CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 01/14

In the matter between:

SOUTH AFRICAN POLICE SERVICE Applicant

and

SOLIDARITY obo R M BARNARD Respondent

and

POLICE AND PRISONS CIVIL RIGHTS UNION Amicus Curiae

Neutral citation:	*South African Police Service v Solidarity obo Barnard* [2014] ZACC 23
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J
Heard on:	20 March 2014
Decided on:	2 September 2014
Summary:	Section 9 of the Constitution — equality — unfair discrimination — restitutionary measures Employment Equity Act 55 of 1998 — section 6 — unfair discrimination — affirmative action measures Employment Equity Act 55 of 1998 — section 15 — affirmative action measures — designated employer

South African Police Service Employment Equity Plan — numerical targets — designated groups

South African Police Service National Instruction 1 of 2004 — National Commissioner vested with discretion to fill vacancy to advance representivity and enhance service delivery

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Labour Appeal Court, Johannesburg):

1. Leave to appeal is granted.
2. Condonation for the late filing of written argument is granted.
3. Leave to supplement the record is granted.
4. The appeal against the decision of the Supreme Court of Appeal is upheld.
5. The order of the Supreme Court of Appeal is set aside.
6. The order of the Labour Appeal Court is upheld subject to paragraph 7 of this order.
7. There is no order as to costs in the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

MOSENEKE ACJ (Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe J, Madlanga J and Zondo J concurring):

Introduction

[1] This case brings to the fore difficult, if not emotive, questions of equality, race and equity at the workplace. The issues surface in an application, by the South African Police Service (Police Service), for leave to appeal against an order of the Supreme Court of Appeal.[1] That Court set aside the order of the Labour Appeal Court[2] and concluded that the decision of the National Commissioner of the Police Service (National Commissioner) not to promote an employee of the Police Service, Captain Renate M Barnard (Ms Barnard), unfairly discriminated against her on the ground of race contrary to section 9(3) of the Constitution and section 6(1) of the Employment Equity Act[3] (Act). The core issue in that and this Court remains unchanged. Did the National Commissioner's decision unfairly discriminate against the respondent?

[2] Ms Barnard is a member of a registered trade union, Solidarity, which has represented her throughout the litigation. She and her trade union oppose the

[1] *Solidarity obo Barnard v South African Police Service* [2013] ZASCA 177; 2014 (2) SA 1 (SCA) (Supreme Court of Appeal judgment) per Navsa ADP, with Ponnan JA, Tshiqi JA, Theron JA and Zondi AJA concurring.

[2] *South African Police Services v Solidarity obo Barnard* [2012] ZALAC 31; 2013 (3) BCLR 320 (LAC) (Labour Appeal Court judgment).

[3] 55 of 1998.

application and urge the Court to dismiss the appeal. She has since been promoted to the rank of Lieutenant-Colonel in the National Inspectorate Division of the Police Service. If she were to succeed, she would not seek to be appointed to the position she sought earlier but an order for compensation permitted by the Act.[4]

[3] This Court has admitted the Police and Prisons Civil Rights Union as a friend of the court (amicus curiae). It operates as a trade union in the Police Service, the Correctional Service and the traffic departments. The amicus curiae and the South African Police Organisation are members of and parties to the safety and security sectoral bargaining council[5] (bargaining council). The Police Service Employment Equity Plan which sits at the hub of this dispute was negotiated and adopted by the same bargaining council.

Initial issues

[4] Before I narrate the facts, let me dispose of three preliminary matters. None should detain us. Leave to appeal should be granted. We are seized with a dispute over pressing constitutional concerns of equality and non-discrimination – matters of

[4] Section 50(2)(a) provides:

> "If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including payment of compensation by the employer to that employee".

[5] Sections 27 and 28 of the Labour Relations Act 66 of 1995 provide that a bargaining council may be established by one or more registered trade unions and one or more registered employers' organisations for a particular sector and area. The powers and functions of the bargaining council so established include among other things the conclusion and enforcement of collective agreements and the performance of labour dispute resolution functions in terms of section 51 of the Act. It also includes the administration of pension and provident funds and medical aid schemes and the like for their members.

considerable personal and public importance. Moreover, the divergent reasoning and outcomes of the two appellate courts impel us to resolve the dispute.

