CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 78/15

In the matter between:

SOLIDARITY	First Applicant
P J DAVIDS	Second Applicant
C F FEBRUARY	Third Applicant
A J JONKERS	Fourth Applicant
L J FORTUIN	Fifth Applicant
G M BAARTMAN	Sixth Applicant
D S MERKEUR	Seventh Applicant
T S ABRAHAMS	Eighth Applicant
D R JORDAN	Ninth Applicant
J J KOTZE	Tenth Applicant
D M A WEHR	Eleventh Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES	First Respondent
MINISTER OF CORRECTIONAL SERVICES	Second Respondent
NATIONAL COMMISSIONER, DEPARTMENT OF CORRECTIONAL SERVICES	Third Respondent
MINISTER OF LABOUR	Fourth Respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	First *Amicus Curiae*

SOUTH AFRICAN POLICE SERVICE Second *Amicus Curiae*

Neutral citation: *Solidarity v Department of Correctional Services* [2016] ZACC 18

Coram: Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, Nugent AJ, Van der Westhuizen J and Zondo J

Judgments: Zondo J (majority): [1] to [95]
Nugent AJ (minority): [96] to [134]

Heard on: 18 November 2015

Decided on: 15 July 2016

Summary: Validity of employment equity plan – non-compliance with section 42 of Employment Equity Act – failure to take into account demographic profile of both regional and national economically active population in setting numerical targets and assessing representivity – *Barnard* principle – Also applies to African, Coloured and Indian candidates as well as to men, women and people with disabilities – employee may be denied appointment if he or she belongs to a category of persons that is already adequately represented at relevant occupational level – wrong benchmark used to set targets and determine representation – Plan not declared invalid – refused to appoint candidates – unfair discrimination based on race or gender – numerical targets not quotas – refusal to appoint set aside and appropriate relief granted

---

ORDER

On appeal from the Labour Appeal Court:

1. The late delivery of the first to third respondents' written submissions is condoned.

2. Leave to appeal is granted.
3. Subject to paragraph 4, the appeal is upheld.
4. The appeals by Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin are dismissed.
5. The orders of the Labour Court and Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:
   "(a) The claims by Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin are dismissed.
   (b) The decisions of the Department of Correctional Services not to appoint the rest of the individual applicants to the posts in which they respectively sought to be appointed constituted unfair discrimination and unfair labour practices and are set aside.
   (c) Those individual applicants who had applied for appointment to posts that remain vacant to this day or that are presently vacant even if they had subsequently been filled must be appointed to those posts and be paid remuneration and accorded the benefits attached to those respective posts.
   (d) Those individual applicants who had applied for appointment to posts that were subsequently filled and are presently filled must be paid the remuneration and be accorded the benefits attached to those respective posts.
   (e) The orders in (c) and (d) shall operate with retrospective effect from the date with effect from which the individual applicants would have been appointed to the respective posts had they not been denied appointment.
   (f) There is no order as to costs."
6. There is no order as to costs in this Court.

JUDGMENT

ZONDO J (Moseneke DCJ, Jafta J, Khampepe J, Nkabinde J and Van der Westhuizen J concurring)

Introduction

[1] The applicants have brought an application for leave to appeal against a decision of the Labour Appeal Court (LAC).[1] In terms of that decision the applicants' appeal against a decision of the Labour Court was dismissed. The decision of the Labour Court related to a dispute between the parties on whether the Employment Equity Plan[2] of the first respondent, the Department of Correctional Services (Department), for the period 2010-2014 (2010 EE Plan) was invalid. In addition, the Department's refusal to appoint the second and further applicants to certain posts constituted unfair discrimination and unfair labour practices and, if so, what the appropriate remedy was, was in issue. The Labour Court had concluded that the 2010 EE Plan did not comply with certain provisions of the Employment Equity Act[3] (EE Act) but had not declared the 2010 EE Plan invalid. It had also concluded that the Department's decisions not to appoint certain of the individual applicants constituted unfair discrimination but did not grant the individual applicants any individual relief.

Parties

[2] The first applicant is Solidarity, a registered trade union. Some of its members are employed by the Department. The second to the eleventh applicants are employees of the Department. They are also members of Solidarity. Except for the

[1] *Solidarity and Others v Department of Correctional Services and Others* [2015] ZALAC 6; 2015 (4) SA 277.

[2] As to what an employment equity plan is, see section 20 of the Employment Equity Act 55 of 1998. Section 20 is quoted in [69] of this judgment.

[3] 55 of 1998.

second applicant who is a White person, the individual applicants are Coloured people. Some of the individual applicants are men whereas others are women. The individual applicants are all based in the Western Cape.

[3] The first respondent is the Department. The second respondent is the Minister of Correctional Services. The third respondent is the National Commissioner of the Department of Correctional Services (National Commissioner). The fourth respondent is the Minster of Labour. She is the Minister responsible for the administration of the EE Act. The Police and Prisons Civil Rights Union, a registered trade union, was admitted as the first *amicus curiae* (friend of the court). Some of the employees in the Department are members of this trade union. The South African Police Service was admitted as the second *amicus curiae*. We are very grateful to the two *amici* for the contribution they made to the debate.

Background

[4] An employment equity plan is a plan provided for in section 20(1) of the EE Act which an employer prepares, adopts and implements in order to achieve employment equity in its workforce. The first employment equity plan of the Department was for the period 2000-2004. The second was for the period 2006-2009. In 2010 the Department adopted its 2010 EE Plan. That Plan was adopted after extensive consultations with a number of stakeholders including recognised trade unions. It would appear that most of the recognised trade unions accepted the 2010 EE Plan. Solidarity was not one of the recognised trade unions in the Department.

[5] The 2010 EE Plan set certain numerical targets to be attained within the five year period of the plan in order to achieve employment equity in the Department's workforce. The numerical targets set in the 2010 EE Plan were:

> "9.3% for White males and females;
> 79.3% for African males and females;

8.8%	for Coloured males and females;
2.5%	for Indian males and females.”

The numerical targets in the 2010 EE Plan were based on the mid-year population estimates, 2005, issued by Statistics South Africa.

[6] In 2011 the Department advertised certain posts in the Western Cape. The individual applicants applied for appointment to some of the posts. Except for Mr AJ Jonkers who was not recommended, all the other individual applicants were recommended for appointment by the respective interview panels. Except for Ms LJ Fortuin who was subsequently appointed to the position for which she had applied, the individual applicants were denied appointment. In the case of males, the basis for this decision was that they were Coloured persons and Coloured persons were already overrepresented in the relevant occupational levels. In the case of women, the basis was that women were already overrepresented in the relevant occupational levels. This meant that appointing the individual applicants to the positions for which they had applied would not be in accordance with the 2010 EE Plan.

[7] The 2010 EE Plan made provision for the National Commissioner to deviate from the targets in the 2010 EE Plan in certain circumstances. A deviation meant that the National Commissioner could approve the appointment of a candidate from a non-designated group in certain circumstances despite the fact that the appointment of a candidate from a designated group should be preferred as it would advance the targets of the 2010 EE Plan. This would occur where a candidate has special skills or where operational requirements of the Department dictated that that candidate be appointed. In this case no deviation was authorised. The effect of the provisions relating to the deviations is that they enabled the Department not to make appointments that advanced the numerical targets in certain circumstances. In other words, although the appointment of candidates that advanced the pursuit of the numerical targets of the 2010 EE Plan, and, therefore, the achievement of equitable

representation, was the preferred route, exceptions to that approach were provided for. That is the thrust of the provisions of the 2010 EE Plan regarding the deviations.

[8] Some of the important features of the Department's 2010 EE Plan are set out below. In an interpretation of a graphical representation provided in the Department's 2010 EE Plan, the Department said:

> "There has been steady progress since the development and implementation of the 2006-2009 EE Plan.
> Female representation at senior management moved from 25% to 30% in June 2009.
> Indians have benefited at SMS level as males stand at 3.5% and females at 1.2%, thus overrepresented.
> Whites have gone up from 12% to 13%.
> Ratio for Africans is also still far from 50-50 and in fact the indication is that more males are still being appointed at this point.
> Appointment of level 13 and 14 has to be closely monitored and should rather focus on women to balance the scales and move towards 50:50 representation."

[9] The Department's global progress made on representation at salary levels 3-6 was reflected as follows:

"Level 3:	National Target has been reached for Africans (88%), Coloureds stand at 10%, Indians stand at 2% while Whites are at 1.4%.
Level 4:	Africans stand at 65%, Coloureds at 13%, Whites at 20%, Indians at 1%.
Level 5:	Africans at 85%, Whites at 2%, Coloureds at 12% and Indian at 2%.
Level 6:	Africans at 75%, Whites at 8%, Coloured at 15% and Indians at 2%."

The Department's global progress made on representation at salary levels 7-12 was reflected as follows:

> "• White males and Coloureds are grossly overrepresented at salary level 7-12.

- White males and females are grossly overrepresented at ASD (9 & 10 salary level) by 9% and 4% respectively, while Coloured males are overrepresented by 4% and females by 1%.
- At levels 11 and 12 both White and Coloured males are overrepresented by 5%. Focus at salary levels 11 and 12 should be only on African females."

[10] It was identified that some of the limitations and shortcomings of the preceding Employment Equity Plans of the Department were that:

> "Recruitment and selection processes were not always EE Plan driven as some appointments that were made were not compliant with the EE targets.
> Lack of commitment and willingness to implement the approved EE Plan targets by some Managers.
> Failure to sanction Managers resulting in non-compliance with the EE Plan (section 24(1)(c))."

