



**UNIVERSITY OF KWAZULU-NATAL  
COLLEGE OF LAW AND MANAGEMENT STUDIES  
SCHOOL OF LAW**

**THE LEGALITY OF THE EXCLUSION OF OVERREPRESENTED GROUPS  
FROM APPOINTMENT AND THE CONCEPT OF EMPLOYMENT EQUITY IN  
LIGHT OF THE SOLIDARITY OBO *BARNARD* CASE.**

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## DECLARATION

I, Khwezi Zondi, student number 214 518 005 hereby declare that the work on which this dissertation is based on my original work (except where acknowledgements indicate otherwise). This dissertation is my own original work and has not been previously submitted for any degree and is not currently being considered in full or partial fulfilment for any other degree at any other University.

Signed at Pietermaritzburg on this *12* day of *December 2018*

*Zondi*  
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Khwezi Zondi (214518005)

## ACKNOWLEDGMENTS

“Seek ye the Lord while he is near, call ye upon him while he is near. Let the wicked forsake his way and the unrighteous man his thoughts: and let him return unto the Lord and he will have mercy upon him; and to our God, for he will abundantly pardon.” – Isaiah 55: 6-7

Only my saviour understands all the hardships I have experienced to reach this point. He has blessed me beyond all measures. I turned to him in times I felt like giving up and lost my way. In him I have found immense strength and guidance. The completion of this work would not have been possible without his presence in my life.

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## ABSTRACT

Employment equity is a very crucial component in a country such as South Africa whose history is plagued with decades of unfair discrimination. Affirmative action measures attempt to provide equal opportunities to previously disadvantaged groups (designated groups) which did not have these opportunities afforded to them during the apartheid regime. During the milestone case of *Barnard*, the court established a principle which entailed that white people could be refused appointment if their race group was overrepresented in that workforce. This principle was later confirmed in a later Constitutional Court judgment as also being applicable to individuals from designated groups. Both the EEA and *Barnard* principle are aimed at achieving broadly representative workplaces but the latter has the potential of limiting the application of the former. Statistics from different bodies not only indicate that there are problems with the EEA but also show that white people are still predominantly occupying top management positions. This is problematic because individuals from designated groups are refused appointment due to adequate representation and this hinders their chances of being granted an equal opportunity. The determination of the legality of the principle is determined in this dissertation and whether this principle can continue to operate in our law having not been inserted into current legislation. Previous consideration of these research questions has failed to address this matter because on the face of it, both the *Barnard* principle and the EEA seem to be aiming to achieve the same goal. This dissertation analyses affirmative action measures as well as the implementation of the EEA whilst also considering the problems that could be associated with the continuous application of the *Barnard* principle. The results of the research demonstrate that although the *Barnard* principle has not been confirmed, it is likely that courts will continue to apply the principle and assign more weight to it than the measures provided in the EEA.

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## CHAPTER 1 INTRODUCTION

### 1. BACKGROUND

South Africa is a country that experienced a great deal of discrimination during the apartheid regime. This led to many race groups being deprived of their basic human rights. During the apartheid era, black, indian and coloured people were not granted the same opportunities as white people.<sup>1</sup> After the country became a democracy in 1994 and the Constitution<sup>2</sup> came into effect in 1996, along with other legislative changes, it became necessary to introduce legislation that would eradicate past discrimination and attempt to put every citizen on a platform that they would have been on had it not been for apartheid. The Employment Equity Act 55 of 1998 (EEA) attempts to achieve equity in the workplace by implementing measures such as affirmative action. The EEA categorises the beneficiaries of affirmative action.<sup>3</sup> These beneficiaries are black people, women and people with disabilities, and are categorised under ‘designated groups’<sup>4</sup>. The drafters of the EEA chose to give the term ‘black people’ a wide interpretation as it represents Africans, Indians, Coloureds and Asians.<sup>5</sup> Although the disadvantage that was suffered by women and disabled persons was not considered to be of the level of black people, they were prejudiced in that many opportunities were not open to them.<sup>6</sup> Affirmative action measures in South Africa are primarily aimed at offering opportunities and advancing the designated groups in their employment.<sup>7</sup>

Affirmative action is not defined under the EEA but is considered a form of fair discrimination.<sup>8</sup> It gives effect to substantive equality. It is a measure that attempts to rectify the wrongs of the discrimination previously experienced in the past.<sup>9</sup> The purpose of the EEA

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<sup>1</sup> S Ebrahim ‘Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom’ (2016) 19 *PER* 3.

<sup>2</sup> Constitution of the Republic of South Africa, 1996.

<sup>3</sup> M McGregor ‘Categorisation to determine beneficiaries of affirmative action: Advantages and deficiencies’ (2005) 46 *Codicillus* 1, 2.

<sup>4</sup> Section 1 of the Employment Equity Act 55 of 1998

<sup>5</sup> *Ibid.*

<sup>6</sup> J Grogan ‘Demographic equity: Turning workers into cyphers’ (2017) 33 *Employment Law* 3.

<sup>7</sup> McGregor *op cit* note 3 at 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> J Grogan ‘The Chronicles of *Barnard*: Affirmative action on trial’ (2014) 30 (6) *Employment Law* 2.

is to have broadly representative workforces in South Africa.<sup>10</sup> The EEA attempts to strike an equilibrium by eliminating the effects of discrimination and also trying to create more opportunities for individuals by providing for a diverse workforce in one piece of legislation.<sup>11</sup> *South African Police Service v Solidarity obo Barnard*<sup>12</sup> established a new principle. The *Barnard* principle denoted that

‘an employer could refuse promotion to a white woman because persons of her demographic category were already overrepresented at the occupational level in question’.<sup>13</sup>

This principle is broadly applied to also include black people. The court in *Barnard* concluded that in order for a workplace to be representative, there should be an equal representation of all the demographics of people in South Africa within that workforce. On one hand, drafters of the EEA have enacted it to give people more opportunities in the workplace and increase their chances of being promoted. On the other hand, the *Barnard* principle states that the employment or promotion of a person can be denied if their race group is already ‘overrepresented’. In the court’s defence, the aim of the principle is to allow for other race groups to be employed and the realisation of a ‘broadly representative workforce’. At face value, the principle appears to be in line with the EEA but the fact that it also applies to black people could be problematic.<sup>14</sup> This raises the question of whether the principle is not hindering on the measures put in place by the EEA. Affirmative action seeks to create opportunities for black people, it does not seek to prejudice them. Furthermore, the application of the principle is uncertain in an area that contains a large demographic of a specific race group.<sup>15</sup> Consideration must be given to whether the application of the EEA and the principle can coherently operate at the same time.

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<sup>10</sup> Section 2 of the EEA.

<sup>11</sup> *Ibid.*

<sup>12</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) see also *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA).

<sup>13</sup> D du Toit ‘Much ado about – what exactly?’ *IR Network* 26 July 2016 at 3.

<sup>14</sup> Grogan *op cit* note 6 at 4.

<sup>15</sup> S Harrison & PM Pillay ‘Employment equity demographics- going national or staying regional?’ *The Mercury* 31 January 2014 at 2.



## 2. RATIONALE

This dissertation is motivated by the need to have clarity and certainty on this particular system of law. The justification for this research question is such that this area of the law will be worth researching as it has not been considered in the spectrum of employment equity. Many people are under the presumption that the EEA stipulates that black people, women and people with disabilities must be given preference when it comes to an appointment in the workplace, but this is not the case.<sup>16</sup> The decision in *Barnard* has brought about change to the ideologies and implementation of the EEA.<sup>17</sup> Although black candidates still get first preference due to past discrimination, they can also be constitutionally refused employment based on an overrepresentation of their race group at that work level.<sup>18</sup> This study will look at the fairness and legality of the exclusion of overrepresented groups from appointment and improve social awareness on the issue. The field has not been considered, approaching the dissertation from this angle will reveal some interesting points.

## 3. PURPOSE STATEMENT (AIMS AND OBJECTIVES)

The aim of this dissertation is to assess the impact of affirmative action measures on the ability of employers to make an informed decision. This means that the dissertation ascertains whether the implementation of the EEA largely influences an employer's decision of appointment. By the final chapter of this dissertation, the thesis seeks to have fully expounded upon the *Barnard* principle and how it might hinder an individual's potential of being appointed regardless of whether they are suitably qualified for the position. One of the most crucial objectives of this dissertation is to provide a critical analysis of the EEA and affirmative action and different arguments that have been raised about the two. As previously stated, the EEA and the *Barnard* principle aim to achieve the same outcome but this dissertation highlights the problems that could arise in applying both simultaneously. Finally, possible solutions will be provided on some of the problems that are raised throughout this dissertation.

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<sup>16</sup> J Grogan *Workplace Law* 11ed (2014) 86.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Solidarity & others v Department of Correctional Services & others (Police and Prisons Civil Rights Union & another as amici curiae)* para 40; see also J Van Wyk 'The importance of regional demographics' *The Times* 24 January 2014 at 3.

#### 4. RESEARCH QUESTIONS

In pursuit of the main focus of this dissertation, these are the following research questions:

1. To what extent has the implementation of the EEA and affirmative action measures influenced the way in which employers address issues of discrimination, employment and promotions in the workplace?
2. How has affirmative action, specifically demographic goal targets, influenced the way in which employers select their prospective employees?
3. Does the *Barnard* principle create uncertainty in this field of law? If so, to what extent could this uncertainty create confusion to both employers and judges who have to decide matters that are brought before the court?
4. What effect will the *Barnard* principle, if applied consistently, have on workforces and their employment equity policies?
5. If both the EEA and the *Barnard* principle are applied, how will the results be consistent with the purpose and aim of the EEA?

#### 5. LITERATURE REVIEW

A focus on the refusal of employment due to an overrepresentation of a race group indicates that there is no literature on the area other than general case notes on the *Barnard* case. Apon and Smit<sup>19</sup> suggest that the question of whether the failure to implement affirmative action measures amount to discrimination depends on whether affirmative action could be said to be an individual or collective right. Grogan<sup>20</sup> seemingly represents a counter-argument by stating that the Act permits but does not require employers to engage in affirmative action programmes but further continues to add that an obligation is expressly imposed in terms of Chapter III of the Act.<sup>21</sup> Furthermore, designated employees include black people and women of all race groups meaning that members of one designated group cannot complain if a member from the other designated group is favoured. Apon and Smith submit that when two candidates, one designated and the other non-designated, are considered, it is prima facie that

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<sup>19</sup> L Apon & N Smit 'Does a right to be appointed exist for designated groups? The "boundaries of employment equity" revisited' 2010 (2) *Tydskrif vir die Suid-Afrikaanse Reg* 353.

<sup>20</sup> Grogan op cit note 16 at 87.