[5] We have to decide whether the applicant and the amicus curiae may supplement the truncated record filed in this Court. It is in the interest of a proper adjudication of this dispute that the record be supplemented. The record is minimal and contains neither new nor disputed matter. It is drawn from the full record that served before the preceding courts. No prejudice has been claimed or suffered by any party. Also, the added record is helpful because it provides insights into the submissions before us. Third, we condone the late filing of the applicant's written argument. It was one day late and the delay is adequately explained. Neither the Court nor parties has been prejudiced by the delay.

Background

[6] The material facts to the dispute are uncontested. They have been usefully rehearsed in three preceding judgments.[6] I restate no more than what is necessary to reach the contested legal matters.

[7] During September 2005, the National Commissioner advertised a promotion position for the rank of superintendent.[7] The post was numbered 6903 and located within the National Evaluation Service Division which has since been renamed the

[6] *Solidarity obo Barnard v South African Police Services* [2010] ZALC 10; 2010 (10) BCLR 1094 (LC) (Labour Court judgment). See also the Supreme Court of Appeal judgment above n 1 and the Labour Appeal Court judgment above n 2.

[7] He purported to act in terms of section 207 of the Constitution and sections 20 and 27 of the South African Police Service Act 68 of 1995.

National Inspectorate. The post related to "evaluating and investigating priority and ordinary complaints nationally"[8] to improve the service delivery of the Police Service to the public. Although the National Commissioner was entitled to do so, the advertisement did not reserve the vacancy for a designated group.[9] Ms Barnard together with six other applicants responded to the advert.

[8] On 3 November 2005, the applicants were interviewed by a racially diverse panel of six senior police officials. The panel included two superintendents and was regarded as well placed to appreciate the demands of the post. Ms Barnard earned 86.67% which was the highest score amongst the applicants interviewed. The panel recommended her as the number one candidate for the position from a shortlist of four. The only Black male candidate to make the shortlist had scored 17.5% less than Ms Barnard. The panel took the view that he could not be appointed without compromising service delivery.

[9] On 9 November 2005, the panel convened a meeting with Divisional Commissioner Rasegatla to discuss its recommendation.[10] During the course of the discussion the Divisional Commissioner bemoaned the insufficient directives on how to balance employment equity against the obligation of efficient service delivery. He remarked that Black men and women were under-represented in the division

[8] South African Police Service: Job Description National Evaluation Service; Key Performance Areas (Clause C.1 and more fully defined in Clause D.1.1.1).

[9] According to section 1 of the Act "designated groups" means black people, women and people with disabilities. Rule 5(3) of the National Instruction 1 of 2004 permits the National Commissioner to reserve an advertised post for the designated group.

[10] Rule 13 of the National Instruction sets out the procedure to be followed.

concerned and that if any of the first three recommended candidates were appointed, the problem would be exacerbated. He declined to support the recommendation. He decided that the vacancy should remain unfilled for reasons of employment equity. Post 6903 was withdrawn. In the interim, Superintendent Prinsloo, a white man, was laterally transferred to fill the vacancy within the division.

[10] A little past six months, on 11 May 2006, a similar level 9 vacancy, now described as post 4701, was advertised. It too was not reserved for designated groups. Ms Barnard applied again. Three weeks prior to the interviews a letter was addressed to all Deputy National, Provincial and Divisional Commissioners. The letter advised that when making their recommendations, the interviewing panels had to recommend personnel who would enhance service delivery of the Police Service.

[11] Ms Barnard, along with seven other candidates, was shortlisted and interviewed on 26 June 2006. The candidates included four African men; one African woman; one Coloured man and one White man. The panel was made up of senior police officials with diverse racial extraction. Ms Barnard obtained the highest score and the panel recommended her as the most suitable candidate for the position. Captain Mogadima (Mr Mogadima), an African man, was the second recommended candidate. He scored 7.33% lower than Ms Barnard.