[11] In the definition section of the 2010 EE Plan the term "Affirmative Action" is defined as meaning—

> "corrective steps that must be taken in order that those who have been historically disadvantaged by unfair discrimination are able to derive full benefits from an equitable employment environment."

The term "Broad Representation" is defined as referring to—

> "the achievement of a Public Service that is inclusive of all historically disadvantaged groups in a manner that represents the make-up of the population within all occupational classes and all post levels of the Public Service."

[12] The Department's 2010 EE Plan included its Affirmative Action Programme (AA Programme). In the introduction to the AA Programme, the Department *inter alia* wrote:

"The Department of Correctional Services acknowledges *the current lack of reflection of demographics of the country in its workforce* and the inequitable representation of employees from designated groups that continue to prevail within the organisation." (Emphasis added.)

[13] Six principles were set out in the AA Programme as the principles that would guide the implementation of the programme. They were:

"2.1 Transparency

The programme shall be open to scrutiny and information pertaining thereto should be easily accessible to all including recognised and organised labour.

2.2 Inclusiveness

While the programme targets employees from the designated groups, the department acknowledges the need to accommodate required scarce skills areas, the need for mentoring and coaching and as such non-designated employees would not be excluded. Partnering with relevant stakeholders is therefore critical to ensure the overall success of the programme.

2.3 Integration with strategic interface

The programme shall support the strategic and operational goals of the DCS and shall form an integral part of the Integrated Human Resources Strategy.

2.4 Relative Disadvantage

The programme shall recognise that even among the designated groups, varying levels of representativity do exist within the organisation e.g. Coloured males in relation to African males, White females in relation to Coloured females and African females in general in relation to the representation needs of the organisation as per the DCS' Employment Equity Plan. Interventions that are developed must therefore ensure equitable representation.

2.5 Promotion and appointments

In striving to address disparities in DCS as stipulated in paragraphs 2.4 supra, acknowledgement and consideration shall be given to disadvantaged

employees within the DCS and only then shall consideration be afforded to lateral entrants.

2.6 Conscious Capacity Building

Specific interventions would be implemented to deal with the development of the previously disadvantaged groups as well as skills transfer." (Emphasis added.)

[14] The AA Programme made it clear that its beneficiaries were the following officials in the employ of the Department:

"TARGET GROUP

3.1 Women of all racial groups.

3.2 Persons with disabilities of all races.

3.3 Blacks (Africans, Coloureds and Indians).

Occupational categories and levels where under-representativity has been identified in terms of the Departmental Employment Equity Plan will receive specific focus."

[15] Some of the points made in the AA Programme were:

"Management and Monitoring of Appointments

- All appointments irrespective of occupational levels within the Department shall be informed by the Departmental Employment Equity Plan.
- Entry level recruitment shall be Employment Equity Plan driven.
- Lists of recommended candidates for Salary Levels 9-12 shall be forwarded to the directorate Equity for compliance monitoring before approval by RC's, DC HRV and CDC Corporate Services.
- Lists of short-listed candidates for Salary Levels 9-12 shall be checked by Regional Managers EE for compliance and necessary guidance at regional level and by Director Equity at National Office."

[16] On non-compliance/deviations, the following provisions appeared:

"NON-COMPLIANCE/DEVIATIONS

- In the event of any form of non-compliance or deviation, concerned managers will be held accountable and action shall be taken by the Commissioner in line with section 24(1)(C) of the EE Act as a requirement by the Department of Labour who are 'watch dogs' on behalf of the public service.
- The National Commissioner has the prerogative to appoint any candidate in accordance with the departmental Employment Equity Plan and is the only person who may deviate with valid documented reasons that will stand the test in the court of law."

Labour Court

[17] The applicants referred unfair labour practice disputes to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation in terms of the Labour Relations Act[4] (LRA). The basis of the disputes was that the Department's refusal to appoint each one of the individual applicants on the ground that they belonged to a race or gender that was already overrepresented on the relevant occupational levels constituted unfair discrimination and, therefore, an unfair labour practice. The applicants also attacked the 2010 EE Plan as non-compliant with the EE Act and as invalid. The conciliation process was unsuccessful. The dispute was then referred to the Labour Court for adjudication as an unfair labour practice dispute.

[18] The applicants sought an order declaring that the Department's 2010 EE Plan—

"1.1.1 failed to satisfy the requirements of an employment equity plan within the contemplation of the EE Act, in particular section 20; and/or

1.1.2 constituted a contravention of the prohibitions on race, gender and/or sex discrimination within the contemplation of section 6 of the EEA and its application in respect of the individual applicants amounts to unfair discrimination."

[4] 66 of 1995.

As an alternative to the above order, the applicants sought a declaratory order that the Department's 2010 EE Plan was—

> "unreasonable and/or irrational and unlawful within the contemplation of paragraphs (e)(iii), (f)(ii) and/or (k) of section 6 of PAJA and, as a consequence,
>
> 2.1 review and set aside as unlawful the decision of the relevant respondents to adopt, apply and implement the DCS Employment Equity Plan in the course of making personnel placement decisions."

The applicants also sought the following orders in respect of the individual applicants:

> "3.1 that the relevant respondents promote or appoint the individual applicants or where the posts have been filled, grant them the benefits of protective promotion;
>
> 3.2 the ordering of appropriate financial compensation; and
>
> 3.3 an order that the relevant respondents take steps to prevent the recurrence of the alleged unfair discrimination."[5]

[19] The Labour Court concluded that the 2010 EE Plan did not comply with the EE Act. The Court held that section 42 of the EE Act[6] meant that both the regional and national demographics had to be taken into account in determining numerical targets. However, it said:

> "I stress that the fact that national demographics must factor into all employment equity plans provides for a safeguard recognising that [it] was the African majority in this country that were the most severely impacted by the policies of apartheid. However, that regional demographics must be also considered, asserts the right of all who comprise black persons in terms of the EEA to benefit from the restitutionary measures created by the EEA, and derived from the right to substantive equality under our Constitution."[7]

[5] As summarised in para 3 of the Labour Court judgment above n 6.

[6] See section 42 in [70] below.

[7] See *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38; [2014] 1 BLLR 76 at para 45.

[20] The Court went on to express the view that, where the selection and recruitment processes derived from the employment equity policy of the Department took no cognisance whatsoever of the regional demographics of the Western Cape, this amounted to discrimination which is not protected by section 6(2) of the EE Act[8] or section 9(2) of the Constitution[9]. It said that that was unfair[10]. The Labour Court later said:

> "I have found that the individual applicants who are black employees in terms of the EEA have suffered unfair discrimination in that the selection process utilised to decide on their applications for appointment to various posts was premised on the understanding that regional demographics do not have to be taken into account in setting targets at all occupational levels of the workforce in DCS. This policy and practice is not in line with the affirmative action measures referred to in section 6(2)(a) of the EEA."[11]

[21] The Labour Court dealt separately with the case of Mr Davids, the only individual applicant who is not a Black person. It pointed out that Mr Davids had not been appointed to the level 8 position for which he had applied on the ground that White males were overrepresented in the relevant occupational level. The Court relied on the decision of this Court in *Barnard*[12] to dismiss Mr Davids' claim. The Labour Court said:

> "50.3 The *Barnard* matter, which binds this Court, held that affirmative action measures are to do with substantive equality and not individual rights to equality and dignity;

---

[8] Section 6(2) provides that—

> "(2) 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."

[9] See para [42] below for Section 9(2).

[10] Labour Court judgment above n 7 at paras 45-6.

[11] Id at para 56.

[12] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC). (*Barnard*).

> 50.4 *Barnard* is also authority for the proposition that persons in the position of the national commissioner of DCS have the discretion to keep posts vacant in order to comply with appointing suitably qualified members of designated groups in line with their employment equity plan."[13]

[22] The Court also pointed out that the EE Act—

> "allows for proportionality, balance and fairness when it requires both national and regional demographics to be taken into account."[14]

It later said:

> "I trust that the DCS and its employees can ensure the appropriate targets are set, factoring in the requirement."[15]

[23] The Labour Court did not conclude that the Black individual applicants should be appointed or promoted to the positions for which they had applied. No specific reason was given for its decision not to do so. About remedy, it said:

> "In my judgment the most appropriate relief for the Court to order in these circumstances is one that will benefit all employees of DCS in the Western Cape who are black employees of the DCS and members of the Coloured community in the future."[16]

The Labour Court then ordered the Department to take immediate steps to ensure that both national and regional demographics are taken into account in respect of members of designated groups when setting equity targets at all occupational levels of its workforce. It said it did not consider it appropriate to make a costs order.

[13] Id at paras 50.3 and 50.4.

[14] Id at para 53.

[15] Id.

[16] Id at para 56.

Labour Appeal Court

[24] The applicants appealed to the Labour Appeal Court against the decision of the Labour Court not to grant the individual applicants relief and its failure to declare the 2010 EE Plan invalid. The respondents cross-appealed against the Labour Court's decision that the 2010 EE Plan did not comply with the EE Act because it did not take into account regional demographics in setting numerical targets.

[25] The Labour Appeal Court referred to an important passage in the judgment of this Court in *Van Heerden*[17] where, writing for the majority, Moseneke J said:

> "When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. *It seems to me that to determine whether a measure falls within section 9(2) the inquiry is threefold. The yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons and the third requirement is whether the measure promotes the achievement of equality*."[18] (Emphasis added.)

