject to a fine.¹⁰² Failure to comply with the order will then initiate civil legal proceedings by the Director-General in the Labour Court.¹⁰³ The Labour Court would then make the compliance order an order of the court.

The EEA also introduces “income differentials,” which refer to “the ratio between the remuneration of workers at different levels and in different occupational categories.”¹⁰⁴ Section 27(1) requires designated employers to report to the Employment Conditions Commission on the remuneration and benefits received by each of its occupational categories and levels.¹⁰⁵ If the Commission finds unfairly disproportionate disparities between employment levels, it may order measures to progressively reduce such differentials in accordance with guidance given by the Minister of Labour.¹⁰⁶

Under the terms of the act, state tenders and contracts are rewarded only to those in compliance with the EEA and in good standing with the Commission.¹⁰⁷ Section 53 sets out that a letter of good standing from the Minister of Labour, valid for one year, demonstrates that the employer is eligible for state contracts.¹⁰⁸ Furthermore, the Act also imposes a minimum fine of R500,000 for failure to comply with the provisions of the Act.¹⁰⁹

⁹⁹ Employment Equity Act op cit note 10 section 24(1)(a).

¹⁰⁰ Employment Equity Act op cit note 10 section 24(1)(b)-(c).

¹⁰¹ Employment Equity Act op cit note 10 section 36.

¹⁰² Employment Equity Act op cit note 10 section 37.

¹⁰³ Employment Equity Act op cit note 10 section 37(6).

¹⁰⁴ Grogan op cit note 87 at “252.

¹⁰⁵ Employment Equity Act op cit note 10 Section 27(1).

¹⁰⁶ Employment Equity Act op cit note 10 section 27(2).

¹⁰⁷ Employment Equity Act op cit note 10 section 30(2)(a).

¹⁰⁸ Employment Equity Act op cit note 10 section 53.

¹⁰⁹ Employment Equity Act op cit note 10 section Schedule 1.

In order to assist employers achieving compliance, the Code of Good Practice¹¹⁰ was enacted. It forms the guidelines for the preparation and implementation of an employment equity plan.¹¹¹ The Code also provides useful guidelines on the purpose, rationale, structure, construction process, monitoring and evaluation of the employment equity plan. Article 8(3) of the Code highlights some examples measures needed for an employer to achieve the goals of their employment equity plan. These include:

- Preferential appointment of members from designated groups in order to achieve representivity in the workplace; and
- Devote more resources to training and development of people from designated groups, in order that they may be suitably qualified for positions, and enlarging the pool of qualified candidates.

2.6 What are the goals of affirmative action

The Employment Equity Act states its objectives in section two, which explains that employment equity aims to “implement AA measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels of the workforce.”¹¹² According to Little, the universal goal of AA is to make reparation to a numerically small class to make up for disadvantages caused by past governmental or widespread social repression.¹¹³

Adams lists five key ambitions for AA. Firstly, AA seeks to achieve the “removal of all forms of discrimination, formal and informal, and all obstacles to equal opportunity.”¹¹⁴ This objective of AA is also highlighted by section 9 of the Constitution which enshrines the right to equality.¹¹⁵ According to Wessels, this indicates the foundational importance of this concept.¹¹⁶ The Green Paper states that the term “equal opportunities” refers both to a “principle enshrined within the ideal of a representative public service to ensure equality in employment for the equal enjoyment of rights, opportunities, benefits and access in the workplace, and a tool to

¹¹⁰ Code of good practice: Preparation, implementation and monitoring of employment equity plans No. R. 1394 1999.

¹¹¹ Ibid Article 1.

¹¹² The Employment Equity Act op cit note 10 section 2(b).

¹¹³ Little op cit note 9 at 263.

¹¹⁴ Adams op cit note 26 at 12.

¹¹⁵ The Constitution op cit note 4 section 9.

¹¹⁶ JS Wessels “Equal employment opportunities: A conceptual puzzle” (2005) 24:2 *Politeia* 126.

eradicate discrimination and unfairness in the workplace in pursuit of a representative public service.”¹¹⁷

By facilitating a space for equal opportunity, we make it possible for disadvantaged groups to gain access to economic resources¹¹⁸ previously denied through apartheid legislation and regulations. So empowered, previously disadvantaged groups would be in a position to make greater contributions to society and to furthering the project of substantive equality,¹¹⁹ This requires that these groups be given access to the corridors of power where they will be able to lead and partake in decision-making processes.

The Green Paper also lists seven objectives of Affirmative Action. These are:

- i. “bringing about representation in composition of staffing at all levels across all occupational classes in which the disadvantaged are under-represented,
- ii. legitimising the public service by transforming institutional culture and organisational environment in accordance with the principles of broad representation,
- iii. enhancing the effectiveness and efficiency of the public service by improving productivity and transforming service provisioning according to the principle of equitability and in manners that are responsive and sensitive to communities,
- iv. building institutional capacity and promoting a professional ethic by enhancing commitment, motivation and morale of public servants through inter alia, organisational development and the appropriate management of diversity,
- v. developing personnel management styles,
- vi. employment equity through the development of equitable personnel administration policies and practices for the equalisation of access and outcomes,
- vii. Democratising the state by including the participation of stakeholders in AA matters that were traditionally excluded from policy making, planning, implementation, monitoring and evaluation in the public service¹²⁰.”

¹¹⁷ Green Paper op cit note 49.

¹¹⁸ Adams op cit note 26 at 13.

¹¹⁹ Ibid.

¹²⁰ Green Paper op cit note 49.

2.7 Concluding Remarks

This chapter began with defining AA and identifying the important elements that characterise it both South Africa and in the USA. While AA measures target places of employment, the education sector, public offices and even government representatives, this dissertation focuses on the employment sector, both private and public. The Chapter also highlighted the rationale behind AA policies in South Africa, presenting employment statistics both in the apartheid and post-apartheid era. International law and Constitutional obligations were discussed, along with the role of substantive equality and its relevance in terms of institutionalised inequality. The Chapter then looked at implementation in South African law through the EEA, what AA seeks to achieve, and in particular, what the EEA seeks to achieve in South Africa.

CHAPTER THREE

A BROAD OVERVIEW OF THE LAW BEFORE THE BARNARD CASES

Introduction

The *Barnard* cases¹²¹, from the LC up until the CC, raised a variety of issues relating to AA measures in South African law. The court made ground-breaking judgments, some of which were over-turned on appeal. The judgments revolved around three main issues: identifying who the true beneficiaries of AA are, the appropriate standard of review and the debate between representivity and service delivery. This chapter discusses the law relating to these three issues prior to the Barnard cases.

3.1 Who are the true beneficiaries of affirmative action?

A correct and consistent implementation of AA requires first that the law identify who the beneficiaries of AA are.¹²² The Constitution,¹²³ while vaguely worded, attempts to categorise the appropriate beneficiaries of AA measures.¹²⁴ Section 9(2) refers to “persons disadvantaged by unfair discrimination” as the target of affirmative action measures,¹²⁵ and provides for the enactment of legislation to facilitate the right to equality, which became the EEA.¹²⁶ The EEA states that the Act applies to people from designated groups,¹²⁷ defined as black people, women and people with disabilities.¹²⁸ The phrase “black people”, according to the Act, means Africans, coloured and Indians whilst people with disabilities are those who have a “long-term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment.”¹²⁹ At first glance, the definitions provided by the EEA might seem adequate, but a closer look shows that is not the case. Mushariwa notes two conflicting schools of thought regarding the rightful beneficiaries of AA.¹³⁰

¹²¹ Supra note 20.

¹²² M Mushariwa “Who are the true beneficiaries of affirmative action” 2011 *Obiter* 440.

¹²³ The Constitution op cit note 4.

¹²⁴ O Dupper “Affirmative Action: Who How and How Long?” (2008) 24 (3) *SAJHR* 426.

¹²⁵ The Constitution op cit note 4 section 9(2).

¹²⁶ The Constitution op cit note 4 section 9(4).

¹²⁷ Employment Equity Act op cit note 10 section 4(2).

¹²⁸ Employment Equity Act op cit note 10 section 1.

¹²⁹ *Ibid.*

¹³⁰ Mushariwa op cit note 123 at 440.

According to one school of thought, it is sufficient for an individual to belong to a designated group in order to fall within the ambit of the remedial measure.¹³¹ This view is shared by Benatar who states that one of the objectives of affirmative action is to benefit “not only Blacks, but other categories of people, including women.”¹³² Furthermore, in *Dudley v City of Cape Town*,¹³³ the court held that there is no individual right to AA, nor is there an enforceable claim. In the implementation of AA measures, it is imperative to identify historically disadvantaged individuals.¹³⁴ On the other hand, Dupper et al maintains that “in order to be identified as a beneficiary of affirmative action, the individual must have been disadvantaged personally.”¹³⁵ The court in *Minister of Finance vs van Heerden* adopted the second approach in holding that the objective of section 9(2) is to remedy the injustices of the past, not only on the premise of race, but gender and class as well and “other levels and forms of social differentiation and systemic under-privilege.”¹³⁶ Dupper also argues that over-emphasis on race as the sole criterion for deciding the beneficiaries of affirmative action is irrational and imposes an otherwise unfair burden on those who are excluded.¹³⁷

3.2 The proper standard of review of affirmative action measures: Section 9(2) of the Constitution

The court, in the Barnard case, also grappled with which standard of review applies to affirmative action measures. According to McGregor,

“the constitution committed itself to a standard which requires a limitation of a right to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, the question which then has to be asked is: “which of the two - a rationality standard or a fairness-based standard – has the *ability to do justice* to the justificatory burden that the section 36 normative yardstick implies, in the context of *equality* disputes.”¹³⁸

¹³¹ Ibid.

¹³² D Benatar “Justice, Diversity and Racial Preference: A Critique of Affirmative Action” (2008) 125 SALJ 274

¹³³ *Dudley v City of Cape Town* [2008] 12 BLLR 1155 (LAC).

¹³⁴ Ibid para 55.

¹³⁵ O Dupper et al *Understanding the Employment Equity Act* 1ed (2009) 99.

¹³⁶ Supra note 2 para 27.

¹³⁷ Dupper op cit note 127 at 435.

¹³⁸ M McGregor “Affirmative action on trial – determining the legitimacy and fair application of remedial measures” (2013) 4 TSAR 657.

The legal position as stated in *Minister of Finance and Other v Van Heerden*

In the *Van Heerden*¹³⁹ case, the Constitutional Court had to decide if a pension fund, which allowed differentiation based on three categories with regards to contributions to that particular fund, amounted to unfair discrimination and the infringement of the right to equality. The court held that there was a sufficiently close nexus between membership differentiation and the need of each class for improved pension benefits.¹⁴⁰ The objective of the program was to distribute pension benefits on an equitable foundation with the purpose of decreasing the inequality between privileged and disadvantaged parliamentarians.¹⁴¹ In that regard, the scheme promoted the achievement of equality as envisaged in the Constitution. It showed a “clear and rational consideration of the need of the members of the Fund and served the purpose of advancing persons disadvantaged by unfair discrimination.” In that case, the court used rationality as the standard to determine whether there was a connection between the restitutionary measure of differentiating the contributions and the need for increased pension benefits.