[12] The interviewing panel recognised that Ms Barnard's appointment would not enhance representivity on salary level 9 but would not aggravate the racial

representivity of the division either as she was already a part of the division. They reasoned that appointing her on salary level 9 would create a vacancy in level 8 which would be filled in accordance with the representivity requirements. The interviewing panel observed that the difference in the scores between Ms Barnard and the second candidate, Mr Mogadima, was small but she was the best candidate. During the interview, she displayed a distinct brand of passion and enthusiasm vital to the service-delivery needs of the Police Service.

[13] On 30 June 2006, the interviewing panel met with Divisional Commissioner Rasegatla to present its recommendation. He agreed with the panel that Ms Barnard be promoted. He was of the opinion that not promoting Ms Barnard after two rounds of applications would foster the wrong impression. He was also convinced that her appointment would advance service delivery within the Police Service. On 10 July 2006, the Divisional Commissioner addressed a letter to the National Commissioner recommending that Ms Barnard be promoted to post 4701. In relevant part the letter read:

> "The candidate is recommended as the panel's first choice candidate for the post. She has proven competence and extensive experience at National level in the core functions of the post and was rated the highest by the promotion panel."

[14] On 20 July 2006 the Provincial and Divisional Commissioners met and discussed recommendations for promotions to various posts including post 4701. The following day, the recommendations were presented to the National Commissioner for his consideration. At the meeting, the National Commissioner consulted with the

Deputy National Commissioners and the Divisional Commissioner of personnel services and thereafter made a decision. Despite the recommendation before him, he declined to appoint Ms Barnard or Mr Mogadima to the advertised post. He took the view that the first choice of the interviewing panel did not address the requirement of representivity and, since the post was not critical to service delivery, it should be withdrawn and re-advertised during the second phase of the year.

[15] On 27 July 2006, the National Commissioner reiterated his views in a letter. The letter stated:

> "Your recommendations do not address representivity and the posts are not critical and the non-filling of the posts will not affect service delivery. The posts should be re-advertised during the phase 2-2006/7 promotion process, during which process you should attempt to address representivity."

The post was indeed re-advertised as post 5101 but eventually withdrawn. Ms Barnard did not apply again.

[16] Ms Barnard was aggrieved by the National Commissioner's decision not to appoint her to post 4701. She filed a complaint following the grievance procedure of the Police Service. She requested that her promotion be made effective backwards to 1 December 2005. The Police Service responded with a letter to her in which the reasons for the National Commissioner's decision not to appoint her were set out. In relevant part the letter read:

> "1. The abovementioned officer's grievance, dated 2006-10-25 refers.

2. The National Commissioner has declined to approve the recommendation for post 4701 due to the following reasons: the recommendation did not address representivity; and the post is not critical and the non-filling of the post will not affect service delivery.

3. The National Commissioner further directed that the post should be re-advertised during the next promotion process, during which process it should be attempted to address representivity.

4. Although the officer formed part of the relevant Business Unit, representivity should be achieved at all levels.

5. With reference to the lateral placement of a white male at the division, it has to be mentioned that lateral placements are not handled in terms of the prescripts of the National Instruction 1of 2004 on Promotions.

6. The officer's attention is also drawn to the fact that in terms of National Instruction 1 of 2004 (Promotions), the National Commissioner is not obliged to fill an advertised post.

7. It has to be mentioned that the relevant post was re-advertised in the phase 2-2006/7 (post 5101) promotion process, but the post was withdrawn and it was indicated that the filling of the post will be dealt with once the restructuring of the Division has been finalised. This decision further confirms the decision that the post is not critical and that the non-filling of the post will not affect service delivery.

8. The status quo with regard to the position of the officer is maintained.

9. Please inform the officer accordingly."

[17] On 11 April 2007, Ms Barnard referred her unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) but it remained unresolved. The Police Service did not attend the conciliation meeting despite due notice. Ms Barnard resorted to litigation which would serve before three courts over a period of nearly seven years.

Litigation history

[18] Ms Barnard approached the Labour Court for relief. Her statement of claim averred that she had not been promoted because she was a White person and that the differentiation she was subjected to amounted to discrimination against her by the Police Service on the listed ground of colour as contemplated in section 6(1) of the Act. She further pleaded that the discrimination was unfair and could not be justified on the grounds of the inherent requirements of the job, affirmative action under the Act or on the basis that the discrimination was fair. She added that her non-appointment impacted severely on the service delivery of the Police Service.