[26] The Court pointed out that Mr Brassey, who, together with Ms Engelbrecht, appeared for the applicants in that Court, had—

> "focussed his submissions almost entirely on the argument that the DCS plan embodied a quota system which had failed to take account of the individual circumstances of the appellants."[19]

It recorded:

[17] *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

[18] Id para 37.

[19] Labour Appeal Court judgment above n 1 at para 37.

> "Mr Brassey pointed out that, from the very outset of the case before the court a quo, appellants had emphasised that the DCS plan made provision for appointments, transfers or promotions within the department 'by reference to what we condemn as quotas strictly reflecting the demographic representativeness of the races and sexes throughout South Africa.'"[20]

[27] It went on to record the following submission by the then Counsel for the appellants:

> "Mr Brassey submitted further that the existence of this quota system was reflected in the fact that Whites were to be preferred for appointment at certain levels with African and Coloured persons being overlooked, notwithstanding the sustained history of racial oppression under apartheid. By contrast, these groups were surely to be beneficiaries of restitutionary measures under the Constitution and the EEA. At other levels in the workforce, the application of the plan meant that white males simply could never be promoted. In developing this argument, Mr Brassey submitted that the court a quo had ignored appellants' central objection to the DCS plan, that it was based upon 'race and gender norming' without any proper regard to questions of past disadvantage."[21]

[28] The conclusion of the Court was that the deviations from the 2010 EE Plan rendered the numerical targets flexible. For this reason, said the Court, the numerical targets were not quotas. In support of this finding, the Labour Appeal Court referred to the evidence of Mr Bonani, the Director for Equity and Gender in the Department concerning how the Department approached deviations. It also said that there was supporting evidence that the Commissioner had approved 13 deviations in the Western Cape during the period 2010 to 2013. It said that this was also recorded in the respondent's statement of defence. The Court also pointed out that the applicants had not based their case specifically on the decision to refuse deviation in individual cases but focussed rather on the plan itself which they contended operated in a discriminatory fashion towards the individual applicants.

[20] Id.

[21] Id at para 38.

[29] The Labour Appeal Court pointed out that, since *Barnard* was concerned with the decision by the National Commissioner of the South African Police Service not to appoint Captain Barnard to an advertised position, in that case this Court did not have to examine the employment equity plan. It said:

> "But in this case, the three criteria which the court in *Van Heerden* isolated in section 9(2) to test restitutionary measures are directly relevant. To recapitulate: the measure should target a category of beneficiaries disadvantaged by unfair discrimination. This is reflected in the very nature of the DCS plan. Secondly, the measure must be 'designed to protect or to advance such persons or categories of persons, and must be reasonably capable of obtaining the desired outcome'."[22]

[30] The Court observed that the 2010 EE Plan had a provision for deviations from the numerical targets which could be implemented in a case where a rigid implementation of the plan could compromise service delivery or where it would not be possible to appoint suitably qualified people from designated groups to the relevant occupational levels in the workforce. It said that, if rationally implemented, the deviations ensured that the plan was not implemented in a rigid fashion. The Labour Appeal Court pointed out that the 2010 EE Plan was reasonably capable of obtaining its desired outcome of a representative workforce which is suitably qualified and achieves service delivery.

[31] It was pointed out by the Court that in *Van Heerden* this Court had held that the measure had to promote "the advancement of equality". The Court said that that is why the test was to ensure that the plan did not impose disproportionate burdens or—

> "constitutes an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long term constitutional goal would be threatened."[23]

[22] Labour Appeal Court judgment above n 1 at para 51.

[23] Id.

It took the view that it was clear from the testimony of Mr Magagula and Mr Bonani that this was the objective the Department had in mind when it developed its plan to ensure substantive equality for those who suffered the most egregious forms of discrimination under apartheid.

[32] The Court said that a further consideration adding weight to the respondents' case was that the EE Act must be read through the prism of section 9(2). It then said:

> "Inevitably, on the reading we have given to section 9(2), weight is accorded in the balancing act to the position of the individual appellants even though there cannot be a blanket deference to a decision to promote disadvantaged groups. The EEA however recognises the need for balance. In the first place, a person appointed from a designated group must be suitably qualified for the position. Secondly, where an individual applicant possesses scarce or unique skills which are relevant to the organisational needs of the designated employer, these must be taken into account; hence the prohibition against an absolute bar to employment. Thirdly, for reasons which will become apparent presently, a consideration of regional demographics in terms of section 42 of the EEA may well come to the aid of categories of applicants who otherwise were unduly burdened by the implementation of the plan."[24]

[33] The conclusion of the Court was that the 2010 EE Plan passed the test required in terms of the EE Act reading it together with the Constitution. It, accordingly, dismissed the appeal.

In this Court

Jurisdiction

[34] This Court has jurisdiction and nothing more needs to be said about that.

[24] Id at para 52.

Leave to appeal

[35] It is in the interests of justice to grant leave to appeal. The matter raises important constitutional issues and the interpretation of legislation enacted to give effect to section 9(2) of the Constitution. Both the Labour Court and Labour Appeal Court concluded that the Department's 2010 EE Plan did not comply with the EE Act but none of them declared the Plan invalid. The applicants persist in their contention that the two courts ought to have gone one step further and declared the 2010 EE Plan invalid. They contend that those two Courts erred in failing to make that order.

[36] The Labour Court concluded that the decisions not to appoint or promote the individual applicants, other than the individual applicant who is not Black, namely, Mr Davids, constituted unfair discrimination but did not grant them any individual relief. It gave no reasons for this decision. The Labour Appeal Court did not make an express finding to this effect. A reading of the judgment suggests that a conclusion to that effect may be implied but that is far from certain. The applicants' case is reasonably arguable. Therefore, there are reasonable prospects of success.

The appeal

May the Barnard principle be applied against a black candidate?

[37] The applicants' statement of case in the Labour Court was drafted before this Court's judgment in *Barnard*.[25] Part of the case that the applicants put up in that statement suggests that as a matter of principle the Department had no right in law to refuse to appoint a candidate for appointment to a position by reason of the fact that he or she was a Coloured person or was a woman. There was also some suggestion by the applicants that an employer could not do that against Coloured people because they are Black people which is one of the designated groups intended to be beneficiaries of employment equity. It is necessary to deal with this issue because, if the *Barnard* principle may not be used against a Black candidate or a woman, then

[25] *Barnard* above n 12.

that conclusion would be fatal to the whole case of the Department and it would not be necessary to consider other aspects of the case other than remedy.

[38] The important question that arises is, therefore, whether the *Barnard* principle applies to African people, Coloured people, Indian people, people with disabilities as well as women or whether its application is limited to White people. Ms Barnard was refused promotion on the basis that White people were already overrepresented in the occupational level to which she wanted to be appointed. This Court upheld this reason. The question is, therefore, whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment. The question also arises whether the *Barnard* principle applies to gender with the result that a man or woman could be denied appointment to a position at a certain occupational level on the basis that men or women, as the case may be, are already adequately represented or overrepresented at that level.

[39] In *Barnard* Moseneke ACJ, writing for the majority, said:

> "The respondent accepted, as we must, that the Instruction gave the National Commissioner the power and discretion to confirm or forgo the recommendations made by the interviewing panel and Divisional Commissioner. He was not bound by the recommendations, particularly in relation to salary level 9 posts. The National Commissioner retained the power to appoint a candidate best suited to the objects of the Employment Equity Plan. The record shows that on several other occasions, the National Commissioner declined to fill up positions because suitable appointments, which would have addressed representivity, could not be made. Here, he exercised his discretion not to appoint Ms Barnard, even though she had obtained the highest score, because her appointment would have worsened the representivity in salary level 9 and the post was not critical for service delivery. Again, in his discretion, he chose not to appoint Mr Mogadima or Captain Ledwaba (Mr Ledwaba) even though their

> appointment would have improved representivity. I cannot find anything that makes his exercise of discretion unlawful."[26]

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

[41] It would be unacceptable, for example, for a designated employer to have a workforce of five hundred employees fifty of whom occupy senior management positions but only five of those senior management positions are held by African people when twenty are held by White people, fifteen by Coloured people and ten by Indian people despite the fact that in the population of South Africa, African people are by far the majority. Such a workforce could not conceivably be said to be broadly representative of the people of South Africa.

---

[26] *Barnard* above n 12 at para 62.

[42] Why do I say that a designated employer is required to work towards achieving a workforce that is broadly representative of the people of South Africa? I say so because, upon a proper construction of the EE Act read with the relevant provisions of the Constitution, the Public Service Act[27] and the Correctional Services Act,[28] that is what is required. Section 9(2) of the Constitution provides:

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." (Emphasis added.)

Section 195 of the Constitution deals with the basic values and principles which must govern public administration. Section 195(2) provides that the principles in section 195(1) apply to the administration in every sphere of government, organs of state and state enterprises. Section 195(1)(i) reads:

> "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.)

[43] Section 196(4)(a),(d) and (e) of the Constitution gives the Public Service Commission the powers to—

> "(a) promote the principles and values in section 195, throughout the public service;
>
> . . .
>
> (d) to give directions aimed at ensuring that personnel procedures, promotions and dismissals comply with the values and principles;
>
> (e) . . . to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with."

[27] 103 of 1994.

[28] 111 of 1998.

[44] Section 11(1) of the Public Service Act provides that—

> "[i]n the making of appointments and the filling of posts in the public service due regard shall be had to equality and the other demographic values and principles enshrined in the Constitution."

