



**UNIVERSITY OF  
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The constitutionality of the concept of demographic representivity, provided for in terms of the  
Employment Equity Amendment Act 47 of 2013

by

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degree of

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## **Declaration**

By submitting this dissertation, I declare that the entirety of the work contained therein is my own work, except for instances indicated otherwise, that I am the author thereof, and that the work, in its entirety or in part, has not been previously submitted for the purposes of obtaining an academic qualification.

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## List of Acronyms

ACJ	Acting Chief Justice
ANC	African National Congress
BEE	Black Economic Empowerment
BEEA	Broad-Based Black Economic Empowerment Act
CC	Constitutional Court
CUSA	Commercial Workers Union of South Africa
DCS	Department of Correctional Services
EEA	Employment Equity Act
EEAA	Employment Equity Amendment Act
EEP	Employment Equity Plan
GG	Government Gazette
GN	Gazette Number
LC	Labour Court
NEDLAC	National Economic Development and Labour Council
OBO	On Behalf Of
PROC	Proclamation
SAPS	South African Police Service
SCA	Supreme Court of Appeal

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# CHAPTER 1: INTRODUCTION AND CONTEXT OF THE RESEARCH

## 1.1 Background

The South African Constitution<sup>1</sup> places a high importance on ‘equality’. Section 8 of the Constitution affirms this by providing that the Bill of Rights applies to all law and binds all organs of the state.<sup>2</sup> ‘Equality’ is the general principle established in section 9(1) of the Constitution to combat the continuance of apartheid inequalities, which caused the majority of black South African people, whether African, Indian, or Coloured, to suffer disparities in wealth and privilege and also divisions in employment. Section 9(1) of the Constitution entitles people to the equal treatment, protection, and benefit of the law.<sup>3</sup> To resolve the aforementioned disparities, section 9(2) of the Constitution allows for legislative and other measures designed to advance historically disadvantaged people. What the latter section does not suggest is that the measures contemplated may advance some people while they diminish other people, thus inevitably coming into conflict with section 9(1) of the Constitution. Section 9(3) and 9(4) of the Constitution prohibits the state and private persons from unfairly discriminating against anyone.<sup>4</sup> Combating unfair discrimination is the state’s prerogative through national legislation.<sup>5</sup> However, discrimination may be permitted in some instances.<sup>6</sup>

It is generally held that affirmative action is one instance in which such discrimination is permitted.<sup>7</sup> Affirmative action is a policy that promotes suitably qualified people from historically disadvantaged groups in order to afford them equal opportunities. In the context of South African Employment Legislation, however, affirmative action is taken a step further in that it is also required to ensure that historically disadvantaged groups are equitably represented in all units and levels of employment.<sup>8</sup> In other words, there is a requirement for substantive ‘equality’ comprising ‘equitable representation’ to result from the affirmative action procedure.<sup>9</sup>

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<sup>1</sup> Constitution of the Republic of South Africa Act 108 of 1996(hereinafter referred to as the Constitution).

<sup>2</sup> Section 8(1) of the Constitution.

<sup>3</sup> See section 2.2 in Chapter 2.

<sup>4</sup> Section 9 of the Constitution will be dealt with in more detail in Chapter 2 below.

<sup>5</sup> Section 9(4) of the Constitution.

<sup>6</sup> Section 9(5) of the Constitution.

<sup>7</sup> *Munsamy v Minister of Safety and Security* (2013) 7 BLLR 695 (LC) para 18.

<sup>8</sup> Section 15(1) of the EEA.

<sup>9</sup> M McGregor “Blowing the whistle?: the future of affirmative action in South Africa (part 1)” (2014) 6 *SAMLJ* 60, 71.

‘Equitable representation’ means that the staff composition of a designated employer must consist of all race groups mirrored in the national demographic profile.<sup>10</sup> Section 15(1) of the Employment Equity Act 55 of 1998 (EEA) in providing for affirmative action measures state the following:

“Affirmative action measures are measures designed to ensure that suitably qualified people from ‘designated groups’ have equal employment opportunities and are suitably and are equitably represented in all occupational categories and levels in the workplace of a designated employer.”

Demographic representivity is such an affirmative action measure. Demographic representivity is a standard that requires all state and private institutions,<sup>11</sup> and organised spheres of people to be broadly reflective of the national population’s race profile.<sup>12</sup> The African National Congress (ANC) government adopted this concept as policy.<sup>13</sup> Gwede Mantashe, the ANC Secretary General, commenting on the Employment Equity Amendment Bill, notes that:

“The amendment is meant to give employers flexibility of using either national or provincial demographics as long as they can justify their preference... A national company will be expected to use national demographics and a provincially based company will be expected to use provincial demographics.”

Thus, it can be argued that the concept of demographic representivity indirectly introduces quotas in the South African labour market. Furthermore, whether a company is nationally or provincially based, employment always occurs locally as far as employees are concerned. Therefore the result of using national demographics to regulate quotas can result in a situation which is completely distorted to the prejudice of certain race groups who are not evenly represented throughout the country. For example, the current percentage of Coloureds in the Western Cape is 52.4%, but their job quota would be only 10.6% according to the mechanism, even in the Western Cape where they are in the majority.<sup>14</sup> Similarly, in KwaZulu-Natal, where the current percentage of Indians is 10.6%, their job quota would be only 3.1%.<sup>15</sup>

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<sup>10</sup> K Malan “Observations on representivity, democracy and homogenisation” (2010) 3 *TSAR* 427, 430.

<sup>11</sup> Demographic representivity is also applicable to designated employers in the private sector.

<sup>12</sup> Malan (note 10 above) 427.

<sup>13</sup> ANC “Affirmative Action and the New Constitution” (1994) 1, available at <http://www.anc.org.za/show.php?id=283>, accessed on 03 February 2015.

<sup>14</sup> Statistics South Africa *Quarterly Labour Force Survey* 3 (2014), quoted on page xiv of the 14<sup>th</sup> Commission for Employment Equity Annual Report 2013 – 2014.

<sup>15</sup> *Ibid.*

Whilst affirmative action is itself constitutional, it is less clear that the concept of demographic representivity envisaged by the EEA passes constitutional muster. It should be noted that there are problems of unfairness and therefore unfair discrimination in regard to any system requiring quotas, which will be dealt with in detail below.<sup>16</sup> Indeed, the EEA expressly prohibits the use of quotas in the workplace,<sup>17</sup> but it provides for numerical goals to be put in place, a concept difficult to distinguish from quotas. This potential contradiction notwithstanding, affirmative action with the inclusion of provision for demographic representivity as provided for in the EEA has been characterised by the courts as valuable.<sup>18</sup> However, before its recent amendment, section 42 of the EEA contained compliance factors which ameliorated the potentially unfair effect of demographic representivity requirements,<sup>19</sup> which probably accounts for its acceptance by the courts. In particular, when hiring or promoting employees to ensure the ‘equitable representation’ of suitably qualified job aspirants from ‘designated groups’ section 42 required designated employers<sup>20</sup> to adopt numerical targets that were flexible in application, with the consideration of a pool of factors.<sup>21</sup> Amendments to the EEA were expected to provide a better solution concerning the provision of affirmative action benefits.<sup>22</sup>

However, the recently promulgated Employment Equity Amendment Act of 2013<sup>23</sup> (EEAA) having substituted the above-mentioned section 42 assessment factors, sanctions the use of a type of demographic representivity which employs rigid population percentages to apportion job quotas per race group.<sup>24</sup> Thus, the EEAA threatens to create unfair discrimination within the South African labour market by enforcing the concept of demographic representivity with little

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<sup>16</sup> See 4.3 in Chapter 4; 5.3 in Chapter 5.

<sup>17</sup> See Section 15(3) of the EEA.

<sup>18</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 102.

<sup>19</sup> See 4.2.3 in Chapter 4.

<sup>20</sup> Section 1 of the EEA defines a designated employer as “an employer who employs 50 or more employees; an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act; a municipality, as referred to in Chapter 7 of the Constitution; an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement [emphasis added].”

<sup>21</sup> Section 1 of the EEA defined ‘designated groups’ as “black people, women and people with disabilities” before it was amended by the Employment Equity Amendment Act 47 of 2013.

<sup>22</sup> See item 2 of the Memorandum on the Objects of the Employment Equity Amendment Bill 2012.

<sup>23</sup> Act 47 of 2013.

<sup>24</sup> AM Louw “Extrapolating ‘equality’ from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998” (2006) 18 *SAMLJ* 336, 337.

or no flexibility. In particular, section 16 of the EEAA, in providing for a mechanism for assessing the compliance of designated employers with employment equity obligations, allows employers to select either national or regional race population percentages, although the application of regional population percentages will almost always be the fairest approach to adopt. This applies to the public or private sector.<sup>25</sup> It will be argued that the requirement of section 16 of the EEAA to consider race population percentages in relation to the composition of the workforce indirectly imposes the impermissible quota system.<sup>26</sup> Therefore the concept of demographic representivity which section 16 of the EEAA provides for may be unconstitutional.

## 1.2 Research problem and literature review

The EEA expressly prohibited quotas.<sup>27</sup> However, much affirmative action legislation, as well as the practical application of affirmative action, has been based on the concept of ‘demographic representivity’.<sup>28</sup> In respect of employment in the public sector, demographic representivity has been used as a method of transformation, however this practice has been challenged in the case of *Solidarity obo Barnard v South African Police Service*.<sup>29</sup> Notwithstanding this challenge, the concept of demographic representivity is specifically provided for in terms of section 16 by the EEAA that provides that both national and the regional economically active population profiles may be considered when determining the extent to which various race groups are represented in the labour market.<sup>30</sup> The effect of section 16 of the EEAA is to render section 42 of the EEA of 1998 obsolete and to substitute it with a new standard of compliance factors that imposes a rigid type of demographic representivity.

The question arises whether demographic representivity as an affirmative action policy is constitutional, given the fundamental commitment of section 9 of the South African Constitution. Furthermore, the concept of demographic representivity raises questions of fairness and practicality.<sup>31</sup>

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<sup>25</sup> See section 16 of the EEAA.

<sup>26</sup> See section 5.3.3 in Chapter 5.

<sup>27</sup> Note 17 above.

<sup>28</sup> Malan (note 10 above) 428.

<sup>29</sup> 2014 (2) SA 1 (SCA) para 81.

<sup>30</sup> See section 5.2.2 in Chapter 5.

<sup>31</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 39.

Equating representivity to ‘equality’ is held as an objective means of achieving ‘equality’ in the South African labour market.<sup>32</sup> Malan, commenting on the use of the concept of representivity in both the EEA and the Broad Based Black Economic Empowerment Act<sup>33</sup> as a method of transformation, observes that representivity and ‘equality’ can be seen to have become two equals. He notes in this regard that representivity should in fact rather be a prerequisite for the achievement of ‘equality’.<sup>34</sup> Malan’s view complements that of Van der Westhuizen J in *Stoman v Minister of Safety and Security*<sup>35</sup> that “efficiency and representivity, or ‘equality’, should, however not be viewed as separate competing or even opposing arms.” Adopting a contrasting view, Louw considering transformation in the South African sports field, noted that representivity has superseded ‘equality’.<sup>36</sup> Despite these differing views, both Louw and Malan’s observations point to the fact that representivity has become the new strategy of achieving ‘equality’.

Whether representivity can practically be equated to ‘equality’ in the South African labour market is a question that still needs to be answered.<sup>37</sup> Equating representivity to ‘equality’ however negates the entitlement to fairness because the standard of ‘equality’ introduced requires the application of substantive ‘equality’, a notion that focusses only on advancing historically disadvantaged people. Giving rise to substantive ‘equality’, affirmative action, through the mechanisation of the concept of demographic representivity create new patterns of disadvantage by excluding other historically disadvantaged groups while benefitting mostly Africans, who are a majority in South Africa.<sup>38</sup> Representivity also creates impediments for the appointment of white people in contravention of section 9(2) of the Constitution that requires measures to be adopted that are designed to promote the achievement of ‘equality’.<sup>39</sup> Venter<sup>40</sup> asserts that the concept of demographic representivity inevitably comes into conflict with the

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<sup>32</sup> Malan (note 10 above) 446.

<sup>33</sup> Act 53 of 2003.

<sup>34</sup> Malan (note 10 above) 446.

<sup>35</sup> (2002) 23 ILJ 1020 (T) para 482.

<sup>36</sup> AM Louw “Should the playing field be levelled? Revisiting affirmative action in professional sport” 2004 *Stellenbosch LR* 409, 419.

<sup>37</sup> See section 4.3 in Chapter 4.

<sup>38</sup> Malan (note 10 above) 447.

<sup>39</sup> See section 9(2) of the Constitution.

<sup>40</sup> F Venter “The limitations of restitutionary equality” (2004) 7 *PELJ* 1.

constitutional value of ‘equality’. Thus, demographic representivity, a mechanism of affirmative action cannot be sustained if it runs counter to the value of ‘equality’.

An ideal model of an affirmative action measure would be one that affords all citizens equal opportunities, taking into account various options available.<sup>41</sup> However, the concept of demographic representivity seems to be a reactionary measure targeted at punishing the white minority for apartheid transgressions as opposed to a genuine process of achieving equity. Mildred Oliphant, the Minister of Labour hinted on the motive behind the drafting of the EEAA in her speech to the National Council of Provinces as follows:

“Unfortunately employers have refused or are unwilling to make a leap of faith with regards to transformation. Reports received from employers over the past 15 years clearly show that not much progress has been made. Whites and males, particularly White males, continue to dominate in the middle to upper echelons of organisations, according to the report by the Commission for Employment Equity for 2012 reporting period... It is clear that legislation has not induced any serious transformation in the upper echelons where real decisions are taken. It is also that the patterns as noted above will not lead to any different results any time soon. The current amendments for EE, therefore could not have come at a better time.”<sup>42</sup>

It is common cause that the right to ‘equality’ is subject to limitations.<sup>43</sup> However, less restrictive means could be used to safeguard against infringements that would render the whole essence of remedial measures unconstitutional. When the EEA was initially enacted, the legislature disregarded the possibility of affirmative action becoming discriminatory itself.

While Louw<sup>44</sup> and other scholars<sup>45</sup> criticise the notion of demographic representivity, much of their emphasis has been on the practicality of demographic representivity in the South African labour market. Their argument may be considered to be lacking a detailed exploration regarding the constitutionality of the concept of demographic representivity in the labour market. Thus, the question remains whether the concept of demographic representivity is a constitutionally acceptable affirmative action practice.