The court in the *Van Heerden case* outlined a three-stage enquiry into the standard to which remedial measures must adhere. According to Moseneke J, the first stage is that the measure must target persons or categories of persons who have been disadvantaged by unfair discrimination.¹⁴² This means that the remedial measure must be designed to favour a group or a category of people as envisaged by section 9(2) and such group must be shown to be disadvantaged by unfair discrimination.¹⁴³ According to Gaibie, the Constitution leaves the concept of potential beneficiaries vague and ambiguous but the provisions of the EEA identify three distinct groups.¹⁴⁴

The second question to be determined is whether the measure is 'designed to protect or advance' those disadvantaged by unfair discrimination.¹⁴⁵ This requirement connotes that restitutionary measures are directed at a future outcome. The future, being difficult to predict, Moseneke J suggests that it is sufficient for the measures be reasonably capable of attaining the desired outcome.¹⁴⁶ Gaibie opines that the objectives of the programme and the means selected

¹³⁹ Supra note 2.

¹⁴⁰ Ibid para 52.

¹⁴¹ Ibid.

¹⁴² Supra note 2 at para 38.

¹⁴³ Ibid.

¹⁴⁴ S Gaibie “The Constitutional Court decision in Barnard: A sequel to the Van Heerden judgment” (2015) 36 *ILJ* 81.

¹⁴⁵ Supra note 2 para 41.

¹⁴⁶ Ibid.

for achieving the objective must be shown to be reasonably capable of achieving the desired outcome.¹⁴⁷ Lastly, the measure must promote the achievement of equality.¹⁴⁸ This requires analysis of the likely effect of the measures towards making a broader society that is non-sexist and non-racist “in which each person will be recognised and treated as a human being of equal worth and dignity.”¹⁴⁹

According to Pretorius, the first two legs of the *Van Heerden*¹⁵⁰ test cover aspects of a rational relationship enquiry.¹⁵¹ The test questions the remedial measure’s capacity to achieve “the desired outcome of protecting and advancing those disadvantaged by unfair discrimination.”¹⁵² However, whether the third question of the test utilises considerations which go beyond rationality depends on the interpretation of the court of the day. According to Pretorius, a narrow interpretation would entail that the section 9(2) requirements are kept within the bounds of a rationality enquiry. This was the interpretation adopted in the case of *Alexandre v Provincial Administration of the Western Cape, Department of Health*¹⁵³ where it was held that it is sufficient that restitution measures be a “rational means of advancing the legitimate aims of affirmative action.”¹⁵⁴ Gaibie argues that the second and third legs of the test are broad concepts and they should form the foundation for all employment equity plans.¹⁵⁵ However, Mokgoro J, in a separate concurring judgment, disagreed with the implications of the third leg of the test. It was argued that the third leg placed too much emphasis on the effect of AA measures on those who are not beneficiaries. Mokgoro J, instead, argued that the focus of AA measures in accordance with section 9(2) should be on the group of persons sought to be advanced.¹⁵⁶

The conflicting principles of Mokgoro J and Moseneke J bring into question whether section 9(2) is a complete defence to a claim of alleged unfair discrimination or whether AA measures are presumptively unfair thereby requiring the employer to prove their fairness.¹⁵⁷ Moseneke’s response to this issue is that if a measure falls squarely within the ambit of section

¹⁴⁷ Gaibie op cit note 145 at 81.

¹⁴⁸ Supra note 2 para 44.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ JL Pretorius ‘Fairness in transformation: A critique of the Constitutional Court’s affirmative action jurisprudence’ (2010) 26 *SAJHR* 561.

¹⁵² Ibid.

¹⁵³ *Alexandre v Provincial Administration of the Western Cape, Department of Health* (2005) 26 ILJ 765 (LC)

¹⁵⁴ Ibid para 6.

¹⁵⁵ Gaibie op cit note 145 at 82.

¹⁵⁶ Supra note 2 para 80.

¹⁵⁷ Gaibie op cit note 145 at 83.

9(2), it does not constitute unfair discrimination. But measures outside the ambit of section 9(2), do constitute discrimination and the *Harksen v Lane NO*¹⁵⁸ test must be applied.¹⁵⁹

Moseneke states that when an AA measure is challenged as having violated the equality provision, the employer may argue that section 9(2) provides a complete defence, arguing that their measures promote the achievement of equality and are designed to advance persons disadvantaged by unfair discrimination.¹⁶⁰ Gaibie sums up Moseneke's view as meaning that any challenge to AA measures will commence as an unfair discrimination claim and in order to defend the measure, the employer must establish that

“the measure meets the requirements of section 9(2) by applying the first and second stages of the Moseneke test and even though discriminatory in form, are nevertheless reasonable and justifiable in an open and democratic society by taking all the relevant factors into account including the situation of the complainant in society, their history and vulnerability, the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context in order to determine its fairness or otherwise in light of the values of our Constitution.”¹⁶¹

A broader interpretation, such as that supported by Moseneke in the *van Heerden* case, would be more inclusive through the recognition and the balancing of the equality aspirations of all. Proportionality and fairness would be considered in determining if the measures in question serve the goal of advancing those previously disadvantaged as envisaged by *Van Heerden's* third requirement. These considerations are of central importance when the court considers that remedial measures “should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long term constitutional goal would be threatened.”¹⁶² Moseneke went further to consider the factors highlighted in *Harksen v Lane NO*¹⁶³ which are used “to determine whether discriminatory provision has impacted on complainants unfairly.”¹⁶⁴ In that regard, Pretorius states that an internal fairness requirement

¹⁵⁸ *Harksen v Lane NO and Others* 1998 (1) SA 300.

¹⁵⁹ Supra note 2 para 36.

¹⁶⁰ Supra note 2 at para 37.

¹⁶¹ Gaibie op cit note 145 at 83.

¹⁶² Supra note 2 para 44.

¹⁶³ Supra note 159.

¹⁶⁴ The factors are as follows:

- a) “the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not
- b) the nature of the provision or power and the purpose sought to be achieved by it

must to be added to the third requirement. This in itself created uncertainty with regards to the applicable standard of review because the judgment in the *van Heerden* case was marred by self-contradiction and conflicting interpretation.¹⁶⁵

Uncertainty after the *Van Heerden* Judgment

The court in *Du Preez v Minister of Justice and Constitutional Development and Others*¹⁶⁶ adopted fairness as the appropriate standard of review with regards to restitutionary measures. Because this case involved judicial officers, the measure in question was not bound to EEA provisions. However, the Equality Act¹⁶⁷ also provides for restitution measures and the court had to rule on whether a measure which excluded the complainant from being shortlisted on the basis of his race and gender was discriminatory in nature. The court held that in determining whether a policy was discriminatory, the court has to decide whether it differentiates between categories of people, and if so, whether the differentiation bears a rational connection to a legitimate government purpose.¹⁶⁸ However, the court went on to hold that fairness is determined in relation to the detrimental nature of the discrimination.¹⁶⁹ In *Gordon v Department of Health, KZN*¹⁷⁰ the court also held that “in the quest to attain representivity, efficiency and fairness should not be compromised.”¹⁷¹

3.3 The service delivery versus representivity debate

The service delivery versus representivity debate also took centre stage in the *Barnard* case. According to Mushariwa, the *Barnard* case deals with the implementation of employment equity plans in a way that balances the requirements of representivity and efficiency in the workplace.¹⁷² According to van Wyk, one of the popular criticisms of AA is that it results in

-
- c) any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”

¹⁶⁵ Pretorius op cit note 154 at 564

¹⁶⁶ *Du Preez v Minister of Justice and Constitutional Development and Others* [2006] 3 All SA 271 (SE).

¹⁶⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁶⁸ Supra note 169 para 24.

¹⁶⁹ Ibid para 42.

¹⁷⁰ *Gordon v Department of Health, KZN* 2008 (6) SA 522 (SCA)

¹⁷¹ Ibid para 28.

¹⁷² Mushariwa op cit note 125 at 444. “Who are the true beneficiaries of Affirmative Action” (2011) *Obiter* 444.

the lowering of standards and inefficiency.¹⁷³ Van Wyk expands on this particular point by stating that the lowering of standards leads to the hiring of unqualified or underqualified persons and this would also result in decreased productivity and on a national scale, a lowering of international competitiveness.¹⁷⁴ The crucial question is therefore to what extent and under what circumstances may restitutionary measures override service delivery and competence. This question is arguably more important with regard to the public sector because of the obligation imposed by statute on the public sector to deliver basic services. Section 195 of the Constitution lists the basic values and principles governing public administration. These principles include, inter alia, the maintenance and promotion of a high standard of professional ethics,¹⁷⁵ the promotion of efficient, economic and effective resource utility¹⁷⁶ and good human-resource management.¹⁷⁷ In pursuit of adequate service delivery, public administration must adopt these values and principles.

The court in the case of *Public Servants Association of SA & others v Minister of Justice*¹⁷⁸ held that representivity and efficiency are often linked, but in certain instances, tension may exist between these two. In such circumstances, the court may be required to strike a balance.¹⁷⁹ The dilemma between affirmative action and the constitutionally entrenched requirements of service delivery was the dominant issue in the case of *Coetzer & others v The Minister of Safety and Security & Another*.¹⁸⁰ In that case, it was held that the Constitution postulates a balance between affirmative action measures and the provisions of the Constitution.¹⁸¹ In particular, the court held that the relevant provision is section 205,¹⁸² which requires that the police service discharge its duties effectively. The court also held that in this case, the SAPS's AA measures had to be balanced against the need to have an efficient explosives unit. The court highlighted the need to address the imbalances of the past vis-a-vis the ability to "monitor the use of explosives and maintain the security of the Republic should it be threatened by the use or intended use of explosives and biological and related threats."¹⁸³

¹⁷³ MW van Wyk "A critical analysis of some popular objections to affirmative action" (1998) 2 *SBL Research Review* 3

¹⁷⁴ Ibid.

¹⁷⁵ The Constitution op cit note 4 section 195(1)(a).

¹⁷⁶ The Constitution op cit note 4 section 195(1)(b).

¹⁷⁷ The Constitution op cit note 4 section 195(1)(h).

¹⁷⁸ *Public Servants Association of SA & others v Minister of Justice* 1997 (3) SA 925 (T).

¹⁷⁹ Mushariwa op cit note 125 at 482.

¹⁸⁰ *Coetzer & others v The Minister of Safety and Security & Another* (2003) 24 ILJ 163 (LC).

¹⁸¹ The Constitution op cit note 4.

¹⁸² Ibid.

¹⁸³ Supra note 181 para 34.

The court in that particular case concluded that SAPS's justification of its remedial measures in that instance should fail because there was no employment equity measure in place.¹⁸⁴ More importantly, the court held that the decision of the National Commissioner not to promote the applicants was wrong because it placed too much emphasis on representivity at the expense of the constitutional imperative that the "service maintain its efficiency."¹⁸⁵

¹⁸⁴ Ibid para 39.

¹⁸⁵ Ibid para 40.

CHAPTER 4

THE *BARNARD* JUDGMENT AND ANALYSIS

Introduction

A large number of cases pertaining to the application of the EEA and AA have been brought before South African courts.¹⁸⁶ This chapter focuses on *South African Police Service v Solidarity obo Barnard*¹⁸⁷ and its significance to AA in South Africa. A brief outline of the facts of the *Barnard* case will be followed by a discussion each judgment with individual analysis of the court findings.