Section 11(2)(b) of the Public Service Act provides that, in the making of any appointment in terms of section 9 in the public service—

> "the evaluation of persons shall be based on training, skills, competence, knowledge *and the need to redress*, in accordance with the Employment Equity Act, 1998 (Act No. 55 of 1998), *the imbalances of the past to achieve a public service broadly representative of the South African people including representation according to race, gender and disability*." (Emphasis added.)

[45] Section 96(3)(c) of the Correctional Services Act provides that—

> "the assessment of persons for purposes of appointment and promotion—
> shall be based on level of training, relevant skills, competence and *the need to redress the imbalances of the past* in order to achieve a Department broadly representative of the South African population, including representation according to race, gender and disability." (Emphasis added.)

[46] Nobody can justifiably dispute that, although under apartheid and racial discriminatory laws and practices all Black people suffered hardships, the greatest hardships were suffered by the African people. Indeed, this much was recognised by the High Court in *Motala*[29] and by the Labour Court in this case. Therefore, any corrective measure, such as an employment equity plan or an affirmative action programme, cannot succeed in reversing the imbalances of the past if it is based on the notion that Black people would be equitably represented in a workforce or in a

[29] *Motala and Another v University of Natal* 1995 (3) BCLR 374 (D) at 383B-E.

particular occupational level if there are enough Coloured people or Indian people even if there are no African people or there are only a few African people.

[47] The EE Act is a legislative measure contemplated in section 9(2) of the Constitution. In part the Explanatory Memorandum that accompanied the Bill that later became the EE Act read:

> "Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in certain areas classified as 'white', which constituted 90% of the landless of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[30]

[48] Finally, the preamble to the EE Act reads in part:

> "Recognising—
> that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed by repealing discriminatory laws,
>
> Therefore in order to—
> *promote the constitutional right to equality* and the exercise of true democracy;
> *eliminate unfair discrimination in employment*;
> *ensure the implementation of employment equity to redress the effects of discrimination*;
> *achieve a diverse workforce broadly representative of our people*;
> *promote economic development and efficiency in the workforce*; and

[30] Explanatory Memorandum to the Employment Equity Bill, GN 1840 of 1997, GG 18481.5, 1 December 1997.

> give effect to the obligations of the Republic as a member of the International Labour Organisation." (Emphasis added.)

[49] The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level. On the basis of the same principle an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level. However, that is if the determination that the group is already adequately represented or overrepresented has a proper basis. Whether or not in this case there was a proper basis for that determination will be dealt with later.

Did the numerical targets constitute quotas?

[50] The applicants contended that the numerical targets contained in the Department's 2010 EE Plan constituted quotas and not numerical targets. As I understand the applicants' case, if, indeed, the targets contained in the 2010 EE Plan were quotas, that would support not only the contention that the 2010 EE Plan did not comply with the EE Act and was, therefore, invalid but also that would support their contention that the decisions not to appoint or promote the individual applicants constituted unfair discrimination. This would be so, because it would mean that the

individual applicants were denied appointments or promotions on the basis of quotas which should not have featured at all in the decision-making process.

[51] In *Barnard* this Court, although not defining a quota exhaustively, held that one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible.[31] Therefore, for the applicants to show that the numerical targets constituted quotas, they need to first show that they were rigid. The applicants submitted that the targets were rigid and were applied rigidly. The 2010 EE Plan made provision for deviation from the Plan and, therefore, for deviation from the targets in certain circumstances. These include cases where a candidate whose appointment would not advance the achievement of the targets of the 2010 EE Plan but could, nevertheless, be appointed if he or she had scarce skills or where the operational requirements of the Department were such that a deviation from the targets was justified or was warranted.

[52] The applicants acknowledged that the 2010 EE Plan made provision for deviations from the targets set by the Plan. They submitted that the provision for deviations in the limited circumstances in which deviations were permitted could not save the targets from being held to be quotas. In support of their contention, the applicants pointed out that only the Commissioner could authorise a deviation, that the 2010 EE Plan provided that managers who did not ensure compliance with it would be sanctioned. They contended that no provision was made in the Plan for deviations to be invoked by the candidates who were aggrieved.

[53] Once it is accepted that the 2010 EE Plan contained a provision for deviations from the targets of the Plan, then, in my view the targets cannot be said to be rigid, particularly where it cannot be said that the situations in which deviations are permitted are situations that do not occur in reality. The evidence given at the trial on behalf of the Department revealed, for example, that scarce skills included cases of candidates who are doctors and those who are social workers. A Department such as

[31] *Barnard* above n 12 at para 54.

the Department of Correctional Services must have a need for many social workers. Deviations could be made in regard to, among others, posts for social workers and doctors.

[54] Furthermore, the provision in the 2010 EE Plan that the Commissioner could authorise deviations in those cases where to do so would accord with the operational requirements of the Department is a provision that gives the Commissioner very wide powers to authorise deviations from the targets. The evidence given on behalf of the Department at the trial included an example that Regional Heads of the Department would recognise positions where the operational requirements of the Department required a deviation. One witness of the Department made the example of "hotspots".

[55] Also, as the Labour Appeal Court said, the Department furnished 13 specific names of persons in whose favour it had approved deviations in the Western Cape alone. The 13 deviations made in the Western Cape were made in favour of two Coloured women, seven Coloured men, two White men and two African men. This appears in the respondents' response to the applicants' statement of claim in the Labour Court. These 13 deviations were not the only ones made by the Department during that period in the Western Cape. In its response to the applicants' statement of claim, the Department said: "[a] full list of the deviations will be provided to this Honourable Court at the hearing of this matter." This reflects that in the Western Cape there were more deviations than 13 during the period 2010 – 2013. It does not appear that that list was provided at the hearing. This must have been as a result of the fact that, as the Labour Appeal Court said, the applicants' case at the trial did not focus on the deviations.

[56] In his separate judgment (second judgment), Nugent AJ disagrees with my conclusion that the numerical targets of the 2010 EE Plan were not quotas and with my reliance on the provisions relating to deviations in this regard. He expresses the view that the deviations were not part of the 2010 EE Plan but were separate. In effect

he says that they may not be taken into account in deciding whether the numerical targets were rigid and, therefore, constituted quotas. I disagree.

[57] The targets in the 2010 EE Plan should not be viewed in isolation as does the second judgment. The correct approach is to look at the 2010 EE Plan holistically including the provisions relating to deviations. After all, the deviations were deviations from those targets. The provisions relating to deviations were part of the 2010 EE Plan, were intended to be part of it and were understood even by the applicants to be part of the 2010 EE Plan. That is why the parties ran the trial on the basis that the provisions relating to deviations were part of the 2010 EE Plan. It is a general rule of appellate adjudication that disputes should be adjudicated on the same basis on which the parties dealt with them in the court of first instance. This rule is subject to one or two exceptions none of which is present in this case.

[58] Furthermore, the conclusion that the numerical targets in the 2010 EE Plan were rigid and the deviations had no effect thereon and were not to be taken into account flies in the face of a concession made by the applicants' own expert witness, Mr Joubert, under cross-examination. Counsel for the Department put to Mr Joubert that the 2010 EE Plan contained—

> "a process which involves a decision by the National Commissioner to determine . . . whether he should appoint – or whether or not he should appoint a person who does not meet the . . . employment plan targets."

To this Mr Joubert said: "[t]he employment equity plan I assume". Counsel for the Department then said: "I am referring to the targets in the plan". Mr Joubert responded: "[y]es I believe that is what the deviation process refers to". This shows that the applicants' own expert witness saw the deviation provisions as part of the 2010 EE Plan.

[59] Thereafter, the following exchange occurred:

Counsel: "And that is an indication, isn't it, of flexibility being introduced in the plan?"

Mr Joubert: "Well there is – some leeway is given to the Commissioner at his discretion to deviate, as it is stated here, deviation from what some of the other figures might lead the conclusion to be."

Counsel: "Yes, that's right. Because if the plan, to which you have had reference, is applied in an inflexible manner, there would be no discretion which rests in anyone to deviate from those targets."

Mr Joubert: "Yes, if it was completely inflexible, certainly there could not be a deviation process."

When Counsel for the applicants in the Labour Court re-examined Mr Joubert, he did not revisit this concession made by Mr Joubert. Therefore, the determination of the question whether the targets were rigid or not must not disregard this concession, as does the second judgment, but must take it into account.

[60] The second judgment also deals with the matter as if deviations were permitted only in the case of scarce skills. It overlooks the fact that deviations could also be made where the "operational requirements" of the Department justified a deviation. That simply related to the needs of the Department. That ground for deviation relates to those cases where a deviation could be justified on the basis of the operational needs of the Department. There is no justification for the conclusion that the targets in the 2010 EE Plan were rigid or were applied rigidly and, therefore, constituted quotas.

[61] The fact that only the Commissioner could authorise deviations does not itself turn a flexible target into a rigid target. In an organisation as big as the Department, it is necessary to take steps to avoid inconsistencies that may occur in the authorisation of deviations when there are too many people with power to authorise deviations. There was, therefore, nothing wrong with the fact that only the Commissioner could

authorise deviations and that Regional Heads or Directors could make recommendations to the Commissioner.

[62] There was also nothing wrong with the provision in the 2010 EE Plan that managers who did not implement the Plan would be sanctioned. Section 24(1)(c) of the EE Act contemplates that. Section 24(1)(a) places an obligation on a designated employer to assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan. Section 24(1)(b) obliges a designated employer to provide the managers with "the authority and means to perform their functions". Obviously, those functions are the functions concerning monitoring and implementing the employer's employment equity plan. Then section 24(1)(c) obliges a designated employer to "take reasonable steps to ensure that the managers perform their functions".