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<sup>41</sup> See T Cohen and L Moodley “Achieving Decent Work in South Africa?” (2012) 15 *PER* 320, 325, these options include furthering the education and skills of historically disadvantaged people and increasing the job creation capacity of the government.

<sup>42</sup> Mildred Oliphant, Speech on the Employment Equity Amendment Bill to the National Council of Provinces, Cape Town, 21 November 2013.

<sup>43</sup> Section 36(1) of the Constitution.

<sup>44</sup> Louw (note 24 above) 338.

<sup>45</sup> Malan (note 10 above) 447; Venter (note 40 above) 1.

In order to answer this question the following research questions will be addressed in the dissertation.

### **1.3 Research questions**

The research questions that will be answered by the dissertation are as follows:

1. To what extent are affirmative action and the mechanism of demographic representivity limited in terms of the Constitution; and in what circumstances does demographic representivity amount to unfair discrimination?
2. What provision was made for demographic representivity in the EEA 55 of 1998 and what were the legal and practical effects of this provision?
3. What provision is made for demographic representivity in the EEAA 47 of 2013 and what are the legal, constitutional and practical effects of this provision?

### **1.4 Research aim**

The aim of this study is to clarify the scope and limits of the concept of demographic representivity in the South African labour market. To the ANC and the Legislature, demographic representivity has appeared to be the most realistic method of remedying divisions in employment caused by systematic discrimination against the majority of black South African people, which occurred in the past. However, the concept of demographic representivity has potential negative effects with regard to unfair discrimination in the South African labour market. Despite the prevalence of disputes concerning the application of demographic representivity in the labour market, it has proved difficult to challenge the concept because it is often applied under the guise of implementing the permissible numerical goals. As the recent EEAA<sup>46</sup> appears to remove safeguards which previously legitimised demographic representivity,<sup>47</sup> its constitutionality needs to be interrogated. However, the opportunity also arises to investigate whether the concept of demographic representivity negates the right to ‘equality’ in the labour market *ab initio*.

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<sup>46</sup> Note 23 above.

<sup>47</sup> Note 25 above.

## **1.5 Research outline**

In order to achieve the aim stated above, given the overriding protection afforded by the right to ‘equality’ in the Constitution, the dissertation will analyse the constitutional acceptability of demographic representivity. This is done in order to establish whether the concept is a permissible affirmative action practice considering the prohibition placed by section 9(3) of the Constitution against race-based discrimination. Also considering that constitutional interpretation is not limited to individual sections in the Constitution, guidance is sought from other provisions in the Constitution that provide for representivity. Thereafter the legal and practical effects of demographic representivity provided for in terms of the EEA are discussed. Moreover, the motivation behind the drafting of the EEAA is established and the legal and practical effects of demographic representivity provided for in terms of that Act<sup>48</sup> are considered. Having considered the abovementioned aspects, a conclusion will be drawn.

## **1.6 Conclusion**

The achievement of ‘equality’ is one of the founding values established by section 1 of the Constitution.<sup>49</sup> A number of contraventions have been noted that contradict the right to ‘equality’ entrenched in section 9 of the Constitution. Thus, the following chapter will provide a critical analysis of demographic representivity in relation to section 9 of the Constitution and the constitutional founding values created by Chapter 1 of the Constitution being human dignity, the achievement of ‘equality’, and the advancement of human rights and freedoms, non-racialism and non-sexism.<sup>50</sup>

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<sup>48</sup> Note 23 above.

<sup>49</sup> Section 1(a) of the Constitution.

<sup>50</sup> Section 1 of the Constitution.

## CHAPTER 2: AFFIRMATIVE ACTION AND UNFAIR DISCRIMINATION

### 2.1 Introduction

Because of the history of South Africa with its racial divisions, ‘equality’ is of paramount importance. The principle of ‘equality’ provides that people who are in the same position must be treated alike.<sup>51</sup> Moreover, the achievement of equality is one of the core values of the Constitution.<sup>52</sup> These founding values are the underlying principles that govern the interpretation of all obligations created by the Constitution. The achievement of ‘equality’ is one such obligation created by section 9 of the Constitution.<sup>53</sup> Despite this, the Constitutional Court (CC) jurisprudence seems to have taken a course that isolates affirmative action from the general ‘equality’ guarantee and the rest of the Constitution.<sup>54</sup> This approach appears to infringe on constitutional values and affects the ability of the lower courts to resolve affirmative action disputes rationally and fairly.<sup>55</sup> Affirmative action derives from substantive ‘equality’, a notion that recognises group disadvantage and determines the allocation of employment opportunities based on the social and historical backgrounds of people or groups of people.<sup>56</sup> Affirmative action measures are designed to give effect to substantive ‘equality’.

The concept of demographic representivity, a widespread mechanism of affirmative action is one such affirmative action measure. What needs to be established is whether the concept of demographic representivity is a permissible affirmative action measure constitutionally.

### 2.2 Section 9(1) of the Constitution

Formal ‘equality’ is the general notion provided in section 9(1) of the Constitution and it requires that people who are similarly placed be treated alike.<sup>57</sup> Section 9 of the Constitution reads as follows:

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<sup>51</sup> S Fredman *Discrimination Law* (2001) 16.

<sup>52</sup> Note 49 above.

<sup>53</sup> Section 9(1) of the Constitution.

<sup>54</sup> JL Pretorius “Fairness in transformation: A critique of the Constitutional Court’s affirmative action jurisprudence” (2010) 26 *SAJHR* 536.

<sup>55</sup> *Ibid.*

<sup>56</sup> McGregor (note 9 above) 71.

<sup>57</sup> I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 223.

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>58</sup>

Section 9(1) of the Constitution provides that every person is entitled to equal treatment regardless of their attributes and characteristics.<sup>59</sup> Accordingly, any differential treatment of people for the purposes of section 9(1) would usually amount to unfair discrimination in terms of section 9(3) of the Constitution.<sup>60</sup> The Constitution affirms human dignity, the achievement of ‘equality’, and the advancement of human rights and freedoms, in a non-racialist and non-sexist society as underlying values on which the South African society is found.<sup>61</sup> These underlying principles must govern the interpretation of rights created by the Constitution.<sup>62</sup> However, an ‘equality’ ideology that is purely based on formal ‘equality’ has been considered problematic for the South African society which still bears the scars of apartheid. From these perceived shortcomings of the notion of formal ‘equality’, the notion of substantive ‘equality’ was born.<sup>63</sup> The notion of substantive ‘equality’ considers the social and historical status of people or groups of people in order to determine whether the constitutional obligation to achieve ‘equality’ is being fulfilled.<sup>64</sup> However, substantive ‘equality’ is not an exception to the right to ‘equality’ and affirmative action measures that are adopted in order to achieve substantive ‘equality’ must comply with section 9 of the Constitution as a whole.<sup>65</sup>

### **2.3 The constitutional standard of affirmative action measures**

Section 9(2) of the Constitution provides as follows:

*“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 [my own emphasis].”*

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<sup>58</sup> Note 53 above.

<sup>59</sup> Currie & De Waal (note 57 above) 213.

<sup>60</sup> Ibid 222.

<sup>61</sup> Note 50 above.

<sup>62</sup> Currie & De Waal (note 57 above) 211.

<sup>63</sup> McGregor (note 9 above) 70.

<sup>64</sup> M McGregor “Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces” (2011) 1 De Jure 111, 113.

<sup>65</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) para 74.

The first part of section 9(2) of the Constitution requires that affirmative action measures must uplift the promotion of ‘equality’ by guaranteeing every person the enjoyment of all rights and freedoms that are bestowed on them by the ‘equality’ protection under section 9(1) of the Constitution. Thus, the legislature in enacting any legislation that is directed at protecting and advancing people who were susceptible to past discrimination, should ensure that such measures do not impinge the rights of those excluded from their benefit.<sup>66</sup>

The second part of section 9(2) provides a limited exception to the general principle set by the first part of section 9(2), that ‘equality’ must “include the full and equal enjoyment of all rights and freedoms.” Thus the affirmative action provision provided in the second part of section 9(2) of the Constitution is not an end in itself and should be interpreted in a restricted manner subject to the first part.<sup>67</sup> The concept of demographic representivity is one such mechanism of affirmative action utilised by the EEA to advance people who were susceptible to past discrimination which may give rise to further inequalities. Thus, the constitutionality of the concept has to be tested. A threefold enquiry was formulated in *Minister of Finance and Another v Van Heerden*<sup>68</sup> for the purpose of testing the legitimacy of affirmative action measures under section 9(2) of the Constitution. The three enquiries that must be satisfied are:

- whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination.
- whether the measure is designed to protect or advance such persons or categories of persons.
- whether the measure promotes the achievement of ‘equality’.<sup>69</sup>

In *Van Heerden*,<sup>70</sup> Moseneke J stated that remedial measures that pass the internal test of section 9(2) cannot be presumed unfair, even though they may differentiate between people based on grounds listed in section 9(3) of the Constitution. Section 9(3) of the Constitution reads as follows:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

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<sup>66</sup> Currie & De Waal (note 57 above) 241.

<sup>67</sup> Ibid.

<sup>68</sup> 2004 (6) SA 121 (CC) para 37.

<sup>69</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 37.

<sup>70</sup> Note 68 above, para 25.

The weakness of the *Van Heerden* ‘rationality test’ is that it legitimises a measure for merely passing its low threshold test even though that measure can disproportionately impact on those excluded from its benefits. However, Moseneke J’s assertion above points to the fact that those measures that are aimed at advancing the previously disadvantaged people but fail to pass the section 9(2) internal test can be presumed to be unfair in terms of section 9(5) of the Constitution read together with section 9(3).<sup>71</sup> Each of the three stages of the *Van Heerden* enquiry are discussed in turn below to establish the legality of the concept of demographic representivity.

### **2.3.1 The measure must target historically disadvantaged people**

The first requirement of the *Van Heerden* ‘stages of enquiry’ is that affirmative action measures must target historically disadvantaged people as their beneficiaries. Thus, the envisaged measures must have the object of preferring groups of people previously disadvantaged by unfair discrimination.<sup>72</sup> The EEA adopted ‘equitable representation’ as a means of achieving substantive ‘equality’, and to that effect utilises the concept of demographic representivity to reach this objective. The EEA’s aim is set out clearly in section 2 as achieving employment equity by:

- a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) implementing affirmative action measures to redress the disadvantages in employment experienced by ‘designated groups’, in order to ensure their ‘equitable representation’ in all occupational categories and levels in the workforce.

Section 15 of the EEA also provides that:

- (1) 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>73</sup>

The above-mentioned provisions makes the concept of demographic representivity comply with the first leg of the *Van Heerden* rationality test. This is because the concept targets groups of people which were susceptible to past unfair discrimination, namely, black people,<sup>74</sup> women and

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<sup>71</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 24.

<sup>72</sup> *Ibid* para 38.

<sup>73</sup> Note 8 above.

<sup>74</sup> The term black people in terms of section 1 of the EEA include African, Coloured and Indian people.

disabled people.<sup>75</sup> In *Chinese Association of South Africa v The Minister of Labour*,<sup>76</sup> South African Chinese people were also declared to be black people for the purposes of section 1 of both the EEA and the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEEA). This is because people of Chinese descent were classified as Coloureds during the apartheid era and to that effect fit within the definition of black people in terms of both the abovementioned Acts.<sup>77</sup>

### **2.3.2 The measure must protect or advance a historically disadvantaged class**

The second requirement of *Van Heerden*<sup>78</sup> is that an affirmative action measure must be designed to protect or advance classes of people previously disadvantaged by unfair discrimination. Thus, remedial measures should be capable of reasonably attaining a desired future goal.<sup>79</sup> The only kind of disadvantage that should be considered in order for a person to be advanced under affirmative action measures is their history of past discrimination. It is not adequate for an affirmative action measure to merely target historically disadvantaged people. The second leg of the *Van Heerden* test must complement the first leg by fulfilling the requirement to empower historically disadvantaged people. In *Public Servants Association of South Africa and Others v Minister of Justice and Others*,<sup>80</sup> Swart J held that:

“The measures must be designed to achieve something. This denotes . . . a causal connection between the designed measures and the objectives [emphasis added].”

A rational connection must exist between an affirmative action measure and the purpose it seeks to achieve in order for that measure to be deemed legitimate for the purpose of section 9(2) of the Constitution.<sup>81</sup> However, this requirement of a rational connection raises a question whether belonging to a group that suffered past disadvantage should automatically entitle a person to benefit under affirmative action measures. Logic dictates that an enquiry into individual disadvantage of people from historically disadvantaged groups is necessary before they can be

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<sup>75</sup> Section 1 of the EEA.

<sup>76</sup> (NDP) unreported case number 59251/2007 (18 June 2008) para 1.

<sup>77</sup> Lloyd Ramutloa “RE: Chinese Association of South Africa” Department of Labour 24 June 2008, available at <http://www.labour.gov.za/DOL/media-desk/media-statements/2008/re-chinese-association-of-south-africa>, accessed on 5 March 2015.

<sup>78</sup> Note 68 above, para 41.

<sup>79</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 41.

<sup>80</sup> 1997 (3) SA 925 (T) para 989A-B.

<sup>81</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 42.

entitled to benefit under any affirmative action measures. Otherwise the failure to conduct such an enquiry can disadvantage those excluded by the measure. The facts of the case of *Solidarity obo Barnard*<sup>82</sup> provides an example of such issues. In this matter Barnard, a suitably qualified white female police officer, was denied a promotion based on representivity, the post being reserved for Africans.<sup>83</sup> Nevertheless, it is difficult to understand how Africans who had the privilege to reach the same rank as hers were classified as disadvantaged, and this shows practical problems associated with the use of past disadvantage as a criteria for people who are now advantaged. Moseneke ACJ held that the National Commissioner practiced his discretion rationally by not appointing Barnard, citing that such conduct was in line with the dictates of section 6(2) of the EEA to advance employment equity goals.<sup>84</sup> The first two stages of the *Van Heerden* enquiry do not include a fairness test and the risk arises that an irrational and arbitrary measure can be capable of reaching its intended goals.

Clearly the EEA's concept of demographic representivity fulfils the second leg of the *Van Heerden* test. Support for this is to be found in section 15(3) of the EEA which reads as follows:

“The measures<sup>85</sup> referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.”