4.1 Facts

Captain Barnard applied for the position of Superintendent in the National Evaluation Services of the SAPS as advertised by the National Commissioner. She was initially shortlisted and achieved the highest rating (86.67%) among the candidates who applied. The only black candidate managed to rate about 70%.¹⁸⁸ The interviewing panel decided that failure to appoint Barnard would compromise service delivery.¹⁸⁹ But it was decided that Barnard could not be appointed because black men and women were under-represented in the division. The position was therefore withdrawn and someone else was temporarily transferred to fill it. A similar position was later advertised and again not reserved for designated groups.¹⁹⁰ Barnard applied again and she was amongst the eight candidates who were shortlisted and interviewed. Again, Barnard managed to gather the highest rating, about 17% ahead of the next best candidate, an African male.¹⁹¹ The interviewing panel decided to appoint her to the post on the basis that her appointment would not aggravate the racial representivity of the division as she was already a part of the division.¹⁹²

Furthermore, the interviewing panel reasoned that she was the best candidate for the job because “she displayed a distinct brand of passion and enthusiasm vital to the service-delivery

¹⁸⁶ *Motala v University of Natal* 1995 (3) BCLR 374 (D); *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); *Fourie v Provincial Commissioner of the SA Police (North West Province)* (2004) 25 ILJ 1716 (LC); *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC); *Munsamy v Minister of Safety and Security and Another* (2013) 34 ILJ 2900 (LC).

¹⁸⁷ Supra note 19.

¹⁸⁸ Supra note 19 at para 8.

¹⁸⁹ Supra note 19 at para 8.

¹⁹⁰ Supra note 19 at para 10.

¹⁹¹ Supra note 19 at para 11.

¹⁹² Supra note 19 at para 12.

needs of the Police Service.”¹⁹³ However, the National Commissioner disapproved of the Divisional Commissioner’s recommendation and decided not to appoint Barnard for the sole reason that representivity would be aggravated. Barnard pursued internal remedies and the CCMA unsuccessfully. She then approached the Labour Court for relief. The matter was taken on appeal, to the Labour Appeal Court (LAC), the Supreme Court of Appeal, and subsequently the Constitutional Court. The courts in the *Barnard* cases raised three major issues. This chapter will discuss these issues and the relevant law prior to the *Barnard* case, then discuss whether the judgements in the *Barnard* case deviated from the law, and if so, in what way.

4.2 The Labour Court Issue¹⁹⁴

The issue before the court was whether Barnard had been unfairly discriminated against on the ground of her race by virtue of being denied promotion twice.

Arguments

The applicant contented that she had been unfairly discriminated because she was denied promotion on two occasions for the sole reason that she was white. The respondent argued that the refusal to appoint Barnard was consistent with its AA plan and that white women were over-represented in the division.

The decision of the court

The court held that an employment equity plan must be implemented in harmony with the principles of fairness and with due considerations of the affected individual’s right to equality. It further demanded a flexible approach, one that takes into account the particular circumstances of the individual whose rights have been adversely affected rather than a fixation on the numerical goals of the plan. The court held that the employment equity plans should give due regard to individual’s right to equality and right to dignity.¹⁹⁵ The court went on to state that an employment equity plan may discriminate or adversely affect individuals only to the degree that the application of its provisions be both rational and fair. Furthermore, the plan must not infringe on the individual’s right to equality and dignity.¹⁹⁶ In that regard, the court held that where a vacancy cannot be filled by an applicant from a category which is under-represented because an appropriate candidate from that category cannot be found, promotion to

¹⁹³ Ibid para 13.

¹⁹⁴ *Solidarity obo Barnard v SAPS 2010 (10) BCLR 1094 (LC)* supra note 3.

¹⁹⁵ Ibid para 25.1.

¹⁹⁶ Supra note 3 at para 25.3.

that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group.¹⁹⁷

The court found that a rational connection must exist between the provisions of the employment equity plan and the measures adopted to implement those provisions,¹⁹⁸ and in certain circumstances, service delivery may be a relevant factor these considerations.¹⁹⁹ The court then held that the SAPS bore the onus of proving that the discrimination alleged by Barnard is fair on a balance of probabilities. The court opined that the onus may be discharged by providing adequate “evidence to enable it to understand this reasoning behind and justification for its decision so that the court is in a position to decide on the matter properly.”²⁰⁰ In considering such evidence, Pretorius held that the respondent had discharged its onus to establish that the decision was both rational and fair.²⁰¹ The Commissioner’s decision “not to appoint Barnard in these circumstances, when she was manifestly the best and recommended as the preferred candidate, is unfair and irrational” especially considering that no satisfactory reason was given.²⁰² Furthermore, it was held that there was no evidence that Barnard’s right to equality was taken into account, as well as the consideration of other relevant factors such as personal work history or other circumstances.²⁰³

Pretorius then concluded that in his view, the failure to appoint Barnard coupled with the non-appointment of the other two recommended candidates was an irrational implementation of the plan.²⁰⁴ It was also held that the respondent’s failure to engage effectively in the mediation and conciliation procedures provided for within the SAPS amounted to failure to consider the letter and spirit of the Constitution which dictates that AA policies should be applied with due respect of the dignity of those who are affected.²⁰⁵ The court dismissed the contention by the respondent that the post was not critical for the purposes of service delivery, holding that it was a necessary one because the respondent saw the need to fill it, albeit temporarily.²⁰⁶ The considerations of efficiency or service delivery suggested no rational connection between the decision of the national commissioner and the overall objectives of the employment equity

¹⁹⁷ Supra note 3 at para 25.4.

¹⁹⁸ Supra note 3 at para 25.6.

¹⁹⁹ Supra note 3 at para 25.7.

²⁰⁰ Supra note 3 at para 26.

²⁰¹ Supra note 3 at para 35.

²⁰² Supra note 3 at para 35.

²⁰³ Supra note 3 at para 36.

²⁰⁴ Supra note 3 at para 37.

²⁰⁵ Supra note 3 at para 38.

²⁰⁶ Supra note 3 at para 41.

plan.²⁰⁷ The court finally held that the failure to promote Barnard was a decision based on her race and constituted discrimination and that the applicant's rights to equality and dignity were not given due consideration.²⁰⁸ The respondent had failed to discharge the onus of proving that the discrimination was fair.²⁰⁹ The court then ordered that the applicant be promoted to the post of superintendent.²¹⁰

Analysis of the decision of the Labour Court

In the Barnard case before the Labour Court, the court seems to have adopted the first school of thought with regards to the beneficiaries of AA. According to this school, it is sufficient for an individual to belong to a designated group in order to be a beneficiary of AA. Mushariwa observes that in the Labour Court judgment, the only reason why Barnard was not promoted was race, and the national commissioner failed to consider her gender in a male dominated field and her position as a designated group member.²¹¹ According to Dupper, it is apparent from the wording of the EEA that white women fall under the ambit of designated groups.²¹² In that regard, the Labour Court erred by failing to consider that Barnard was a member of the designated group, and thereby eligible to fill the vacant position.

The arguments of the Labour Court and Rycroft are flawed. Affirmative action measures should not be applied rigidly in order to conform to quotas. A flexible approach, which considers the backgrounds of all those affected by the policy and whether or not they are disadvantaged should be adopted. The court could have adopted the approach taken in the case of *Minister of Finance v van Heerden*²¹³ which stated that “the objective of section 9(2) is to remedy the injustices of the past not only on the premise of race, but gender and class as well and other levels and forms of social differentiation and systemic under-privilege.” In this way it could have been seen that through appointing Barnard, substantive equality in the domain of gender could be advanced.

The Labour Court further held that there was a presumption of unfair discrimination with regards to the non-appointment of Barnard.²¹⁴ It follows then that the respondent bears the onus

²⁰⁷ Supra note 3 at para 42.

²⁰⁸ Supra note 3 at para 43.2- 43.5.

²⁰⁹ Supra note 3 at para 43.6.

²¹⁰ Supra note 3 at para 44.1.

²¹¹ Mushariwa op cit 123 at 446.

²¹² Dupper op cit note 125 at 435.

²¹³ Supra note 2 para 27.

²¹⁴ Supra note 3 at para 25.6.

of proving that the discrimination was fair.²¹⁵ Traditionally, in order to meet this burden, the respondent is must provide evidence to “enable the court to evaluate the reasoning behind and justification for a decision in terms of its fairness.”²¹⁶ In order to prove that the decision is fair, the respondent must satisfy the court that it has adequately considered the individual situations of those adversely affected. Equity targets also must be considered, but not as the only relevant factor. In that regard, the Labour Court in the case of *Barnard* is authority for the proposition that fairness is the preferable standard that AA measures must achieve. In so doing, the Labour Court deviated from the standard of rationality which was adopted in the *Van Heerden* case.

4.3 The Labour Appeal Court²¹⁷

Issues

The issue before the Labour Appeal Court was if the Labour Court was warranted in concluding that AA measures under section 9(2) of the Constitution "must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality." At issue were the EEA and the EE plan adopted by the appellant.²¹⁸

Arguments

The appellant argued that the decision of the National Commissioner not to appoint Barnard should stand in the interests of representivity. It was further reiterated that the post was not a critical one therefore the National Commissioner had the sole prerogative not to fill it.²¹⁹ The appellant further argued that the decision of the Labour Court was wrong on the grounds that restitutionary measures need not yield to the right to equality and dignity.

It was also argued that Pretorius J had failed to comprehend and appreciate that AA by its nature was discriminatory and was intended to accord preferential treatment to persons from designated groups.²²⁰ The appellant also stated that the consideration of the right to equality and dignity in the implementation of restitutionary measures was inconsistent with the objects

²¹⁵ Supra note 3 at para 26.

²¹⁶ Ibid.

²¹⁷ *South African Police Services v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC).

²¹⁸ Ibid at para 2.

²¹⁹ Supra note 218 at para 17.

²²⁰ Ibid.

and imports of AA. For these reasons, the appellant contended, the Labour Court had misdirected itself in holding that the failure to appoint Barnard was unfair and inconsistent with the objects of the Employment Equity Act.²²¹ POPCRU intervened as an *amicus curiae* and submitted that the EEA is a measure “by which the right to equality is justifiably limited with a view to addressing the effects of unfair discrimination of the recent apartheid the past.”²²² In that regard, the EE Plan is a measure to achieve substantive equality in the workplace by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workplace.²²³

The decision of the Labour Appeal Court

The court held that the real question was whether the implementation of AA measures should be suppressed if such implementation would have a prejudicial impact only affecting persons from non-designated groups.²²⁴ The court proceeded to deal with the finding of the Labour Court that the failure to appoint Barnard amounted to unfair discrimination as envisaged in the Constitution.²²⁵ In deciding this question, the court considered the test in *Harksen v Lane NO*²²⁶ where it was held that determining whether differentiation amounts to discrimination “requires a two stage analysis. Firstly, whether the differentiation amount to 'discrimination' and if it does, whether secondly, it amounts to unfair discrimination.”²²⁷ In *casu*, the court found that there was no differentiation because no appointment took place. However the court held that an omission, in this case failure to appoint, may amount to discrimination. The court then proceeded to determine whether such discrimination was unfair as contemplated by section 6 of the EEA.²²⁸ The court underscored the importance of section 6(2) of the EEA,²²⁹ holding that in certain instances, it is justifiable to discriminate under the Constitution.²³⁰

The court rejected the Labour Court's contention that AA measures should be subjected to the right to equality and the right to dignity. The court held that holding otherwise would “...defeat

²²¹ Ibid.

²²² Supra note 218 at para 19.

²²³ Ibid.