<sup>21</sup> *Ibid* at 97.

no preference is given to either one.<sup>22</sup> However, this view fails to take into account the fact that an omission to differentiate may be a discriminatory act, employers must differentiate for the purposes of affirmative action in the workplace.<sup>23</sup>

Discrimination is not narrowly limited to the listed grounds of the EEA as it may include a failure to prefer a designated employee over a non-designated employee even in the absence of a collective agreement.<sup>24</sup> This argument is challenged by an article discussing case authority which made a bold statement to the effect that in order to diversify the workplace, a designated employer is entitled to deny black people appointment on the basis that they are already adequately represented in that occupational level. Attempting to obtain a goal of a broadly representative workplace makes it difficult for employees from previously advantaged groups to claim that they were unfairly overlooked for appointment to positions if the employer preferred a candidate from a previously disadvantaged group.<sup>25</sup>

McGregor identified deficiencies in the categorisation used by the Act.<sup>26</sup> First, she contends that the categories are over-inclusive in that they are based on the assumption that all persons from the designated groups are disadvantaged.<sup>27</sup> People that have not been disadvantaged are still able to benefit in terms of affirmative action. Furthermore, there should be a provision that provides for degrees of disadvantage because the people that were mostly disadvantaged are not recognised. Secondly, McGregor submits that the subgroups within the designated groups makes it possible for middle-class white women to benefit from affirmative action based on the fact that they fall under the category of women.<sup>28</sup> It is evidently clear that the notion of excluding overrepresented groups from appointment confers authority on employers to overlook designated employees and also determine overrepresentation in relation to the racial composition of the broader population.<sup>29</sup> It is crucial to consider literature that will ascertain the current legal position on equality in the workplace. Such literature is critical in making a determination on the extent of the implementation of the EEA. Fergus and Collier outline the role that the judiciary plays in the

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<sup>22</sup> Apon & Smit op cit note 19 at 353.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid at 367.

<sup>25</sup> Grogan op cit note 16 at 97.

<sup>26</sup> McGregor op cit note 3 at 6.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid at 7.

<sup>29</sup> Grogan op cit note 6 at 9.

promotion of transformation in the workplace.<sup>30</sup> They correctly identify how the judiciary interpret and apply the law as prescribed by the EEA.<sup>31</sup> It can be argued that the judiciary is at times incorrect in the conclusions that they reach. These decisions are lenient and do not set examples for employers to comply.<sup>32</sup> The purpose of this paper is to ascertain what the courts have said when cases concerning employment equity laws have come before them.<sup>33</sup> The duos paper also includes an analysis of the most important provisions in the EEA.<sup>34</sup>

Mushariwa critically engages with affirmative action measures.<sup>35</sup> The beneficiaries of affirmative action are accurately outlined as well as what is considered a strong and weak affirmative action plan.<sup>36</sup> The thesis captures the challenges associated with the beneficiaries of affirmative action; there is no distinction made on the degrees of discrimination that they have experienced and that even people who did not experience discrimination are able to benefit from affirmative action.<sup>37</sup> Dupper questions the validity of the EEA.<sup>38</sup> The focus of the thesis is to interrogate the entirety of affirmative action. According to the author, the measure is uncertain in who it is for, how it is applied and when it will be finalised.<sup>39</sup> This dissertation will consider the arguments represented in the above-mentioned literature and present the findings on the arguments put forward by the different authors.

## 6. RESEARCH METHODOLOGY

This dissertation will use qualitative methods to address the objectives set out above. It will be based on cases and legislation analysis.<sup>40</sup> Other forms of academic work such as textbooks, journal articles and newspaper sources will also be considered. More specifically the dissertation will investigate academic material that contain an explanation of the implementation of affirmative action in the context of its impact in the workplace. In addition

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<sup>30</sup> E Fergus & D Collier 'Race and gender at work: The role of the judiciary in promoting workplace transformation' (2014) 30 (3) *SAJHR* 486.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid* at 487.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid* at 489.

<sup>35</sup> M Mushariwa 'Who are the true beneficiaries of affirmative action? – *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC)' (2011) 32 *Obiter* 439.

<sup>36</sup> *Ibid* at 445.

<sup>37</sup> *Ibid.*

<sup>38</sup> O Dupper 'Affirmative Action: Who, How and How long?' (2008) 24 (3) *SAJHR* 432.

<sup>39</sup> *Ibid* at 433.

<sup>40</sup> Primary sources are cases and statues, this dissertation will critically assess one specific case in detail. Secondary sources are journal articles, textbooks and unpublished/ published dissertations, these sources address the law in detail and the author argues on some points. This dissertation will use both these sources.

to outlining the legislation, the dissertation will analyse articles that specifically relates to the topic.

## CHAPTER 2

### AN OVERVIEW OF DISCRIMINATION, AFFIRMATIVE ACTION AND THE BENEFICIARIES OF AFFIRMATIVE ACTION

#### 1. INTRODUCTION

The Constitution guarantees every citizen a right to equality.<sup>41</sup> This means that everyone should be treated equally regardless of their race, gender or any of the other listed grounds found under section 9 (3). This, however, is not easy to realise. Both the Constitution and the EEA prohibit any form of discrimination but, the EEA utilises affirmative action to obtain equal opportunities for previously disadvantaged individuals.<sup>42</sup> Although the Constitution does not specifically allocate the beneficiaries of affirmative action, the identity of these individuals is deliberately left vague.<sup>43</sup> The EEA provides for affirmative action and the beneficiaries thereto.<sup>44</sup> This will be dealt with separately under this chapter. The application of affirmative action was introduced as an attempt to diversify the workplace and to ensure that suitably qualified people from designated groups are offered equal opportunities.<sup>45</sup>

Historically, designated groups were not adequately represented in many key work areas but after South Africa became a democratic country, affirmative action was introduced as a mechanism to guarantee that designated groups are equally represented at all levels of the workplace.<sup>46</sup> Affirmative action falls under the EEA.<sup>47</sup> Many cases have been decided by the Labour courts, Labour Appeal Courts, Supreme Court of Appeal and Constitutional Court that related to discrimination and affirmative action measures that were considered to be discriminatory in nature. This chapter will address unfair discrimination, affirmative action and the deficiencies of applying affirmative action to achieve transformative change.

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<sup>41</sup> Section 9 of the Constitution.

<sup>42</sup> Grogan op cit note 16 at 88.

<sup>43</sup> Mushariwa op cit note 35 at 440.

<sup>44</sup> The definitions section of the EEA defines what is meant by designated employees and who they are. Those people listed under this definition are automatically the beneficiaries of affirmative action. Section 12 to 33 of the EEA details affirmative action and its operation under the EEA. This includes how it is to be applied and the requirements that employers must satisfy when implementing affirmative action measures.

<sup>45</sup> McGregor op cit note 3 at 4.

<sup>46</sup> Ibid at 5.

<sup>47</sup> Chapter 3 of the EEA expressly provides for affirmative action.

## 2. UNFAIR DISCRIMINATION

One of the core purposes of the EEA is to eradicate any barriers to the advancement of black people, women and disabled persons.<sup>48</sup> Grogan<sup>49</sup> is of the opinion that the EEA complements the Labour Relations Act<sup>50</sup> (LRA) in two regards. First, it offers a refined version on the prohibition on unfair discrimination which is reflected in chapter 2 of the EEA.<sup>51</sup> Secondly, a duty is imposed on employers to comply with the requisite affirmative action measures. The EEA places an obligation on all employers to eliminate any policy that amounts to unfair discrimination and to promote equal opportunities for all employees.<sup>52</sup> Section 6 of the EEA should be read with section 9 of the Constitution as both these sections permit any measures that are intended to protect or advance people that were previously disadvantaged by unfair discrimination.<sup>53</sup>

Section 6 of the EEA contains a list of the forms of discrimination that are prohibited. This list is not exclusive or closed, meaning that if the type of discrimination experienced by an employee is closely related to any of the listed grounds, the court will consider it as possibly being discriminatory.<sup>54</sup> The employee bears the onus of proving that discrimination did occur. If they successfully prove discrimination then the onus shifts to the employer to prove that they have not acted unfairly.<sup>55</sup> The onus that is placed on the employee is not easy to discharge as the courts require proof to show that they were subjected to a form of discrimination.<sup>56</sup> Simply, the employee must show that they experienced selective unfair treatment.<sup>57</sup> It does not amount to discrimination if an employer applies the prescribed affirmative action measures and gives preference to either a black person, woman or a disabled person if that candidate is suitably qualified and the company's policy permits it.<sup>58</sup> It would be incorrect to categorise affirmative action as a form of unfair discrimination as it is a method implemented to place previously disadvantaged people in a better position. The

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<sup>48</sup> Grogan op cite note 16 at 85.

<sup>49</sup> Ibid.

<sup>50</sup> Labour Relations Act 66 of 1995.

<sup>51</sup> Chapter 2 of the EEA; s5 and s6 of the EEA.

<sup>52</sup> Section 5 of the EEA.

<sup>53</sup> Fergus & Collier op cit note 30 at 487.

<sup>54</sup> Grogan op cit note 16 at 86.

<sup>55</sup> Ibid at 87.

<sup>56</sup> Fergus & Collier op cit note 30 at 488.

<sup>57</sup> Grogan op cit note 16 at 89.

<sup>58</sup> McGregor op cit note 3 at 6.

labour courts have suggested that affirmative action should be conceived as a defence to allegations of unfair discrimination.<sup>59</sup>

### 3. AFFIRMATIVE ACTION

‘Through legislation and policies, the former government was able to exclude blacks and women systematically from having rights in the workplace as well as socially, ensuring that their advancement economically and/ or socially was curtailed.’<sup>60</sup>

Chapter 3 of the EEA addresses affirmative action and when it will apply.<sup>61</sup> The above quotation highlights why it was necessary to address the issues that hovered over the groups of people that were discriminated against. The quotation summarises the reason why there are certain measures that are put in place to diversify workplaces and empower people who experienced restriction on their career choices. Although affirmative action is not defined, the EEA is explicit and provides concise measures of the implementation of it. Affirmative action is intended to address any social and economic imbalances between different groups as well as assist vulnerable groups by offering them better opportunities at being employed. Affirmative action requires employers to identify qualified individuals that belong to any of the designated groups and offer them equal opportunities.<sup>62</sup>

Affirmative action does not guarantee an individual employment, just preference in order to ensure a diverse workplace.<sup>63</sup> The rationale behind affirmative action is to afford all individuals equal opportunities at all levels of the workplace.<sup>64</sup> These opportunities are presumed to have been withheld during apartheid. Thus, all job categories and levels of the workplace must have an equal representation of different ethnicities, genders as well as disabled people.<sup>65</sup> There are critics who are against affirmative action and refer to it as reverse discrimination or a form of tokenism.<sup>66</sup> Nonetheless, there are people who support the aim of affirmative action and see it as an advancement into a new democratic era. The

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<sup>59</sup> Fergus & Collier op cit note 30 at 486.

<sup>60</sup> Mushariwa op cit note 35 at 439.

<sup>61</sup> Section 12 of the EEA.

<sup>62</sup> McGregor op cit note 3 at 4.

<sup>63</sup> Mushariwa op cit note 35 at 440.

<sup>64</sup> Ibid at 441.

<sup>65</sup> Grogan op cit note 16 at 90.

<sup>66</sup> BB Motileng *Affirmative Action: The Experience of People in Middle Management Positions* (unpublished LLM thesis, University of Pretoria, 2004) 10.



transformative laws focus heavily on race and gender.<sup>67</sup> Although affirmative action is intended to benefit women, black people and persons with disabilities, white women are able to benefit from it by virtue of their gender. White women are disadvantaged when compared to white men.<sup>68</sup> It is well known that non-white people suffered greater disadvantage but this forms the main basis of why affirmative action makes it permissible for both genders in designated groups to be able to benefit. Success has been minimal in claims of unfair discrimination by designated applicants in terms of the EEA.<sup>69</sup> Designated employers are compelled by chapter 3 of the EEA to implement affirmative action measures for people from designated groups who are suitably qualified.<sup>70</sup> These employers must work in collaboration with their employees when preparing employment equity plans and implement them fairly and rationally.