[63] Managers are employees. An employer is entitled to indicate to an employee that, if he or she fails to perform his or her duties or functions properly, disciplinary steps may be taken against him or her. There is no reason why a provision in an employment equity plan to the effect that managers who fail to perform their duties properly in regard to the monitoring and implementation of the employer's employment equity plan will be disciplined should be held against the employer or should be said to render numerical targets quotas.

[64] Finally, it also needs to be highlighted that at the trial the applicants' case did not include showing that the Commissioner had failed to properly exercise her discretion to authorise deviations in the case of any of the individual applicants. I, therefore, conclude that the applicants have failed to show that the targets in the 2010 EE Plan constituted quotas.

Validity of the Plan and unfair discrimination

[65] The applicants contend that the Department's decisions to refuse to appoint the individual applicants on the basis of their race or gender constituted unfair

discrimination which is prohibited by section 6(1) of the EE Act. In this regard it will be recalled that the Department's reason for not appointing the individual applicants who were recommended for appointment was that the Coloured people and women were already overrepresented in the occupational levels to which the individual applicants sought to be appointed. That meant that they were overrepresented in terms of the numerical targets set by the Department in the 2010 EE Plan. The applicants also argued that the 2010 EE Plan did not comply with the EE Act in certain respects and, because of this, was invalid and should be set aside. The issues relating to whether a declaratory order should be made concerning the validity of the 2010 EE Plan and whether the Department's refusal to appoint the individual applicants constituted unfair discrimination will be dealt with together.

[66] The provisions which the applicants contend the 2010 EE Plan did not comply with are those of section 20(2)(a) and (c) as well as section 42 of the EE Act. However, there are other sections of the EE Act that are also relevant which will be referred to in the course of dealing with the applicants' contention. Section 13(1) and (2) reads:

> "(1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.
>
> (2) A designated employer must—
>
> (a) consult with its employees as required by section 16;
>
> (b) conduct an analysis as required by section 19;
>
> (c) prepare an employment equity plan as required by section 20; and
>
> (d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21."

[67] Section 15 reads:

> "Affirmative action measures

(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.

(2) Affirmative action measures implemented by a designated employer must include—

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to—

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.

(4) 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."

[68] Section 19 reads:

"Analysis

(1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices,

procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.

(2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels of that employer's workforce."

[69] Section 20(1) and (2) reads:

"(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state—

(a) the objectives to be achieved for each year of the plan;

(b) the affirmative action measures to be implemented as required by section 15(2);

(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;

(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;

(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

(i) any other prescribed matter."

[70] At the relevant time, section 42 read:

> "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 must, 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 the—
>
> (i) demographic profile of the national and regional economically active population;
>
> (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
>
> (iii) economic and financial factors relevant to the sector in which the employer operates;
>
> (iv) present and anticipated economic and financial circumstances of the employer;
>
> (v) the number of present and planned vacancies that exists in the various categories and levels, and the employer's labour turnover;
>
> (b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
>
> (c) reasonable efforts made 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; and
>
> (e) any other prescribed factor."

Subsequently, this provision was amended by the replacement of the word "must" in the introductory part of subsection (1) with the word "may". Accordingly, this matter must be determined on the basis of how this provision read before amendment.

[71] Section 42 applies when the Director-General or any person or body applying the EE Act seeks to determine "whether a designated employer is implementing employment equity in compliance with [the EE Act]. . .". It is to be noted that this provision does not directly refer to the implementation of an employment equity plan but simply to "implementing employment equity". However, the matter was argued on the basis that the implementation of employment equity means the same thing as the implementation of an employment equity plan where there is one. For purposes of this matter I shall deal with section 42 on this basis as well.

[72] Section 42(a) must be read with other sections of the EE Act including sections 13, 15, 19, 20 – all of which I have already quoted. Section 13 deals with the "[d]uties of designated employers". I draw attention to section 13(2)(b) and (d). Paragraph (b) obliges a designated employer "to conduct an analysis as required by section 19". Paragraph (d) obliges a designated employer to report to the Director-General progress made in implementing its employment equity plan.

[73] Section 42 is about determining whether a designated employer is implementing employment equity in accordance with the EE Act. It provides for the factors that, before its amendment, anyone applying the EE Act to make that determination was obliged to take into account. Before amendment, section 42 said that the factors that had to be taken into account were those set out in sections 15(2) and 42(a) to (e). There are nine factors altogether provided for in those two sections.

[74] One of the factors that section 42 required to be taken into account in determining whether a designated employer was implementing employment equity in compliance with the EE Act was the extent to which suitably qualified people from and amongst the different designated groups were 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 equitable representation must be equitable representation "in relation to the demographic profile of the national and regional economically active population". In other words, the

person applying the EE Act had to determine whether or not the relevant categories of persons were equitably represented in each occupational level in relation to the demographic profile of the national and regional economically active population. If those categories of persons were equitably represented in that context, that meant that the employer was implementing employment equity in compliance with the EE Act in regard to the factor in section 42(a). If they were not, that meant that the employer was not implementing employment equity in compliance with the EE Act in regard to the factor in section 42(a).

[75] Section 42(a) must be read with section 19. This is so because they both relate, at least in part, to the determination of the level of representation of suitably qualified people from and amongst the designated groups. Section 19(1) obliges a designated employer to collect information and conduct an analysis of employment equity policies, practices, procedures and working environment in order to identify employment barriers which adversely affect people from designated groups. Section 19(2) provides that that analysis must include a profile of the designated employer's workforce within each occupational level—

> "in order to determine the degree of underrepresentation of people from designated groups in various occupational categories and levels in that employer's workforce."

This means that the analysis provided for in section 19 is used to determine whether suitably qualified people from the different designated groups are equitably represented within all occupational levels in a designated employer's workforce.

[76] Section 20(2)(c) must also be read with section 19. This is because section 20(2)(c) refers to underrepresentation "identified by the analysis". The reference to "the analysis" can only be a reference to the analysis referred to in section 19. It, therefore, seems logical that the extent of the representation of suitably qualified people from and amongst the different designated groups in all occupational

levels in a designated employer's workforce, as provided for in section 42(a), would be determined on the basis of the analysis referred to in section 19.

[77] Section 20(2)(c) says that, "where underrepresentation of people from designated groups has been identified by the analysis", the employment equity plan must state—

> "the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals."

This means that the numerical targets or goals in an employment equity plan must be based on the level of underrepresentation that has been identified using the section 19 analysis.

[78] Going back to section 42(a), it seems to me that, if a designated employer uses a wrong basis to determine the level of representation of suitably qualified people from and amongst the different designated groups, the numerical goals or targets that it may set for itself to achieve within a given period would be wrong. It is of fundamental importance that the basis used in setting the numerical goals or targets be the one authorised by the statute. A wrong basis will lead to wrong targets. In the present case the Department only used the national demographic profile to determine the level of representation of the different designated groups. At the time the law was that it was obliged to use the demographic profile of both the national and regional economically active population. It did not also take into account the demographic profile of the regional economically active population as it was obliged to in terms of section 42(a).

[79] In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully. It had no

power to disregard the requirement of also taking into account the demographic profile of the regional economically active population provided for in section 42(a). The Department sought to justify its conduct in this regard on the basis that it is a national Department. The problem with this is that section 42(a) did not exclude national Departments from its application. Accordingly, the fact that it is a national Department in terms of section 1 of the Public Service Act did not exempt it from complying with the requirements of section 42(a).

[80] The effect of the above conclusion is that, when the Department refused to appoint the Coloured and female individual applicants on the basis that they belonged to groups that were already overrepresented within the occupational levels to which they wanted to be appointed, the overrepresentation of those groups had been determined on a wrong benchmark. Whether the groups would still have been overrepresented or not had the correct benchmark been used, we do not know. However, the fact of the matter is that the Department acted in breach of its obligations under section 42(a) as that provision stood before it was amended.

[81] Once it has been found that the overrepresentation relied upon by the Department to refuse to appoint the Coloured and female individual applicants lacked a proper basis, what remains is that the Department is not able to justify the use of race and gender in not appointing them. Section 6(1) of the EE Act provides that:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender. . ."

Section 11(1) of the EE Act provides:

> "If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—
>
> (a) did not take place; or

(b) is rational and not unfair or is otherwise justifiable."

[82] One cannot "prove, on a balance of probabilities", that anything is "rational and not unfair or is otherwise justifiable", because it is only a fact that can be proved. Whether conduct is rational or fair or justifiable is not a question of fact but a value judgment.[32] I shall take section 11(1)(b) to require that the employer must show that the discrimination was rational and not unfair or is otherwise justifiable. Since the Department's understanding that Coloured people and women were overrepresented in the relevant occupational levels had no lawful basis, the Department has failed to show that the discrimination was rational and not unfair or was otherwise justifiable. In the circumstances, the conclusion is inescapable that the Department's decisions in refusing to appoint the Coloured and female individual applicants constituted acts of unfair discrimination. Those decisions also constituted unfair labour practices.

Remedy

[83] The next question is what remedy, if any, should be granted to the individual applicants. The applicants contended that the Department's 2010 EE Plan should be declared invalid and set aside. That plan was for the period 2010-2014. It is no longer in use. Many decisions may have been made while it was in use. It does not appear to me that it is warranted to invalidate the entire plan. It seems appropriate to rather focus on the specific decisions that were taken pursuant to that plan about which the applicants complain and declare them invalid and set them aside.