²²⁴ Supra note 218 at para 20.

²²⁵ The Constitution op cit note 4.

²²⁶ Supra note 161.

²²⁷ Supra note 161 at para 45.

²²⁸ Employment Equity Act op cit note 10.

²²⁹ Ibid Section 6(2) “It is not unfair discrimination to –

a) take affirmative action measures consistent with the purpose of this Act

b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job

²³⁰ The Constitution op cit note 4.

the very purpose of having restitutionary measures in the first place, as such implementation would always fall short due to the presumption that adverse effects on persons from non-designated groups would exist...”²³¹ The judge also held that the very substance of AA is to protect the right to equality because without such measures, the achievement of equitable treatment would not be possible in South Africa. An approach such as the one adopted by the Labour Court, they opined, would promote the interests of persons from non-designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid²³² and this would counteract legitimate constitutional objectives.

The EEA was enacted to undertake the obligation under section 9 of the Constitution²³³ to address the injustices and the inequalities created by past discriminatory practices.²³⁴ The court opined that the over-representation of Whites in level 9 is a stark reminder of such discriminatory practices but that it could be broken by embracing the spirit of restitution found in the Constitution.²³⁵ Appointing Barnard would not have advanced the target for in the appellant's workforce in level 9 and the Labour Court erred in holding that her appointment to level 9 would have improved equity in level 8 as this would have worsened the over-representation of white employees in level 9 and would have represented a step backwards and in “direct violation of a clear constitutional objective.”²³⁶ The court also rejected the Labour Court’s view that failure to appoint Barnard would compromise service delivery, in the process, holding that it is not open to a court to “second guess” a decision that not filling a post will or will not compromise service delivery because the National Commissioner is the only person answerable with regards to service delivery matters.²³⁷ The court then concluded that Labour Court misinterpreted the purpose of restitutionary measures by holding that their implementation should be subject to the right to equality and the right to dignity.²³⁸ The appeal was upheld.²³⁹

Analysis of the decision of the LAC

²³¹ Supra note 218 at para 26.

²³² Supra note 218 at para 30.

²³³ The Constitution op cit note 4.

²³⁴ Supra note 218 para 31.

²³⁵ Supra note 218 at para 38.

²³⁶ Supra note 218 at para 42.

²³⁷ Supra note 218 at para 46.

²³⁸ Supra note 218 at para 47.

²³⁹ Supra note 218 at para 49.

The LAC²⁴⁰ adopted the rationality test in determining the proper standard of review of affirmative action measures. In so-doing, the court followed in the footsteps of the *Van Heerden* judgment. However, rationality has been criticised for lacking the normative content to be able to determine whether restitutionary measures promote the overall purpose of section 9.²⁴¹ Pretorius further argues that rationality does not interrogate the comparative fairness of the impact of AA measures on the affected parties and also lacks the comparative overview imperative as an intermediary for equality.²⁴² In his scathing critique, Pretorius adds that the rationality standard does not contain any considerations of fairness and proportionality.²⁴³ McGregor²⁴⁴ agrees that the rationality test has been created in isolation from section 9(2)²⁴⁵ and section 36. The sentiments of the LAC seem to be misguided. The court should have rather adopted the fairness approach as discussed by the Constitutional Court below. The LAC is disinclined to dwell into the representivity vs service delivery debate by holding it was not its place to second guess the decision of the National Commissioner with regards to the effect of the position on the efficiency of the SAPS. This proposition is wrong. It is the duty of the court to ensure that state entities uphold the principles and values of the Constitution, and hold them accountable for their failure to do so. The LAC should have taken note of the SAPS mandate to uphold the values and principles enshrined in section 195 and section 205 of the Constitution. According to the case of *Coetzer & and Others v The Minister of Security and Another*,²⁴⁶ these principles bind every organ of state including SAPS.

4.4 The Supreme Court of Appeal²⁴⁷

Issues

The Supreme Court of Appeal was tasked with determining whether the failure to appoint Barnard was discriminatory and if so, if it was unfair. It also had to decide whether the failure to appoint Barnard was in violation of the values and principles underpinning the duties of SAPS in accordance with section 195 of the Constitution.

Arguments

²⁴⁰ Supra note 218.

²⁴¹ Pretorius op cit note 152 at 565.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ McGregor op cit note 139 at 655.

²⁴⁵ The Constitution op cit note 4 Section 9(2).

²⁴⁶ Supra note 183.

²⁴⁷ *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA).

Barnard argued that she had been unfairly discriminated against on the basis of her race. The respondent, on the other hand, was claimed that the discrimination was fair and the position was not critical.

Decision of the court

The court found that employment equity could not be achieved by mechanical application of formulae and numerical targets.²⁴⁸ The SCA held that the “starting point for enquiries of the kind under consideration is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair.”²⁴⁹ The court also held that when it is alleged that a plaintiff has violated the equality clause in the Constitution, section 9(2) can provide a defence for such a plaintiff.²⁵⁰ The plaintiff may argue that “the discriminatory policy was adopted to promote the achievement of equality as contemplated by section 9(2), and was designed to protect and advance persons disadvantaged by prior unfair discrimination.”²⁵¹ Section 11 of the EEA can provide a similar defence. Where unfair discrimination is alleged, the employer must establish that such discrimination was fair. The court went on to reject the LAC’s assertion that Barnard was not discriminated against because the vacancy was not filled. It was held that Barnard was discriminated against on the basis of her race because if a senior African woman or man had had all of Barnard’s skills and had achieved the same interviewing score, that person would most surely have been appointed to the post and that the only reason why Barnard was not appointed was because she is white.

Having decided that there was indeed discrimination, the court set out to determine whether such discrimination was fair under section 11 of the EEA. The court upheld the principle in the *Harksen*²⁵² case that the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation,²⁵³ placing the onus of proving that the discrimination was fair on SAPS. The court held that SAPS did not discharge that onus as their justifications for failing to appoint Barnard were inadequate. Furthermore, in deciding this issue, the court was obliged to adopt a flexible and situation-sensitive approach to the facts of the case.²⁵⁴ The LAC failed to adopt such an approach, and consequently failed to take into

²⁴⁸ Ibid para 23.

²⁴⁹ Supra note 248 at para 50.

²⁵⁰ Ibid.

²⁵¹ Supra note 248 at para 54.

²⁵² Supra note 161.

²⁵³ Supra note 248 para 55.

²⁵⁴ Supra note 248 at para 58.

account several relevant factors. These factors include that Barnard herself was part of a designated group because she is a woman and that a white male was temporarily appointed before the position was re-advertised. The decision to appoint a white male was questionable since race representivity within organs of state is apparent.²⁵⁵

The court also held that despite that the National Commissioner is not bound by the evaluations and the recommendations of the interview panel; he must give consideration to and engage with what they put before him. Failure to consider relevant material and factors expose him to liability if legally challenged.²⁵⁶ The court also highlighted the distinctive characteristics, possessed by Barnard, and approved by the panel, which made her a suitable candidate for the vacancy. Furthermore, the court held that the recommendation by the Commissioner should have been taken into account by the National Commissioner in deciding whether or not to appoint Barnard. The court went on to affirm the argument that Barnard's promotion might have had the indirect effect of promoting the employment equity agenda because if Barnard was promoted to Superintendent, her position at the lower level (level 8) would be free and that would present an opportunity to enhance representivity at that level.²⁵⁷ In that regard, SAPS had failed to discharge the onus of proving that the discrimination was fair as envisaged by section 11 of the EEA.²⁵⁸

The court went on to consider whether the justification of non-appointment based on the position not being a critical post. In response to this argument, it was held that it could not be argued that such a senior position could be created and advertised without serious consideration. In that regard, the post was created because it was necessary in furtherance of the SAPS mission of providing a professional and efficient police service.²⁵⁹ The court held that the SAPS are obliged to be professional and effective in the execution of their duties and use its resources efficiently.²⁶⁰ The court rejected the argument by the LAC that it is the National Commissioner's sole prerogative to determine whether a position is critical, and held that applicable constitutional and statutory provisions, as well as the facts must be considered.²⁶¹ In that regard, SAPS was prejudiced by the failure to appoint Barnard. The court also agreed with Barnard that failure to appoint her to a position which, with respect to the

²⁵⁵ Supra note 248 at para 59.

²⁵⁶ Supra note 248 at para 60.

²⁵⁷ Supra note 248 at para 64.

²⁵⁸ Supra note 248 at para 68.

²⁵⁹ Supra note 248 at para 73.

²⁶⁰ Supra note 248 at para 72.

²⁶¹ Supra note 248 at para 74.

regulatory constitutional and statutory framework, must have been necessary, had a negative impact on service delivery.²⁶²

The court also held that “the negative impact of a double rejection on dubious grounds upon a loyal and dedicated servant of the SAPS”²⁶³ was a factor that had to be taken into account. The impact on the employee and on the employer also has to be taken into account and a situation-sensitive approach has to be adopted.²⁶⁴ The court went on to say that where there is no suitable person capable of fulfilling the requirements of the position, there is no reason why the only suitable person from a non-designated group should not be appointed.²⁶⁵ It was also held that

“...if South Africa is to address past imbalances with affirmative-action measures, race has to be taken into account, but this has to be done fairly and without forgetting that the ultimate objective is to ensure a fully inclusive society.”²⁶⁶

The court then concluded that SAPS had not established that the discrimination complained of was fair. The court reversed the decision of the LAC, holding that there was no factual foundation for the finding.²⁶⁷ The appeal was upheld with costs and Barnard’s compensation was awarded as the difference between what she would have earned as a superintendent and what she continued to earn as a captain, but limited to a two-year period.²⁶⁸

Analysis of the decision of the SCA

The SCA²⁶⁹ in the *Barnard* case held that the National Commissioner should have taken into account that Barnard was also a woman and therefore a member of a designated group. In that regard, the court adopted the second school of thought which states that “in order to be identified as a beneficiary of AA, the individual needs to have actually been disadvantaged personally.”²⁷⁰ Rycroft, however, has his own reservations about the second school of thought. He argues that it is more desirable to focus on representivity, the broader and more general social objective of affirmative action, rather than interrogating whether “a person in the

²⁶² Supra note 248 at para 76.

²⁶³ Supra note 248 at para 77.

²⁶⁴ Supra note 248 at para 77.

²⁶⁵ Supra note 248 at para 78.

²⁶⁶ Supra note 248 at para 80.

²⁶⁷ Supra note 248 at para 79.

²⁶⁸ Supra note 248 at para 81.

²⁶⁹ Supra note 248.

²⁷⁰ Dupper op cit note 136 at 99.

designated group comes from a wealthy background and has received the best education.”²⁷¹ The Supreme Court of Appeal judgment in *Barnard* calls for a “situation-specific” approach which considers, inter alia, race and gender as crucial, but not conclusive factors.²⁷² In this way, the second school of thought seems to better achieve the desired objectives of the EEA of redressing past unfair discrimination.

The Supreme Court of Appeal in *Barnard* held the SAPS to be bound by the principles enshrined in section 205 of the Constitution in the execution of their duties.²⁷³ It therefore follows that the National Commissioner must have been aware that the post was created with the intention of furthering the mandate of the SAPS in upholding these principles. This suggests that the National Commissioner, in failing to appoint Barnard or to fill the position permanently, undermined the efforts of SAPS to provide efficient and effective service delivery. Section 195 and section 205’s values and principles bind each and every organ of state including SAPS, as correctly held by the court in *Barnard*²⁷⁴ and *Coetzer & others v The Minister of Safety and Security & Another*.²⁷⁵ On the other hand, AA is also provided for by the same Constitution and the courts are bound to balance these competing interests and determining which outweighs the other, in light of the peculiar circumstances of each case.