To advance and promote groups of people that were susceptible to past unfair discrimination, preferential treatment of those groups and the use of numerical goals that are directed at increasing the representation of people from those groups is permitted.<sup>86</sup> Numerical goals are set in an employment equity plan that is prepared after an analysis to determine the extent to which ‘designated groups’ are underrepresented in all levels of the workforce.<sup>87</sup> Representivity based on demographics informs the workforce analysis.<sup>88</sup>

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<sup>82</sup> 2014 (6) SA 123 (CC).

<sup>83</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC). para 201.

<sup>84</sup> *Ibid* para 69.

<sup>85</sup> Affirmative action measures.

<sup>86</sup> Section 15(3) of the EEA.

<sup>87</sup> Section 19(2) of the EEA.

<sup>88</sup> See section 16 of the EEA.

### 2.3.3 The measure must promote the achievement of ‘equality’

The third requirement in the *Van Heerden*<sup>89</sup> test is that affirmative action measures must promote the achievement of ‘equality’, positive action being necessary for the redress of past inequalities. Thus, the perspective of a diverse society needs to be taken into account in executing remedial measures.<sup>90</sup> There must be some degree of proportionality and fairness involved. Proportionality requires striking a balance between two equally important considerations, and that is, the decision to withhold a benefit from some people and the severity of such action.<sup>91</sup> On the other hand rationality requires reasonableness when making decisions that may unfairly impact on those excluded by remedial measures.

The concept of demographic representivity in terms of both the EEA and the EEAA does not promote the achievement of ‘equality’, the concept is an unfair mechanism which achieves directly the opposite of ‘equality’. Section 16 of the EEAA reads as follows:

42. (1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:
- (a) The extent to which suitably qualified people from and amongst the different ‘designated groups’ are equitably represented within each occupational level in that employer’s workforce in relation to the- demographic profile of the national and regional economically active population.

The concept of demographic representivity requires the workforce of any designated employer to reflect the relative population of the national or regional profiles, and this is what is purported to be the achievement of ‘equality’. Rationality requires that if demographic representivity is to be regarded as a proxy of ‘equality’,<sup>92</sup> a reasonable link must exist between the two concepts. There is no link whatsoever between the concept of demographic representivity and ‘equality’. Demographic representivity only boosts representation of ‘designated groups’ in the workforce.

The failings of the concept of demographic representivity are that it is irrational and arbitrary as shown by the unrealistic figures (also known as the ‘numbers game’) that were at play in *Naidoo v Minister of Safety and Security*. In this matter<sup>93</sup> an Indian female police officer was denied a

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<sup>89</sup> Note 68 above, para 44.

<sup>90</sup> *Minister of Finance and another v Van Heerden* (note 18 above) para 44.

<sup>91</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 52.

<sup>92</sup> Louw (note 36 above) 409, 419.

<sup>93</sup> *Naidoo v Minister of Safety and Security and Another* 2013 (3) SA 486 (LC) para 6.

promotion on the basis that there were no vacancies available for Indians because of the group's low percentage of 2.5% in the national population profile. Naidoo's promotion was not approved by the national panel despite having the second best score out of all the candidates who were interviewed for the promotion. The reasons cited by the national panel were that Naidoo's appointment would not address representivity as well as the organisations service delivery standards.<sup>94</sup> However, after resolving that Naidoo was unfairly discriminated by a quota driven employment equity plan (EEP), only informed by national demographics, the court ordered the SAPS to appoint her.<sup>95</sup>

If a measure fails to pass the section 9(2) internal test, the dictates of the principle of rule of law requires an unfair discrimination enquiry in terms of the *Harksen v Lane*<sup>96</sup> fairness test to be conducted. The following section discusses how demographic representivity can lead to unfair discrimination.

## **2.4 Factors for determining instances of unfair discrimination**

Unfair discrimination is described as differentiating between people based on illegitimate grounds that are listed in section 9(3) of the Constitution.<sup>97</sup> The prohibition against unfair discrimination also applies to grounds that are analogous to those listed in section 9(3).<sup>98</sup> Any applicant who claims to have been unfairly disadvantaged based on an analogous ground should prove that the use of such attributes and characteristics not listed in section 9(3) of the Constitution unfairly impacts on their dignity as human beings. The determination whether a complainant has been unfairly discriminated depends on factors that were formulated in *Harksen*<sup>99</sup> which are as follows:

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

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<sup>94</sup> Ibid para 6.

<sup>95</sup> Ibid para 232.

<sup>96</sup> 1998 (1) SA 300 (CC) para 51.

<sup>97</sup> Currie & De Waal (note 57 above) 222.

<sup>98</sup> Ibid 236.

<sup>99</sup> Note 96 above.

- the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These are discussed below in interrogating whether the concept of demographic representivity in terms of both the EEA and the EEAA unfairly impacts on people from non-designated groups as well as other minority groups that are often excluded from affirmative action benefits.

#### **2.4.1 The position of the complainants**

The position of the complainant in society is one of the influential factors in determining whether a measure has an unfair impact on the victim.<sup>100</sup> The criterion used to determine affirmative action beneficiaries in the Constitution is past disadvantage caused by unfair discrimination.<sup>101</sup> This criterion in section 9(2) of the Constitution has been abandoned in both the EEA and the EEAA which use race, sex and disability as their only criterion to determine beneficiaries of affirmative action. *Naidoo* is one such decision in which people from minority groups were denied promotions based on demographic representivity, a ground which is analogous to grounds of sex and race which are prohibited in section 9(3) of the Constitution. The concept of demographic representivity which is a mechanism empowered by both the EEA and the EEAA makes use of degrees of disadvantage which often results in African people, who are a majority in the national population profile always benefiting the most.

Minority groups have been disadvantaged and continue to be disadvantaged under both the EEA and the EEAA. In the context of *Solidarity obo Barnard*,<sup>102</sup> Barnard in her personal capacity and as a public servant belongs to a class of people who have been deeply affected by the past and present inequalities, namely, women.<sup>103</sup> Just as there is a need to eradicate racial discrimination, there is also a need to remedy gender disadvantages. Gender assumptions were recognised by the CC in *President of the Republic of South Africa and Another v Hugo*.<sup>104</sup> The failure to declare Ms Barnard's exclusion as unfair discrimination based on race and gender shows the CC's changing views influenced by race.

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<sup>100</sup> Ibid.

<sup>101</sup> See section 9(2) of the Constitution.

<sup>102</sup> Note 82 above.

<sup>103</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 171.

<sup>104</sup> 1997 (6) BCLR 708 (CC) para 109.

## **2.4.2 The nature of the provision and the purpose sought to be achieved**

The concept of demographic representivity realises the principle of social inclusion which is envisioned in the Constitution.<sup>105</sup> The concept seeks to redress the disproportionate representation of various race groups in the South African labour market.<sup>106</sup> However, the concept of demographic representivity in both the EEA and the EEAA is deeply rooted in the idea of ‘equitable representation’, a term which is alien to section 9 of the Constitution. The requirement for demographic representivity as proof of ‘equality’ is not referred to in the Constitution, other than in section 174 of the Constitution which requires broad representivity when appointing judges.<sup>107</sup> Section 9(1) of the Constitution provides for ‘equality’ of opportunities<sup>108</sup> while the concept of demographic representivity seeks ‘equality’ of outcomes, resulting in punitive and retaliatory measures.

As distinct from *Hugo*,<sup>109</sup> where the discriminatory conduct was held to serve a legitimate governmental purpose, the concept of demographic representivity fails to do so. By requiring that all designated employers make use of the national and the regionally economically active population profiles in determining employment quotas per each race group, new patterns of disadvantage are created for minority groups being Coloured, Indian and the physically able bodied White people.<sup>110</sup> Thus, the concept of demographic representivity in terms of both the EEA and the EEAA unjustifiably creates degrees of disadvantage that tend to prefer Africans to the exclusion of other racial groups designated as legitimate beneficiaries of affirmative action.

## **2.4.3 The extent to which rights or interest of the complainants have been impaired**

In *S v Makwanyane*,<sup>111</sup> the right to human dignity was held to be one of the fundamental factors for consideration in determining whether any conduct is denigrating. Human dignity is one of the founding values in the Constitution that guide the interpretation of affirmative action measures.<sup>112</sup> Moreover, human dignity is an aspect of the general notion of ‘equality’ which

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<sup>105</sup> See the Preamble of the Constitution.

<sup>106</sup> Malan (note 10 above) 427.

<sup>107</sup> See section 174(2) of the Constitution.

<sup>108</sup> *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) para 58.

<sup>109</sup> Note 104 above, para 115.

<sup>110</sup> Malan (note 10 above) 428.

<sup>111</sup> 1995 (3) SA 391 (CC) para 94, 135.

<sup>112</sup> Note 50 above.

recognises that all people are equal in dignity, and to that effect that it is unfair discrimination to impugn on a person's dignity. Demographic representivity breaches the right to human dignity. In *Solidarity obo Barnard*,<sup>113</sup> race was used by the National Commissioner as a determinant factor, thereby outweighing Barnard's gender, experience, and attitude, and to that effect, her value as a person was seriously undermined. The right to 'equality' and dignity are independent rights that complement each other and sometimes the affirmative action aspect of 'equality' comes into conflict with the right to human dignity.<sup>114</sup>

The founding values of the Constitution, namely, human dignity, 'equality', non-racialism, and non-sexism,<sup>115</sup> do not permit the exclusion of those disfavoured by section 9(2) of the Constitution. Moreover, the CC's jurisprudence should be influenced by Immanuel Kant's philosophical thinking on human dignity as it emphasises that "human worth is impaired when persons are treated, not as ends in themselves, but as mere objects."<sup>116</sup> Thus, people should not be treated as a means to an end but rather as ends themselves.<sup>117</sup> This means that those disfavoured by section 9(2) of the Constitution should not be denigrated as a means of empowering the targeted groups. Dignity encompasses both individualistic and collective rights.<sup>118</sup> Thus, the concept of demographic representivity is unconstitutional because it distinguishes between people who are inherently equal in dignity thereby impairing their self-worth.<sup>119</sup>

The shortcomings of *Solidarity obo Barnard*<sup>120</sup> are discussed below.

## **2.5 The shortcomings of *Solidarity obo Barnard* (CC)**

The *Solidarity obo Barnard*<sup>121</sup> decision displays the tension that is caused by the implementation of remedial measures in complying with the obligation of affirmative action. Barnard, a white female police officer, was denied a promotion on two occasions despite being the best

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<sup>113</sup> Note 82 above, para 177.

<sup>114</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 169.

<sup>115</sup> Note 50 above.

<sup>116</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 26.

<sup>117</sup> *S v Dodo* 2001 (3) SA 382 (CC) para 38.

<sup>118</sup> S Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34, 51.

<sup>119</sup> *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 31.

<sup>120</sup> Note 82 above.

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

candidate.<sup>122</sup> The reasons given by the National Commissioner were that her appointment would not advance representivity and that the post did not compromise service delivery.<sup>123</sup> White females were overrepresented at salary level 9.<sup>124</sup> The majority judgement of the CC, led by Moseneke ACJ, held that the South African Police Service (SAPS) employment equity plan (EEP) is a measure as contemplated in section 9(2) of the Constitution,<sup>125</sup> refusing however to pronounce on whether the EEP amounted to the implementation of quotas or not. The CC based its decision on the fact that the National Commissioner was empowered by the National Instrument to exercise his discretion as long it was rational.<sup>126</sup> Thus, the fact that the SAPS EEP did not bar Barnard from future professional advancement, the non-critical role of the post and the National Commissioner's failure to even appoint African candidates in the absence of best suited candidates ameliorated his conduct as pursuing genuine employment equity goals.<sup>127</sup>

The CC's main judgement may have been wrong for several reasons. Firstly, the CC had a misconception that it was not empowered to pronounce on the legality of the SAPS EEP in the absence of an administrative law review claim. Barnard alleged unfair discrimination, which is a different claim from an administrative law review.<sup>128</sup> The EEA prohibits unfair discrimination in terms of section 6(1), and Barnard claimed that the National Commissioner's decision, which was informed by the SAPS EEP, violated this prohibition.<sup>129</sup> Section 6(2) of the EEA provides an affirmative action defence.<sup>130</sup> However, the SAPS can only be exonerated from an unfair discrimination claim if the National Commissioner's decision is compliant with the aim of the EEA. The EEA expressly prohibits quota driven affirmative action measures.<sup>131</sup> Thus, the CC was supposed to interpret the purpose of the EEA and thereafter establish whether the National Commissioner's conduct complied with the Act.<sup>132</sup> The CC's refusal to pronounce on the legality

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<sup>122</sup> *South African Police Service v Solidarity obo Barnard* 2014 (note 83 above) para 201.

<sup>123</sup> *Ibid* para 16.

<sup>124</sup> *Ibid* para 66.

<sup>125</sup> *Ibid* para 70.

<sup>126</sup> *Ibid* para 66.

<sup>127</sup> *Ibid* para 65, 70.

<sup>128</sup> *Ibid* para 84.

<sup>129</sup> *Ibid* para 86.

<sup>130</sup> Section 6(2)(a) of the EEA provides that "It is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act."

<sup>131</sup> Note 86 above.

<sup>132</sup> Act 55 of 1998.

of the SAPS EEP was a miscarriage of law. This is despite an earlier pronouncement by the court in *Cusa v Tao Ying Metal Industries and Others*<sup>133</sup> that:

“Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality [emphasis added].”

The CC’s failure to uphold its earlier decision in *Cusa* shows the court’s inconsistency in its application of law. As stated in *Cusa*,<sup>134</sup> the point of law was that Barnard had not asserted her right to fairness on the basis that the SAPS EEP unfairly impacted on her. She had only claimed unfairness on the part of the National Commissioner’s decision not to appoint her. To quote from *The Bill of Rights Handbook*,<sup>135</sup> Currie and De Waal states the standard set under the rule of law, that rationality is not triggered only by differentiation, and this means that the complainant does not need to raise a claim that legislation or a measure differentiates between people to trigger the test of such legislation or measure. The exercise of public power is required to be rational, thus, the CC was supposed to answer the question whether the SAPS EEP amounted to the implementation of quotas regardless of Barnard’s plea. It is difficult to understand how the CC adjudicated the *Barnard* case without evaluating the SAPS EEP against the requirements of the EEA, considering that the National Commissioner’s decision was informed by the SAPS EEP.