According to the EEA, a person is suitably qualified for a job where they possess formal qualifications, prior learning, relevant experience or the capacity to acquire the ability to perform the job in a reasonable amount of time.<sup>71</sup> In implementing the policy, the employer must identify previously disadvantaged individuals for whom the policy is aimed at. Section 6(2)(a) of the EEA sets limits to the defence of affirmative action.<sup>72</sup> For an employer to avoid being branded as unfair, they must ensure that an affirmative appointment corresponds with the purposes set out in the EEA.<sup>73</sup> Designated groups are to be granted benefits but these benefits must be reasonable (should comply with the aim and purpose for which employment equity seeks to achieve). Employers cannot grant improvident benefits to members that belong in the designated groups or advance their positions without just cause; these acts could be considered to go beyond the scope of the goals that are set out in the EEA.<sup>74</sup>

Having ‘broadly representative’<sup>75</sup> workforces is the goal that affirmative action seeks to achieve, where the attainment of this goal comes at the disadvantage of groups of people

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<sup>67</sup> Grogan op cit note 16 at 93.

<sup>68</sup> Fergus & Collier op cit note 30 at 489.

<sup>69</sup> Ibid at 496.

<sup>70</sup> Section 20 (3) of the EEA.

<sup>71</sup> Section 15 of the EEA.

<sup>72</sup> Section 6 (2)(a) provides that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act. Additionally, section 6 (2)(b) also excludes distinguishing, excluding or preferring any person on the basis of an inherent requirement of a job as a form of unfair discrimination.

<sup>73</sup> Mushariwa op cit note 35 at 442.

<sup>74</sup> Grogan op cit note 16 at 95.

<sup>75</sup> Ibid at 97.

who are considered to be formerly advantaged. This group cannot claim that they were unfairly overlooked if the employer has preferred a previously disadvantaged candidate.<sup>76</sup> There has been a surge of cases<sup>77</sup> where individuals have challenged the validity of their employer's employment equity plan and the employer had to prove to the court that they acted in terms of a defensible plan. Although the aim and purpose of affirmative action and the employment equity plans that are set out are understandable, it is evident that they prejudice white people to a certain extent. Many consider this a lesser of two evils, meaning that it is necessary for the attainment of greater good.<sup>78</sup>

Before implementing affirmative action measures, employers have to first identify the beneficiaries.<sup>79</sup> There are two schools of thought concerning the true beneficiaries of affirmative action. The first thought provides that the individual only needs to satisfy the requirement of being a member of a designated group in order to be classified as previously disadvantaged.<sup>80</sup> This implies that if an individual belongs to any of the designated groups it is prima facie proof that they were previously disadvantaged. McGregor<sup>81</sup> lists this as one of the deficiencies of the categorisation of affirmative action. The EEA does not have any provisions which distinguish the degrees of disadvantage that different people have experienced. It presupposes that everyone that is a member of the designated groups has experienced the same amount of disadvantage.<sup>82</sup> This is problematic because a person who has not been disadvantaged can still benefit from affirmative action measures by virtue of their designated status. Moreover, the differences between groups are also not acknowledged. This strongly suggests that black people, women and disabled people have equally been disadvantaged and affected by discrimination.<sup>83</sup>

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<sup>76</sup> Ibid.

<sup>77</sup> *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (J644/97) [1999] ZALC 107 found that an employer can rely on affirmative action as a defence only if it has an affirmative action policy, if not then they have to justify the appointment of a weak candidate; *Public Servants Association of South Africa v Minister of Justice and Constitutional Development & others* (J3895/01) [2001] ZALC 148 decided that the criteria adopted by the Department of Justice to promote blacks and women instead of highly experienced white men was irrational; In *Minister of Safety and Security v Coetzer & others* (JS222/02) [2003] ZALC 11 the court held that where an employer failed to show that they acted in terms of a coherent plan then they would be considered to have discriminated against the employees/ applicants that are from designated groups; *Du Preez v Minister of Justice and Constitutional Development & others* 2006 (9) BCLR 1094 (SE).

<sup>78</sup> Fergus & Collier op cit note 30 at 490.

<sup>79</sup> Ibid.

<sup>80</sup> Mushariwa op cit note 35 at 440.

<sup>81</sup> McGregor op cit note 3 at 6.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid at 9.

The second school of thought holds that a beneficiary needs to have been personally disadvantaged in order to be categorised as someone who can benefit from affirmative action.<sup>84</sup> This school of thought is problematic and raises many questions as to how one would prove that they have been personally. For instance, how much disadvantage should a person have experienced in order to satisfy this requirement?<sup>85</sup> The question remains open and unanswered. Due to this, the first school of thought appears to be the most sufficient way to identify the true beneficiaries of affirmative action.<sup>86</sup>

It is insufficient to merely identify the beneficiaries. The employer must ensure that they also meet the criteria of creating an efficient workforce.<sup>87</sup> As previously discussed, the individual must have the requisite qualifications and skills to be suitably qualified for the job. It can be suggested that if an employer considers the perception of different degrees of disadvantage within the designated groups, they can easily lose sight of who the true beneficiaries of affirmative action are.<sup>88</sup>

In *Dudley v City of Cape Town & another*<sup>89</sup> the court found that an independent individual is not afforded a right to affirmative action as they are not categorised as an employee under the LRA and a member of a designated group has no enforceable claim for a preferential right. This decision emphasised the point that although candidates from one of the designated groups should be afforded preference, they do not have a right to be appointed.<sup>90</sup> *Dudley* also serves to show that an individual who is not yet appointed cannot rely on the LRA because they are not employees of that company.<sup>91</sup> The employer can exercise their discretion on whether or not to appoint someone. Mushariwa<sup>92</sup> states that there are two types of affirmative action policy plans. A strong affirmative action plan disregards suitably qualified candidates and gives preference solely to black people and women, whilst a weak affirmative action plan ensures that individuals who are not part of the designated groups are not overlooked because under ordinary circumstances they would qualify for the

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<sup>84</sup> Mushariwa op cit note 35 at 441.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid at 443.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid at 444.

<sup>89</sup> *Dudley v City of Cape Town & another* (2008) 29 ILJ 2685 (LAC).

<sup>90</sup> Grogan op cit note 16 at 93.

<sup>91</sup> Mushariwa op cit note 35 at 445.

<sup>92</sup> Ibid at 446.

position.<sup>93</sup> The Constitution, as well as the courts have argued for the former, despite the fact that it may attract strong criticism.<sup>94</sup> The distinctions between the types of affirmative action plans differ in terms of fairness. Although a weak affirmative action plan is not recommended, it seems to support the aim and purpose of employment equity. According to various authors,<sup>95</sup> affirmative action measures should also consider whether a person has the requisite qualifications and skills to fulfil the position.<sup>96</sup> Based on the description and aim of affirmative action, merely appointing an individual based on the fact that they are in one of the designated groups could be interpreted as unfair.<sup>97</sup> This act would amount to discrimination because the appointed person might not be able to perform the work that they are appointed to undertake and it would fall within the ambit of unfair discrimination as provided for in the EEA. Additionally, the EEA cannot be used to protect an individual who does not act for the purpose that it provides for.<sup>98</sup>

The principle of substantive equality permits an individual to benefit from affirmative action if they fall under a designated group.<sup>99</sup> The principle permits this without taking into account whether the individual has experienced discrimination on the basis of race or not.<sup>100</sup> In *Stoman v Minister of Safety and Security*,<sup>101</sup> the high court supported the notion that the Constitution promotes substantive equality in addition to formal equality. It is uncertain how long affirmative action measures will be implemented as discriminatory cases continue to plague the country.<sup>102</sup> As previously provided, affirmative action was implemented to advance previously disadvantaged individuals in their careers and provide better career opportunities for them.<sup>103</sup> With this advancement, there should be a change in the mentality of individuals towards issues of discrimination and equality. In many occupations, there has been little or no transformation which alludes to the fact that the EEA has been poorly

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<sup>93</sup> Ibid.

<sup>94</sup> Grogan op cit note 16 at 95.

<sup>95</sup> S Ebrahim 'Reviewing the suitability of affirmative action and inherent requirements of the job as grounds of justification to equal pay claims in terms of the Employment Equity Act 55 of 1998' (2018) 21 *PER* 3; E Rankhumise & EG Netswera 'Identifying the barriers to affirmative action training: perceptions of affirmative action appointees in Mpumalanga public hospitals' (2010) 8 *SAJHRM* 5; Motileng op cit note 66 at 10.

<sup>96</sup> McGregor op cit note 3 at 4.

<sup>97</sup> Ibid.

<sup>98</sup> Grogan op cit note 16 at 92.

<sup>99</sup> Mushariwa op cit note 35 at 449.

<sup>100</sup> McGregor op cit note 3 at 4.

<sup>101</sup> *Stoman v Minister of Safety and Security* (2002) 23 *ILJ* 1020 (T).

<sup>102</sup> Mushariwa op cit note 35 at 443.

<sup>103</sup> Ibid.

implemented or poorly drafted.<sup>104</sup> The implementation of the EEA will be discussed in detail further on in the dissertation. Having put so much emphasis on equality, it is uncertain why largely black people occupy the entry-level positions in specific workforces and why other black people remain stagnant in their occupation, with little or no progression.<sup>105</sup> This is evidence that South Africa as a nation has not yet realised its purpose in offering a broadly diverse society with no unfair discrimination.

Evidence that has been examined by legal writers suggests that there is a preference system in the actual implementation of affirmative action.<sup>106</sup> For instance, race is preferred over gender and disability, similarly, Africans are preferred over Coloured, Indian and Asian people.<sup>107</sup> It could be argued that emphasis is placed on race which means that other areas are often excluded or redress has not taken place.<sup>108</sup> Race is the main focus because apartheid systematically excluded individuals based on their race. Based on the previously discussed information, using race is considered the best approach to overcome racial discrimination and any effects that might have been previously sustained.<sup>109</sup> Although using race seems like the best approach, sticking a plaster over an open wound does not treat it or ensure that it does not leave a scar. An argument was raised against the hastening of transformative laws, this was believed to be the reason for the appointment of candidates who were not suitably qualified.<sup>110</sup>

Many questions regarding affirmative action remain unanswered, such as, whether there will be a point where it will subsequently be brought to an end. People who are against the implementation of affirmative action argue that the EEA should contain a 'sunset clause' that states that its operation will be abolished on a certain date.<sup>111</sup> South Africa's history has left the nation with a scar that cannot easily be cleared by applying laws to try and assist those who have been hurt the most to benefit from the new system. Despite affirmative action being a temporary measure with a goal, the idea of a time limitation is farcical.<sup>112</sup> No

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<sup>104</sup> Rankhumise & Netswera op cit note 95 at 4.

<sup>105</sup> Ebrahim op cit note 95 at 3.

<sup>106</sup> Dupper op cit note 38 at 425.

<sup>107</sup> K Bentley & A Habib 'Racial redress, national identity and citizenship in post-apartheid South Africa' in SA Arjomand & E Reis (eds) in *Worlds of Difference* (2008) 21.

<sup>108</sup> Dupper op cit note 38 at 426.

<sup>109</sup> Ibid.

<sup>110</sup> Bentley & Habib op cit note 107 at 23.

<sup>111</sup> Ibid at 25.

<sup>112</sup> Dupper op cit note 38 at 432.

individual can dictate how long it will take to rectify discrimination. Employment equity legislation contains many implementations but these are heavily flawed, the following chapter will look at the implementation of the EEA. Furthermore, chapter 5 of this dissertation will provide suggestions on ways to rectify these.