It should be noted that the court in *Coetzer & others v The Minister of Safety and Security & Another*,²⁷⁶ found that too much emphasis was placed on the requirement of representivity at the expense of efficiency. The Supreme Court of Appeal, on the other hand, reasoned differently, that failure to appoint Barnard had an adverse impact on SAPS obligation to perform their duties consistently with section 205. Indeed, Frahm-Arp, in his critique of the SCA decision,²⁷⁷ states that “considerations of representivity and numeral targets are not absolute criteria for employment.”²⁷⁸ Such an approach would enhance efficiency in public service. According to McGregor, this approach is ideal because “affirmative action should apply broadly to give effect to substantive equality as enshrined in the Constitution and the

²⁷¹ A Rycroft “Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies” (1999) 20 *ILJ* 1423.

²⁷² *Supra* note 250 para 58.

²⁷³ *Ibid* para 64.

²⁷⁴ *Ibid*.

²⁷⁵ *Supra* note 183.

²⁷⁶ *Ibid*.

²⁷⁷ *Supra* note 250.

²⁷⁸ L Frahm-Arp ‘Solidarity obo Barnard: Perhaps not as definitive a position as suggested’ May 2014 *Without Prejudice* 67.

EEA.”²⁷⁹ She goes further to state that neither efficiency nor representivity surmounts the other, nor can one be scrutinised in isolation from the other because they are connected and interdependent.²⁸⁰ The judgment in *Coetzer*, however, seems to illustrate that that efficiency may prevail over representivity in cases involving services critical to the South African public.²⁸¹ This approach is also supported by Mushariwa who states that “suitably qualified individuals being appointed would equal efficiency and quality of service rather than just appointing individuals on the basis of race to enhance representivity.”²⁸² With that in mind, the approach adopted by the SCA is correct in that it recognises the importance of the values and principles enshrined in section 195 and section 205 of the Constitution in the representivity versus service delivery debate.

4.5 The Constitutional Court²⁸³

Issues

The SAPS appealed the decision to the the Constitutional Court, which had then to decide whether the national commissioner's decision unfairly discriminated against the respondent.²⁸⁴

Majority Judgment

The court held that the constitution has a mission to address the inequalities of the past. Certain provisions in the constitution enjoin South Africans to take active steps to achieve substantive equality, particularly for those disadvantaged by past unfair discrimination.²⁸⁵ But the court went on to hold that care must be taken to ensure remedial measures do not unduly assault the dignity of those concerned and that furthermore, such measures are not meant to be punitive, but to create a more equal and fair society that is non-racial, non-sexist and socially inclusive.²⁸⁶ The court also held that “...there is a positive obligation on the state to direct

²⁷⁹ M McGregor ‘Affirmative Action and the Constitutional Requirement of Efficiency for the Public Service’ (2003) 15 *SA Merc LJ* 93.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Mushariwa op cit note 123 at 445.

²⁸³ *Supra* note 19, *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

²⁸⁴ *Ibid* para 1.

²⁸⁵ *Supra* note 19 at para 29.

²⁸⁶ *Supra* note 19 at para 30.

reasonable public resources to achieve substantive equality for full and equal enjoyment of all rights and freedoms.”²⁸⁷ This may be best achieved by taking reasonable, prompt and effective measures to realise the socio-economic reforms needed by the vulnerable.²⁸⁸

The court acknowledged that the equality clause permits what would otherwise discriminatory measures, when they protect or advance those disadvantaged by unfair discrimination and help to achieve substantive equality.²⁸⁹ In determining whether a measure or a policy falls within the ambit of section 9(2), the following three part test is applied.

The measure must:

- a) “Target a particular class of people who have been susceptible to unfair discrimination;
- b) Be designed to protect or advance those classes of persons; and
- c) Promote the achievement of equality.”²⁹⁰

If a measure passes this test, it is presumed to be fair in terms of the Constitution. However, if a properly adopted restitution measure is then wrongfully or unlawfully applied, it may be challenged.²⁹¹ A legitimate restitution measure must be implemented in such a way as to be rationally connected to the terms and objects of the measure and to advance its legitimate purpose.²⁹² The court then reiterated the relevant provisions in the EEA²⁹³ before analysing the decision of the SCA.

The Constitutional Court found against the ruling of the SCA. The SCA had set out to determine whether there was discrimination, and if so, whether or not it was fair. This same test was applied in *Harksen v Lane NO*.²⁹⁴ The court held that the SCA misconceived the issue before it, as well as the relevant law. The issue before the court was not the validity of the employment equity plan, but rather whether decision of the national commissioner was open to challenge.²⁹⁵ On that point, the relevant law is found under section 9(2) of the Constitution²⁹⁶

²⁸⁷ Supra note 19 at para 33.

²⁸⁸ Ibid.

²⁸⁹ Supra note 19 at para 35.

²⁹⁰ Supra note 19 at para 36.

²⁹¹ Supra note 19 at para 38.

²⁹² Supra note 19 at para 39.

²⁹³ Supra note 19 at para 40-45.

²⁹⁴ *Harksen v Lane NO and Others* 1998 (1) SA 300, supra note 159.

²⁹⁵ Supra note 19 para 51.

²⁹⁶ The Constitution op cit note 4.

and section 6(2) of the EEA.²⁹⁷ The Constitution Court found it was unwarranted to impose on SAPS, the onus to prove that the discrimination was fair.

The respondent also argued that by declining to appoint Barnar, the national commissioner had made an unlawful and unreasonable that must be set aside. The court held that this would amount to a new cause of action. This would be impermissible as it would result in a review and the setting aside of an impugned decision.²⁹⁸ This would violate the principle of legality and the provisions of the Promotion of Administrative Justice Act.²⁹⁹

The court agreed however, with the respondent that the decision of the National Commissioner must be informed by the selection criteria of the National Instruction. These criteria demand that the successful applicant have the “existing or potential competence to do the job” and an “acceptable record of conduct.” The instruction also requires that promotions heed the employment equity plan of the relevant business unit.³⁰⁰

The court did agree however, that under the National Instruction, the National Commissioner had discretion to forgo or ignore recommendations of the interviewing panel and divisional commissioner.³⁰¹ As such, the National Commissioner was not bound by these recommendations, and was exercising that discretion, when deciding not to appoint Barnard. The justification claimed for withholding the promotion of Barnard was that it would have worsened representivity in salary level 9, and furthermore that the post was not critical for service delivery. The National Commissioner did not appoint another person from the designated groups (and with a lower score) even if their appointment would have improved representivity. For that reason, the court concluded that it could not find this the exercise of that discretion to be unlawful.³⁰² Turning to the issue of service delivery, the court accepted the appellant’s claim that the position was non-critical and and never ultimately filled. The court thus accepted the National Commissioner’s argument that failure to appoint to Barnard did not affect service delivery.

The court further held that the National Commissioner did not pursue the targets of the employment equity plan rigidly because over-representation of white females at salary level 9

²⁹⁷ Employment Equity Act op cit note 10.

²⁹⁸ Supra note 19 para 59.

²⁹⁹ Promotion of Administrative Justice Act 3 of 2000.

³⁰⁰ Supra note 19 para 61.

³⁰¹ Supra note 19 at para 62.

³⁰² Ibid.

was emphasized.³⁰³ Barnard was also not barred from future promotions and when she went for the interview, she was aware that selection would occur within the structures imposed by employment equity.³⁰⁴ The court found in favour of SAPS, holding that an inference of unreasonable decision-making and illegality could not be imputed from the decision of the National Commissioner. In that regard, the court held that,

“...the national commissioner exercised his discretion not to appoint Ms Barnard rationally and reasonably and in accordance with the criteria in the instruction, in pursuit of employment equity targets envisaged in s 6(2) of the Act.”³⁰⁵

Minority judgment per Cameron J, Froneman J and Majiedt AJ

Cameron, Froneman and Majiedt agreed with the reasoning and the outcome of the majority judgment, but wished to consider the tensions that follow the establishment and application of AA measures;³⁰⁶ and secondly to evaluate the suitable standard that should be applied when a litigant questions the application of a constitutionally consistent AA measure in a particular case.³⁰⁷ It was held that the majority judgment erred in not discussing these two issues. This was the first case in which a court had to decide the standard in assessing the lawfulness of the implementation of constitutionally compliant restitutionary measures.³⁰⁸ The court held that the tension that is at issue in this case is between recognising and redressing the realities of the past and establishing a society that is non-racial, non-sexist and socially inclusive.³⁰⁹ The court held that race and gender are not the only forms of discrimination that have to be taken into account when implementing restitutionary measures.³¹⁰

The court also held that section 2³¹¹ does not determine when a restitutionary measure is permissible, but that the EEA must be consulted as to its relevant provisions. The Act does not sanction overly rigid measures and furthermore, no AA decision is compliant with the purpose of the Act unless it acknowledges the elevation of the designated groups in terms of the Act.³¹² The Act also underscores the right to dignity as a fundamental one, and as a value under which

³⁰³ Supra note 19 at para 66.

³⁰⁴ Supra note 19 at para 68.

³⁰⁵ Supra note 19 at para 70.

³⁰⁶ Supra note 19 at para 74.

³⁰⁷ Supra note 19 at para 75.

³⁰⁸ Supra note 19 at para 75.

³⁰⁹ Supra note 19 at para 77.

³¹⁰ Supra note 19 at para 79.

³¹¹ The Employment Equity Act op cit note 10.

³¹² Supra note 19 para 88.

the Act must be interpreted.³¹³ The court went on to hold that the majority judgment failed to consider the relevant question regarding the difference between quotas and numerical goals. The question was relevant because Barnard had alleged that national commissioner's implementation of the plan was indeed so rigid as to constitute the use of quotas rather than numerical goals.³¹⁴ The question then, before the court centered on the individual implementation of the plan and the standard to be applied in determining the lawfulness of the plan.³¹⁵

The court held that the facts of the case required a less deferential standard than rationality, namely that rationality must be balanced by a consideration of fairness.³¹⁶ Fairness is a core Constitutional value, especially in employment.³¹⁷ Despite the “open-ended” nature of a fairness criterion, the court suggested that it would “crystallise” over time. Additionally, focussing on fairness could give the court the flexibility to deal with new cases on a *sui generis* basis.³¹⁸

In applying this standard, the court investigated whether “a specific implementation of a measure that is constitutionally compliant in its general form is nevertheless in conflict with the provisions of the Act.”³¹⁹ By applying this standard to the facts, the court held that due regard must be paid to the objective facts of the case and the reasons stipulated by the National Commissioner for his decision not to appoint Barnard.³²⁰ Upon review, the court found that the reasons given were insufficient, having failed to justify how he balanced the considerations of representivity and service delivery.³²¹ While the National Commissioner had the power to disagree and disregard the divisional panel’s recommendation, he was obliged when doing so, to adequately explain his disagreement and reasoning for choosing representivity over service delivery.

The court also held that in deciding the fairness of the implementation of the equity plan, all relevant aspects of the candidate's identity and ways they could advance representivity in a

³¹³ Supra note 19 at para 89.

³¹⁴ Supra note 19 at para 91.