[84] The applicants' real complaints were based on the Department's refusal to appoint the individual applicants to the relevant posts. Those decisions should be set aside. That should afford the applicants effective relief. In this Court the applicants sought to make the invalidation of the 2010 EE Plan a big issue. However, that reflected a change of attitude on their part to the issue because in the pre-trial minute agreed to between the parties they said that "the constitutionality and legality of the

[32] *Media Workers Association of SA & Others v Press Corporation of SA Ltd* 1992 (4) SA 791 (A); (1992) 13 ILJ 1391 (A) at 1397H-1398B.

Plan is merely ancillary to the discrimination dispute". Therefore my approach that the discrimination dispute is the real dispute between the parties accords with the pre-trial minutes.

[85] In a case such as this, section 50(2) of the EE Act gives the Labour Court the power to make "any appropriate order that is just and equitable in the circumstances" including an order for the payment of compensation. As we are dealing with an appeal from the Labour Appeal Court which had heard an appeal from the Labour Court we have to determine a remedy that the Labour Court had power to grant. Therefore, we have the same powers. It seems to me that the first step would be to set aside the Department's refusal to appoint the Coloured and female individual applicants.

[86] With regard to further orders, it is necessary to distinguish between those individual applicants who had applied for appointment to posts that remain unfilled to this day and those that were filled. The applicants' Counsel asked the Court to make this distinction in dealing with the remedy. This must have been based on the recognition of the fact that it may be disruptive if those who had been appointed to the posts and have served in them for a number of years were to be removed to make space for the individual applicants. It may also be that some of those who were appointed were members of Solidarity and Solidarity may not have wanted to disrupt the lives of some of its members.

[87] Except for one Coloured individual applicant, namely, Mr AJ Jonkers, all the Coloured individual applicants were recommended for appointment. Mr AJ Jonkers was not recommended for appointment. Ms LJ Fortuin was recommended but initially denied appointment. However, later she was appointed to the post she had wanted. These two individual applicants can therefore not be said to have suffered any unfair discrimination or to have been subjected to any unfair labour practice. Had it not been for the fact that the Department had concluded, on the basis of a wrong benchmark, that Coloured people and women were overrepresented in the relevant

occupational levels, there seems to be no reason why the individual applicants, other than Mr PJ Davids, Ms LJ Fortuin and Mr AJ Jonkers, would not have been appointed. The Coloured individual applicants who had applied for appointment to posts that remain unfilled to this date must be appointed to those posts. The appointment must be with retrospective effect to the date from which they would have been appointed had they been appointed at the time they were denied appointment. This means that they must also be paid the difference in remuneration that they would have received from that date to the date of their commencement of work in the posts in terms of this judgment. They must also be accorded the benefits that attach to the posts with effect from the date from which they would have been appointed to the posts had they not been denied appointment.

[88] What about the individual applicants who had applied for posts that were subsequently filled? Counsel for the applicants submitted that they should be granted "protective promotion". However, Counsel did not furnish this Court with any legislative instrument providing for "protective promotion". As I understand it, the concept of "protective promotion" entails that, if an employee had applied for promotion but was not promoted and it is later found that he or she should have been promoted, that employee is then accorded the remuneration that he or she would have been accorded had she been promoted. In other words, he or she remains in the lower position but is remunerated at the level of the post to which she was wrongly denied promotion.

[89] The fact that the applicants did not seek to have the successful candidates removed from the posts to which they had applied must be of benefit to the Department. This is so because it avoids disruption in the workplace that would occur if the present incumbents to the posts have to be removed. Section 50(2) of the EE Act does not in terms make provision for "protective promotion". However, it seems to me that the remedial powers that it gives the Labour Court – which are the powers this Court also has on appeal in relation to this matter – are wide enough to

cover an order that would have the same effect as protective promotion or similar effect. Section 50(2) reads:

> "(2) If the Labour Court decides that an employee has unfairly been discriminated against, the Court may make *any appropriate order that is just and equitable in the circumstances* including—
>
> (a) payment of compensation by the employer to that employee;
> (b) payment of damages by the employer to that employee;
> (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
> (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
> (e) an order directing the removal of the employer's name from the register referred to in section 41; and
> (f) the publication of the Court's order." (Emphasis added.)

[90] What matters the most in regard to the power of the Court under section 50(2) is that the remedy or order it makes must be one that is appropriate as well as just and equitable. The respondents did not contend that, if this Court held that the individual applicants had been unfairly discriminated against, the so-called protective promotion would be inappropriate. I do not call the order that I propose to make protective promotion. However, it is an order that, in my view, is just and equitable.

[91] Considerations of justice and equity dictate that the individual applicants concerned should be paid remuneration applicable to the posts to which they were unfairly denied appointment. The payment of this remuneration must be with effect from the date with effect from which they would have been appointed to the posts if they were not denied appointment.

[92] This does not mean that the individual applicants concerned must be paid double, namely, for the posts they continue to occupy and for the posts to which they were denied appointment. It simply means that:

(a) for the period before the date of this judgment they must be paid the difference between what they would have been paid had they been appointed to the posts to which they were denied appointment and what they have been paid in respect of the posts they have occupied during that period;

(b) for the period after the handing down of this judgment, despite the fact that they continue to occupy the posts that they occupy, they must be paid at the level of the remuneration at which they would have been paid had they been appointed to the posts to which they were denied appointment; and

(c) they must also be accorded benefits attached to the posts in which they sought appointment but were not appointed.

[93] The finding that the Department's decision not to appoint the individual applicants to the posts to which they had applied for appointment does not apply to three of the individual applicants, namely Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin. In respect of Mr Davids, the reason is that he is a White person and white people were already overrepresented in the relevant occupational level to which he sought appointment. In respect of Ms Fortuin, she was later appointed to the post to which she had initially been denied appointment. Mr Jonkers was not recommended for appointment by the panel that interviewed him.

[94] With regard to costs, as this is a labour matter I propose not to make any costs order.

Order

[95] In the result the following order is made:

1. The late delivery of the first to third respondents' written submissions is condoned.

2. Leave to appeal is granted.
3. Subject to paragraph 4, the appeal is upheld.
4. The appeals by Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin are dismissed.
5. The orders of the Labour Court and Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:

   "(a) The claims by Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin are dismissed.

   (b) The decisions of the Department of Correctional Services not to appoint the rest of the individual applicants to the posts in which they respectively sought to be appointed constituted unfair discrimination and unfair labour practices and are set aside.

   (c) Those individual applicants who had applied for appointment to posts that remain vacant to this day or that are presently vacant even if they had subsequently been filled must be appointed to those posts and be paid remuneration and accorded the benefits attached to those respective posts.

   (d) Those individual applicants who had applied for appointment to posts that were subsequently filled and are presently filled must be paid the remuneration and be accorded the benefits attached to those respective posts.

   (e) The orders in (c) and (d) shall operate with retrospective effect from the date with effect from which the individual applicants would have been appointed to the respective posts had they not been denied appointment.

   (f) There is no order as to costs."
6. There is no order as to costs in this Court.

NUGENT AJ (Cameron J concurring)

[96] I support the orders proposed by my colleague Zondo J, except for a reservation I come to presently, but see the matter differently in a number of respects. It is necessary briefly to express my reasons for supporting those orders.

[97] This Court has for long been conscious of the enormous task of realising the transformational aspirations of the Constitution, and has been acutely aware of the difficulties that will be confronted along the way. It was foremost in the mind of this Court in *Bel Porto* where, grappling with equality in the education system, it was led to say:

> "The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."[33]

[98] Two years later, in *Bato Star*, when considering the appropriate balance to be struck to facilitate equity in the fishing industry, the Court reflected once more upon the difficulties to be overcome:

> "There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them."[34]

[99] More recently, in *Barnard*, writing for the majority, Moseneke ACJ eloquently expressed the objectives of the Constitution, applicable as much in this case as they

[33] *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*) at para 7.

[34] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at para 76.

were in *Barnard*, as plainly having a transformative mission. "It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination."[35] But he took care, in addition, to articulate the vigilance to be exercised in pursuing that goal:

> "Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. . . . Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive. . . . We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged."[36] (Footnotes omitted.)

[100] In a joint concurring judgment Cameron J, Froneman J and Majiedt AJ emphasised that timely caution; highlighting the tension that can arise from the Constitution's commitment both to recognising and redressing the realities of the past, and to establishing a society that is non-racial, non-sexist and socially inclusive:

> "[We] must note with care how these remedial measures often utilise the same racial classifications that were wielded so invidiously in the past. Their motivation is the opposite of what inspired apartheid: for their ultimate goal is to allow everyone to overcome the old divisions and subordinations. But fighting fire with fire gives rise to an inherent tension. That is why, as the main judgment observes, we must 'remain vigilant that remedial measures under the Constitution are not an end in themselves.' . . . We agree with the main judgment that, to exercise this vigilance, remedial measures 'must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society'."[37] (Footnotes omitted.)

---

[35] *Barnard* above n 12 at para 29.

[36] Id at paras 30-1.

[37] Id at paras 93-4.

[101] The fact that balance must be brought to bear if those objectives are to be reconciled was stressed repeatedly by Van der Westhuizen J, who also said:

> "[It] must be pointed out that equality can certainly mean more than representivity. Affirmative measures seek to address the fact that some candidates were not afforded the same opportunities as their peers, because of past unfair discrimination on various grounds. By focusing on representivity only, a measure's implementation may thwart other equality concerns."[38] (Footnote omitted.)