Secondly, the CC erred when it pronounced that the SAPS EEP did not constitute an absolute bar to the professional advancement of Barnard. Section 15(4) of the EEA<sup>136</sup> shows that the role of the EEA is not only to advance affirmative action, but also to allow individuals from non-designated groups who are prevented from advancing by affirmative action to challenge affirmative action measures that impose absolute barriers. Barnard alleged that the National Commissioner created an absolute barrier for her professional advancement based on the fact that she is a white person, conduct that section 15(4) of the EEA prohibits.<sup>137</sup> In refuting Barnard’s allegation, the CC reasoned that she had since been promoted to a higher rank than she

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<sup>133</sup> 2009 (2) SA 204 (CC) para 68.

<sup>134</sup> *Ibid.*

<sup>135</sup> Currie & De Waal (note 57 above) 222.

<sup>136</sup> Section 15(4) of the EEA provides that, “Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from ‘designated groups’.”

<sup>137</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 90.

was before.<sup>138</sup> However, the CC's conclusion was unreasonable because the court chose to ignore an absolute barrier that had been imposed on Barnard with respect of the promotion to salary level 9 and the court justified this anomaly by referring to a promotion that came at a later stage.

Thirdly, the CC erred by commenting on the National Commissioner's claim that the non-appointment of Barnard did not compromise SAPS's provision of service delivery. By virtue of the fact that the post existed within the ranks of the SAPS its functions needed to be performed.<sup>139</sup> Moreover, the post was advertised on three occasions and this serves to show that the post might have been important for SAPS provision of service delivery.<sup>140</sup> The CC's conclusion that the National Commissioner's decision not to appoint Barnard did not hamper the provision of service delivery encroached on the separation of powers.<sup>141</sup> The CC commented on a matter of policy, this amounts to overseeing the executive and that is in breach of the separation of powers. Thus, the CC's main decision in its entirety is tainted by this illegality.

Lastly, the CC's failure to recognise Barnard as a member of a designated group was wrong. The CC chose to restrict the requirements for representivity to only the race imperative. Being a woman, Barnard is a legitimate beneficiary of affirmative action.<sup>142</sup> The CC chose to be silent on this point. The decision was in direct conflict with section 9(2) of the Constitution that requires the advancement of historically disadvantaged people as a whole. The CC adopted the notion of the degree of disadvantage that was used in *Motala v University of KwaZulu-Natal and Another*,<sup>143</sup> which was wrong. The SAPS National Commissioner should have considered the gender imperative and then tried to balance it with the need to achieve race representivity.<sup>144</sup> The *Harksen* fairness test requires proportionality to always inform decisions that may unfairly impact on people. Proportionality requires the balancing of factors if one factor is to supersede the other. The CC advanced a defence for the National Commissioner's failure to consider gender stating that Barnard never raised the gender argument.<sup>145</sup> The fact that the CC chose not

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<sup>138</sup> Ibid para 67.

<sup>139</sup> Ibid para 187.

<sup>140</sup> Ibid para 25.

<sup>141</sup> Ibid para 189.

<sup>142</sup> Ibid para 114.

<sup>143</sup> 1995 (3) BCLR 374 (D) para 383C, D.

<sup>144</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 116.

<sup>145</sup> Ibid para 122.

to raise this point of law that was lacking in Barnard's argument, applying the court's earlier decision in *Cusa*,<sup>146</sup> points to the CC's decision being reached on a wrong point of law consequently being affected by this illegality.

Thus, for the reasons mentioned above, the failure of SAPS to appoint Barnard was irrational and unfair and supports the claim that the EEP has a quota driven motive for representivity, which conflicts with the EEA's aim.<sup>147</sup> Moseneke ACJ's decision appears to have been swayed by his desire to defend the weaknesses of the rationality test he established in his earlier judgement in *Van Heerden*.<sup>148</sup> The *Van Heerden* rationality test mainly relies on its first two legs of enquiry and abandons the third leg which requires a fairness test consequently resulting in a low threshold for any legislation or a measure to pass muster under section 9(2) of the Constitution. The CC made a very wrong precedent by relying on the *Van Heerden* rationality test to adjudicate the *Solidarity obo Barnard*<sup>149</sup> decision.

## 2.6 Conclusion

The *Van Heerden* test sets a very low threshold for measures to meet the requirement of legitimate affirmative action measures in terms of section 9(2) of the Constitution. The *Van Heerden* test sets a very risky standard that has the effect of endorsing measures that otherwise impact on the inherent dignity of people as legitimate affirmative action measures. The rationality test set in *Van Heerden* emphasises more on the first two legs of enquiry however without incorporating a fairness test as is the case in the *Harksen* fairness test. Thus, in the interest of safeguarding people against irrational and arbitrary affirmative action measures, the *Harksen* fairness test is the most appropriate approach to utilise in determining the legality of affirmative action measures. The *Harksen* fairness test offers a strict standard which prevents measures that meet the *Van Heerden* rationality test but otherwise impugn on human dignity from being endorsed as legitimate affirmative action measures. As displayed above, the concept of demographic representivity in terms of both the EEA and the EEAA is an illegitimate affirmative action measure that fails the *Harksen* fairness test because it has an unfair impact on minority groups.

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<sup>146</sup> Note 133 above, para 68.

<sup>147</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 92.

<sup>148</sup> Note 68 above.

<sup>149</sup> Note 82 above.

## CHAPTER 3: PROVISIONS FOR REPRESENTIVITY IN THE CONSTITUTION

### 3.1 Introduction

The concept of demographic representivity has been critiqued with regard to its breach of the right to ‘equality’.<sup>150</sup> Section 9(2) of the Constitution allows for affirmative action measures and sets a standard to which they should conform however, without providing a procedure of how those measures should be achieved. The duty is placed on the courts to interpret the required procedure that is envisaged by section 9(2) of the Constitution as displayed in *Solidarity obo Barnard*.<sup>151</sup> Because the interpretation of the Constitution is not limited to section 9, it is necessary to consider other sections that mention requirements akin to demographic representivity and which may also provide guidance. The extent to which representivity is provided for in these sections may even guide instances of employment in the private sector.<sup>152</sup>

The sections include section 174(2), section 193(2), 195(1)(i) and section 205(2) of the Constitution. Each section is discussed in turn below.

### 3.2 Section 174(2) of the Constitution

Section 174(2) of the Constitution mentions requirements for appointment to the judiciary that are akin to demographic representivity.<sup>153</sup> The insertion of the section in chapter VIII of the Constitution might have been a deliberate attempt to provide a procedure for affirmative action measures which section 9(2) of the Constitution lacks.<sup>154</sup> Section 174 of the Constitution reads as follows:

- (1) Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.

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<sup>150</sup> Louw (note 24 above) 336.

<sup>151</sup> Note 82 above.

<sup>152</sup> E Bray “Macro issues of Mikro Primary School” (2007) 10 *PELJ* 1, 17.

<sup>153</sup> Malan (note 10 above) 428.

<sup>154</sup> Note 39 above.

The section advocates for a legitimate and a broadly representative judiciary.<sup>155</sup> Section 9(2) of the Constitution complements this requirement by placing a duty on the Judicial Service Commission to take active measures to remedy the disparities in the demographic composition of the bench created by apartheid.<sup>156</sup> The requirement to consider race and gender compositions in terms of section 174(2) is justified bearing in mind South Africa's history of race and gender based exclusions, dispossessions, and unequal opportunities.<sup>157</sup> The race and gender composition requirement merely refers to the need for all races to be represented in the Judiciary. Given the general principle of 'equality', taking race and gender into account must be seen as exceptional, and only for the limited purposes provided in section 9 of the Constitution, unless the Constitution makes special provision elsewhere, as the case for section 174(2) of the Constitution.

Transformation requires judicial appointments to incorporate diversity.<sup>158</sup> A diverse judiciary gains legitimacy and credibility from all segments of the society as it seeks to serve South Africa as a whole.<sup>159</sup> Transformation is compelled by the past marginalisation of the majority of black South African people and their exclusion from consideration for judicial appointments.<sup>160</sup> Mokgoro J, a former judge of the Constitutional Court of South Africa, voiced her concerns about the judiciary having been white-and-male dominated in the pre-democratic era. She asserts this led to the disenfranchisement of the majority of black South African people.<sup>161</sup> As a result, the Judicial Service Commission noted a preponderance of male applicants as opposed to female applicants.<sup>162</sup>

The method employed for achieving broad representivity in the judiciary is scrutinised below. This is done to establish the difference between the concept of demographic representivity and broad representivity that is provided for in terms of section 174 of the Constitution.

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<sup>155</sup> *Singh v The Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EC) para 24.

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> T Sidaki "Building a transformed judiciary in post-apartheid South Africa: prospects and challenges" (2012) 25 *Advocate* 25.

<sup>159</sup> *Ibid.*

<sup>160</sup> S Kentridge "Telling the Truth about Law" (1982) *SALJ* 648, 652.

<sup>161</sup> Y Mokgoro "Judicial appointments" (2010) 23 *Advocate* 44, 48.

<sup>162</sup> N Manyathi "Transformation debate continues at BLA AGM" (2012) 526 *De Rebus* 10, 12.

### 3.2.1 Numerical goals or quotas in section 174 of the Constitution?

An enquiry as to whether judicial transformation requires absolute race representivity<sup>163</sup> is necessary. Section 174(2) of the Constitution cannot be read without subsection (1) if a sensible interpretation of representivity is to be derived from it.<sup>164</sup> Subsection (1) reads:

- (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
- (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

Section 174(2) of the Constitution utilises race and gender considerations as diversity indicators and does not seek to make them determinant factors for appointment.<sup>165</sup> Thus, the need for judicial appointments to reflect the society's social composition coordinates with the need for an appropriately qualified and competent Judiciary.<sup>166</sup> Section 174(2) places an obligation on the Judicial Service Commission to enquire into the race and gender composition of the Judiciary before effecting appointments.<sup>167</sup> When underrepresentation is detected, the disparities are remedied by appointing competent and appropriately qualified candidates from the affected race or gender groups.<sup>168</sup> Nevertheless, compliance with the requirement of a competent Judiciary safeguards the transformation from degenerating into the implementation of quotas solely based on race and gender preferences.

Thus, in *Singh v The Minister of Justice and Constitutional Development and Others*,<sup>169</sup> the Ministry of Justice in keeping up with the requirements of competence ordered the Magistrates Commission to consider seriously the provisions of section 174 of the Constitution in relation to section 9 of the Constitution. The Magistrates' Commission had discriminatorily excluded a disabled Indian female from a number of posts on the basis of inflexible 'race and gender preferences' or quotas.<sup>170</sup> The selection criterion was held to discriminate unfairly because it

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<sup>163</sup> Absolute race representivity refers to an exact mathematical replication of national or even local racial and gender demographics in the composition of the Judiciary.

<sup>164</sup> Manyathi (note 162 above) 12.

<sup>165</sup> *Singh v The Minister of Justice and Constitutional Development and Others* (note 155 above) para 30.

<sup>166</sup> O Dupper "Affirmative Action: Who, How and How Long?" (2008) 24 *SAJHR* 1, 15.

<sup>167</sup> Malan (note 10 above) 430.

<sup>168</sup> *Ibid.*

<sup>169</sup> 2013 (3) SA 66 (EC) para 3.

<sup>170</sup> *Singh v The Minister of Justice and Constitutional Development and Others* (note 155 above) para 9.

overlooked considerations of merit in favour of race and gender preferences.<sup>171</sup> Although, according to section 174(2) of the Constitution race and gender considerations are important, treating them as the sole selection criteria for the achievement of broad representivity leads to the subordination of the seventeen prohibited grounds of unfair discrimination in section 9(3) of the Constitution.<sup>172</sup>

### 3.3 Section 195(1)(i) of the Constitution

Section 195(1)(i) of the Constitution provides that public administration must reflect broadly the diverse composition of the South African people. The section provides that:

“Public administration *must be broadly representative* of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation [emphasis added].”<sup>173</sup>

The phrase “must be” in the section is authoritative and may create the impression that a strict quota is provided for in public administration appointments. However, the phrase “must be broadly representative of the South African people,” means no more than that the South African people should feel socially included in the management of the public administration, without any reference being given to demographic statistics. The peremptory wording of section 195(1)(i) makes it more authoritative than the provisions of section 174(2) of the Constitution, which provides a less demanding criterion.<sup>174</sup> Section 195(1)(i) of the Constitution applies to all local, provincial or national government departments and enterprises while section 174(2) only provides for judicial appointments.<sup>175</sup> Section 195(1)(i) of the Constitution was mentioned in *Munsamy v Minister of Safety and Security*<sup>176</sup> as an important section that requires compulsory attainment of broad representivity in public administration appointments. Thus, the staff composition of public administration must be broadly representative of South Africa’s social composition.<sup>177</sup> Broad representivity must not be confused with the concept of demographic representivity which provide for a strict quota based on demographics. Section 195(1)(i) is based

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid para 27.

<sup>173</sup> Section 195(1)(i) of the Constitution.

<sup>174</sup> Section 172(2) of the Constitution uses the phrase “must consider.”

<sup>175</sup> Section 195(2) of the Constitution.

<sup>176</sup> (2013) 7 BLLR 695 (LC) para 65.

<sup>177</sup> Note 173 above.

on an assumption that it provides a standard that should apply to affirmative action measures envisioned in section 9(2) of the Constitution, which is the pursuance of ‘equality’ of opportunities.

The achievement of broad representivity required in public administration appointments must be achieved with consideration of other competing factors.<sup>178</sup> Section 195(1)(i) of the Constitution provides a pool of factors for consideration. The mechanism allows for a balance between all the competing factors. The other factors that should be considered along with the requirement to achieve broad representivity include ability, objectivity, fairness, and the need to redress disparities caused by apartheid. These are discussed in detail below.