#### 4. CONCLUSION

Affirmative action forms a large part of our society and interlinks with discrimination. Were it not for the previous discrimination that the country endured, there might not be a need for affirmative action measures. Although unfair discrimination still continues, so do affirmative action measures. The main purpose of the EEA is enforced through affirmative action. Although the measures that are put in place have been referred to as a form of reverse discrimination,<sup>113</sup> some readings provide that there is a serious need to try and balance the inequalities that still exist.<sup>114</sup> The system of affirmative action is not perfect and still needs to be clarified and addressed. It also seems redundant to impose these on employers without providing for a penalty if the employers fail to satisfy the requirements. Affirmative action policies adopted by employers need to be closely monitored as most employers use these policies as their defence when faced with an allegation of discrimination.<sup>115</sup> Although transformative laws have made some workplaces more representative and have led to positive outcomes, the deficiencies in the system of affirmative action show that there might be a need to revisit the legislation and make it more concise.<sup>116</sup>

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<sup>113</sup> AM Louw ‘The Employment Equity Act, 1998 (and Other Myths about the pursuit of “Equality” and “Dignity” in post-apartheid South Africa’ (2015) 18(3) *PER* 594.

<sup>114</sup> *Ibid*; Mushariwa *op cit* note 35 at 445.

<sup>115</sup> Grogan *op cit* note 16 at 87.

<sup>116</sup> Louw *op cit* note 113 at 595.

## CHAPTER 3

### THE IMPLEMENTATION OF THE EMPLOYMENT EQUITY ACT

#### 1. INTRODUCTION

A recent article that was published in the *City Press*<sup>117</sup> discussed how the government is currently seeking to engage with the South African Human Rights Commission (hereinafter ‘the Body’) regarding the country’s affirmative action and employment equity policies. This need for redress comes after the Body found that these policies are unconstitutional.<sup>118</sup> This means that the standard of which the EEA was drafted or implemented is not in line with international conventions.<sup>119</sup> Having only been implemented in 1998, the EEA is a fairly new piece of legislation. One author goes so far as to argue that the EEA was hastily and poorly drafted in order to give immediate remedial action to previously disadvantaged people.<sup>120</sup>

This author bluntly points out that legislators can do better than the ‘controversial piece of legislation’ referred to as the EEA which is unconstitutional in relation to its mandate on affirmative action.<sup>121</sup> This chapter will examine sections from the EEA that are mostly related to the title of the dissertation as well as the effect that the overall Act has on non-designated employees. Furthermore, this chapter will also critically analyse the implementation of the EEA and whether it has successfully been implemented in South African workplaces. Notwithstanding the critiques of the EEA, this section also aims to ascertain whether there are some positive features in its implementation and how those can be used to further enhance it and make it more appropriate in terms of South African standards.

#### 2. THE CONSTITUTIONAL BASIS FOR THE EEA

As previously stated, section 9 of the Constitution provides an equality clause.<sup>122</sup> This clause prohibits any form of discrimination and promotes equal enjoyment of rights. Similarly, the

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<sup>117</sup> L Malope ‘We may need affirmative action relook- Minister’ *City Press* 16 September 2018 at 4.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> Louw *op cit* note 113 at 594.

<sup>121</sup> *Ibid.*

<sup>122</sup> Section 9 of the Constitution.

EEA also seeks to protect the right to equality but in addition to that, it is aimed at creating a workforce that represents all the demographics of South Africa.<sup>123</sup> This means that the purpose of the EEA is two-fold. First, it is aimed at eliminating unfair discrimination in the workplace.<sup>124</sup> Secondly, the EEA implements measures such as affirmative action to redress the previous disadvantages as well as to ensure that workforces have equitable representation of individuals of the designated groups.<sup>125</sup>

The fulfilment of the second purpose requires equitable representation in all the occupational levels of the workplace. Some employers comply with both the purposes of the EEA but do not go beyond that.<sup>126</sup> This means that employers have diverse individuals to represent members of the designated groups but these individuals are kept stagnant at a low position with no possibility of climbing the hierarchy and occupying higher positions.<sup>127</sup> In most workplaces in South Africa, members from a designated group can be found in administrative or secretarial positions.<sup>128</sup> This is a tactic used by employers to put people under the misapprehension that they are complying with the EEA when they are merely just filling quotas.

### 3. THE ROLE OF THE JUDICIARY IN TRANSFORMATIVE LAWS

Decisions that have been concluded by the labour courts have indicated that judges are drawn towards making a narrow interpretation about equality.<sup>129</sup> This means that the courts have a conservative approach on the available remedies on discrimination; the courts fail to be more mindful of the role that they should play in guaranteeing transformation.<sup>130</sup> As previously alluded to earlier in the chapter, there have been some problems that are associated with the EEA, some of these issues stem from the judicial interpretation of some of the sections of the EEA.<sup>131</sup> Section 5 of the EEA<sup>132</sup> attempts to regulate the behaviour of all employers.

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<sup>123</sup> Mushariwa op cit note 35 at 439.

<sup>124</sup> Ibid at 440.

<sup>125</sup> Ibid.

<sup>126</sup> Fergus & Collier op cit note 30 at 487.

<sup>127</sup> L Booysen 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31 *SAJLR* 58.

<sup>128</sup> Ibid.

<sup>129</sup> Fergus & Collier op cit note 30 at 484.

<sup>130</sup> Louw op cit note 113 at 595.

<sup>131</sup> Fergus & Collier op cit note 30 at 485.

<sup>132</sup> Section 5 of the EEA states that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.



Therefore, it has the potential of bringing change in every workplace in the country.<sup>133</sup> The section compels employers to abolish discriminatory policies and to respond to acts of unfair discrimination at work but the interpretation of this section by the judiciary fails to accomplish this in two respects. First, it fails to take into account the emphasis placed on promoting equal employment opportunities and subsequently the Act's objective.<sup>134</sup>

This easily means that instead of imposing a duty on employers to respond to discrimination in the workplace, it imposes a duty for them to forestall it.<sup>135</sup> Secondly, policies and practices are confined by the construction of section 5 which places programmes and systems in place.<sup>136</sup> The narrow interpretation of the section has not been extended to affirmative action cases in court decisions.<sup>137</sup> The impact of section 5 does not satisfy the vision of the EEA which is to facilitate substantive and transformative change.<sup>138</sup> The courts are responsible for ensuring that the interpretation of a specific legislation is consistent with both the EEA and Constitution.<sup>139</sup> Therefore, if the courts fail to consider an interpretation that is in line with both these statutes, then legislative amendments could be necessary as changes might be able to clarify the purpose of that particular section.<sup>140</sup>

#### 4. THE IMPLEMENTATION OF THE EEA

The EEA lists separate objectives in its preamble<sup>141</sup>; a relatively new concept is introduced in one of the objectives. The concept seeks to 'achieve a diverse workforce that is broadly representative of our people'. This objective was first encountered in the EEA, which shows that the whole aim of the EEA is to ensure diversity and representation<sup>142</sup> in workplaces.

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<sup>133</sup> Mushariwa op cit note 35 at 440.

<sup>134</sup> Fergus & Collier op cit note 30 at 487.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid at 488.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

<sup>141</sup> The objectives of the EEA are set out in its preamble and are as follows:

1. To promote the constitutional right of equality and the exercise of true democracy;
2. To eliminate unfair discrimination in employment;
3. To ensure the implementation of employment equity to redress the effects of discrimination;
4. To achieve a diverse workforce broadly representative of our people;
5. To promote economic development and efficiency in the workforce; and
6. To give effect to the obligations of the Republic as a member of the International Labour Organisation.

<sup>142</sup> Broadly representative denotes both race and gender.

Section 6 (1) of the EEA prohibits unfair discrimination in any employment policy or practice and applies to all employers.<sup>143</sup> The section also provides specific grounds that would constitute unfair reasons on which to base a decision. Section 6 (2) provides instances that do not fall under the realm of unfair discrimination.<sup>144</sup> This section is pivotal as it states that an employer may be able to defend a claim of unfair discrimination. However, the best approach to combat discrimination and ensure that employers take employment equity laws seriously is for the labour courts to change their view on affirmative action being a defence to allegations of unfair discrimination but rather view it as an essential part to achieving equality.<sup>145</sup>

The change in the perception of the labour court will prompt employers to comply with the laws and perhaps significantly decrease the amount of employers who use employment equity mechanisms as quota systems and rather use these systems to empower previously disadvantaged people to get better positions in the workplace.<sup>146</sup> Both Fergus and Collier suggest that there is a divide between the prohibition of unfair discrimination found in chapter 2 and the employer's duties to establish and implement employment equity plans in their workplaces found in chapter 3.<sup>147</sup> The effect of this is that employees are barred from basing their claim for unfair discrimination on their employer's failure to implement a proper affirmative action policy.<sup>148</sup>

In *Minister of Safety and Security v Govender*<sup>149</sup> the employee instituted proceedings for unfair discrimination against their employer because they had applied for a promotion on three separate occasions without any success. The employee alleged that the unfair discrimination was a result of poor implementation of the employer's employment equity plan.<sup>150</sup> The employee further alleged that had it not been for the employer's non-compliance of equity plan, he would have been appointed to the relevant post.<sup>151</sup> Although, the labour

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<sup>143</sup> Section 6(1) states that 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

<sup>144</sup> Section 6(2) states that 'It is not unfair discrimination to--

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

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

<sup>145</sup> Fergus & Collier op cit note 30 at 489.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid at 490.

<sup>148</sup> Ibid.

<sup>149</sup> *Minister of Safety and Security v Govender* (2011) 32 ILJ 1145 (LC).

<sup>150</sup> *Govender* supra note 149 para 1

<sup>151</sup> *Govender* supra note 149 para 2.

court could not exercise jurisdiction over the matter, the employer was found to have unfairly discriminated against the employee but a breach of section 6 had not occurred.<sup>152</sup> This case illustrates the existence of the divide between chapter 2 and chapter 3 that is suggested by the two authors because Govender had contended that the employer had failed to adequately apply the employment equity plan which ultimately amounted to unfair discrimination.<sup>153</sup>

Chapter 3 of the EEA reemphasises the issue of racial and gender representivity which is closely related to its mandate. Additionally, the chapter compels employers to follow certain processes when dealing with affirmative action disputes.<sup>154</sup> These measures are put in place for suitably qualified people from designated groups. Where the employer fails to comply with chapter 3, the non-compliance may be brought to the attention of either the labour inspector, director-general of the Department of Labour or the CCMA.<sup>155</sup> There are several steps that any of these bodies can institute against an employer for non-compliance.<sup>156</sup> Interference by the courts is limited under matters that fall under chapter 3. Section 13 explicitly provides that designated employers must undertake affirmative action measures that are set out in section 15 (1).<sup>157</sup> Additionally, the employer must not take decisions relating to the measures unilaterally, they must consult with their employees.<sup>158</sup> Section 15 (2)(d) (i) further provides that affirmative action measures must make sure that an equitable representation of suitably qualified people from designated groups must be reflected at all

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<sup>152</sup> *Govender* supra note 149 para 27.

<sup>153</sup> *Govender* supra note 149 para 2.

<sup>154</sup> Found in section 13 to 21 of EEA.

<sup>155</sup> *Mushariwa* op cit note 35 at 450.

<sup>156</sup> Schedule 1 of the EEA sets out the maximum permissible fines that may be imposed for contravening certain provisions of the EEA.

<sup>157</sup> T Deane 'The regulation of affirmative action in the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc LJ* 381; section 13(1) provides that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.