[102] The nuances and complexities this Court has repeatedly recognised as inherent in the constitutional process of transformation have a practical bearing on this case. There is no sign in the Plan now before us of the just balancing required by *Bel Porto* and *Bato Star*, nor is there any recognition of the care and vigilance expressed in *Barnard*. Nor is there any attempt to harmonise the constitutional tensions that concerned the concurring judges, nor of the balancing that was urged by Van der Westhuizen J. In contrast to the thoughtful, empathetic, and textured plan one might expect if weight is given to what was expressed by this Court, what we have before us is only cold and impersonal arithmetic. A person familiar with the arithmetic functions of an Excel spreadsheet might have produced it in a morning.

[103] The arithmetic is founded on two ratios and no more. One is the proportional relationship to one another of the four major racial groups that make up our population, bluntly expressed as: "White 9.3%; African 79.3%; Coloured 8.8%; Indian 2.5%". The other is a ratio of men to women, expressed in numbers, but equating to 60% and 40% respectively.[39]

[104] Those ratios are described as reflecting "SA Statistics of economically active population (Census 2006)". The source of the figures is said to be "Stats SA, Mid-year population estimates, South Africa, 2005 (Statistical Release P0302)". Even

[38] Id at para 149.

[39] This ratio was adopted at salary levels 3-8. Salary levels 9-16 prescribed a 50:50 ratio.

that attribution was accorded disturbingly little care. First, it overlooks that Statistics Release P0302 was issued on 31 May 2005 and could not have reflected the outcome of a census conducted only in 2006.[40] Second, there was no census in 2006.[41] Third, the Statistics Release is not the source of the gender ratio that has been adopted.[42] And fourth, the statistics in the Statistics Release reflect not the composition of the economically active population but the composition of the population as a whole.

[105] What follows the expression of those ratios in the Plan is a series of arithmetic tables. These allocate posts at various levels in the Department's establishment in accordance with the ratios, comparing the allocations with the racial and gender composition of its then existing workforce, and recording the differences (referred to as "gaps"), to the last digit. At the foot of each table are instructions on what must be done to eliminate the "gaps" at the various levels. In each case the instruction records that a negative "gap" means "reduce personnel" and a positive "gap" means "appoint personnel". What follows are the instructions at each level of the establishment:

> "Levels 3-5:
>
> "At level 3 only Whites and Indians should be appointed. At salary level 4 only 9 African Males, one African Female and one Coloured Male need to be appointed to balance representation of the workforce. At level 5 only African Females, Whites and Indians can be appointed."
>
> Levels 6-8:
>
> "At level 6 African Females, White Females and Indians should be appointed. At level 7 Africans (M 684; F 3 039) 331 Coloured Females and 103 Indian Females should be appointed. At level 8 only Africans (157 m & 190 f) and 15 Indians."

[40] See Statistics South Africa *Mid-year population estimates, South Africa: 2005* (statistical release P0302, May 2005), available at http://www.statssa.gov.za/publications/P0302/P03022005.pdf.

[41] A census was scheduled for 2006 but was postponed to 2011.

[42] The document reveals that the ratio 60:40 was adopted as a matter of policy for levels 3-8. At levels 9-16 the ratio adopted was 50:50.

Levels 9-12:

"At levels 9 & 10 only 51 African Males, 198 African Females and 2 Indian Females can be appointed. At level 11 & 12 only 109 African Females, 5 White Females and 9 Coloured Females can be appointed."

Levels 13-16:

"At level 13 African Males stand at 63 with a gap of -9 which indicates no African male should be appointed. 24 African Females, 4 Coloured Females and 1 Indian Female need to be appointed at this level. At level 14 only 3 African Females and 1 White Female needs to be appointed. At level 15 only 2 African Females and 1 African Male can be appointed."

[106] That exposition gives the full substance of the Department's Employment Equity Plan. It gives a flavour of how antithetical the Plan is to constitutional transformation that is respectful of the rights and interests of everyone. The remainder of the document incorporating the Plan comprises explanatory background, historical progress towards achieving the allocations, statements of policy, allocation of responsibilities, and directions for implementation.

[107] The hallmark of the implementation directions is that those responsible for making appointments must apply the racial and gender allocations unswervingly. If they do not they are at peril even of disciplinary steps:

"In the event of any form of non-compliance or deviation, concerned managers will be held accountable and action shall be taken by the Commissioner in line with section 24(1)(c) of the EE Act as a requirement by the Department of Labour who are 'watchdogs' on behalf of the public service."

[108] My colleague finds those allocations not to be "quotas", which are prohibited, but instead to be "numerical targets", which are allowed.[43] I disagree. They have the look, flavour and characteristics of quintessential quotas.

[109] A "quota" is a word in common usage. This Court used it liberally in *Bato Star* with no need to question what it means.[44] Its meaning is given in various dictionaries, with nuances of language that all fit the present case. It means an allocation that is in some sense due. And it is self-evident from the tables, for example, that 197 posts at level 3 are "given" or "due" to Coloured women, and 84 posts are "given" or "due" to Indian men (Oxford English Dictionary).[45] And that 79.3% of posts throughout the establishment are "proportionately assigned" to African people (Black's Law Dictionary).[46] And that a maximum number of posts at each level are available only to each racial and gender group (Collins English Dictionary).[47]

[110] My colleague finds these are not "quotas" because the National Commissioner is entitled to deviate from the allocations. The Plan says the National Commissioner may do so where "special skills" are required that would not otherwise be available (examples he gives are doctors and social workers) or where "operational reasons" require them not to be applied. The judgment concludes on that basis that the allocations are not rigid and thus not quotas.

[111] The judgment draws for its reasoning on *Barnard*. There, Moseneke ACJ, while eschewing a definitive meaning of a quota, said nonetheless that "the primary

---

[43] Section 15(2)(d) of the EE Act provides that: "Affirmative action measures implemented by a designated employer must include . . . measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce." Section 15(3) of the EE Act provides that such measures "include preferential treatment and numerical goals, but exclude quotas".

[44] *Bato Star* above n 34 at para 1: "This application . . . concerns the allocation of fishing quotas."

[45] *The Oxford English Dictionary* 2 ed (Clarendon Press, Oxford, 1989) vol 13 at 51: "2. The part or share of a total which belongs, is given, or is due to one."

[46] *Black's Law Dictionary* 8 ed (West Group, 2004) at 1285: "1. A proportional share assigned to a person or group: an allotment. 2. A quantitative restriction: a minimum or maximum number."

[47] *Collins English Dictionary* 3 ed (HarperCollins, Glasgow, 2007) at 663: "1. Share that is due from, due to, or allocated to a group or person. 2. Prescribed number or quantity allowed."

distinction between numerical targets and quotas lies in the flexibility of the standard."[48] He went on to say that section 15(3) of the EE Act "endorses numerical goals in pursuit of work place representivity and equity. They serve as a flexible employment guideline to a designated employer".[49]

[112] The National Commissioner (but only the National Commissioner) is indeed entitled to deviate from the allocations in the special cases mentioned. That is expressly recognised in the implementation directives:

> "The National Commissioner has the prerogative to appoint any candidate in accordance with the departmental Employment Equity Plan and is the only person who may deviate with valid documented reasons that will stand the test in [a] court of law."

And:

> "[Regional Commissioners] and [Chief Deputy Commissioners] must ensure that deviations or any appointment that is against the [Employment Equity] Plan is effected by the National Commissioner as the only person mandated to do so by the approved [Department of Correctional Services Affirmative Action] Programme. All scarce skills are considered where candidates from the under-represented group are not available. Reasons for [a] deviation request must thus be provided in a memorandum format. Non-discriminatory operational requirements / critical positions that are central to core business delivery may be considered by the National Commissioner."

[113] But the approach of my colleague seems to me to misstate the enquiry. We are concerned with the general application of the Plan – not with special cases to which the Plan does not apply. When the National Commissioner deviates from the Plan to appoint doctors he is not implementing the Plan – he is excepting doctors from it. The critical enquiry is not whether there are special cases that are excepted from the Plan,

[48] *Barnard* above n 12 at para 54.

[49] Id.

but instead whether there is scope for flexibility when the Plan is applied to non-excepted posts.

[114] And there the Plan could not be more rigid. It is no answer to someone in a non-excepted post, like an administrator, or an accountant, or a prison warder, who is rigidly turned away because of his or her race or gender, to be told the Plan is flexible because they would have been appointed if they had been doctors. A flexible plan is one that allows flexibility in appointments to which the Plan applies in appointments of administrators, and accountants, and prison warders, as the case may be. A rigid allocation of posts is not made flexible by excluding some posts from its scope.

[115] These allocations are not at all the "guidelines" for appointment referred to in *Barnard*. Once the maxima in each category have been reached, they are rigid barriers to appointment to any of the approximately 40 000 posts in the Department's establishment. I pointed earlier to the instructions that follow each of the tables – for example, "at levels 9 & 10 only 51 African Males, 198 African Females and 2 Indian Females can be appointed", and so forth. If no factors other than the given numbers may be taken into account when applying the Plan, and there are none, that is not flexibility.

[116] The exception of special cases from the ambit of the Plan does not seem to me to be the flexibility Moseneke ACJ had in mind when he said in *Barnard*:

> "[S]ection 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups."[50]

[50] Id at para 42.

[117] I respectfully adopt his description of "numerical targets" as "employment guidelines". These imply at least a measure of discretion in their application. How else than with discretion is the Department to avoid unduly infringing the dignity of applicants for posts, which was the anxiety of this Court in *Barnard*, if the posts are for clerks and accountants, and not for doctors or social workers? The enquiry is whether there is flexibility in applying the allocations to these non-excepted posts.