[19] She asked for an order declaring that she had been unfairly discriminated against on the ground of race contrary to section 6(1) of the Act and directing that she be promoted retrospectively to the rank of superintendent from 1 December 2005. In addition, relying on section 50(2)(a) of the Act,[11] she claimed damages equal to the monetary loss she suffered from 1 December 2005 to the date of judgment calculated on the difference of income between the salary of a captain and of a superintendent or that she be paid compensation in an amount in the discretion of the Court.

[20] The statement of response of the Police Service raised four related defences. First, it asserted that the National Commissioner acted lawfully, in pursuit of a legitimate Employment Equity Plan and the National Instruction. His decision not to appoint her was thus on a valid ground. Second, the applicant's complaint was not

[11] See above n 4.

one of unfair discrimination under section 6(1) of the Act because no appointment was made to any of the two posts that she had applied for. She was not discriminated against or overlooked in favour of someone else. However, should the Court find that the decision discriminated against her, it was a legitimate and justifiable differentiation because it was based on legitimate grounds and a defensible Employment Policy and Plan. In the third instance, it was the prerogative the National Commissioner to make appointments. The recommendation of the interviewing panel did not bind him. He exercised the discretion lawfully and judiciously. It was not up to the applicant but the National Commissioner to decide whether a particular post would enhance service delivery. Lastly, the applicant did not seek to review the decision of the National Commissioner not to appoint her at all. Her complaint was misguided.

[21] The Labour Court upheld the claim.[12] It reasoned that when a claimant complains of unfair discrimination, the Police Service bears the onus to show that the discrimination was not unfair. This meant that it must adduce sufficient evidence to show, on a balance of probabilities, that the decision was fair. It concluded that the reasons given by the National Commissioner were scant and insufficient. In the absence of a fully reasoned decision of the National Commissioner, the Court concluded, the Police Service had failed to discharge the onus and thus the decision not to appoint Ms Barnard was unfair and invalid. The Court added that an Employment Equity Plan must be applied fairly with due regard to the affected

[12] Labour Court judgment above n 6.

individual's right to equality and that representivity must be weighed against that right. It added that it was not appropriate to apply without more numerical goals set out in an Employment Equity Plan.

[22] The Police Service appealed the decision to the Labour Appeal Court.[13] It upheld the appeal and set aside the order of the Labour Court. It held that the National Commissioner had not overlooked Ms Barnard and preferred or appointed another candidate. Therefore, it reasoned, no discrimination had occurred because no appointment had been made. In another principal holding, the Labour Appeal Court said the Labour Court was wrong in treating the implementation of restitutionary measures as subject to the individual conception of the right to equality. It added that treating restitutionary measures in that way is bound to stifle constitutional objectives and result in the perpetuation of inequitable representation in the workplace. It concluded that the decision not to promote Ms Barnard in the circumstances of this case was justifiable.

[23] Unhappy, Ms Barnard approached the Supreme Court of Appeal.[14] It held for her and reversed the decision of the Labour Appeal Court. In effect, it re-instated the decision of the Labour Court with a slight adaptation of the initial order. It did not order her re-instatement but directed that Ms Barnard, being successful, should be paid compensation calculated as the difference between what she would have earned

[13] See above n 2.

[14] See above n 1.

had she been a superintendent and what she continued to earn as a captain, but limited to a two-year period.[15]

[24] The Supreme Court of Appeal's principal reason for holding in favour of Ms Barnard was that the decision of the National Commissioner not to appoint her amounted to discrimination on the impermissible ground of race. The Police Service was required to show that the discrimination was not unfair. It did not discharge that duty. That is so because the reasons of the National Commissioner for not appointing Ms Barnard were "scant" and "contrived". For this conclusion the Court sought support from the unfair discrimination protections in section 9(3)[16] of the Constitution, section 6(2) of the Act and the decision of this Court in *Harksen*.[17]

[25] Turning to whether the unfilled post was essential for service delivery, the Court made the factual finding that service delivery would be compromised. It reasoned that a senior position as was advertised cannot be said not to be necessary in the furtherance of the Police Service mission to provide a professional and efficient police service. In the absence of a reasoned motivation by the National Commissioner, his explanation that the post was not filled because it was not critical was contrived. This shows, the Court held, from the fact that when the post was not

[15] Id at para 81.