### **3.3.1 Ability**

Ability is a broad term, which is capable of referring to many qualities. However, in this instance, ability refers to competency.<sup>179</sup> In the interest of enhancing service delivery, ability is one of the factors to be considered when hiring prospective employees or promoting current employees in public administration. Race and gender attributes can only be determinants for appointment of candidates who possess the required degree of competence.<sup>180</sup> Belonging to a designated group does not enhance employment prospects for incompetent and unskilled job aspirants.<sup>181</sup> In *Solidarity obo Barnard*<sup>182</sup> the decision of the SAPS National Commissioner could be justified on grounds of ability for withdrawing a vacancy after failing to find appropriately qualified candidates from designated employees. However, the SAPS National Commissioner can be condemned for failure to appoint Barnard, a member of a non-designated group who was a suitably qualified candidate, based on representivity, disregarding the importance of merit in employment.<sup>183</sup> The consideration of ability makes it possible for the public administration to reflect a diverse South African workforce, which is competent to boost service delivery. This

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<sup>178</sup> Ibid.

<sup>179</sup> O Dupper “In Defence of Affirmative Action in South Africa” (2004) 121 *SALJ* 207, 209.

<sup>180</sup> *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T) para 468, 482.

<sup>181</sup> D Meyerson ‘How Useful is the Concept of Racial Discrimination?’ (1993) 110 *SALJ* 575, 579.

<sup>182</sup> Note 82 above, para 9.

<sup>183</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 80.

consideration strikes a balance between the need to achieve broad representivity and the need for a competent workforce.<sup>184</sup>

### 3.3.2 Objectivity

Objectivity requires appointments to be allocated realistically in response to the current needs of the department involved.<sup>185</sup> The requirement of objectivity safeguards public administration appointments from tokenism. Appointments in the public administration should not just be by numbers, but should be directed at supporting the continued viability of the department concerned.<sup>186</sup> Appointing employees along demographic profiles might result in the employment of less qualified candidates if not carefully dealt with.<sup>187</sup> Objectivity requires a situation sensitive approach in achieving employment equity. However, the SAPS's objectivity in its recent deployments is questionable. The SAPS recently embarked on deploying Xhosa speaking police officers to Khayelitsha, Cape Town where the local population is approximately estimated to be 90% Xhosa speaking.<sup>188</sup> The deployment was in accordance with an objective to make communication between the local people and the police officers easy. While, public administration is beneficial if personnel that the community can easily relate to carry it out,<sup>189</sup> SAPS's decision unfairly discriminates against police officers from other race groups who also have an equal entitlement to be stationed at Khayelitsha.

### 3.3.3 Fairness

What is fair depends on the circumstances of a particular situation. Fairness entails the consideration of all competing interests in decision-making, including considering the severity of any decision on the rights and legitimate interests of job seekers and promotion aspirants excluded from the benefits.<sup>190</sup> Fairness requires rationality and proportionality in the selection

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<sup>184</sup> Dupper (note 166 above) 15.

<sup>185</sup> Ibid 16.

<sup>186</sup> *Coetzer v Minister of Safety and Security* (2003) 24 ILJ 163 (LC) para 176, 177.

<sup>187</sup> Dupper (note 166 above) 12.

<sup>188</sup> South African Press Association "Xhosa policy discriminatory: Union" SABC 27 August 2014, available at <http://www.sabc.co.za/news/a/cb75d28045416780b060b1a5ad025b24/Xhosa-policy-discriminatory:-Union-20142708>, accessed on 24 October 2014.

<sup>189</sup> *Stoman v Minister of Safety and Security and others* (note 180 above) para 468, 482.

<sup>190</sup> *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40.

criteria to curb against appointments that are unreasonable<sup>191</sup> and arbitrary. The achievement of broad representivity in public administration should be done in a fair manner and should be consistent in application.

Rationality requires reasonableness in public administration appointments. The achievement of broad representivity has to be rationally connected to the need to maintain a competent workforce.<sup>192</sup> There has to be a rational connection between the choice of a particular individual for appointment and their role in enhancing service delivery.<sup>193</sup> A consistent consideration of factors listed in section 195(1)(i) of the Constitution exonerates public administration departments from unfair discrimination claims. Unreasonable reliance on race as a criterion for appointment amounts to unfair discrimination.<sup>194</sup> *Solidarity obo Barnard*<sup>195</sup> confirmed that previously disadvantaged people could only be accommodated on condition that they have the required degree of competence. Public administration departments have to apply their employment equity plans rationally and in compliance with both the EEA<sup>196</sup> and the EEAA.

Proportionality requires the balancing of competing factors.<sup>197</sup> This means that public administration departments have to weigh the affirmative action obligation against considerations of ability, objectivity, and fairness. Proportionality requires broad representivity to be achieved without disproportionately affecting the rights of other work seekers and the provision of service delivery.<sup>198</sup> The need to create a diverse workforce must consistently relate to the need for a skilled workforce that enhances service delivery.<sup>199</sup> Affirmative action measures that exclusively favour ‘designated groups’ to the detriment of other employees and job seekers

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<sup>191</sup> The word “unreasonable” is defined as a defiance of logic in *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC para 374, 408.

<sup>192</sup> *Shoprite Checkers (Pty) v Rainbow NO & Others* (2000) 3 BLLR 243 (LAC) para 19.

<sup>193</sup> *Stoman v Minister of Safety & Security & others* (note 180 above) para 1031.

<sup>194</sup> *Coetzee v Department of Education Western Cape* (NDP) unreported case No PSES 221-08/09WC (14 April 2009) para 32.

<sup>195</sup> Note 82 above, para 66.

<sup>196</sup> See section 20 of the EEA.

<sup>197</sup> *Du Preez v Minister of Justice & Constitutional Development & others* (note 190 above) para 40.

<sup>198</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 5 ed 600.

<sup>199</sup> *Ibid.*

would be contrary to the objects of the EEA.<sup>200</sup> There has to be a rational means of achieving broad representivity without necessarily imposing a strict quota.<sup>201</sup>

### **3.3.4 The need to redress imbalances of the past**

The need to redress injustices of the past requires public administration departments to ensure the ‘equitable representation’ of people previously disadvantaged by unfair discrimination.<sup>202</sup> Apartheid caused disparities in employment, with the majority of black South African job aspirants’ employment prospects in the labour market being limited. Section 195(1)(i) of the Constitution seeks to compensate the majority of the disenfranchised black people by empowering the able but disadvantaged job aspirants. However, the affirmative action obligation placed by section 195(1)(i) of the Constitution must be fulfilled with consideration of the abovementioned factors. While it is important to remedy disparities of the past, less restrictive means should be used to achieve that objective.<sup>203</sup> Affirmative action measures should not be used to disadvantage unfairly other members from ‘designated groups’ as well as members of non-designated groups.

### **3.4 Section 193(2) of the Constitution**

Section 193(2) provides that the institutions established by Chapter IX of the Constitution must reflect the societal composition of the South African people.<sup>204</sup> Section 193 of the Constitution reads as follows:

- (1) Public Protector and the members of any Commission established by this Chapter must be women or men who-
  - a) are South African citizens;
  - b) are fit and proper persons to hold the particular office; and
  - c) comply with any other requirements prescribed by national legislation.
- (2) The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

The section requires that the composition of Commissioners reflect South Africa’s rich human diversity. The requirement, however, does not place a strict reliance on demographics as a

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<sup>200</sup> J Grogan *Dismissal, Discrimination and Unfair Labour Practices* 1 ed 101.

<sup>201</sup> Section 36(1)(e) of the Constitution.

<sup>202</sup> Section 13 of the EEA.

<sup>203</sup> *Minister of Finance and Another v Van Heerden* (note 18 above) para 44.

<sup>204</sup> Section 193(2) of the Constitution.

determinant factor for appointment. Section 193(2) is worded the same way as section 174(2) of the Constitution.<sup>205</sup> The phrase “must be considered” makes section 193(2) of the Constitution less demanding than section 195(1)(i) of the Constitution, which provides for mandatory broad representivity.<sup>206</sup> Broad representivity only requires inclusion of all segments of the South African society in the Commissions as opposed to the concept of demographic representivity which requires a mathematical calculation of employment quotas based on demographics. Section 193(2) requires broad representivity to be achieved in consideration with other competing factors.<sup>207</sup>

The requirement of broad representivity should be complemented by the job aspirant’s degree of competence and possession of appropriate qualifications and skills.<sup>208</sup> Employment based on merit is the standard that is required to achieve broad representivity in institutions that support constitutional democracy. Merit is a requirement while broad representivity is a consideration to be taken into account. Observance of obligations imposed by national legislation is also required in achieving broad representivity in these institutions.<sup>209</sup>

### **3.5 Section 205(2) of the Constitution**

Section 205(2) of the Constitution requires the Police Service to consider the needs of provinces.

The section reads:

“National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, *taking into account the requirements of the provinces* [emphasis added].”<sup>210</sup>

Section 205(2) accords with the requirement to consider regional demographics in the EEA.<sup>211</sup> Section 42 of the EEA provides that the regional economically active population profile must also be considered when setting numerical targets. Section 205(2) affirms the need to consider regional demographics in order for the Police Service to discharge its services effectively. The

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<sup>205</sup> See (note 6 above).

<sup>206</sup> See Cohen & Moodley (note 41 above).

<sup>207</sup> See section 193(1) of the Constitution.

<sup>208</sup> Section 193(1) of the Constitution.

<sup>209</sup> Ibid.

<sup>210</sup> Section 205(2) of the Constitution.

<sup>211</sup> See section 42 of the EEA.

latter section was mentioned in *Solidarity obo Barnard*<sup>212</sup> as an essential section that was supposed to be considered by SAPS when it decided whether to promote Barnard or not. The section recognises the practical differences in the needs of the national and provincial spheres.

To disregard the needs of the provinces not only affects the legitimacy of the Police Service, but also its efficiency. As the court observed in *Stoman v Minister of Safety & Security & Others*,<sup>213</sup> the SAPS can hardly discharge its responsibilities efficiently if its staff does not reflect the society it serves. Inclusion of the community builds trust and cooperation with the Police Service for better efficiency. The efficiency approach has been used to justify the appointment of a suitably qualified African male over a suitably qualified white female.<sup>214</sup> The approach sacrifices ‘equality’ by invoking efficiency as a defence thereby impacting on those excluded.<sup>215</sup> The use of this unacceptable practice has been displayed by *Solidarity obo Barnard*,<sup>216</sup> where the SAPS National Commissioner decided not to fill a vacancy with a candidate from a non-designated group because representivity would not be advanced.

### **3.6 Can the above-mentioned provisions be read to create an exception to section 9(2) of the Constitution?**

The special representivity requirements spelt out in sections 174(2), 193(2) and 195(1)(i) of the Constitution have been placed in the Constitution to provide specifically for the appointment of judicial officers, members of Commissions which support democracy, and all government departments and enterprises respectively.<sup>217</sup> The rules of interpretation would suggest that these provisions create exceptions from section 9(2), which should be read restrictively to accommodate instances which require the achievement of broad representivity, that is social inclusiveness per se, not the concept of demographic representivity. This is because section 9(2) runs against the general principle of ‘equality’.<sup>218</sup>

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<sup>212</sup> Note 29 above, para 71.

<sup>213</sup> *Stoman v Minister of Safety & Security & others* (note 180 above) para 482.

<sup>214</sup> *Fourie v South African Police Service* (2004) 25 ILJ 1716 (LC) para 1732, 1735.

<sup>215</sup> Dupper (note 166 above) 16.

<sup>216</sup> Note 29 above, para 71.

<sup>217</sup> Note 175 above.

<sup>218</sup> The general principle is found in section 9(1) of the Constitution which provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.”

Sections 174(2), 193(2) and 195(1)(i) of the Constitution may serve as a guide for the practice to be followed whenever demographic representivity provisions are encountered in legislation. Broad representivity only requires social inclusiveness without making use of the strict mathematical reliance on population profiles, as encountered with demographic representivity. Although the two concepts are not the same, the requirement of broad representivity is favourable because it places merit first while race and gender considerations follow. Because of this, the concept of broad representivity is best suited to boost competence in the workforce, as opposed to demographic representivity which directly relies on race and gender consideration as the sole criterion for appointment.

The inclusion of sections 174(2), 193(2) and 195(1)(i) of the Constitution as exceptions in terms of section 9(2) of the Constitution excludes them from the general notion of 'equality' in section 9 of the Constitution. Thus, the concept of demographic representivity is unconstitutional because the abovementioned provisions are the only instances in which limited versions of demographic representivity are permitted to exist constitutionally.

### **3.7 Conclusion**

The consideration of broad representivity has been established to mean only social inclusiveness and this maintains the merit principle because there is no rigid application of population percentages. More importantly, the existence of sections 174(2), 193(2) and 195(1)(i) in the Constitution, as special exceptions to the section 9(2) affirmative action provision, seems to suggest that the concept of demographic representivity cannot be used in conformity with section 9 of the Constitution as a whole.<sup>219</sup> If the drafters of the Constitution contemplated the future use of the concept of demographic representivity, they could have included a provision which provides for it as was the case of broad representivity.

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<sup>219</sup> More particularly the concept of demographic representivity conflicts with section 9(1) of the Constitution which requires every person to be entitled to equal treatment.

## CHAPTER 4: THE EMPLOYMENT EQUITY ACT 55 OF 1998

### 4.1 Introduction

As was demonstrated in Chapter 3, the issue of representivity is also featured in the Constitution. Thus, the EEA, being a creature of the Constitution, must give effect to the constitutional obligation to achieve ‘equality’. The aim of the EEA is to ensure the ‘equitable representation’ of ‘designated groups’,<sup>220</sup> and to deal with the disparities in employment caused by the apartheid regime, which perpetuated preference of white people in respect of employment opportunities. Section 2 of the EEA states that the aim of the Act is to achieve employment equity by:

- a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) implementing affirmative action measures to redress the disadvantages in employment experienced by ‘designated groups’, in order to ensure their ‘equitable representation’ in all occupational categories and levels in the workforce.

Chapter III of the EEA permits the preferential treatment of members from ‘designated groups’.<sup>221</sup> To achieve the objective stated above, the EEA makes use of the concept of demographic representivity,<sup>222</sup> as a mechanism for transforming the labour market to reflect the South African social composition.<sup>223</sup> The EEA also includes a provision that expressly prohibits the use of racial quotas in the South African labour market.<sup>224</sup> The insertion of this provision in the EEA is intended to prevent representivity from being manipulated into implementation of racial quotas.<sup>225</sup> Malan defines representivity as follows:

“Representivity is the norm in terms of which institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population.”<sup>226</sup>

In this way representivity and the concept of demographic representivity mean the same thing. The following chapter analyses the legal and practical effects of the EEA’s provisions for representivity as they were prior to the amendments introduced by the EEAA 47 of 2013 and

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<sup>220</sup> Section 2 of the EEA.