³¹⁵ Supra note 19 at para 92.

³¹⁶ Supra note 19 at para 98.

³¹⁷ Ibid.

³¹⁸ Supra note 19 at para 100.

³¹⁹ Supra note 19 at para 101.

³²⁰ Supra note 19 at para 102.

³²¹ Supra note 19 at para 110.

manner which complies with the Act.³²² Furthermore, restitutionary measures must be implemented harmoniously with the Act, which lists women as members of designated groups.³²³ As such, the national commissioner was required to consider how Barnard would address gender representivity, as well as racial representivity.³²⁴ However, the court concluded that despite the national commissioner's failure to address adequately the question of service delivery, his failure to mention gender representivity was insufficient for finding his decision to be unfair.³²⁵ Furthermore, Barnard never rebutted the argument that the division was being restructured and that the post did not need to be filled until restructuring was complete, nor did she presented any argument on the basis of gender.³²⁶ The court also held that there was a greater justification for prioritising representivity over all the other considerations. The overriding factor was the over-representation of white women at salary level 9.³²⁷ Barnard's eventual promotion to the post of lieutenant-colonel also showed her non-appointment did not serve as a barrier to her advancement.³²⁸

Minority judgment per Van der Westhuizen J

Van der Westhuizen agreed with the reasoning and the finding of the majority judgment but differed, on certain matters of principle. In particular, the learned judge found that the majority judgment erred in refusing to review and set aside the decision of the national commissioner.³²⁹ It was held that Barnard brought an application before the court to declare the implementation of the AA measure unlawful, pursuant to the EEA and the equality clause in the Constitution. Therefore in order to determine lawfulness of the implementation, it must be tested against the standard of the *Van Heerden*³³⁰ case. The court also had a duty to opine on how implementation influenced the right to equality or human dignity.³³¹ The court held that “schemes and conduct based on race, which arbitrarily benefit some and violate the rights of others, can never qualify as a legitimate measure under 9(2).”

In determining whether the national commissioner's decision passed judicial muster, the learned judge held that it could be subject to review on the basis of rationality. Despite

³²² Supra note 19 at para 118.

³²³ Supra note 19 at para 114.

³²⁴ Supra note 19 at para 120.

³²⁵ Supra note 19 at para 121.

³²⁶ Supra note 19 at para 122.

³²⁷ Supra note 19 at para 123.

³²⁸ Ibid

³²⁹ Ibid para 133.

³³⁰ *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC), supra note 2.

³³¹ Supra note 19 para 133.

Barnard's decision not did not raise this issue, the national commissioner was exercising public power in the decision not to appoint Barnard, and therefore that decision could be scrutinised using the rationality test. The court also held that the test in *Van Heerden*³³² is relevant in determining whether the implementation of the equity plan passes constitutional muster. The test in that particular case questions whether an affirmative or restitutionary measure

- a) "targets persons or categories of persons who have been disadvantaged by unfair discrimination;
- b) is designed to protect or advance such persons or categories of persons; and
- c) promotes the achievement of equality."³³³

The first two legs of the test are concerned with whether the measure is rationally connected with its objective while the third focuses on the implementation of the measure.³³⁴ In determining the third part of the test, rationality is insufficient, the court must also look at implementation. Considerations like whether the measure "serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved"³³⁵ should be taken into account. The court held that the decision not to appoint Barnard promoted the achievement of equality because her appointment would have exacerbated the over-representivity of her designated group.³³⁶ The learned judge then evaluated whether the implementation of the plan passes constitutional muster in that it does not infringe any constitutional rights.³³⁷

The court rejected the possibility of using fairness as a standard as proposed by Cameron, Froneman and Majiedt in their separate judgment, holding that the standard is too vague.³³⁸ The learned judge proposed the use of the limitation clause³³⁹ in measuring the impact of enforcing one right over another,³⁴⁰ given that AA measures may impact on any number of rights and interests, both of the individuals concerned and of the public.³⁴¹ The learned judge went on to consider if Barnard's right to dignity was infringed and held that indeed it was

³³² Supra note 2.

³³³ Supra note 2 at para 37.

³³⁴ Supra note 19 at para 143.

³³⁵ Supra note 19 at para 148.

³³⁶ Supra note 19 at para 150.

³³⁷ Supra note 19 at para 156.

³³⁸ Supra note 19 at para 159.

³³⁹ The Constitution op cit note 4.

³⁴⁰ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC), supra note 19 para 164.

³⁴¹ Supra note 19 at para 167.

because her attributes, experience and attitude were eclipsed by considerations of race.³⁴² However, the court held that the violation to her right were reasonable and justifiable in light of the goal of substantive equality.³⁴³ With regards to service delivery, the court held that in balancing the interests of service delivery versus representivity, factors like “the nature of the duties of the job, the needs of the workplace and the employer, and the under- or over-representation of the group seeking to be advanced by the AA measure should be taken into account.”³⁴⁴ The learned judge then held that it could not question the national commissioner’s decision on the issue of service delivery because there was not enough evidence to do so.³⁴⁵

Analysis of the decision of the Constitutional Court

The majority judgment in the Constitutional Court³⁴⁶ held that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure and it must only be applied to advance its legitimate purpose.³⁴⁷ This means that the majority in the Constitutional Court agreed with the approach of the Labour Court. The minority, however, disagreed and held that a less deferential standard than rationality was required. Instead, the Labour Court adopted the standard of fairness, holding it as a core Constitutional value. The court justified this standard, holding that it would promote flexibility. Rationality as a test for applying section 9(2)³⁴⁸ to AA measures was rejected by the minority in the Barnard case. The court held that unlike section 9(2),³⁴⁹ the EEA imposes a different standard than that of mere rationality. Fairness, the court opined, provides a more “exacting level of scrutiny”.³⁵⁰ Furthermore, the standard of fairness would ensure that “a decision-maker has carefully evaluated relevant constitutional and statutory imperatives before making a decision that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by section 9(3) of the Constitution.”³⁵¹

The court criticized rationality as the appropriate standard of review, suggesting that it does not allow for balancing of multiple designated groups and their interests against those adversely

³⁴² Supra note 19 at para 177.

³⁴³ Supra note 19 at para 180.

³⁴⁴ Supra note 19 at para 186.

³⁴⁵ Supra note 19 at para 189.

³⁴⁶ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

³⁴⁷ Supra note 19 at para 39.

³⁴⁸ The Constitution op cit note 4.

³⁴⁹ Ibid.

³⁵⁰ Supra note 19 at para 95.

³⁵¹ Supra note 19 at para 96.

affected by the remedial measure.³⁵² The standard of rationality has also been criticised for stripping section 9(2) internal requirements of all fairness content. This has the effect of undermining the promotion of substantive equality and detaching it from its essence.³⁵³ Rationality has also further been criticised by Pretorius in that it lacks the normative component to be able to determine whether a restitutionary measure promotes the overall purpose of section 9, as well as it not containing any considerations of fairness and proportionality.³⁵⁴ However, Albertyn argues that, according to the majority judgment, in assessing the substance of employment equity plans and AA measures by the state, rationality meet the bare minimum standard, but is not the definitive standard.³⁵⁵

It should also be noted that the majority in the CC upheld the three-stage inquiry which was established in the *Van Heerden* case. Gaibie states that, according to the majority judgment, once the plan passes the three-stage Moseneke test, any AA measure taken as a consequence of it is not unfair or presumed to be unfair. In that regard, the majority deviated from the judgment of the SCA, holding that the SCA had misconceived the issue before it and consequently, the controlling law. The court found that the SCA had erred by failing to approach the equality claim through the context of both section 9(2) of the Constitution and section 6(2) of the EEA. The rationale behind this was that the plan opposed was unlawful and invalid. The SCA erred in applying the test in *Harksen v Lane NO*³⁵⁶ as doing so presumes the plan to be unfair. It was held therefore that the question before the court was never whether the plan was valid, but whether National Commissioner's decision was questionable.³⁵⁷ In applying this approach, the court found that a measure implemented in terms of an employment equity plan may only be challenged for the purpose of determining whether or not it is unlawful.³⁵⁸ The principle of legality therefore requires the implementation of AA measures to be rationally connected to the terms and objects of the measure.³⁵⁹ According to Albertyn, the effect of this is that the starting point for evaluating affirmative action measures and related decisions, starts with s 9(2) and not

³⁵² Ibid.

³⁵³ JL Pretorius 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 565.

³⁵⁴ Ibid.

³⁵⁵ CH Albertyn "Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act – an opportunity missed? *South African Police Services v Solidarity obo Barnard*" (2015) 134 (4) *SALJ* 6.

³⁵⁶ Supra note 159.

³⁵⁷ Supra note 19 para 51.

³⁵⁸ Supra note 19 para 38.

³⁵⁹ Supra note 19 para 39.

unfair discrimination in s 9(3). Accordingly, AA measures are subject to divergent constitutional and legal benchmarks beyond s 9(3) fairness.³⁶⁰

Gaibie finds three conceptual difficulties with the majority judgment. Firstly, only Van der Westhuizen J discusses the nature of the Moseneke three-legged test and the issue that the third leg of the test can only be considered at the implementation stage of the employment equity plan. This narrowed the test considerably to mere formulation and adoption of the plan and represents a fundamental shift from the *Van Heerden* judgment.³⁶¹ Secondly, Gaibie argues that in equating the provisions of section 9(2) of the Constitution and section 6(2) of the EEA, the CC seems to have misconceived the matter.³⁶² It is argued that section 9(2) is structured such that the right to equality may demonstrate that AA measures meeting the internal requirements of section 9(2) cannot be presumed to be unfair. However, the same cannot be said about section 6(2) of the EEA because issues relating to equality and unfair discrimination in employment are regulated by the Labour Relations Act.³⁶³ Finally, unlike the *Van Heerden* judgment, the CC failed to consider the distinction between unacceptable discrimination and proper AA measures. Where a challenge to an AA measure is made, it will be fair and logical for the employer to explain their reasons and justify their actions, ensuring that the decision is protected under the provisions of section 9(2) of the Constitution read together with section 6(2) of the EEA.³⁶⁴

Albertyn further criticizes the majority judgment for limiting the ambit of *Van Heerden* by setting a minimum rationality standard for evaluating restitutionary measures when Moseneke stated that they must be rationally related to the terms and objects of the measure.³⁶⁵ Moseneke also failed to apply the requirements of section 9(2) to the facts and circumstances of the case at hand. In so-doing, the learned judge circumvents “a substantive engagement with the problems of evaluating affirmative action within an overall understanding of employment law and substantive equality.”³⁶⁶ Instead, Moseneke reinterprets the claim as directed, not at unfair

³⁶⁰ Albertyn op cit note 356 at 13.

³⁶¹ Gaibie op cit note 145 at 91.

³⁶² Ibid.

³⁶³ The Labour Relations Act 66 of 1995.

³⁶⁴ Gaibie op cit note 145 at 92.

³⁶⁵ Albertyn op cit note 356 at 6.