[16] Section 9(3) of the Constitution provides:

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

[17] *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) (*Harksen*).

filled, a senior superintendent was moved laterally to fill in temporarily a post that was advertised on three occasions.

[26] The Court held further that whilst it is true that in terms of the National Instruction, the National Commissioner is not obliged to fill a vacancy:

> "[I]t does not follow that where the only suitable person is from a non-designated group in relation to representivity, that person should not be appointed. The foreword to the EEP makes that clear. This is particularly so where there is no rational or proffered explanation, or none at all."[18]

[27] Before I evaluate the correctness of the legal reasoning of the Supreme Court of Appeal it is necessary to sketch the applicable legal framework.

Applicable law

[28] Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.[19] The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law.[20] But, unlike other constitutions, ours was designed to do more than record or confer formal equality.

[18] Supreme Court of Appeal judgment above n 1 at para 78.

[19] Section 1(a) to (c) of the Constitution.

[20] Section 9(1) of the Constitution.

[29] At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists.[21] So, plainly, it has 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. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.

[30] Our quest to achieve equality must occur within the discipline of our Constitution.[22] 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. They are not meant to be punitive nor retaliatory.[23] 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.

[31] 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

[21] See above n 16.

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

[23] *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at para 43.

themselves previously disadvantaged. The scope of this "visionary and inclusive constitutional structure"[24] was stated in *Fourie*:

> "[T]he founders committed themselves to a conception of our nationhood that was both very wide and very inclusive. . . . It was because the majority of South Africans had experienced the humiliating legal effect of repressive colonial conceptions of race and gender that they determined that henceforth the role of the law would be different for all South Africans. Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans."[25]

[32] Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they 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.

[33] We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality "for full and equal enjoyment of all rights and freedoms."[26] It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the

[24] *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132; 2005 (3) SA 429 (SCA); 2005 (3) BCLR 241 (SCA) (*Fourie*) at para 25.

[25] Id at para 9.

[26] Section 9(2) of the Constitution.

words of our Preamble the state must help "improve the quality of life of all citizens and free the potential of each person."[27] That ideal would be within a grasp only through governance that is effective, transparent, accountable and responsive. Our public representatives will also do well to place a premium on an honest, efficient and economic use of public resources.

[34] A closer scrutiny of the equality protection shows that direct or indirect unfair discrimination by the state or anyone on any of the listed grounds is forbidden. Discrimination on a listed ground is unfair unless shown not to be. National legislation must prevent unfair discrimination.[28] The Act is a species of national legislation that regulates equality and non-discrimination at the workplace.

[35] An allied concern of our equality guarantee is the achievement of full and equal enjoyment of all rights and freedoms.[29] It permits legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. Restitution or affirmative measures are steps towards the attainment of substantive equality. Steps so taken within the limits that the Constitution imposes are geared towards the advancement of equality. Their purpose is to protect and develop those persons who suffered unfair discrimination because of past injustices.

[27] The Preamble to the Constitution.

[28] Section 9(4) and (5) of the Constitution.

[29] See above n 26.

[36] The test whether a restitution measure falls within the ambit of section 9(2) is threefold. The measure must—

(a) target a particular class of people who have been susceptible to unfair discrimination;

(b) be designed to protect or advance those classes of persons; and

(c) promote the achievement of equality.[30]

[37] Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so.[31] It says measures of this order may be taken. Section 6(2) of the Act, whose object is to echo section 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2).

[38] The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.

[30] *Van Heerden* above n 23 at para 37.

[31] Id at para 33.

[39] 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. Although these are the minimum requirements, it is not necessary to define the standard finally.