<sup>221</sup> Section 15 of the EEA.

<sup>222</sup> See (note 220 above).

<sup>223</sup> Malan (note 10 above) 427.

<sup>224</sup> See (note 86 above).

<sup>225</sup> Malan (note 10 above) 340.

<sup>226</sup> Ibid 427.

also the jurisprudence pertaining to these provisions. The provisions for representivity are discussed in 4.2 below.

## **4.2 The EEA provisions for representivity**

Representivity has been generally held as an important principle on which the South African social order depends.<sup>227</sup> As was demonstrated in Chapter 3, representivity also features in the Constitution.<sup>228</sup> However, the real effects of representivity as a tool for transformation can be seen from the EEA provisions.<sup>229</sup> The relevant sections in the EEA that provide for representivity, namely, sections 2, 15 and 42 are discussed in turn below.

### **4.2.1 Section 2 of the EEA**

The EEA's purpose is to achieve employment equity in the labour market by:

- a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) implementing affirmative action measures to redress the disadvantages in employment experienced by 'designated groups', in order to ensure their 'equitable representation' in all occupational categories and all levels in the work force"<sup>230</sup>

'Equitable representation' in terms of the EEA is one and the same thing as the concept of demographic representivity.<sup>231</sup> What this means is that the workforce of each designated employer has to reflect the national population profile of the country in its racial diversity.<sup>232</sup> Section 2 being the aim of the EEA declares from the onset that its affirmative action measures are solely based on the concept of demographics representivity which uses race and sex as its main pointers in determining beneficiaries.

Section 2 of the EEA brings in 'equitable representation', a term which is not provided for in section 9(2) of the Constitution. The standard that is required by the general notion of 'equality' is that people be afforded equal opportunities.<sup>233</sup> 'Equitable representation' is a term which is

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<sup>227</sup> Ibid.

<sup>228</sup> See sections 174(2), 193(2) and 195(1)(i) of the Constitution.

<sup>229</sup> Malan (note 10 above) 427.

<sup>230</sup> Note 220 above.

<sup>231</sup> Malan concurs, asserting that 'equitable representation' is one and the same thing as numerical representation in (note 10 above) 430.

<sup>232</sup> Malan (note 10 above) 430.

<sup>233</sup> Note 77 above.

alien to the Constitution as a whole. There is no mention of such a term in the Constitution and its inclusion in the EEA deviates from the known criteria for one to qualify as an affirmative action beneficiary.<sup>234</sup> The Constitutional requirement for a person to benefit under section 9(2) affirmative action clause is that such person has suffered from past unfair discrimination. ‘Equitable representation’ in terms of section 2 of the EEA places race and gender as its major factors for determining who should benefit under affirmative action measures and this has the potential of leading to the unfair differentiation of people in terms of section 9(3) of the Constitution. ‘Equitable representation’ is contrary to the principles of ‘equality’ and human dignity.<sup>235</sup>

#### **4.2.2 Section 15 of the EEA**

Section 15(1) of the EEA reads as follows:

“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.”

Section 15(1) of the EEA defines what an affirmative action measure should comprise. Affirmative action measures are measures designed to advance and promote appropriately qualified people from historically disadvantaged groups in order to increase their representation in all units and levels of employment.<sup>236</sup> As discussed in 4.2.1, ‘equitable representation’ requires the workforce of a designated employer to mirror the national demographics of the population. This idea of ‘equitable representation’ thus goes beyond what section 9(2) of the Constitution permits and inevitably results in quotas.<sup>237</sup> Quota driven remedial measures also disregards merit.

Section 15(2)(d) of the EEA provides that:

“Affirmative action measures implemented by a designated employer must include ...subject to subsection (3), measures to ensure the ‘*equitable representation*’ of suitably qualified people

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<sup>234</sup> Note 39 above.

<sup>235</sup> Note 49 above.

<sup>236</sup> Note 8 above.

<sup>237</sup> Section 9(2) of the Constitution provides that “equality includes the full and equal enjoyment of all rights and freedoms that “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.”

from ‘designated groups’ in all occupational categories and levels in the workforce [emphasis added].”<sup>238</sup>

The section supplements section 15(1) of the EEA by providing a way of advancing the concept of demographic representivity. The measures which section 15(2)(d) refers to are numerical goals which should be used to allocate employment quotas per each race group. These numerical goals are informed by demographic statistics, making it difficult to execute those measures without implementing quotas. Section 15(3) of the EEA provides that affirmative action measures “include preferential treatment and numerical goals, but exclude quotas.”<sup>239</sup> Section 15 of the EEA offers an imprecise safe-guard against quotas because the execution of numerical goals has little difference to the concept of demographic representivity. Numerical goals only use a flexible criterion but with similar repercussions. The difference between the impermissible quotas and the legitimate measure of numerical goals in the EEA is discussed in 4.3.1 below.

Section 15(4) of the EEA provides the following:

“Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from ‘designated groups’.”

Section 15(4) of the EEA is a prohibition which seeks to prohibit employers from adopting employment policies that creates absolute barriers for the advancement, promotion or employment of people from non-‘designated groups’. Section 15(4) could have been a good section was it not for its lack of authority. The lack of an authoritative term in section 15(4) means that all the other sections that are authoritative override it - for example section 42 of the EEA which creates demographic representivity requirements to which section 15(4) must succumb to. *Solidarity obo Barnard*<sup>240</sup> is one of the decisions in which the issue of absolute barriers was considered, with the CC ruling that Barnard’s exclusion did not create an absolute barrier to her appointment, regardless of the fact that she was not appointed to salary level 9 based on representivity.

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<sup>238</sup> Section 15(2)(d)(i) of the EEA.

<sup>239</sup> Note 86 above.

<sup>240</sup> Note 82 above, para 90.

### 4.2.3 Section 42 of the EEA

Section 42 of the EEA is an assessment indicator that must be used by the Director-General or any persons or juristic persons applying the Act<sup>241</sup> for the purpose of determining whether a designated employer is complying with the EEA's employment equity obligations. Moreover, in addition to factors mentioned in section 15 of the EEA, section 42 requires the extent to which members from 'designated groups' are equitably represented in every unit and level of employment to be determined in relation to the

“demographic profile of the national and regional economically active population; pool of suitably qualified people from 'designated groups' from which the employer may reasonably be expected to promote or appoint employees; economic and financial factors relevant to the sector in which the employer operates; present and anticipated economic and financial circumstances of the employer; and the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover [emphasis added].”<sup>242</sup>

Section 42 of the EEA implies that the prohibition against quotas is applicable to its factors because it states that those factors mentioned in section 15 of the EEA may also be considered in the assessment of compliance process. This means that the assessment factors listed in section 42 of the EEA should be compliant with section 15(4), which prohibits designated employers from adopting employment policies or practices that create absolute barriers for hiring, promotion, and professional advancement of members from non-'designated groups'. However, as stated above, section 15(4) of the EEA lacks peremptory wording to make it authoritative. Only if a designated employer identifies underrepresentation of a designated group is it permissible to employ the section 42 factors to set numerical targets directed at remedying the deficiency in their representation.<sup>243</sup> However, this type of demographic representivity would be one that is disguised in numerical goals. When a designated employer pursues goals that are informed by section 15 and 42 factors, such affirmative action measures would be legitimate for the purposes of section 15 of the EEA.<sup>244</sup> A measure that does not take cognisance of or deviates from the standard set in section 15 and section 42 factors would operate the same way as quotas.<sup>245</sup>

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<sup>241</sup> Note 132 above.

<sup>242</sup> Section 42(a) of the EEA.

<sup>243</sup> Louw (note 24 above) 341.

<sup>244</sup> Ibid 342.

<sup>245</sup> Ibid.

Despite the clear standards of affirmative action measures that were displayed in the EEA's abovementioned provisions for representivity, there are still problems with regard to the application of the Act, particularly with the provision of affirmative action benefits. The legal and practical effects caused by the implementation of race-based affirmative action in the South African labour market are discussed below.

### **4.3 The legal and practical effects of the EEAs provisions for representivity**

The application of the EEAs concept of demographic representivity often leads to unfair discrimination which the Act purports to combat. The implementation of quotas in the South African labour market exacerbates divisions in employment. The legal and practical effects posed by the implementation of demographic representivity in terms of the EEA are discussed below.

#### **4.3.1 Imposition of racial quotas**

A problem that is posed by the implementation of affirmative action measures in terms of section 15 of the EEA is the potential implementation of racial quotas. Thus, it is necessary to distinguish between the legitimate measure of numerical goals and the prohibited quotas. The distinction of the terms serves to settle the confusion that surrounds the two terms. *The American Heritage Dictionary of the English Language* defines quotas as “a number or percentage... of people, constituting a required or targeted minimum: e.g. a system of quotas for hiring minority applicants [emphasis added].”<sup>246</sup> With regard to the implementation of quotas in the labour market, Pretorius, Klinck, and Ngwena describe quotas as follows:

“Quotas refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for ‘designated groups’. This may be achieved through the setting aside of specific number of positions for ‘designated groups’ or by making designated group status the only or dominant criterion for eligibility for employment opportunities”<sup>247</sup>

The observation by Pretorius, Klinck, and Ngwena shows that quotas are rigid by nature and do not allow any room for flexibility. The definition of quotas closely suits the aim and objective of the EEA. The EEAs aim is mainly the advancement of historically disadvantaged people and to

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<sup>246</sup> *The American Heritage Dictionary of the English Language* 4 ed (2000).

<sup>247</sup> JL Pretorius, ME Klinck & CG Ngwena *Employment Equity Law* (loose-leaf, service issue 4, 2000) at ch 9-50.

that effect identifies those people as a designated group.<sup>248</sup> Thus, being a black South African, whether African, Coloured, or Indian becomes the determinant factor for a person to qualify for affirmative action benefits.<sup>249</sup> The merit of a job aspirant is overlooked in favour of race considerations, even though it might be relevant.<sup>250</sup> This a rigid imposition of quotas.

To give effect to the aim of the EEA, section 42 of the EEA requires regional and economically active population profiles to be taken into account in setting numerical goals for the advancement of ‘designated groups’.<sup>251</sup> Thus, section 42 of the EEA reserves job opportunities that reflect the relative population percentages of designated and non-’designated groups’ and this mechanism operates the same way as quotas. However, the EEA’s wording implies that it advances a legitimate measure of numerical goals.<sup>252</sup> A legitimate numerical goal is a target that is set based on demographic statistics but the only difference being that it is permitted by the EEA in section 15(3). Thus, it is also crucial to scrutinise the meaning of numerical goals.

The Code of Good Practice: Preparation, Implementation, and Monitoring of Employment Equity Plans<sup>253</sup> promulgated by the Department of Labour, describes the basis of numerical goals as follows:

“Numerical goals should be developed for the appointment and promotion of people from ‘designated groups’. The purpose of these goals would be to increase the representation of people from ‘designated groups’ in each occupational category and level in the employer’s workforce, where underrepresentation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA8.”

The Department of Labour’s above-mentioned publication contrasts with Connolly’s observation that numerical goals “are aspirational in nature” and to that effect, that “they do not predetermine the outcome of any given selection decision.”<sup>254</sup> The purpose of numerical goals that is described by the Code of Good Practice<sup>255</sup> contains nothing different from the definition of quotas provided above. The target people of affirmative action measures are a pre-determined group, namely, the

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<sup>248</sup> Note 220 above.

<sup>249</sup> Louw (note 24 above) 339.

<sup>250</sup> Ibid.

<sup>251</sup> Section 42(a)(i) of the EEA.

<sup>252</sup> See section 15(3) to (4) of the EEA.

<sup>253</sup> GN R1394 of GG 20626, 23/12/1999.

<sup>254</sup> M Connolly *R Townshend-Smith Discrimination Law: Text, Cases and Materials* (1998) 562.

<sup>255</sup> Note 253 above.

‘designated groups’.<sup>256</sup> To achieve the EEA’s aim, numerical goals, just like quotas, utilise population percentages for the purposes of allocating affirmative action benefits to each target race group.<sup>257</sup> For these reasons, no clear distinction can be drawn between the legitimate measure of numerical goals and the prohibited quotas, their only difference being that numerical goals are flexible and quotas are rigid in application, with similar results.<sup>258</sup>

The pursuit of employment equity targets that withhold employment opportunities from members of non-‘designated groups’ would be in breach of section 5 of the EEA which requires designated employers to take reasonable steps to ensure that their workforce is entitled to equal opportunities.<sup>259</sup> The provisions of section 5 of the EEA requires people to be treated equally in respect of employment opportunities, is in line with section 9 that recognises that people are equal in dignity and should be treated equally. Thus, in as far as section 6(2) of the EEA provides a defence for preferring black South Africans, measures that are quota-driven or seek to perpetuate the disadvantage of non-‘designated groups’ lack reasonableness and proportionality<sup>260</sup> and fall short of being ‘legitimate’ affirmative action measures for the purposes of section 15(4) of the EEA.<sup>261</sup> Section 6 of the EEA reads as follows:

- (1) 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.

Section 6(2) of the EEA contains a similar provision as section 9(2) of the Constitution. However, section 6(2) of the EEA provides a justification that goes beyond immutable characteristics and attributes, which are the affirmative action defence and the inherent requirements of the job defence. While an employer can use the affirmative action defence to refuse to advance non-‘designated groups’, he is also empowered with the inherent requirement of the job defence in refusing to comply with rigid demographic statistics.

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<sup>256</sup> Note 221 above.

<sup>257</sup> Louw (note 24 above) 338.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid 342.

<sup>260</sup> The requirement of reasonableness was established in Van Heerden rationality test in *Minister of Finance and another v Van Heerden* (note 18 above) para 41, which requires a measure to be rationally connected to its purpose; and the requirement of proportionality was established in the Harksen fairness test in *Harksen v Lane NO and Others* (note 91 above) para 52, which requires all important considerations to be balanced in order to avoid arbitrariness.

<sup>261</sup> Louw (note 24 above) 342.