(2) 'A designated employer must--

(a) consult with its employees as required by section 16;

(b) conduct an analysis as required by section 19;

(c) prepare an employment equity plan as required by section 20; and

(d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21; Section 15(1) states that affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.'

<sup>158</sup> Section 16 (1) states that 'A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17--

(a) with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or

(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.'

levels of the workplace.<sup>159</sup> This coincides with an argument raised earlier in the chapter regarding the lack of transformation at managerial positions in most workplaces.<sup>160</sup> Section 19 requires an analysis of the profile of a designated employer's workforce in order to 'determine the degree of underrepresentation of people from designated groups in the employer's workforce'.<sup>161</sup> This means that information must be collected and an analysis must be conducted in order to ensure that an effective employment equity plan has been drafted to adequately provide for designated employees or prospective employees. The information that is collected and analysed assists in identifying employment barriers that exist and impact on people from the designated groups.<sup>162</sup>

Section 20 discusses the preparation of the employment equity plan. This section adequately sets out the main features that a plan must have. The employment equity plan should be reflective of the affirmative action legislation contained in the EEA.<sup>163</sup> This plan should have the current policies implemented in the workforce, any barriers and the remedial steps that will be implemented to eradicate the existing barriers. The purpose of the plan is to take practical steps in achieving reasonable progress towards employment equity in the workplace.<sup>164</sup> Although the plan must outline the steps that the employer will take in attaining equality in the workplace, it should comply with the set guidelines that are allocated in section 20 (1) and 20 (2).<sup>165</sup>

Chapter 5 sets out the enforcement of the EEA.<sup>166</sup> The labour inspectors are appointed by the labour court to enforce the EEA through undertakings to comply and compliance orders.<sup>167</sup> Section 42 serves as a very important provision that is used when inspecting whether employment equity is being implemented in accordance with the EEA.<sup>168</sup> The

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<sup>159</sup> Section 15 (2)(d)(i) provides that affirmative action measures that are implemented by a designated employer must include measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; see also M Budeli-Nemakonde 'Employment equity and affirmative action in South Africa: A review of the jurisprudence of the courts since 1994' (2016) 3 (2) *AJDG* 86.

<sup>160</sup> Booyesen op cit note 127 at 48.

<sup>161</sup> Section 19 (2) of EEA.

<sup>162</sup> Deane op cit note 157 at 382.

<sup>163</sup> Ibid at 384.

<sup>164</sup> Ibid.

<sup>165</sup> Section 20 (1) of the EEA provides that a designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce; Section 20 (2) of the EEA provides the requisites of an employment equity plan listed from (a) – (i).

<sup>166</sup> Deane op cit note 157 at 386.

<sup>167</sup> Ibid; ss 35, 36 and 37 of the EEA.

<sup>168</sup> Ibid; section 42 of EEA.

section addresses the concept of demographics as well as representivity.<sup>169</sup> Prior to the amendment of section 42 in 2013, the section contained a number of indicators that were used to assess the employer's compliance with the EEA.<sup>170</sup> This is the only section in the EEA which makes an attempt at defining 'equitable representation' which is considered to be central to the purpose of the Act.<sup>171</sup> The determination of the underrepresentation of a group is a fundamental part of affirmative action as it helps in achieving a certain amount of appointments of suitably qualified people from designated groups. Both private and public institutions have been compelled to address transformation issues in the workplace because of the enactment of the EEA.<sup>172</sup>

No workforce should take employment equity legislation lightly. Most of the sections that have been previously discussed in this chapter, seek to ensure that the EEA is being consistently, adequately and correctly applied in order to effectively guarantee transformation. Although the EEA attempts to address all the guidelines and steps to be followed in the implementation of it, it also fails to impose serious sanctions for non-compliance of it.<sup>173</sup> If the guidelines provided in the EEA are properly followed and complied with, it is suggested that it will move South African employers a step closer to achieving the goal of equality in the workplace. This arguably forms an important part in overcoming the effect of apartheid and building a better society.<sup>174</sup>

Many authors have argued that the proper implementation of the EEA could ultimately assist South African workplaces to extinguish discrimination and promote equitable employment policies and practices.<sup>175</sup> Many authors have also expressed their concerns in the implementation of the EEA. They have argued that it fails to satisfy its purpose and ensure employment equity through the measures that it has outlined.<sup>176</sup> These authors argue that rather than addressing important issues and ensuring that employers comply with the measures, the EEA makes employers fearful and prompts them to act merely

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<sup>169</sup> Louw op cit note 113 at 616.

<sup>170</sup> Ibid; Employment Equity Amendment Act, 47 of 2013.

<sup>171</sup> Ibid at 617.

<sup>172</sup> Deane op cit note 157 at 386.

<sup>173</sup> Ibid.

<sup>174</sup> Ibid at 387.

<sup>175</sup> Budeli-Nemakonde op cit note 159 at 92; see also Deane op cit note 157 at 387; see also Rankhumise & Netswera op cit note 95 at 5.

<sup>176</sup> Louw op cit note 113 at 616; Dupper op cit note 38 at 432.

to satisfy an allocated quota.<sup>177</sup> The EEA assists in identifying the beneficiaries of affirmative action and guidelines to ensuring equity in the workplace. However, the EEA does not outline any steps that should be taken to prompt employers to promote said beneficiaries to higher positions.<sup>178</sup>

Section 60 of the EEA imposes vicarious liability on employers for any contravention of the EEA committed by their employees.<sup>179</sup> The provision states that where a contravention has been committed and has been brought to the attention of the employer, that employer must ensure that they consult all the relevant parties and take the necessary steps to eliminate the conduct that has been alleged.<sup>180</sup> If the employer is aware of the contravention but fails to take the required steps, they are regarded as having committed a discriminatory act personally.<sup>181</sup> However, the employer is able to escape liability if they are able to show that they did all that was ‘reasonably practicable’ to ensure that the employee in question would not act contrary to the EEA.<sup>182</sup> The rationale behind this, is to help any employees who experience discrimination from their colleagues to have an available recourse.<sup>183</sup> This also ensures that the employer will adequately respond appropriately to allegations of discrimination and encourage them to address grievances that are related to discrimination and have been raised by employees.<sup>184</sup> With regards to section 60, the courts have remarked that the section merely imposes obligations on employers for the protection of their staff in a minimal manner.<sup>185</sup>

## 5. CONCLUSION

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<sup>177</sup> Budeli-Nemakonde op cit note 159 at 92; see also Deane op cit note 157 at 387; see also Rankhumise & Netswera op cit note 95 at 5.

<sup>178</sup> Ibid at 596.

<sup>179</sup> Fergus & Collier op cit note 30 at 495; section 60 of the EEA.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid at 496.

<sup>183</sup> Ibid at 497.

<sup>184</sup> Ibid at 498.

<sup>185</sup> Ibid.

The implementation of the EEA is essentially aimed at not only promoting equality and diversification in the workplace but also the general reception towards discrimination in the workplace.<sup>186</sup> It gives guidelines that employers must follow when either selecting a prospective employee, promoting an employee or dealing with a current employee. The implementation of the EEA is not without its flaws. It mentions many guidelines but minimal sanctions for contravening them.<sup>187</sup> This could be one of the main reasons why employers are not consistent in their application of it. The EEA mentions underrepresentation but does not deal with the issue of overrepresentation.<sup>188</sup> This raises a question on the establishment and development of the *Barnard* principle which was applied in the *Barnard* case and will be discussed in detail in chapter 4.

The EEA does not directly or indirectly address whether an employee can be refused employment on the bases of overrepresentation of their race group in a workplace.<sup>189</sup> This could indicate possible conflict between the EEA and a decision made by the court. The former deals with the promotion of individuals from the designated group and diversification in the workplace while the latter makes an exemption and hinders an individual's prospects of employment but also deals with diversification. The implementation of the EEA has not been as efficient as legislators had planned and this has led to instances of non-compliance.<sup>190</sup> As previously alluded to in the beginning of the chapter, the EEA has been found to be unconstitutional by the Body and may need to be revisited in due course.<sup>191</sup>

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<sup>186</sup> Sections 5 and 6 of the EEA discusses the elimination of unfair discrimination and the prohibition of unfair discrimination.

<sup>187</sup> Fergus & Collier op cit note 30 at 495.

<sup>188</sup> Grogan op cit note 16 at 88.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Malope op cit note 117 at 4.

CHAPTER 4  
REFUSAL OF APPOINTMENT DUE TO OVERREPRESENTATION OF A SPECIFIC  
RACE GROUP

1. *SOLIDARITY OBO BARNARD*

(a) *Facts*

Barnard was a white female who was employed as a constable for the South African Police Service ('SAPS') from 1989.<sup>192</sup> She served many years in service. In 1997 she was promoted to become a captain and was later transferred to another branch.<sup>193</sup> She remained loyal and dedicated to all of her assigned positions within SAPS. In 2005, a new position was created and was stated to be a non-designated post.<sup>194</sup> Barnard was interviewed by a panel for the position and was the highest scoring candidate.<sup>195</sup> Despite this, SAPS had adopted an employment equity plan that set targets for the positions that were available.<sup>196</sup> The employment equity plan was intended to reflect the racial demographics of the population. After the adoption of the employment equity plan, the recommendations made stated that appointing a white individual would not add to the ratio of black officers at that level.<sup>197</sup>

The post was withdrawn. The post was re-advertised the following year and Barnard obtained the highest score again.<sup>198</sup> She was recommended by the interview panel to be appointed.<sup>199</sup> Despite Barnard's highest rank out of all the candidates present at the interview, the National Commissioner made the final decision not to appoint her.<sup>200</sup> Again, the Commissioner deliberated that it would not address representivity.<sup>201</sup> The post remained vacant.<sup>202</sup> Barnard approached the Commissioner for Conciliation, Mediation and Arbitration ('CCMA') where she filed a grievance.<sup>203</sup> Thereafter, the dispute was referred to four courts,

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<sup>192</sup> *Solidarity obo Barnard v South African Police Services* 2010 5 BLLR 561 (LC) para [24.1]; *South African Police Services v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC) para [5].

<sup>193</sup> *Barnard* (LC) para [24.1].

<sup>194</sup> *Barnard* supra note 192 para[24.4] and [24.5].

<sup>195</sup> *Barnard* supra note 192 para[24.6]; *Barnard* (LAC) para[5] and *Barnard* (CC) para[8].

<sup>196</sup> *Barnard* supra note 192 (LAC) para[11].

<sup>197</sup> *Barnard* supra note 192 (LC) para[24.9] and [24.11]; *Barnard* supra note 192 (LAC) para[8].

<sup>198</sup> *Barnard* supra note 192 para[24.13] and [24.15]; *Barnard* supra note 192 (LAC) para[7].

<sup>199</sup> *Barnard* supra note 192 para[24.16]; *Barnard* supra note 192 (LAC) para[6].

<sup>200</sup> *Barnard* supra note 192 para[24.20]; *Barnard* supra note 192 (LAC) para[8].

<sup>201</sup> *Barnard* supra note 192 para[24.20].

<sup>202</sup> *Barnard* supra note 192.

<sup>203</sup> *Barnard* supra note 192 para[24.21].



where four different judgments were decided but ultimately a judgment was handed down by the Constitutional Court.