Employment Equity Act

[40] The mission of the Act is diverse. For now, its important objects are to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people. The Act expressly prohibits unfair discrimination.[32] It obliges a designated employer to take affirmative action measures.[33] The Police Service is a designated employer.[34] Designated employers must ensure that suitably qualified employees from designated groups are equally represented in each working category of the designated employer. The Act requires that an employment equity plan must be devised and approved. Affirmative action measures must be taken in accordance with an approved employment equity plan.[35]

[32] Section 6(1).

[33] Section 13(1).

[34] Section 1.

[35] Section 20.

[41] Section 15 describes the permissible character of affirmative action measures. They must be designed to ensure that "suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels".[36] I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.

[42] A designated employer is required to implement several measures in pursuit of affirmative action. They must identify and eliminate employment barriers, further diversify the workforce "based on equal dignity and respect of all people" and "retain and develop people" as well as "implement appropriate training measures".[37] Section 15(3) contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude "quotas".[38] Curiously, the statute does not furnish a definition of "quotas". This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe that section 15(4) sets the tone for the flexibility and inclusiveness required to

[36] Section 15(1).

[37] Section 15(2)(b) and (d)(ii).

[38] Section 15(3).

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.

[43] Lastly, the Act requires the Director-General to police whether a designated employer implements employment equity in accordance with the Act and with a list of further factors.[39]

Employment Equity Plan

[44] During 2001 the Police Service adopted an Employment Equity Plan as a collective agreement under the bargaining council which binds Police Service employees.[40] It sets numerical norms by reference to which staff appointments and promotions should be made within the Police Service. They are based on a grid that divides existing personnel by race and gender in order to produce a distribution of staff within the hierarchy that reflects race and gender.

[45] Due to the high number of employees of the Police Service, its employment equity targets are linked to divisional business units.[41] The targets are informed by national demographics. Each grade level shows what the tally would be if it reflected national demographics. The Employment Equity Plan provides for numeric

[39] Sections 42 and 43.

[40] The South African Police Organisation and the amicus curiae were the two trade unions who were party to the bargaining council where the Employment Equity Plan was planned and developed.

[41] The Police Service had 120 017 members at the time that the Employment Equity Plan was adopted.

employment equity targets consisting of 16 salary levels. The targets are split into "ideal" and "realistic". The ideal targets hope for 90% of appointments to be made from designated groups. In respect to middle management positions (salary levels 8 to 12) the realistic targets comprise appointments of 75% from designated groups. It follows that the ideal target for non-designated groups is 10% and the realistic target is 25% of appointments.

National Instruction

[46] In the course of 2004 the National Commissioner issued a National Instruction[42] (Instruction) which pertinently regulated the manner in which promotions within the Police Service were to be dealt with. It provides that the Employment Equity Plan is binding on all members of the Police Service. Observing its requirements was mandatory. The Instruction stipulates that selections must be based on a consideration of all relevant information and sets out the criteria upon which the decision must be based. They comprise—

> "(a) competence based on the inherent requirements of the job or the capacity to acquire, within a reasonable time, the ability to do the job;
> (b) prior learning, training and development;
> (c) record of previous experience;
> (d) employment equity in line with the Employment Equity Plan of the relevant business unit;
> (e) evidence of satisfactory performance;
> (f) suitability; and
> (g) record of conduct."[43]

[42] 1 of 2004.

[43] Rule 12(1).

[47] The Instruction sets out the parameters within which a selection panel must work. Its promotion guidelines vest a wide discretion in the National Commissioner. Although the interviewing panel and the Divisional Commissioner must recommend a list of suitable candidates, the recommendations are not binding on the National Commissioner. Rule 13(4) stipulates that appointments to salary level 8 and higher must be forwarded to the National Commissioner for his approval.[44] He or she may decline to appoint or leave a vacancy unoccupied. The ultimate decision remains with him or her.

Decision of the Supreme Court of Appeal

[48] The Supreme Court of Appeal adjudged the respondent's equality claim as one of unfair discrimination on the ground of race and that it fell within the prescripts of section 9(3) of the Constitution and section 6(1) of the Act. It resorted to the *Harksen*[45] test and concluded that the Police Service had not discharged the presumption of unfairness attracted by a claim based on a listed ground.[46]

[49] Its underpinning legal reasoning is divulged in the passage below:

> "I turn to consider the correctness of the LAC's decision. The starting point for enquiries of the kind under consideration is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair. When a measure is challenged as violating the Constitution's equality

[44] The Instruction makes it clear that the National Commissioner may leave a post vacant for re-advertisement.