### 4.3.2 Abrogation of the merit principle

Merit is one of the foremost principles that maintain a workforce that is best suited to advance the business interests of designated employers. Merit is an important consideration that should not be easily overlooked.<sup>262</sup> Merit denotes the skills, attributes, and characteristics that are used to determine whether a candidate would be in a position to perform a particular job satisfactorily.<sup>263</sup> As indicated in 4.3.1 above, there is a possible lack of distinction between numerical goals and quotas; this section seeks to display how the imposition of quotas in the South African labour market affects merit-based employment.<sup>264</sup>

The use of quotas is characterised by the use of non-job related factors in the employment selection criteria of designated employers.<sup>265</sup> Race plays a major role in the implementation of quotas. While section 15 of the EEA provides two requirements for the implementation of affirmative action measures, namely, that the target group should be ‘designated groups’ and that such people should be appropriately qualified, designated employers often resort to non-job related factors when hiring and promoting employees.<sup>266</sup>

Connolly observes that the imposition of quotas, which are often disguised as numerical goals, leads to the appointment of less qualified job candidates for the job.<sup>267</sup> The concept of demographic representivity which the EEA utilises predetermines a fixed percentage of members who are to represent any particular race group.<sup>268</sup> This implies that even if some people might be the best candidates for the job, they are excluded from consideration if the quota allocated to their group has been filled. This scenario is evident in *Solidarity obo Barnard*<sup>269</sup> discussed in Chapter 2 (see 2.3 above). Barnard a white female police officer, after a series of two interviews, gave up due to the SAPS National Commissioner’s failure to appoint her despite being the best candidate for the promotion on all occasions. The National Commissioner cited representivity as one of the reasons for failure to promote Barnard. According to the SAPS EEP, it was apparent

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<sup>262</sup> Section 15(1) of the EEA provides that, affirmative action measures are measures that advance “suitably qualified” people from disadvantaged groups.

<sup>263</sup> Louw (note 24 above) 338.

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Connolly (note 254 above) 562.

<sup>268</sup> Louw (note 24 above) 339.

<sup>269</sup> Note 82 above, para 66.

that white females were overrepresented at salary level 9.<sup>270</sup> As a result, the quota that had been allocated to white females had been filled and, even though Barnard was an appropriately qualified candidate, merit would not enhance her chances of being promoted, faced with a rigid quota placed by the SAPS EEP, which applied demographic representivity.<sup>271</sup> The *Barnard* decision displays the impact of racial profiling on merit based employment. In accordance with the EEA's obligation to achieve employment equity, demographic representivity uses racial profiling as a mechanism of achieving employment equity, which excludes other competing factors.<sup>272</sup> It is for this reason that it was argued in 2.6 above that the concept of demographic representivity is unconstitutional.

### 4.3.3 Exclusion of minority groups

The use of demographic representivity has consequences for the South African labour market with regard to fairness. The EEA's aim clearly states that the object of the Act is to achieve employment equity by advancing appropriately qualified people from 'designated groups'.<sup>273</sup> Being a member of a designated group and being appropriately qualified are the only requirements for a person to qualify for affirmative action benefits under the EEA.<sup>274</sup> The EEA aims to advance appropriately qualified people from 'designated groups' as a whole in order to ensure that they are equitably represented in every unit and level of employment.<sup>275</sup> However, the wording of section of 42 of the EEA has not been carefully constructed by the legislature. Section 42 of the EEA establishes degrees of disadvantage that are not envisaged in the EEA's aim.<sup>276</sup> Section 42 of the EEA allows the extent to which employees are represented in the workplace to be considered even amongst 'designated groups'.<sup>277</sup> The aforementioned determination utilises the national and regional economically active population profiles as its mechanism of transformation.

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<sup>270</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 66.

<sup>271</sup> *Ibid* para 131.

<sup>272</sup> See (note 86 above).

<sup>273</sup> Note 220 above.

<sup>274</sup> *Ibid*.

<sup>275</sup> *Ibid*.

<sup>276</sup> See (note 242 above).

<sup>277</sup> Section 42(a) of the EEA provides that "the extent to which suitably qualified people from and amongst the different 'designated groups' are equitably represented within each occupational category and level in that employer's workforce ..." should be determined.

Despite section 42 of the EEA being clear in its wording that both national and regional demographics are applicable in the setting of employment equity targets,<sup>278</sup> some designated employers only resort to the use of the national economically active population profile in setting employment equity targets as was the case in *Munsamy*.<sup>279</sup> This has the effect of excluding some of the targeted beneficiaries of the EEA. Thus, Africans, who constitute a majority of the national population profile, benefit the most. This, however, is problematic in that the EEA recognises ‘designated groups’ as a class of people who should be advanced as a whole.<sup>280</sup> The demarcations created by demographic representivity when it distinguishes people based on their race displays the negative effects which the concept has as a mechanism of affirmative action in the South African labour market. In *Munsamy v Minister of Safety and Security*<sup>281</sup> the court considered whether it is justifiable for an employer to favour one group of designated employees over another, which is purportedly overrepresented, in the absence of a clear EEP. Munsamy a police officer employed by SAPS was recommended for a post but was not appointed on the basis that Indians were overrepresented at that level and an African was appointed instead.<sup>282</sup> Indians were susceptible to past unfair discrimination and failure to promote Munsamy was considered to be unfair. The court found that the failure to appoint Munsamy amounted to unfair discrimination after considering the impact of the breach on his human dignity as a member of a designated group.<sup>283</sup>

There are also problems that are caused by disregarding the regional economically active population profile when setting employment equity targets. Disregarding the regional economically active population profile affects minority groups who constitute a majority in some provinces in South Africa. The exclusion of regional demographics came under the spotlight in *Solidarity and Others v Department of Correctional Services and Others*,<sup>284</sup> which considered whether designated employers must consider both the regional and national economically active population profiles when setting employment equity targets. The applicants were Coloured people and one white person. The applicants alleged that the Department of Correctional Service

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<sup>278</sup> Note 242 above.

<sup>279</sup> Note 176 above, para 3.

<sup>280</sup> See (note 220 above).

<sup>281</sup> Note 176 above, para 3.

<sup>282</sup> *Munsamy v Minister of Safety and Security* (note 7 above) para 14.

<sup>283</sup> *Ibid* para 75.

<sup>284</sup> (2012) 11 BLLR 1163 (LC) para 4.

(DCS) unfairly discriminated against them by failing to appoint them to posts they had applied for, a decision that was informed by an EEP that was exclusively based on national demographics.<sup>285</sup> Consequently, the court held that the DCS's EEP was inconsistent with affirmative action measures contemplated by section 6(2) of the EEA.<sup>286</sup> The DCS was ordered to consider both the national and regional economically active population profiles when setting employment equity targets in every unit or level of its workforce.<sup>287</sup>

Moreover, the EEA affects employment prospects of people from non-'designated groups' as its aim clearly states that its purpose is to advance appropriately qualified members from 'designated groups'.<sup>288</sup> However, from the definition of 'designated groups', it is apparent that white females and disabled white males are members of 'designated groups' for the purposes of the EEA, with only physically able white males being excluded (the only non-designated group in the EEA).<sup>289</sup> Most designated employers choose to overlook this consideration, resulting in race considerations overriding decisions when setting employment equity targets. One of the notable decisions that show the predicament faced by white people who qualify as members of 'designated groups' but were overlooked based on representivity is the case of *Solidarity obo Barnard*.<sup>290</sup> In this decision, the National Commissioner of the SAPS did not even consider Barnard's gender and did not recognise her as a member of a designated group despite being a white female.<sup>291</sup>

#### **4.3.4 Inherent requirement of the job defence**

Section 6 of the EEA provides designated employers with both an affirmative action defence and an inherent requirement of the job defence when implementing employment equity.<sup>292</sup> Section 6(2) of the EEA reads as follows:

- (2) It is not unfair discrimination to-
  - c) take affirmative action measures consistent with the purpose of this Act; or

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<sup>285</sup> *Solidarity and Others v Department of Correctional Services and Others* (2012) 11 BLLR 1163 (LC) para 4.

<sup>286</sup> *Ibid* para 56.

<sup>287</sup> *Ibid*.

<sup>288</sup> See (note 220 above).

<sup>289</sup> Louw (note 24 above) 343.

<sup>290</sup> Note 82 above, para 73.

<sup>291</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 120.

<sup>292</sup> Section 6(2) of the EEA provides that "it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act; or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

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

An inherent requirement of the job defence plays a vital role in the EEA. This defence is one of the only ways in which members of non-designated groups may be protected from the impact of the concept of demographic representivity. What this means is that a designated employer, even when faced with rigid demographic statistics which needs to be fulfilled, can invoke the inherent requirements of the job defence where appropriate to prevent an unsuitable candidate from being recruited.<sup>293</sup>

However, the inherent requirements of the job defence may also be detrimental in the South African Labour market because it constitutes a defence which justifies designated employers' failure to achieve affirmative action in a way which promotes the achievement of equality as contemplated in the Constitution.<sup>294</sup> Section 6(2) of the EEA places unfettered powers on designated employers to design requirements which they deem inherent and which are regarded to bring the job to a standstill if not fulfilled. Owing to the concept of demographic representivity's use of racial proportions, race has been made an inherent requirement of the job. The idea of race as an inherent requirement of the job has been displayed in *Solidarity obo Barnard*,<sup>295</sup> where Barnard, a white female officer was denied a promotion on the basis of representivity. Since white female police officers were overrepresented at salary level 9,<sup>296</sup> it had become an inherent requirement of the job that an appropriate candidate to fill the post was supposed to be a member of an underrepresented race group.

The inherent requirement of the job defence, not only affect people from non-designated groups but members of designated groups as well. In *Naidoo*,<sup>297</sup> discussed numerous times above, an Indian female police officer was denied a promotion on the basis of both representivity and the operational requirements of the job. The SAPS considered Naidoo's appointment to the post as detrimental to its provision of service delivery.<sup>298</sup> The requirement of proportional race representation informed by national demographics, as well as the requirement of suitably

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<sup>293</sup> Section 6(2) of the EEA.

<sup>294</sup> See section 9(2) of the Constitution which states that affirmative action measures must promote the achievement of equality.

<sup>295</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 16.

<sup>296</sup> *Ibid* para 66.

<sup>297</sup> *Ibid* para 6.

<sup>298</sup> *Ibid*.

qualified workforce doubled Naidoo's prejudice, displaying how invidious the invocation of the inherent requirements of the job can be in the South African labour market.

#### **4.4 Conclusion**

The enactment of the EEA was an important achievement of the legislature. The Act was an important piece of legislation in its attempt to avoid quotas in the South African labour market. However, the problem has been with the designated employers' application and the courts' interpretation of the prohibition against the use of quotas in the South African labour market. Some of the courts have condoned the use of quotas when they were disguised as numerical goals. The Constitutional court in *Solidarity obo Barnard*<sup>299</sup> avoided answering an important question pertaining to whether quotas are permissible in the South African labour market. Thus, it can be inferred that the use of quotas has been legitimised as a permissible affirmative action measure as long they are disguised as numerical goals. Furthermore, the implementation of numerical goals inescapably leads to quotas because of their use of goals or targets.<sup>300</sup>

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<sup>299</sup> Note 82 above, para 91.

<sup>300</sup> *South African Police Service v Solidarity obo Barnard* (note 83 above) para 54.

## CHAPTER 5: THE EMPLOYMENT EQUITY AMENDMENT ACT 47 OF 2013

### 5.1 Introduction

In order to clarify the legal implications of the EEA of 1998, the EEAA was enacted and legalises the practice of quotas that was previously applied under the guise of numerical goals. Section 16 of the EEAA amends section 42 of the EEA<sup>301</sup> and does away with considerations aimed at encouraging employment by merit.<sup>302</sup> This chapter discusses what the thinking and motivation of the drafters of the EEAA might have been and the amendments pertaining to representivity as well as their legal and practical effects in the South African labour market.

### 5.2 The thinking and motivation of the EEAA's drafters

The prime reason for drafting the EEAA was to fill in the gaps that were apparent in the EEA, but the thinking of the legislature can only remain a matter of speculation.<sup>303</sup> However, an insight into the motivation and thinking behind the drafting of the EEAA may be provided for in the Memorandum on the Objects of the Employment Equity Amendment Bill of 2012<sup>304</sup> as well as the substance of the EEAA's amendments. The most disappointing part is that item 3 of the Bill fails to help comprehend the legislature's motivation and thinking because it just paraphrases section 16 of the EEAA. Thus, it might as well be best for individuals to get insight into the motive of the EEAA's amendments from the interpretation of section 16 of the Act.<sup>305</sup>

The EEAA entrenches the notion of the degree of disadvantage in the South African labour market. Section 16 of the EEAA (replacing section 42 of the EEA) allows for the achievement of 'equitable representation of suitably qualified employees even amongst members of different 'designated groups'.<sup>306</sup> The concept of the degree of disadvantage has been previously applied though not provided for in clear terms by legislation.<sup>307</sup> The degree of disadvantage was

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<sup>301</sup> Note 25 above.

<sup>302</sup> Ibid.

<sup>303</sup> See item 1 of the Memorandum on the Objects of the Employment Equity Amendment Bill of 2012.

<sup>304</sup> Item 2 of the Memorandum on the Objects of the Employment Equity Amendment Bill of 2012 provides that some of the objects of the Bill are "giving effect to and regulating the fundamental rights conferred by section 9 of the Constitution of the Republic of South Africa, 1996; and rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the EEA in the past decade."

<sup>305</sup> Note 23 above.

<sup>306</sup> Note 25 above.

<sup>307</sup> See *Motala and Another v University of KwaZulu-Natal* 1995 (3) BCLR 374 (D) para 383C, D.

considered in *Motala and Another v University of KwaZulu-Natal*<sup>308</sup> to benefit an African student applying for admission to university. Although this case was not in the employment context, the notion established in *Motala*<sup>309</sup> was adopted in *Fourie v Provincial Commissioner of the South African Police Service and Another*,<sup>310</sup> where the court affirmed that, while white females were also disadvantaged by apartheid, Africans were the most disadvantaged. The notion of the degree of disadvantage advances people in relation to the extent of discrimination they endured.<sup>311</sup> Thus, it affirms that Africans should get first preference due to the severe discrimination they endured during the apartheid era, with Coloureds, Indians and Whites enjoying second, third and fourth preferences respectively.

The following section discusses the EEAA's provisions for representivity.

### **5.3 The EEAA's provisions for representivity**

Section 7 of the EEAA amends section 15 of the EEA, while section 16 of the EEAA substitutes section 42 of the EEAA as stated above. The discussion below is restricted to these substitutions and amendments pertaining to representivity.