*(b) Labour court*

The court had to decide whether SAPS had unfairly discriminated against Barnard by denying her a promotion on two occasions because she is white.<sup>204</sup> Acting Judge (AJ) Pretorius set out a series of unopposed propositions. First, the EEA and SAPS equity plan was required to give regard to affected employees' right to dignity and equality, thus, the two were meant to be applied fairly.<sup>205</sup> In order to assess whether SAPS had complied with the propositions, the court outlined the relevant sections in the EEA which contained the essence of the purpose of it and prohibition against unfair discrimination.<sup>206</sup> Secondly, the court stated that the law limits the extent to which equity plans may discriminate against employees.<sup>207</sup> This means that the employer bears the onus of proving that the alleged discrimination is fair in terms of the EEA.<sup>208</sup> Thirdly, provisions from the EEA are required to be applied fairly and rationally whilst taking all the employees' rights into consideration.<sup>209</sup> It is insufficient for the employer to merely apply a numerical goal to achieve representivity.<sup>210</sup> Furthermore, a person from another group should not be denied appointment or promotion without a valid reason where a candidate from an under-represented group cannot be found to fill the vacant position.<sup>211</sup>

Barnard understood the repercussions of affirmative action and how they could adversely affect people.<sup>212</sup> SAPS raised the defence that Barnard could not claim that she had been discriminated against because the post had remained vacant and no appointments had been made.<sup>213</sup> Pretorius AJ held that the failure to appoint Barnard was based on her race and amounted to discrimination, the non-appointment of other candidates did not alter the fact

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<sup>204</sup> *Barnard* supra note 192 para[26]; Mushariwa op cit not 35 at 442.

<sup>205</sup> Grogan op cit note 6 at 3.

<sup>206</sup> Mushariwa op cit note 35 at 444; *Barnard* supra note 192 paras 2-15.

<sup>207</sup> Grogan op cit note 6 at 3.

<sup>208</sup> *Barnard* supra note 192 (LC) para[26]; Mushariwa op cit note 35 at 450.

<sup>209</sup> Grogan op cit note 9 at 4.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Barnard* supra note 192 (LC) para[32].

<sup>212</sup> Grogan op cit note 9 at 4.

<sup>213</sup> *Barnard* supra note 192 (LC) para[32].

that it was unfair and did not comply with the EEA.<sup>214</sup> The failure to leave the position vacant when there was a suitably qualified black candidate available was an unfair and irrational way to implement an equity plan.<sup>215</sup> SAPS equity plan had provided that when filling in posts, service delivery must be taken into account. In concluding its judgment, the court clearly emphasised that they failed to understand how failure to fill a post could rationally be justified by the need for an efficient police force.<sup>216</sup> The labour court decided the matter by ascertaining what is required in an employment equity plan and what representivity entails.<sup>217</sup> This decision seemingly confirmed that affirmative action measures may be subjected to judicial scrutiny.<sup>218</sup> Additionally, when an employer's equity plan is challenged, that employer must, at most prove that the equity goals that they are pursuing are reasonable, rational and fair.<sup>219</sup> SAPS appealed on the basis that they believe that Pretorius AJ had misread their equity plan, the EEA and the Constitution.

*(c) Labour appeal court*

The labour appeal court (LAC) noted that the labour court judgment concluded that where a post cannot be filled by a suitable candidate from an underrepresented category then a candidate from another group should not be denied the opportunity if they are suitable for the position.<sup>220</sup> The LAC differed in their approach to the case. The court first found that the case dealt with the implementation of an equity plan where it is unfavourable to persons from non-designated groups.<sup>221</sup> More specifically, the LAC had to ascertain whether the SAPS equity plan should be suppressed in instances that its implementation would negatively affect people from non-designated groups.<sup>222</sup> The labour court had failed to narrow the scope of what the case dealt with. The LAC observed the normal interpretation of discrimination and unanimously found that the present case did not contain any discrimination or differentiation.<sup>223</sup> According to the court, Barnard had neither been discriminated against nor

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<sup>214</sup> *Barnard* supra note 192 (LC) paras [43.7]- [43.8].

<sup>215</sup> Grogan op cit note 9 at 4.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Barnard* supra note 192 (LC) para[42].

<sup>218</sup> J Grogan 'Steel ceiling: Affirmative action by numbers' (2013) 29 *Employment Law* 5.

<sup>219</sup> *Barnard* supra note 192 (LC) para[33].

<sup>220</sup> *Barnard* supra note 192 (LAC) para[14]; Grogan op cit note 218 at 6.

<sup>221</sup> *Barnard* supra note 192 para[11] – [12]; *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

differentiated against in the consideration of her application.<sup>224</sup> Grogan is of the opinion that if there had been an affirmative action appointment then the manner in which Barnard approached the court would have significantly differed.<sup>225</sup> In such an instance, Barnard would have had to prove that the appointed candidate was not suitably qualified and therefore their appointment would have been irrational.<sup>226</sup>

The judges in the LAC found that the issue was the relationship between section 9 (1) and 9 (2) of the Constitution.<sup>227</sup> This entailed considering whether the EEA and SAPS equity plan were applied respectively in accordance with the principles of fairness and bearing in mind the constitutional right to equality afforded to the affected individual.<sup>228</sup> According to the LAC, the labour court erred in placing more emphasis on the individual's rights to equality and dignity above equity measures of rationality and fairness.<sup>229</sup> One of the other conclusions that was reached by the LAC was that the failure to appoint a black candidate could not necessarily be regarded as a failure to implement an equity plan.<sup>230</sup> Due to the fact that Barnard's promotion would not have yielded any changes in representivity at that level of employment, her appointment would have stifled the SAPS equity provisions in which black candidates had a claim to be preferred.<sup>231</sup> The LAC effectively held that if Barnard had been discriminated against, the discrimination was not unfair because the equity plan was rational.<sup>232</sup>

Although the equity plan itself was not thoroughly observed, the court found that where an equity plan was rational in achieving an attainable goal then no discrimination can be said to have taken place, if it had, it would be fair.<sup>233</sup> The equity plan served as a method of removing the inequality that existed in the past.<sup>234</sup> The consequence thereof is that the implementation of affirmative action measures operate to the detriment of non-designated

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<sup>224</sup> *Barnard* supra note 192 (LAC) para[22]-[24].

<sup>225</sup> Grogan op cit note 218 at 6.

<sup>226</sup> *Ibid*.

<sup>227</sup> Section 9(1) provides that 'Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) 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'; Grogan op cit note 9 at 4.

<sup>228</sup> *Ibid*.

<sup>229</sup> Grogan op cit note 9 at 5.

<sup>230</sup> *Barnard* supra note 192 (LAC) para[15].

<sup>231</sup> Grogan op cit note 218 at 6.

<sup>232</sup> *Ibid* 10.

<sup>233</sup> *Barnard* supra note 192 (LAC) para[33]- [34].

<sup>234</sup> *Barnard* supra note 192 para[38].

groups.<sup>235</sup> Grogan states that after the decisions in both the labour court and LAC, a question arose on whether the *Barnard* decision raised an absolute barrier to claims of unfair discrimination by overrepresented race groups in a particular workforce where the employer presents its equity plan as a defence.<sup>236</sup>

Grogan discusses the judgment in detail.<sup>237</sup> He does this by making reference to two judgments, namely, *Naidoo v Minister of Safety and Security*<sup>238</sup> and *Munsamy v Minister of Safety and Security & another*.<sup>239</sup> The facts of both cases do not differ significantly to that of *Barnard*. The only differences were that firstly, *Naidoo* and *Munsamy* were both Indians, one female and the other a male respectively, whereas *Barnard* was a white female.<sup>240</sup> Secondly, the posts in both cases were not left vacant but rather filled.<sup>241</sup> Thirdly, the applicants in both cases contended that the equity plans were not in accordance with the EEA.<sup>242</sup>

In *Munsamy*, the court noted a document that detailed the numerical goals in KwaZulu-Natal demographics that had been compiled by the employer.<sup>243</sup> The document detailed the different race groups that would need to be allocated to certain posts to meet equity goals. In the end, the court in *Munsamy* noted that employers may utilise discriminatory measures in order to make their workforces equally representative.<sup>244</sup> The court relied on the LAC decision of *Barnard* as confirmation and also added that an employer cannot prefer one group of designated employees over another who are already overrepresented without proof of a valid equity plan which permits it.<sup>245</sup> The employer in *Naidoo* denied that their appointment of a black candidate was made solely on the basis of achieving numeric targets which were set out in their equity plan.<sup>246</sup> The court found that plenty of focus had been placed on African candidates and the focus needed to shift to other members within the designated group.<sup>247</sup> The court further held that the equity plan created

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid 10.

<sup>237</sup> Ibid 10.

<sup>238</sup> *Naidoo v Minister of Safety and Security* [2013] 5 BLLR 490 (LC).

<sup>239</sup> *Munsamy v Minister of Safety and Security & another* [2013] 7 BLLR 695 (LC).

<sup>240</sup> Grogan op cit note 218 at 10.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid

<sup>244</sup> Ibid at 11.

<sup>245</sup> Ibid.

<sup>246</sup> *Naidoo* supra note 238 para[9].

<sup>247</sup> *Naidoo* supra note 238 para[200].

an employment barrier against Indian people which was prohibited in terms of the EEA.<sup>248</sup> It was held that Indians were overrepresented but the equity plan did not consider or make provision for the employment of Indian females, this amounted to unfair discrimination.<sup>249</sup> The *Munsamy* case serves to show the influence that the labour court and LAC decision in *Barnard* has had on subsequent cases.

Whilst the *Naidoo* case serves to show the general consideration that courts have towards females being appointed despite an overrepresentation of their race group, this approach was unfortunately not followed in the *Barnard* case. Ultimately, Barnard had not challenged the SAPS equity plan which required the appointment of a black candidate to the relevant post.<sup>250</sup> Barnard had contended that she had been unfairly discriminated against because she was white. She argued that this using section 6 (1) of the EEA.<sup>251</sup> She wanted the court to order SAPS to promote her to the relevant post because she had achieved the highest score and had been recommended by the interview panel as the preferred candidate.<sup>252</sup> The court held that due to an overrepresentation of her race group, Barnard was aware that black candidates were targeted for the post. The matter proceeded to the Supreme Court of Appeal (SCA).

*(d) Supreme court of appeal*

The SCA noted the purpose of the implementation of the EEA.<sup>253</sup> The EEA was enacted in order to assist the country in overcoming historical injustices by placing measures to facilitate equal opportunities being granted to all.<sup>254</sup> The SCA found Barnard's experience to be a pivotal point.<sup>255</sup> The advertisements that contained information of the posts that Barnard applied for had not been reserved for candidates of designated groups. Judge Navsa rejected the suggestion from the LAC that Barnard had not been discriminated against by the actions of the employer to leave the post vacant.<sup>256</sup> This suggestion by the LAC incorrectly presumes

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<sup>248</sup> *Naidoo* supra note 238 para[209].

<sup>249</sup> *Naidoo* supra note 238 para[184] –[188].

<sup>250</sup> Grogan op cit note 9 at 5.

<sup>251</sup> *Barnard* supra note 192 (LAC) para[9].

<sup>252</sup> *Barnard* supra note 192 para[5] and [10].

<sup>253</sup> *Barnard* supra note 192 (SCA) para[1].

<sup>254</sup> Grogan op cit note 9 at 6.

<sup>255</sup> *Barnard* supra note 192 (SCA) para[7].