[118] No doubt the allocations will most often be applied, as they must be if they are to function as guidelines. And no doubt in most cases the availability of a discretion will not have a significant practical effect. But without a measure of discretion race and gender operates as an absolute barrier to the appointment of some, as the individual applicants in this case discovered. What stood in the path of their appointment were quotas with no discretion to take account of other factors, like individual experience, application and verve, and this Court said in *Barnard* that rigid quotas "amount to job reservation and are properly prohibited by section 15(3) of the Act".[51] On that ground alone the Department's Plan is unlawful and falls to be set aside. I note my colleague's references to how a witness and Counsel viewed the Plan. Whether or not the Plan is lawful is not determined by how they viewed the Plan. It is determined by what the Plan is as objective fact, and what the Plan is as objective fact is as I have stated it.

[119] Zondo J finds the plan to be unlawful on a narrow ground. This is its conflict with section 42(a)(ii) of the EE Act, in that it does not take account of the demographic profile of the economically active population regionally. On that I respectfully agree. Far from bringing the regional profile of the population to account, the Plan prohibits it. Regional managers are prohibited from taking regional demography into account by Employment Equity Plan Circular No 01 of 2011/12:

> "Regions are not to develop their own regional plans based on the regional demographic profile of the economically active population but that the different

[51] Id at para 54.

> regions are to develop own EE implementation plans to work towards realisation of the national numeric goals set for the entire department."

[120] But section 42(a) expresses an important fact that is in any event inherent in the demographic profile of the population as a whole. This is its uneven distribution throughout the country. Without its uneven distribution being brought to account, the racial proportions of the population, as an entirety, are dangerously misleading if applied when compiling an employment equity plan.

[121] While affirmative action measures are directed to redressing past discrimination against the entire designated group, discrimination within the group is sanctioned if it is in pursuit of equitable representivity. The EE Act's primary measure of representivity is the "demographic profile" of the economically active population.[52] A demographic profile is a statistical analysis of the characteristics of a population constructed upon whatever characteristics one chooses to analyse.[53] For powerful historical reasons the statute has focused on race and gender as markers of employment equity.

[122] But if the demographic profile of the population is to be the measure of employment equity then all the characteristics of the population that are relevant must be brought to account and not only some. To select only one characteristic, and

---

[52] Section 42(a)(i) of the Act:

> "In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person applying this Act must . . . take into account . . . [t]he 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 in relation to the demographic profile of the national and regional economically active population."

The 2009 Code of Good Practice (2009 Code) issued under the Act records one of the purposes of "numerical goals" as being "to make the workforce reflective of the relevant demographics as provided for in Form EEA 8", which groups the economically active population racially.

[53] Demographic profiles are classically constructed from the results of a census. From the results of the 2011 Census, for example, profiles have been constructed, for the population as a whole, and for each racial group, of its distribution, level of education, average household income, rate of unemployment, and so forth. See Statistics South Africa *Census 2011* (statistical release P0301.4, 30 October 2012) available at: http://www.statssa.gov.za/publications/P03014/P030142011.pdf.

ignore others that are relevant, will produce an irrational result, and irrationality is not countenanced by the law. As it was stated in *Barnard*:

> "As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational."[54]

And as it was expressed later by Cameron J, Froneman J and Majiedt AJ:

> "We agree that rationality is the 'bare minimum' requirement. It can hardly be otherwise. In our law all exercises of public power must at least be rational."[55] (Footnotes omitted)

[123] The nature of the enquiry mandated by the EE Act makes it clear that the racial[56] characteristics of the demographic profile were primarily what the Legislature had in mind, but there are many facets of those characteristics. To ascribe to the demographic profile of the population no more than the proportion of each racial group in the entire country, as the Department has done, is misleading and violates the clear statutory mandate. National proportions are but one characteristic of the population's demographic profile. There are others.

[124] It is well established that a rational decision calls for all relevant factors to be brought to account and not only some, and what factors are relevant depends upon the purpose of the enquiry.

[125] The purpose of the EE Act for present purposes is representivity in the workplace. This is achieved by equitable access to employment opportunities – and

[54] *Barnard* above n 12 at para 39.

[55] Id at para 94.

[56] The gender profile of the population is not material for the outcome of this case and I have left it out of account in what follows.

employment opportunities are accessible to people only where they live. The objective of the EE Act is not to induce racial migrations to accommodate the statistics. Its objective is accessibility of employment opportunities and it achieves that objective only if it takes account where applicants for the posts are located. Statistics that serve as a tool for that purpose will be statistics that reflect the reality of the population, and the reality is that the races are not distributed uniformly throughout the country, which is not reflected in the Department's Plan.

[126] If racial proportions are to be the measure of a representative workforce then they must necessarily reflect the distribution of the people making up those proportions. To do otherwise produces irrational anomalies, as is evident in this case.

[127] The great majority of Coloured people live in the Western and Northern Cape. The 2011 census revealed that Coloured people comprised 48.8% of the population of the Western Cape, and 40.3% of the population of the Northern Cape. In all other provinces except the Eastern Cape, where they comprised 8.3% of the population, their presence was negligible. In Limpopo they made up a mere 0.3%, while 96.7% of the population of that province were what the census calls "Black Africans".

[128] Translating those proportions to numbers, at the time of the 2011 census there were some 16 000 Coloured people in Limpopo and some 5.2 million Black African people. Approximately 2.8 million Coloured people[57] and 1.9 million Black African people[58] lived in the Western Cape.

[129] I see no rationality in restricting almost half the population of the Western Cape to 8.8% of employment opportunities in that province, and simultaneously extending 8.8% of employment opportunities in Limpopo to 0.3% of the population. Of every 100 work opportunities in the Western Cape nine are made accessible to some 2.8 million Coloured people, while in Limpopo nine opportunities are made

[57] 48.8% of the population.

[58] 32.9% of the population.

accessible as well to roughly 16 000 Coloured people. And while in Limpopo nine of every 100 posts are made accessible to roughly 16 000 Coloured people, only 73 are made available to 2.8 million Black African people, denying some 20% of employment opportunities to almost the whole population. Conversely, in the Western Cape nine of each 100 opportunities are made accessible to some 2.8 million Coloured people while 1.9 million Black African people have access to 73.[59]

[130] The same anomalies, albeit to a lesser degree, but equally irrational, apply wherever the distribution of the population has been ignored. Anomalies will necessarily abound when people are reduced to statistics. That is particularly so if the statistics bear no relation to the purpose for which they are used. Other irrational anomalies can be expected if the structure of the Department's establishment were examined in detail, but that detailed structure was not in evidence before us.

[131] Applying the racial proportions of the population as a whole, without more, ensures every branch, every office, and every nook and cranny of the Department's structure is constructed accordingly, but that does not then serve the purpose of an employment equity plan. If access to employment is to be allocated in proportions, one might expect it to be allocated relative to the proportions of the potential employees, not relative to overall proportions that lump together people who in fact live a thousand kilometres and more apart.

[132] The Department has provided no rational explanation for reserving posts to the various race groups with reference alone to their proportions as part of the national population, with no regard to their distribution, and I see none. It seems the Department considers the "demographic profile" of the nation to be solely its racial proportions. In that the Department is wrong. The racial proportions of the population are not its demographic profile. They are but one characteristic of the demographic profile, and in themselves they do not provide a coherent basis upon

[59] Adopting the approach taken by the Department, these illustrative figures relate to the population as a whole, and are not restricted to those who are economically active.

which to measure employment representivity. That is no doubt why the EE Act, and the 1999 Code of Good Practice issued under the EE Act,[60] expressly directs designated employers to take account of the regional profile of the population. But regional distribution is in any event inherent in the country's demographic profile.[61] On that ground, too, the conclusion must follow that the Plan is irrational and in consequence unlawful.

[133] Stepping back from the separate grounds upon which I find the Plan to be defective, it seems to me they are all mere symptoms of a fundamental malaise. The passages from judgments of this Court I referred to all recognise that reconciling the redress the Constitution demands with the constitutional protection afforded the dignity of others is profoundly difficult. That goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. It is only in that way that the constitutional tensions referred to in *Barnard* are harmonised. And it is in that way that the Constitution's demand for a public service that is "broadly representative of the South African people" will be realised. Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers reflected in an arid ratio having no normative content.

[134] So far as the proposed orders are concerned, having found the Plan was unlawful, it follows that it offers no defence to the claims of discrimination of all the applicants, including Mr Davids, and he, too, is entitled to relief. As this is a minority judgment I need not elaborate upon the relief I would grant to him.

[60] Code of Good Practice: Preparation, Implementation, and Monitoring of Employment Equity Plans (GNR. 1394 *GG* 19370, 23 November 1999).

[61] The Labour Court at para 45 considered the later Code of Good Practice on the Integration of Employment Equity Into Human Resource Policies and Practice (GN 1358 in *GG* 27866, 4 August 2005) to conflict with the 2009 Code. On the approach I take to what constitutes the demographic profile of the nation, I do not think that is correct.

Counsel for the Applicants:	J J Gauntlett SC and M J Engelbrecht Instructed by Serfontein Viljoen & Swart
Counsel for the Respondents:	M T K Moerane SC, D B Ntsebeza SC, B M Lecoge and N Mbelle Instructed by the State Attorney
Counsel for the first Amicus Curiae:	V Ngalwana SC and F Karachi Instructed by Marais Müller Yekiso Inc
Counsel for the second Amicus Curiae:	T Ngcukaitobi, N Muvangua and V Bruinders Instructed by the State Attorney