#### **5.3.1 Section 7 of the EEAA**

Section 7(a) of the EEAA amends section 15 of the EEA by substituting subsection (1) with the following subsection:

- (1) Affirmative action measures are measures designed to ensure that suitably qualified people from 'designated groups' have equal employment opportunities and are equitably represented *in all occupational levels* in the workforce of a designated employer [emphasis added]."

Section 7(b) of the EEAA substitutes subsection 2(d)(i) of the EEA with the following subsection:

- i) ensure the 'equitable representation' of suitably qualified people from 'designated groups' *in all occupational levels* in the workforce [emphasis added]."

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<sup>308</sup> Note 143 above, para 383C-D.

<sup>309</sup> Ibid.

<sup>310</sup> (2004) 25 ILJ 1716 (LC) para F.

<sup>311</sup> See *Fourie v South African Police Service and Another* (note 214 above) para F.

The EEAA omitted reference to “categories” in amending section 15 of the EEA.<sup>312</sup> The original wording included the phrase “all occupational categories and levels.”<sup>313</sup> The motive behind the omission was to pave the way for the guidelines envisaged in section 16 of the EEAA read together with section 21 of the EEAA.<sup>314</sup> Section 21 of the EEAA, which amends section 55 of the EEA, permits the Minister of Labour after consultation with the National Economic Development and Labour Council (NEDLAC) to issue regulations that should be used to assess designated employers’ compliance with the EEA.<sup>315</sup> The new amendments have created a gap in the EEA that could cause chaos in the South African labour market, unless the Minister of Labour immediately issues regulations that guide the application of demographic representivity. The Draft Employment Equity Regulations of 2014 were supposed to provide guidelines to designated employers for determining which of the economically active population profiles to use in setting numerical targets, depending on the size of their workforce.<sup>316</sup> However, stakeholders viewed the Draft Employment Equity Regulations<sup>317</sup> with contempt because its proposed allocations were viewed as quota driven. Consequently, the Employment Equity Regulations<sup>318</sup> were issued without guidelines for the application of demographic representivity. This made the situation worse than it was before the EEAA.

### **5.3.2 Section 16 of the EEAA**

Section 42 of the EEA provided that the Director-General or person or body applying the Act in order to assess the compliance of designated employers with the Act “must” consider factors in section 42(a) to (e) in addition to those mentioned in section 15. However, section 42 of the EEA as amended by section 16 of the EEAA now provides that the Director-General, or person or body applying the Act for assessing designated employers’ compliance with the Act,<sup>319</sup> “may” consider in addition to factors mentioned in section 15, the following factors:

- a) The extent to which suitably qualified people from and amongst the different ‘designated groups’ are equitably represented within each occupational level in that employer’s

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<sup>312</sup> Note 25 above.

<sup>313</sup> Note 8 above.

<sup>314</sup> Note 25 above.

<sup>315</sup> See section 21 of the EEAA.

<sup>316</sup> See regulation 3 of the Draft Employment Equity Regulations 2014.

<sup>317</sup> GG 37338, 24/02/2014.

<sup>318</sup> GN 590 of GG 37873, 01/08/2014.

<sup>319</sup> Note 132 above.

workforce in relation to the demographic profile of the national and regional economically active population:

- b) reasonable steps taken by a designated employer to train suitably qualified people from the ‘designated groups’;
- c) reasonable steps taken by a designated employer to implement its employment equity plan;
- d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from ‘designated groups’;
- dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the ‘designated groups’; and
- e) any other prescribed factor.”

Section 16 of the EEAA deletes subsections 1(a)(ii) to (v) in section 42 of the EEA, which required the complementing of representivity and the operational requirements of business enterprises.<sup>320</sup> The amendments to section 42 of the EEA focus on the need to advance members of ‘designated groups’, disregarding the needs of business.<sup>321</sup> Thus, employers are left without an excuse for failure to advance members of ‘designated groups’. Furthermore, the amendments allow for accommodation of members of ‘designated groups’ even though they may possess minimum skills required for the relevant job.<sup>322</sup> Thus, the amendments pose problems in the South African labour market as merit is disregarded in favour of race imperatives.

#### **5.4 Practical effects of the EEAA’s provisions for representivity**

The EEAA’s provisions have caused uncertainty in the South African labour market.<sup>323</sup> Furthermore, they have implications for minority groups as well as the needs of business.

##### **5.4.1 Uncertainty**

The EEAA, just like its predecessor, the EEA, fails to provide the anticipated remedy for the quagmire in which the South African labour market is trapped. What the EEAA has done is to exacerbate the troubled situation in the labour market. The EEAA’s amendments give designated employers the option to choose any of the economically active population profiles to use.<sup>324</sup> As noted above, section 16 of the EEAA deleted the word “must” in section 42(a) of the EEA and inserted the word “may”. Affording designated employers such an option nevertheless poses

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<sup>320</sup> Note 25 above.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid.

<sup>323</sup> Jacques Van Wyk “New employment equity targets create uncertainty” *Cape Times* 27 March 2014 at 16.

<sup>324</sup> Note 25 above.

problems in the labour market. A dispute concerning whether designated employers should use both the national and regional demographics when setting numerical targets under the EEA arose in *Solidarity and Others*.<sup>325</sup> Rabkin-Naicker J ruled that the proper application of section 42 of the EEA required that designated employers when setting numerical targets should use both national and regional demographics.<sup>326</sup> The reasoning was directed at advancing the majority of the black South African people in line with the constitutional obligation to achieve substantive 'equality'.<sup>327</sup> However, the problem arises by providing employers with the choice of using any economically active population profile they see fit.<sup>328</sup> More chaos will ensue since the regulations that were to serve as a guide to the application of demographic representivity were abandoned in the Employment Equity Regulations<sup>329</sup> issued on 1 August 2014.

#### **5.4.2 The needs of business**

With the advent of the EEAA, merit is no longer a requirement in designated employers' employment selection criteria.<sup>330</sup> The consideration of a consortium of suitably qualified job aspirants from which a designated employer may choose is no longer required by the EEAA.<sup>331</sup> The EEAA's amendments focus on the reasonable steps that designated employers should take to accommodate members of 'designated groups'.<sup>332</sup> Thus, designated employers are required to develop the skills of suitably qualified people from 'designated groups' who may possess minimal required skills.<sup>333</sup> This results in the employment of less skilled employees.<sup>334</sup>

The requirement to consider how other designated employers in the same sector are progressing with employment equity is no longer required.<sup>335</sup> The exclusion of this requirement by the EEAA results in unrealistic expectations being heaped on designated employers. Moreover, the consideration of the number of jobs available in the designated employer's occupational

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<sup>325</sup> Note 284 above, 4.

<sup>326</sup> *Solidarity and Others v Department of Correctional Services and Others* (note 285 above) para 45.

<sup>327</sup> *Ibid.*

<sup>328</sup> Note 25 above.

<sup>329</sup> Note 318 above.

<sup>330</sup> Note 25 above.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.*

categories and levels is left out.<sup>336</sup> Also, the economic factors relevant to the circumstances of a particular designated employer are disregarded.<sup>337</sup>

The abrogation of the above-mentioned considerations means that designated employers no longer have a reason for failure to implement employment equity, particularly the advancement of ‘designated groups’. Section 16 of the EEAA heightens race as the determining factor for appointment. This was the case in *Solidarity obo Barnard*,<sup>338</sup> where the National Commissioner of SAPS sacrificed service delivery for the sake of advancing representivity. While quotas were disguised in numerical goals under the EEA, the EEAA through its provisions openly declares race classification as the determining factor for appointment.<sup>339</sup>

#### **5.4.3 Exclusion of minority groups from affirmative action benefits**

The notion of the degrees of disadvantage focusses on the advancement of groups that suffered the most disadvantage during the apartheid era,<sup>340</sup> hence, the use of the national economically active population profile, of which the Africans constitute a majority.

Substantive ‘equality’ requires all black South Africans to benefit equally from remedial measures.<sup>341</sup> Notwithstanding that, the notion of the degrees of disadvantage also breaches the constitutional obligation to achieve substantive ‘equality’ in terms of section 9(2) of the Constitution. The underlying problem of the EEA was that most employers resorted to the use of regional demographics, which resulted in the employment of more Indian and Coloured employees in KwaZulu-Natal and Western Cape respectively.<sup>342</sup> The EEAA does not remedy the situation, but rather turns the tables. Indians and Coloureds, who once enjoyed the benefits of regional demographic representivity, would be disadvantaged if national demographics are used in setting numerical targets. In *Munsamy*,<sup>343</sup> it was asserted that Indian and Coloured members of the SAPS in KwaZulu-Natal and the Western Cape respectively would have to migrate to other

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<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

<sup>338</sup> Note 82 above, para 16.

<sup>339</sup> Note 25 above.

<sup>340</sup> See *Motala and Another v University of KwaZulu-Natal* (note 307 above) para 383C, D.

<sup>341</sup> *Solidarity and Others v Department of Correctional Services and Others* (note 285 above) para 30

<sup>342</sup> Bradley Conradie “Employment Equity Act amendments -The detail behind the politics” Moneyweb 23 March 2011, available at <http://www.moneyweb.co.za/moneyweb-soapbox/employment-equity-act-amendments--the-detail-behind?sn=2009+Detail>, accessed on 26 October 2014.

<sup>343</sup> Note 176 above, para 37.

provinces for promotions and employment prospects once the allocated race quotas are filled in their provinces. The EEAA is unconstitutional because it creates demarcations amongst ‘designated groups’, which are in contravention of what the legislature contemplated in section 9(2) of the Constitution.<sup>344</sup>

## **5.5 Conclusion**

The EEAA abrogates the requirement to employ based on merit. The merit principle has been the foremost principle in maintaining a competent and a qualified workforce that boosts service delivery. However, group affiliations have now been made the determining factor for appointment. All the previous relevant considerations under the EEA have been repealed by the EEAA. The new developments have caused further implications with regard to the right to fairness in the South African labour market. While Africans are acknowledged as the first preferred beneficiaries of affirmative action, Indians and Coloureds are demeaned to second and third class citizens. Moreover, the EEAA’s affirmative action policy by omission reduces white people to fourth-class citizens. The EEAA has diverted most of the affirmative action measures to benefit Africans. This diversion is detrimental to members of other ‘designated groups’ who are less preferred as well as members of non-‘designated groups’. While the exclusion of white people can be justified on the basis of substantive ‘equality’, the exclusion of other ‘designated groups’ does not pass constitutional muster under section 9(2) of the Constitution.

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<sup>344</sup> Note 39 above.

## CHAPTER 6: CONCLUSIONS

### 6.1 Conclusions

Drawing on the analysis developed in the various chapters, it may be concluded that the concept of demographic representivity as provided for in terms of both the EEA and the EEAA is contrary to the obligation imposed by the Constitution to provide every person the right to 'equality'. Rather, the concept is deeply rooted in a quest to ensure that everyone attains the same outcome.<sup>345</sup> This is contrary to the whole essence of substantive 'equality', which recognises the difference in people's circumstances and therefore the need to empower disadvantaged members of society.<sup>346</sup> What the concept of demographic representivity seeks to achieve is to make people ends in themselves.<sup>347</sup> This creates apartheid type demarcations where people who are equal in dignity are grouped according to their race and gender. This results in a situation where the empowerment of any race or gender group leads to the denigration of other race or gender groups.<sup>348</sup> The quota driven motive of the concept of demographic representivity is far from the objective of promoting the 'equality' which it claims to achieve. Thus, it has been demonstrated that the concept of demographic representivity is an unconstitutional affirmative action measure.<sup>349</sup>

This dissertation provides a challenge to South African government policy in respect of demographic representivity, a widespread mechanism of affirmative action. The dissertation makes a contribution in that it comments on new legislation which has not been commented much on previously, namely, the EEAA. In addition, it takes a novel approach to the concept of demographic representivity. As stated in 1.2 above, most of the literature on demographic representivity has been based on the practicality of the concept per se,<sup>350</sup> without, however, challenging its constitutionality. This dissertation seeks to challenge the constitutionality of the concept of demographic representivity as it applies in the South African labour market. It is suggested that, in order to address the issue, the government could pursue other options, such as

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<sup>345</sup> Louw (note 24 above) 343.

<sup>346</sup> Note 39 above.

<sup>347</sup> *S v Makwanyane and Another* (note 116 above) para 26.

<sup>348</sup> Louw (note 24 above) 343.

<sup>349</sup> See section 2.3 in Chapter 2.

<sup>350</sup> See Louw (note 24 above) 338.

furthering the education and skills of people from previously disadvantaged groups,<sup>351</sup> rather than making people from non-designated groups a means to an end in the affirmative action equation.

To that effect the provisions on affirmative action in terms of the EEA should be amended and the EEAA's provisions for representivity should be repealed. Section 2 which is the aim of the EEA contradicts section 9 of the Constitution. The constitutional standard of 'equality' should be maintained at all cost. Section 2 of the EEA brings in a new requirement of 'equitable representation' and which results in the implementation of quotas. To solve this issue, the aim of the EEA has to be brought in line with the standard set in section 9 of the Constitution. The definition of affirmative action measures in terms of both the EEA and the EEAA has to be amended to conform to the definition of affirmative action measures provided for in terms of the Constitution.

In terms of future research, the study could be a starting point for questions about demographic representivity as it affects other areas of government policy such as the Black Economic Empowerment policy (BEE) which is empowered by the Broad-Based Black Economic Empowerment Act (BEEA).<sup>352</sup> These important questions could raise public awareness of the misconception that affirmative action is a right. The members of society are only entitled to the right to be treated equally and affirmative action can be seen as a privilege which no one has a right to claim.<sup>353</sup>

As Dr Mamphela Ramphele has written:

“Society has a responsibility to create an equitable framework but successful performance under such conditions is the responsibility of individuals. The right to equal opportunities does not mean the right to successful outcomes.”<sup>354</sup>

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<sup>351</sup> Cohen and Moodley (note 41 above) 325.

<sup>352</sup> Act 53 of 2003.

<sup>353</sup> M McGregor “Affirmative action – a defence or a right? (2003) 11 SA Merc LJ 164, 167.

<sup>354</sup> Tony Leon, “Stand up for change!” DA Voter Registration Rally Westville Civic Centre, Durban, KwaZulu-Natal, 06 November, 2003.

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