³⁶⁶ Ibid at 6.

discrimination based on race under section 6(1) of the Act, but at reviewing and setting aside the National Commissioner's decision not to appoint her.³⁶⁷

The majority in the Constitutional Court held that the National Commissioner exercised his discretion rationally by failing to appoint Barnard because her appointment would have worsened representivity in salary level 9 and the post was not critical for service delivery.³⁶⁸ In that regard, the court was of the opinion that considerations of service delivery could not override the issue of representivity in the workplace. The court also overlooked other relevant considerations, including Barnard's merit and competence, focusing instead on representivity.³⁶⁹ The National Commissioner blatantly disregarded the selection criteria in terms of the National Instruction which provide, inter alia, that "competence based on the inherent requirements of the job or the capacity to acquire, within a reasonable time, the ability to do the job and suitability" are some of the relevant considerations to be taken into account in choosing a suitable candidate.³⁷⁰ In his critique of the minority judgment, Albertyn states that the question before the court was whether the Commissioner had adequately explained how he weighed up service delivery and representivity, and had implemented the plan in a flexible and fair manner in a bid to avoid the de facto conversion of numerical targets into rigid quotas.³⁷¹ The judges found that the Commissioner's failure to give reasons for choosing representivity over service delivery, and to even consider the issue of gender representivity, were both indications that he was not implementing the Plan in a fair manner.³⁷²

The Constitutional Court agreed with the LAC, holding that it could find no reason to object to the National Commissioner's argument that failure to appoint Barnard did not affect service delivery. It could be argued though that the court should have adopted the stance set forth in the case of *Stoman v Minister of Safety & Security & others*³⁷³ where the court held that that the need for representivity cannot be used to legitimise the appointment of a candidate who is not suitably qualified and who cannot discharge his duties.³⁷⁴ This principle should also be extended to the public service, including the SAPS. If there is an individual who is suitably qualified for a position and gives every indication of the ability to discharge their duties

³⁶⁷ Ibid.

³⁶⁸ Supra note 19 para 62.

³⁶⁹ Ibid.

³⁷⁰ Supra note 19 para 46.

³⁷¹ Albertyn op cit note 356 at 6.

³⁷² Supra note 19 para 120.

³⁷³ *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T)

³⁷⁴ Ibid para 1032A.

efficiently, then such a candidate should be appointed. Representivity should be one of the considerations which may be taken into account in deciding who the suitable candidate is, but it should not be rigidly applied at the expense of other important considerations.

The role of the right to dignity

The *Barnard* judgment reveals that the idea of substantive equality in s 9 remains contested, and even undeveloped. At this stage, it is imperative to discuss the role of the right to dignity in the right to equality. Various authors argue that the right to dignity should be the ‘lodestar of equality’ and that unfair discrimination should be measured by equality of moral worth.³⁷⁵ Some authors disagree with this proposition.³⁷⁶ In his critique of the Barnard CC judgment, Alibertyn deals at length with the contesting ideas of equality. The dignity-centred approach was also advocated for by the Labour Court in *Barnard*. According to Alibertyn, the purpose of the concept of dignity is to distinguish between differential treatment under s 9(1), subject to a test of rationality, and differential treatment under s 9(3) which amounts to discrimination and is subject to the test of fairness.³⁷⁷ Differentiation constitutes discrimination when it occurs on premises that have the potential to diminish dignity. Secondly, it is only when there is *actual impairment of human dignity* that this discrimination is found to be unfair. The impact of the impugned law or conduct on the dignity of the person complaining of discrimination is crucial. In that regard, dignity, is crucial to determining unfair discrimination and is predominantly appreciated to indicate fundamental human worth, and the need to be treated as equally worthy and with equal concern and respect.³⁷⁸ But this raises a problem in that if the effect on the dignity of the individual complainant is crucial, and this is exacerbated by a presumption in favour of unfairness, how does one rationalize positive measures that seek to “redress collective disadvantage, but which affect also individual members of other, usually more privileged, groups?”³⁷⁹

Cameron J, seeks to incorporate the concept of dignity by stating that the courts ought to “develop a ‘standard to determine whether the implementation of a remedial measure has adequately balanced substantive equality with the dignity of the person negatively affected by

³⁷⁵ See L Ackerman *Human Dignity. Lodestar for Equality in South Africa* (2013); S Woolman ‘Dignity’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2nd Edition, OS, 2006.

³⁷⁶ See C Alibertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *SAJHR* 248.

³⁷⁷ Alibertyn op cit note 356 at 14.

³⁷⁸ Ibid.

³⁷⁹ Alibertyn op cit note 356 at 14.

the measure.”³⁸⁰ Whereas Van der Westhuizen J seems more concerned with balancing the collective dignity of a group versus the individual.³⁸¹ He argues that dignity is a self-standing right which must be weighed against the nature and scope of the equality measure. In that regard, the learned judge balances the value and right of equality against other rights and values, particularly dignity.³⁸² The common approach connecting these judgments is that dignity continues to define equality and a more complex idea of equality remains undeveloped.³⁸³ On the other hand, the majority judgment adopts an approach in which the achievement of equality is informed by the need to overcome unequal power relations and disadvantage, whilst being alert to the dignity of all.³⁸⁴ Substantive equality is achieved, *inter alia*, by the taking of restitutionary or AA measures, but it cannot be equated with this. In that regard, both the majority and minority judgments lack a multifaceted appreciation of the objects and principles of substantive equality that would have facilitated a vivid and consistent development of section 9 equality jurisprudence. Such an approach could have drawn on the *Van Heerden* case to help weigh and justify the competing claims of discrimination and affirmative action, in both section 9 and in the EEA.³⁸⁵

4.6 Concluding remarks

The court in the LC adopted fairness as the appropriate standard of review for all AA measures. This was a deviation from the law as held in the *Van Heerden* case. It can be argued, however, that the LC was justified in that it was subsequently held in the CC that fairness is the appropriate standard to ensure that a decision-maker has carefully evaluated relevant constitutional and statutory imperatives before making a decision; particularly one that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by section 9(3) of the Constitution. Rationality fails as a standard in that it does not incorporate the principles of proportionality and fairness as required by the Constitution. Furthermore, with regards to the representivity vs. service delivery debate, the SCA is accurate when it suggests

³⁸⁰ Supra note 19 para 94.

³⁸¹ Albertyn op cit note 356 at 15.

³⁸² Supra note 19 para 169.

³⁸³ Albertyn op cit note 356 at 16.

³⁸⁴ Supra note 19 para 31.

³⁸⁵ Albertyn op cit note 356 at 17.

that the provisions of section 195 and section 205 of the Constitution should always be borne in mind. These provisions impose an obligation on all state organs in the execution of their duties. It cannot be stated as a hard and fast rule that representivity prevails over service delivery or vice versa, but the provisions of the sections would assist in deciding which should prevail on a *sui generis* basis. In that regard, the SCA judgement can be supported.

CHAPTER FIVE

Introduction

The judgment in *Barnard*, being a CC decision is binding on all courts. A court may only deviate from this decision if parliament enacts new legislation or if another CC judgment decides otherwise. However, the CC decision is not entirely perfect and therefore future courts should adopt its principles cautiously. It is argued that the *Barnard* case does not set a final constitutional benchmark; provide a precise interpretation of the application of s 9(2) to employment-related positive measures and employment equity; indicate the nexus between s 9 and the Act in these matters; and provide certainty on the concept of substantive equality and its numerous elemental principles that would form the basis for a coherent reading of s 9.³⁸⁶ This chapter now looks at the strengths and the weaknesses of the *Barnard* decision and then concludes by summarising and integrating all material, before explaining exactly how the research questions have been answered.

5.1 What principles should future courts extract from the *Barnard* judgment?

The *Barnard* judgment has been cited as authority for the proposition that

“...there is no absolute bar to the appointment and advancement of employees from non-designated groups and that considerations of representivity and numeral targets are not absolute criteria for employment and that the establishment of quotas are not allowed by the Employment Equity Act.”³⁸⁷

Future courts should follow this principle because it cries out for implementers of AA measures to adopt a so-called ‘situation specific’ approach which was proposed in the SCA *Barnard*

³⁸⁶ Albertyn op cit note 356 at 13.

³⁸⁷ Frahm-Arp op cite note 281 at 67.

case. This approach is ideal because it is flexible and takes into account various relevant considerations, including the competence of the candidate and the existence or non-existence of a potential candidate in the designated groups, as well as service delivery.³⁸⁸ However, that was not the approach adopted by the Constitutional Court. The approach of the Constitutional Court promulgates for the rigid implementation of AA measures at the expense of other relevant considerations. This research therefore urges future courts to disregard the majority judgment in the CC and take into account the judgment of the SCA. Furthermore, both the SCA and the CC judgments were correct in holding that in the implementation of AA measure, the SAPS are bound by the values and principles set forth in section 195 read together with section 205 of the Constitution of the Republic of South Africa.

The CC was indeed correct with regards to the issue of the appropriate standard of review for AA measures. Rationality as a standard has been criticised for various reasons by several academic writers.³⁸⁹ The appropriate standard of review is therefore fairness because it is flexible and situation sensitive. Furthermore, it “allows the court to investigate every equality claim “keeping in mind the situation of the complainants in society, their history and vulnerability, the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in a “real life” context”; and it considers constitutional values by “balancing” all these facets to determine its fairness.³⁹⁰ However, the benchmark for evaluating employment equity plan implementations and AA measures by the state remains undecided. Whilst one could argue that the main judgment is precedent for the standard of rationality, the judgment’s concern with the absence of legal argument on the issue suggests that the question is open to further consideration.³⁹¹ Furthermore, the court correctly identified who the true beneficiaries of AA measures are, those being Blacks, Indians, Coloureds, people with physical and mental disabilities and women. Furthermore, the situation specific approach advocated by the SCA allows the court to take into account the background

³⁸⁸ M McGregor op cit note 282 at 93.

³⁸⁹ Pretorius op cit note 354: See also McGregor op cit note 139. Rationality lacks the normative content to be able to determine whether a differentiating measure promotes the overall purpose of section 9. It does not interrogate the comparative fairness of the impact of differentiating measures on the affected parties. Pretorius also argues that rationality as a standard lacks the comparative overview which is imperative to be able to be utilised as an intermediary for equality. Furthermore, the rationality standard does not contain any considerations of fairness and proportionality. McGregor further argues that the rationality test has been created in isolation from section 9(2) and section 36 and this results in a non-inclusive and unbalanced test.

³⁹⁰ McGregor op cit note 139 at 657.

³⁹¹ Albertyn op cit note 356 at 13.

of all candidates in deciding whether the candidate was disadvantaged and therefore entitled to AA.

5.2 What future courts should disregard from the *Barnard* judgment

Future courts should disregard that first school of thought approach that identifies beneficiaries of AA as individuals who belong to designated groups, regardless of whether they are previously disadvantaged or not.³⁹² This approach requires rigid application of numerical targets and quotas. It does not take into account the personal background of the particular individual, but instead focuses only on designated groups. This would lead to unfair and unjust implementation of AA measures and is likely not to achieve the desired outcome of substantive equality. The CC in the *Barnard* case acknowledges this in stating that “one must account for interactions between the different aspects of identity and privilege when reviewing whether an affirmative measure was acceptably implemented.”³⁹³ The court also found that SAPS acknowledges this by identifying white women as a designated group which must be advanced in terms of their employment equity plan and in accordance with the Act.³⁹⁴

Courts should not also adopt rationality standards of review as advocated by the LC for reasons already stated above. Furthermore, courts should resist placing too much emphasis on the discretion of authority figures tasked with the overseeing implementation of AA measures. The courts should fetter this discretion by taking into account the affected individual’s right to equality and dignity as well as the section 195 and section 205 principles. The CC *Barnard* judgment held that it could not interfere with the National Commissioner’s decision not to appoint Barnard in light of the position being non-critical and not affecting service delivery. It failed to take into account that the National Commissioner was a public official exercising public power, therefore his decision is subject to review on the basis of unfairness and irrationality.