<sup>256</sup> *Barnard* supra note 192 para[51]; see also Grogan op cit note 9 at 7.

that an individual is only discriminated against where another person is advantaged by the Act.<sup>257</sup>

The SCA could find no reason why the LAC had treated Barnard as if she was not a designated employee when she was a designated employee by virtue of being a female.<sup>258</sup> Although the EEA permits numerical goals,<sup>259</sup> it does not deliberate on the distribution of the weight of the four designated groups in equity plans.<sup>260</sup> The SCA held that the EEA prohibits an absolute barrier approach that is created where an employer fails to find a suitable black candidate to fill a post and overlooks a suitable available white candidate.<sup>261</sup> The LAC decision had affirmed that employers are entitled to set targets and overlook members of overrepresented groups in all appointments until the targets are met.<sup>262</sup> So the concept of non-appointment of overrepresented groups was not a new concept when the CC judgment was written. For the purpose of this dissertation, the SCA decision does not deliberate further on the subject-matters related to the theme of the paper.

*(e) Constitutional court*

Justice Moseneke first noted the values enshrined in the Constitution including human dignity and the achievement of equality.<sup>263</sup> The guarantee of equality is that everyone will be afforded equal protection and benefit of the law. The Constitution also considers the history of the country and seeks transformative change by allowing for active steps to be made to achieve substantive equality.<sup>264</sup> These steps should not infringe on the dignity of other individuals. Although remedial measures are implemented to advance people who were previously disadvantaged, they must not unduly infringe on the rights of the people who are affected by them.<sup>265</sup> Justice Moseneke re-emphasised a point that was previously discussed in this dissertation which is that, restitution measures alone are inadequate to advance social equity.<sup>266</sup>

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<sup>257</sup> *Barnard* supra note 192 para[52]; *Ibid*.

<sup>258</sup> *Ibid* 8.

<sup>259</sup> *Barnard* supra note 192 (SCA) para[17]; With the exception of quotas, section 15 (3) states that the measure referred to in section 15 (2) (d) include preferential treatment and numerical goals but excludes quotas.

<sup>260</sup> Grogan op cit note 9 at 8.

<sup>261</sup> *Barnard* supra note 192 (SCA) para[68]; *Ibid*.

<sup>262</sup> *Barnard* supra note 192 (LAC) para[42].

<sup>263</sup> *Barnard* supra note 192 (CC) para[28]; Grogan op cit note 9 at 8.

<sup>264</sup> *Ibid*.

<sup>265</sup> *Ibid*.

<sup>266</sup> *Barnard* supra note 192 (CC) para[33].

After discussing discrimination and its effects on society, Justice Moseneke looked at the EEA and considered the aims and purpose of it. In *Minister of Finance & another v Van Heerden*<sup>267</sup> the court established how restitution measures are able to be constitutional, this included the fact that the measure must target a particular class of people who have previously experienced unfair discrimination.<sup>268</sup>

Furthermore, the restitution measure must be designed with the purpose of either protecting or advancing that particular group of people and the promotion of equality within the workforce.<sup>269</sup> Once the measure passes the test, it is not considered or presumed to be unfair.<sup>270</sup> The court still reserves the right to intervene and investigate whether the measure falls within the scope of section 9 (2) of the EEA. The majority noted an important point which was that the EEA permits for affirmative action to include preferential treatment and numerical goals but to exclude quotas.<sup>271</sup> Justice Moseneke failed to understand why the EEA did not define what quotas are.<sup>272</sup> Although the definition of quotas was not required for the present case, the legislature should have given a clear and concise definition for it. Not having a clear definition provides judges with too much discretion and the power to ‘make the law’ which is not the role of the judiciary.<sup>273</sup>

The SAPS restitutionary measures were based on targets that took into account national demographics and provided numerical targets for different levels.<sup>274</sup> This suggests that it is important for a company to ascertain the demographics of that particular area and set numerical targets based on that.<sup>275</sup> In considering the numerical targets, companies should also bear in mind the demographic of the area. Where an area consists of a large amounts of a particular race group, it is futile to set targets to advance other races and disregard the race that forms a large part of the area because that specific demographic will be prejudiced by that particular restitution measure.<sup>276</sup> The majority found that the SCA’s judgment had been concluded based on the premise that the equality claim was unfair discrimination on the

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<sup>267</sup> *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (LC).

<sup>268</sup> *Barnard* supra note 192 (CC) para[36].

<sup>269</sup> *Barnard* supra note 192; Grogan op cit note 9 at 8.

<sup>270</sup> *Barnard* supra note 192 para[37]; *Ibid.*

<sup>271</sup> *Barnard* (CC) para[42]; Section 15 (3) of EEA; Grogan op cit note 9 at 9.

<sup>272</sup> *Barnard* supra note 192.

<sup>273</sup> Grogan op cit note 9 at 9.

<sup>274</sup> *Barnard* supra note 192 (CC) para[45].

<sup>275</sup> Grogan op cit note 9 at 9.

<sup>276</sup> *Ibid.*

ground of race.<sup>277</sup> In the SCA reaching their decision, they were obliged to approach the claim through section 9 (2) of the Constitution and section 6 (2) of the EEA.<sup>278</sup> The majority of the CC considered the test in *Harksen v Lane NO & others*<sup>279</sup> and concluded that it was incorrect to use this test as the SAPS equity plan's application was never challenged.<sup>280</sup>

Another issue that the CC majority raised in their judgment was how Barnard's claim had changed from being directed at unfair discrimination.<sup>281</sup> It was aimed at the national commissioner's decision not to appoint her and this ultimately amounted to a review of his decision.<sup>282</sup> Based on this point only being raised at the final stage of appeal, it could not be raised.<sup>283</sup> When the court considered the issue of service delivery, they found that service delivery was not adversely affected by the failure of SAPS to appoint Barnard.<sup>284</sup> This finding was contrary to the finding of the SCA.<sup>285</sup> Furthermore, the national commissioner could not be found at fault for the general fact that white women were overrepresented at that level.<sup>286</sup> The decision of the national commissioner had not set a barrier to her advancement.<sup>287</sup>

Although the *Barnard* case deliberated on many points and had a majority and minority judgment, for the purposes of this dissertation it is crucial to only consider a few points that were raised in the majority judgment. In the majority judgment written by Justice Moseneke, the national commissioner was permitted to exercise his discretion and with that he decided not to appoint Barnard because of representivity.<sup>288</sup> His exercise of discretion was not found to be unlawful.<sup>289</sup> In Justice Jafta's judgment, he refers to the LAC's judgment as a crucial point regarding representivity on the level that Barnard was applying for.<sup>290</sup>

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<sup>277</sup> *Barnard* supra note 192 (CC) para[208]; This would entail an inquiry of section 9 (3) of the Constitution and section 6 (1) of the EEA.

<sup>278</sup> Grogan op cit note 9 at 10.

<sup>279</sup> 1998 (1) SA 300 (CC).

<sup>280</sup> *Barnard* (CC) para[208]; Grogan op cit note 9 at 10.

<sup>281</sup> *Barnard* supra note 192 para[211]; Ibid 11.

<sup>282</sup> Ibid.

<sup>283</sup> *Barnard* (CC) para[213].

<sup>284</sup> *Barnard* supra note 192 para[64] Grogan op cit note 9 at 10.

<sup>285</sup> *Barnard* supra note 192.

<sup>286</sup> *Barnard* supra note 192 para[66]; Grogan op cit note 9 at 10.

<sup>287</sup> Ibid.

<sup>288</sup> *Barnard* supra note 192 (CC) para[70].

<sup>289</sup> *Barnard* supra note 192 (CC) para[62] and [70].

<sup>290</sup> *Barnard* supra note 192 para[196]; Labour Appeal Court judgment para38 reads as follows:

'The over representivity of white males and females is itself a powerful demonstration of the insidious consequence of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the



Ultimately Barnard was denied relief because white officers were ‘overrepresented’ at the level she had applied for.<sup>291</sup> The *Barnard* principle which denotes that an employer may refuse to appoint a candidate who is a race group that is already adequately represented in that workforce was read into the case as it was not expressly stated in it.<sup>292</sup> This ruling was initially introduced by the CC and imposed on Barnard who was a white female. This principle favoured overlooking Barnard for the position based on an adequate representation of her race at that workplace. This meant that her non-appointment was accepted by the court and did not amount to unfair discrimination.<sup>293</sup>

Two years after Barnard came the CC judgment of *Solidarity & others v Department of Correctional Services & others (Police and Prisons Civil Rights Union & another as amici curiae)*<sup>294</sup>. One of the issues that the majority judgment addressed was whether the *Barnard* principle could be raised by the defendants against black people who seek positions and promotions if those positions are already overrepresented by that race group.<sup>295</sup> The case decided whether this principle could be applied to employees that are part of the designated groups? Justice Zondo summarised his findings in the following passage:

‘...the application of the *Barnard* principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the *Barnard* principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce.’<sup>296</sup>

This judgment essentially ruled that no person is immune to the application of the *Barnard* principle. The court went so far as to give an example that stated that a workforce

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exclusion of others, especially blacks. The over representivity of whites in level 9 is a stark reminder of our past and indeed the present and yet another wake up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution.’

<sup>291</sup> Grogan op cit note 9 at 11.

<sup>292</sup> *Barnard* supra note 192 (CC) para[62]; H Pienaar, S Jamieson & J Long ‘Constitutional Court clarifies Employment Equity Measures’ (2016) *EMPLOYMENT ALERT*, available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-1-august-constitutional-court-clarifies-employment-equity-measures.html>, accessed on 27 November 2018.

<sup>293</sup> *Barnard* supra note 192.

<sup>294</sup> *Solidarity & others v Department of Correctional Services & others (Police and Prisons Civil Rights Union & another as amici curiae)* [2016] 10 BLLR 959 (CC).

<sup>295</sup> Grogan op cit note 6 at 8.

<sup>296</sup> *Department of Correctional Services* supra note 199 para[40].

that consisted of only whites and Indians could not be broadly representative any more than that with only Africans and Indians.<sup>297</sup> The meaning of equitable representation means that all race groups must be spread proportionally regardless of whether they are within or outside the designated groups.<sup>298</sup> Justice Zondo also made an example which illustrated that broad representation also refers to an equitable representation of all race groups in different management positions.<sup>299</sup> The court failed to deliberate on the rationality of the demographic figures considered in the case and whether these were based on national or regional statistics.<sup>300</sup> Section 15 (3) explicitly prohibits the use of quotas and the *Barnard* principle has been described by Grogan as amounting to a quota because it limits a candidate from being appointed due to the fact that the workforce already has an adequate amount of people representing that race group.<sup>301</sup>

The *Barnard* principle is not authorised under the EEA and therefore there is no justification behind it other than the hindrance of the appointments of different race groups.<sup>302</sup> Another problem with the principle is that it fails to consider the demographics of a particular area.<sup>303</sup> In an area with a high population of Indian people, it is highly probable that the workforce will have a wider representation of them at most of the levels of the workplace.<sup>304</sup> Thus, the *Department of Correctional Services* case concluding that the *Barnard* principle includes black people as well as both males and females.<sup>305</sup> Although the application of the principle on all individuals that belong to the designated groups<sup>306</sup> defeats the purpose of which the EEA seeks to accomplish, its main aim is to attain representativity of all race groups in workplaces.<sup>307</sup> In *Department of Correctional Services*, the applicants were Coloured people in the Western Cape, a place that has a high demographic of Coloured people. Rather than considering only national demographics, the regional statistics should be taken into account to ensure that the individuals are given fair opportunities of being appointed.

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<sup>297</sup> Grogan op cit note 6 at 9; *Department of Correctional Services* supra note 199.

<sup>298</sup> Ibid at 9.

<sup>299</sup> Ibid.

<sup>300</sup> Ibid at 10.

<sup>301</sup> Grogan op cit note 9 at 8.

<sup>302</sup> Ibid.

<sup>303</sup> Grogan op cit note 9 at 9; Harrison & Pillay op cit note 15 at 2.

<sup>304</sup> Grogan op cit note 9 at 10.

<sup>305</sup> *Department of Correctional Services* supra note 199 para[40].

<sup>306</sup> *Department of Correctional Services* supra note 199 para[40] is silent on whether the principle is applicable to disabled persons as well.

<sup>307</sup> *Department of Correctional Services* supra note 199 para[40] –[41].

The courts have not commented on the legality of not appointing someone because their group is adequately represented.<sup>308</sup> There also seems to be no correlation between that and the EEA.<sup>309</sup> It is difficult to comprehend how both the *Barnard* principle and the EEA can co-exist and operate simultaneously and both yield their intended outcomes. Although both have the aim to diversify workplaces and have broadly representative workforces, one can possibly limit the other to achieve its goal. The EEA permits for designated groups to be preferred in certain relevant instances and the *Barnard* principle effectively permits employers to refuse appointing a person, whether from a designated group or not, due to overrepresentation.<sup>310</sup> Courts are yet to address the issue of how workforces are expected to have an equal representation of all the race groups in South Africa.<sup>311</sup> Although ‘broadly representative’ sounds appealing and fair, expecting workplaces to set targets for how many race groups they are to employ in a year seems drastic and too burdensome.<sup>312</sup> The CC must also address why quotas are not permitted and furthermore explain the difference between that and having numerical targets of race groups to employ.

## 2. CONCLUSION

There is no plausible explanation on why the courts would formulate a principle that would contradict with existing legislation. The difference in how the courts assessed, deliberated and decided the *Barnard* case is evident in their judgments. The SCA decision was favourable to *Barnard*, while the LAC and CC could not conclusively find that there was unfair discrimination present in the refusal to appoint her. This case clearly illustrates how the courts will view unfair discrimination cases and that the individual who bears the onus of proving it should be persuasive in their argument. The *Department of Correctional Services* case served to illustrate how the courts have responded to affirmative action cases after *Barnard*.<sup>313</sup> The case not only followed the *Barnard* principle but also extended its narrow application to include other races and genders.

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<sup>308</sup> Grogan op cit note 9 at 11.

<sup>309</sup> Ibid.

<sup>310</sup> Grogan op cit note 218 at 17.

<sup>311</sup> Ibid.

<sup>312</sup> Louw op cit note 113 at 596.

<sup>313</sup> Grogan op cit note 9 at 18.

Although the judgment explained that this was to realise the goal of broadly representative workforces, it did not explain how the principle will operate whilst the EEA attempts to rectify the past discriminations faced by individuals from the designated groups.<sup>314</sup> This still remains open and undiscussed. Although it seems unfair to argue that the principle's application is more complicated on a person from a designated group by virtue of their race, some could argue that it represents equal treatment. Conversely, if the principle was held to not apply to individuals from the designated groups then it would have opened the floodgates at courts for claims of unfair discrimination. People that do not belong in the designated groups would have felt prejudiced twice, first for affirmative action measures and secondly for being denied employment where their race group is said to be adequately represented.

Consequently, if a black individual approaches a court for a matter of being refused employment because their race group is already overrepresented, will the courts look at their right to be considered for the job, restitutionary measures offered by the EEA, assess the equity plan of that workplace or will it simply rule in favour of the *Barnard* principle? These questions will most likely be answered if another similar case comes before the CC.

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<sup>314</sup> Ibid.

## CHAPTER 5

### SUGGESTIONS/ RECOMMENDATIONS AND CONCLUSION

#### 1. INTRODUCTION

This final chapter is aimed at putting forward suggestions to the possible conflict between the EEA and *Barnard* principle. The courts have not addressed the issue and therefore it is difficult to comment on the legality of the *Barnard* principle at this stage. This chapter will also consider any problems that might have previously been discussed in the preceding chapter relating to the EEA or affirmative action measures. The existing problems with the EEA are prominent and are a cause for concern due to the finding that it is not in line with the Constitution. Although the EEA has its problems, it is futile to suggest that it be completely cancelled because its purpose is important in addressing issues that were faced by many people in the country. Finally, this chapter will conclude the dissertation and summarise the findings of the overall research.

#### 2. RECOMMENDATIONS

As previously discussed in chapter 2, ascertaining the true beneficiaries of affirmative action has been contended since the implementation of the EEA.<sup>315</sup> McGregor insists that many people benefit by virtue of their race being part of a designated group whilst they did not experience any discrimination.<sup>316</sup> Furthermore, she states that employers should consider the level of disadvantage a person has experienced.<sup>317</sup> The system that McGregor suggests could assist in revealing the true beneficiaries but it will be too burdensome on the employer as it is near impossible to establish the level of disadvantage a person has experienced unless a criterion is provided.<sup>318</sup> Mushariwa suggests that the implementation of affirmative action should not have a general application.<sup>319</sup> This means that it would be strictly applied on a case-by-case basis in terms of considering the equity plan of that workforce and the

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<sup>315</sup> Louw op cit note 113 at 598.

<sup>316</sup> McGregor op cit note 3 at 4.

<sup>317</sup> Ibid.

<sup>318</sup> Ibid.

<sup>319</sup> Mushariwa op cit note 35 at 448.

demographics of the people that work there.<sup>320</sup> In addition to considering the above mentioned, other factors such as social, gender and educational disadvantage should be regarded when ascertaining the true beneficiaries of affirmative action. An employer in reaching their decision of appointing an individual from a designated group, must ensure that the candidate is suitably qualified.<sup>321</sup>

It is possible to realise Mushariwa's suggestion. The EEA should contain a further provision in the measure of affirmative action which will oblige the employer to consider the social, educational and economic disadvantage experienced by an individual. Although the suggestions put forward by McGregor and Mushariwa are similar, Mushariwa provided aspects that the criterion must ascertain whereas McGregor did not.

A development of section 5 of the EEA is required.<sup>322</sup> This must take place in a manner that engages the employer and prompts them to promote transformation in the workplace. This means that the relationship between chapter 2 and 3 of the EEA should be reconsidered and structured in a way that will facilitate transformation in all workplaces.<sup>323</sup> Additionally, because judges can utilise their discretion, they should be mindful of the hardships entailed in the proving of discrimination. The court should recall the broad powers afforded to it by both the EEA and LRA.<sup>324</sup> Therefore, discrimination should be interpreted to include implicit forms which could affect the employee as well as their performance at work.<sup>325</sup> The EEA should contain a provision which obliges employers to provide skills development to designated employees at the lowest level in the workplace.<sup>326</sup> This will allow them to improve their skills and get promoted within that workplace.

Some key issues were identified in the Commission for Employment Equity Annual Report.<sup>327</sup> To these, the commission responded by offering amendment proposals which include revisiting the definition of designated employers, and setting of sector targets as an

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<sup>320</sup> Mushariwa op cit note 35 at 449.

<sup>321</sup> Ibid at 450.

<sup>322</sup> Deane op cit note 157 at 382.

<sup>323</sup> Fergus & Collier op cit note 30 at 500.

<sup>324</sup> Mushariwa op cit note 35 at 450.

<sup>325</sup> Ibid.

<sup>326</sup> Booysen op cit note 127 at 59.

<sup>327</sup> T Kabinde *Commission for Employment Equity: Annual Report* (2018) 1.

enabling provision to monitor and measure the compliance.<sup>328</sup> The proposed amendments to the EEA are aimed at easy regulation. In identifying key issues, the report also concluded that there had been a lack of equitable representation at top management level which has a negative impact on the economic growth of the country.<sup>329</sup> The solution suggested in the report to this problem is to implement strategies or to develop the existing ones. The report also considers the fact that the EEA and Skills Development Act<sup>330</sup> were aimed at supporting each other in order to drive transformation and achieve an outcome of developing the skills of people from designated groups but failed to achieve the desired outcome.<sup>331</sup> Drastic steps must be taken to offer more opportunities to designated employees by either developing, recruiting and promoting them at a professionally qualified level.<sup>332</sup>

The government sector appears to have achieved more transformation than the private sector in terms of representation of designated groups.<sup>333</sup> This could indicate that their equity plans have successfully been implemented or that employers in the private sector need to take employment equity laws more seriously.<sup>334</sup> Louw feels very strongly about the EEA having a sunset clause<sup>335</sup> but the EEA has not yet achieved effective transformation in workplaces. Therefore, the idea of a sunset clause is premature and should be withheld as it will take a long time to achieve the aims and objectives set out in the EEA.

As briefly alluded to in the previous chapter, it is insufficient for the national demographics to be regarded instead of regional demographics as this is a true reflection of the prospective employees.<sup>336</sup> Similarly, in the *Department of Correctional Services* case, the court applied the principle without giving regard to the fact that the Coloured employees form a large population in the Western Cape chose not to appoint them because their race groups was adequately represented at the workforce.<sup>337</sup> The next time the CC considers a matter where the *Barnard* principle is raised, the court must address the matter. The court cannot, in

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<sup>328</sup> Ibid at 5.

<sup>329</sup> Ibid at 12.

<sup>330</sup> Skills Development Act 97 of 1998.

<sup>331</sup> Kabinde op cit 327 at 12.

<sup>332</sup> Ibid.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> Louw op cit note 113 at 594.

<sup>336</sup> Harrison & Pillay op cit note 15 at 2.

<sup>337</sup> *Department of Correctional Services* para 80.

its effort to achieve a certain goal disregard the provisions of the EEA which are also set out to achieve its purpose.<sup>338</sup>

### 3. CONCLUSION

Based on the research set out, the legality of the *Barnard* principle has yet to be confirmed. Despite this, the research strongly suggests that there is no place for the principle in the country's legislation which seeks to address the issues that were previously experienced. The EEA is aimed at empowering, promoting and offering better opportunities to designated groups. Anything that interferes with the attainment of its goals and/ or objectives should be disregarded and considered unlawful as it would be directly affecting the operation the EEA. That being said, it should be noted that the EEA is not without its flaws, these must be addressed so that it will be in line with the Constitution.

The correction of the EEA should be done in such a way that it directly stipulates what should be done by employers and what consequences will stem from non-compliance. Granting judge's discretion on the punishment that employers should achieve ensures that the provisions set out in the EEA are dynamic instead of rigid. It is insufficient to expect employers to comply with all the prescribed provisions of employment equity, this must be strictly regulated.<sup>339</sup> Most employers utilise a quota system despite the EEA expressly prohibiting this.<sup>340</sup> This is only a few of the things that employers do that show that they blatantly disregard the provisions set out along with not promoting designated employees to top positions.

In order for employers to strictly comply with the EEA, they should be expected to submit an annual report on their employees and whether they have complied with their equity plan.<sup>341</sup> Skills development programs should be made compulsory by employer to assist in advancing their employees in their career.<sup>342</sup> Failure to apply the prescribed requirements should result in either monetary penalty or imprisonment of that employer. This is the only way that employers will correctly and adequately enforce the provisions set out in the

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<sup>338</sup> Mushariwa op cit note 35 at 448.

<sup>339</sup> Mushariwa op cit note 35 at 450.

<sup>340</sup> Grogan op cit note 218 at 17.

<sup>341</sup> Section 20 of the EEA.

<sup>342</sup> Booysen op cit note 127 at 64.



EEA.<sup>343</sup> In everything the employer does, they must bear in mind the constitutional rights afforded to the employee.

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<sup>343</sup> Mushariwa op cit note 35 at 450.

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