5.3 Conclusion

The apartheid political system had massive adverse effects on various sectors in South Africa, in particular the employment sector, both private and public. Black people were barred from most jobs, which were specifically reserved for white people. The end of apartheid marked the beginning of a new era for South African citizens, but that era depends on addressing the

³⁹² Gaibie op cit note 145 at 440.

³⁹³ Supra note 19 para 153.

³⁹⁴ Ibid para 154.

inequities of the past. AA is one of the policies which seeks to address the effects of apartheid employment policies, and has been defined earlier in this research as “a strategy for the achievement of employment equity through redressing imbalances”³⁹⁵ in sectors such as staff composition and human resource management practices, *inter alia*. These imbalances of the past are evident in the employment statistics of the apartheid era and the early post-apartheid era. Additionally international law obligations, for example, the International Convention on the Elimination of All Forms of Racial Discrimination³⁹⁶ and the Constitution³⁹⁷ itself, require the state to take positive steps to achieve equality.

In South Africa, AA was first promulgated in the Constitution through the equality clause.³⁹⁸ Subsequently, the EEA was enacted to give effect to the constitutional provisions relating to AA in the workplace. The EEA contains, *inter alia*, provisions relating to who AA aims to promote and who is bound by its provisions. It further provides for an employment equity plan and enforcement provisions to ensure that its directives are followed. The EEA seeks to achieve goals like the removal of all forms of discrimination, to enable disadvantaged groups to be given opportunities and to redress the imbalances of the past. Prior to the *Barnard* case, the *locus classicus* with regards to AA measures was the *Minister of Finance v Van Heerden*³⁹⁹ case. According to that particular case, in order for a person to be identified as a beneficiary of AA, they must be disadvantaged personally. Furthermore, the court adopted rationality as the appropriate standard of review of AA measures. Presently, the *Barnard* case⁴⁰⁰ is authoritative regarding AA policies. According to the majority judgment in the Constitutional Court, a three-pronged enquiry must be adopted in evaluating AA measures:

- i. “The measure must target a particular class of people who have been susceptible to unfair discrimination;
- ii. It must be designed to promote or advance those classes of persons; and
- iii. It must promote the achievement of equality.”⁴⁰¹

However, the court went on to say that if the measure is wrongfully applied, the principle of legality surfaces, which requires AA measures to be rationally connected to its objectives and

³⁹⁵ Green Paper op cit note 27.

³⁹⁶ International Convention on the Elimination of All Forms of Racial Discrimination op cit note 56.

³⁹⁷ The Constitution op cit note 4.

³⁹⁸ *Ibid* section 9.

³⁹⁹ *Supra* note 2.

⁴⁰⁰ *Supra* note 19.

⁴⁰¹ *Supra* note 19 at para 36.

to be applied to advance its legitimate purpose.⁴⁰² This means that the court in *Barnard* agreed with the *Van Heerden* case regarding the appropriate standard of measuring the application of AA. The court further held that there was no reason to find that the National Commissioner exercised its discretion unlawfully and that this had an adverse effect on service delivery. AA action is a continuing phenomenon and courts will continue to apply the provisions of the EEA and the Constitution. Since jurisprudence in relation to AA is evolving gradually, one would expect that the law would clarify as new principles develop over time.

⁴⁰² *Supra* note 19 at para 39.

LIST OF CITED WORKS

Table of Cases

Alexandre v Provincial Administration of the Western Cape Department of Health (2005) 26 ILJ 765 (LC).

Brink v Kitshoff NO 1996 (6) BCLR 752 (CC).

Du Preez v Minister of Justice and Constitutional Development and Others [2006] 3 All SA 271 (SE).

Dudley v City of Cape Town and Another [2008] 12 BLLR 1155 (LAC).

Gordon v Department of Health: Kwazulu-Natal 2008 (6) SA 522 (SCA).

Harksen v Lane NO 1998 1 SA 300 (CC).

Harksen v Lane NO And Others 1998 (1) SA 300 (CC).

Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC).

Minister of Finance and Other v Van Heerden 2004 (6) SA 121 (CC).

Solidarity obo Barnard v SAPS 2010 (10) BCLR 1094 (LC).

Solidarity obo Barnard v South African Police Service 2014 (2) SA 1 (SCA).

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC).

Stoman v Minister of Safety and Security (2002) 23 ILJ 1020 (T).

Table of Statutes

Bantu Laws Amendment Act 42 of 1964.

Code of Good Practice on Employment Equity Plans No. R1394 1999.

Convention on the Elimination of All Forms of Discrimination against Women 1979.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

Employment Equity Act No. 55 of 1998.

Green Paper on the Conceptual Framework for Affirmative Action Management of Diversity in the Public Sector Notice 851 of 1997.

Industrial Conciliation Act 28 of 1956.

International Convention on the Elimination of all Forms of Racial Discrimination 7 March 1966.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Constitution of the Republic of South Africa Act 108 of 1996.

The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights of 16 December 1966.

Books and Chapters in Books

Adams, C. 1993. *Affirmative Action in a Democratic South Africa*. Capetown: Juta.

Dupper, O & Garbers, C. 1978. "Employment Discrimination". In C Thompson & P Benjamin (eds). *South African Labour Law*. (2nd ed). Vol 3. Cape town: Juta.

Dupper, O *et al.* 2004. *Essential Employment Discrimination Law*. Cape Town: Juta.

Grogan, J. 2001. *Workplace Law* (6th ed). Lansdowne: Juta.

Rosenfeld, M. 1991. *Affirmative Action & Justice: A Philosophical & Constitutional Inquiry* Michigan: Yale University Press.

Tinarelli, S. 2000. *Employers' Guide to the Employment Equity Act*. Pretoria: Van Schaik.

Journal Articles and Thesis

- Abdelrahman, A “Affirmative Action in the United States and South Africa: Why South Africa should not follow in our footsteps” 19 (1999-2000) *N.Y.L. Sch. J. Int'l & Comp. L.* 195-214.
- Abram, MB “Affirmative action: Fair shakers and social engineers” (1986) 99 (6) *Harvard Law Review* 1312-1326.
- Albertyn, C “Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act – an opportunity missed? *South African Police Services v Solidarity obo Barnard*” (2015) 134 (4) *SALJ* 1-24.
- Albertyn, C ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 253-276.
- Benatar, D “Justice, Diversity and Racial Preference: A Critique of Affirmative Action” (2008) 125 *SALJ* 274-306.
- Brassey, M “The Employment Equity Act: Bad for employment and bad for equity” (1998) 19 *ILJ* 1354-1359.
- Coetzer, N “Affirmative action: The sword versus shield debate continues” (2009) 21 *SA Merc LJ* 92-101.
- Dupper, O “Affirmative Action: Who, How and How long” 2008 24 *SAJHR* 425-444.
- Dupper, O “In Defence of Affirmative Action in South Africa” 2004 *SALJ* 187-215
- Faundez, J “Promoting Affirmative Action” 1994 (11) 4 *Indicator SA* 1187-1194.
- FM Higginbotham “Affirmative Action in the United States and South Africa: Lessons from the other side” (1999) 13 *Temp. Int'l & Comp. L.J.* 187-230.
- Frahm-Arp, L “Solidarity obo Barnard: Perhaps not as definitive a position as suggested” May 2014 *Without Prejudice* 66-67.
- Fredman, S “Providing Equality: Substantive Equality and the Duty to provide” (2005) 21 *SAJHR* 163-190.
- Fredman, S “Redistribution and recognition: Reconciling inequalities” 2007 (23) *SAJHR* 214-234.

- Gaibie, S “Affirmative Action — Concepts and Controversies” (2014) 35 *ILJ* 2655-2677.
- Gaibie, S “The Constitutional Court decision in Barnard: A sequel to the Van Heerden judgment” (2015) 36 *ILJ* 81.
- Kaye, A “Apartheid Labour Legislation in South Africa” 1976-1977 (5) *Indus. & Lab. Rel. F.* 5-22.
- Kazee, S “Affirmative action back in the spotlight” March 2014 *Without Prejudice* 33-34.
- Little, JW “Affirmative Action: Legal bases and risks in the United States and South Africa” 1994 (5) *Stellenbosch L. Rev.* 262-272.
- MacGregor, M *The application of affirmative action in employment law with specific reference to the beneficiaries: A comparative study* LL.D Thesis UNISA 2005.
- McGregor, M ‘Affirmative Action and the Constitutional Requirement of Efficiency for the Public Service’ (2003) 15 *SA Merc LJ* 82-94.
- McGregor, M “Affirmative action on trial – determining the legitimacy and fair application of remedial measures” (2013) 4 *TSAR* 650-675.
- McGregor, M “Blowing the whistle on affirmative action: The future of affirmative action in South Africa (part 2)” (2014) 26 (2) *SA Merc LJ* 282-306.
- McGregor, M “Categorisation to determine beneficiaries of affirmative action: advantages and deficiencies” (2005) 46 (2) *Codicillus* 1-12.
- McGregor, M “Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces” (2011) 8 *De Jure* 111-125.
- McGregor, M “The Nature of Affirmative Action: a Defence or a Right?” (2003) 15 (3) *SA Merc LJ* 421-436.
- Mushariwa, M “Who are the true beneficiaries of affirmative action” 2011 *Obiter* 439-452.
- Partington, J & Van der Walt, A “The development of defences in unfair discrimination cases” (2005) 26 (2) *Obiter* 595-608.
- Pretorius, JL ‘Fairness in transformation: A critique of the Constitutional Court’s affirmative action jurisprudence’ (2010) 26 *SAJHR* 36-570.

- Pretorius, JL “Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*’ (2013) 130 SALJ 31-44.
- Rycroft, A “Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies” (1999) 20 *ILJ* 1411-1429.
- Smith, A “Equality constitutional adjudication in South Africa” (2014) 14 *AHRLJ* 609-632.
- Thompson, D and Van der Walt, A “Affirmative action: only a shield? Or also a sword? *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 and *Dudley v City of Cape Town* (2004) 25 *ILJ* 305 (LC)” (2007) 28 (3) *Obiter* 636-646.
- Van Wyk, MW “A critical analysis of some popular objections to affirmative action” (1998) 2 *SBL Research Review* 1-8.
- Wessels, JS “Equal employment opportunities: A conceptual puzzle” (2005) Vol 24 No 2 *Politeia* 125-141.

Internet Sources

“Affirmative action does more harm than good”. Available Online: <http://debatewise.org/debates/249-affirmative-action-in-south-africa-does-more-harm-than-good/> [2 April 2015].

“South Africa - October Household Survey 1994”. Available Online: <http://microdata.worldbank.org/index.php/catalog/958> [19 October 2015].

CCMA Info Sheet “CCMA Employment Equity in the Workplace”. 2002. Available Online: <http://www.safmh.org.za/documents/human-rights-violations/CCMA%20EMPLOYMENT%20EQUITY%20INFO%20SHEET.pdf>, [17 November 2015].

De Vos, P. 2007. “Will affirmative action ever end?” *Constitutionally speaking* Available Online: <http://constitutionallyspeakinga.blogspot.com/2007/05/will-affirmative-action-ever-end.html> [25 March 2015].

“Employment, unemployment, skills and economic growth”. Available Online: http://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf [19 October 2015].