[45] *Harksen* above n 17.

[46] Section 9(5) of the Constitution.

> clause, its defender could meet the claim by showing that it was adopted to promote the achievement of equality as contemplated by section 9(2), and was designed to protect and advance persons disadvantaged by prior unfair discrimination. Similarly, as stated above, section 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegations are made must establish that it is fair."[47]

[50] Later the Court expanded its reasoning:

> "Having determined that there was discrimination based on a specified ground, namely race, it is necessary to turn to the next question; whether the SAPS had established that the discrimination is fair. In this regard, the Constitutional Court in *Harksen* stated the following:
>
> > 'the test of unfairness focuses primarily on the impact on the complainant and others in his or her situation'.
>
> Although that case dealt with direct reliance on the equality clause in the interim Constitution, the same test, in my view, would apply in relation to reliance on section 6 read with section 11 of EEA."[48]

[51] With respect, that Court misconceived the issue before it as well as the controlling law. It was obliged to approach the equality claim through the prism of section 9(2) of the Constitution and section 6(2) of the Act. This is because the Employment Equity Plan was never impugned as unlawful and invalid. It was not open to the Court to employ the *Harksen* analysis of unfair discrimination, which presumed the application of the Employment Equity Plan to be suspect and unfair. At stake before that Court was never whether the Employment Equity Plan was assailable, but whether the decision the National Commissioner made under it was open to challenge.

[47] Supreme Court of Appeal judgment above n 1 at para 50.

[48] Id at para 55.

[52] The respondent readily accepted this position in this Court. She never pressed upon us to endorse the reasoning of the Supreme Court of Appeal. Ms Barnard accepted that the Employment Equity Plan in question was a valid affirmative action measure. Equally, she did not impugn the validity of the Instruction. She never contended that either of the two were suspect and should have attracted a presumption of unfairness. None of the parties contended otherwise nor can I find a valid reason to hold that the Employment Equity Plan and the accompanying Instruction are not affirmative action measures authorised by section 6(2) of the Act.

[53] Accordingly, there was no warrant for the Supreme Court of Appeal to burden the applicant Police Service with an onus to dispel a presumptively unfair discrimination claim and find that it had not discharged it. The appeal in that Court was therefore decided on the wrong principle. Ordinarily, an incorrect appreciation of the applicable law is sufficient to dispose of an appeal. Here too the appeal should succeed. Ms Barnard, however, was adamant that the appeal should fail, but for another reason.

Respondent's contentions

[54] The respondent diverged from her original statement of claim in the Labour Court. She chose to persist only with a narrow part of her written argument. In oral argument, she jettisoned her detailed attack against the Employment Equity Plan and the Instruction as unjustifiable infringements of her equality protection because they

amounted to racial quotas or racial norming or racial profiling. We are thus not called to pronounce on a possible breach of the statutory prohibition against quotas to be found in section 15(3) read with section 15(4) of the Act. That, in any event, was not her case in her statement of claim. Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the Act.[49] The same section endorses numerical goals in pursuit of work place representivity and equity. They serve as a flexible employment guideline to a designated employer.

[55] In her words:

> "Whatever the position may previously have been, the issues in these proceedings are narrow. SAPS accepts that the National Commissioner had to make his decision in accordance with the criteria set out in the Instruction and the respondent has no quarrel with the stance. Placing employment equity in the balance with the other listed factors and drawing a judicious conclusion in the process is manifestly what the EEA requires, and we discern no challenge to this proposition in the proceedings before this court. As the decision of the SCA correctly accepts, the EEA in mandating affirmative action requires the exercise of a discretion that comprehends a balancing of all the factors relevant to the decision. Erecting race or gender as an absolute barrier to the advancement of a candidate for appointment or promotion is simply in breach of the law."

[56] She later refines the contours of her case in this Court:

> "For its part, the respondent agrees that a decision on promotion must take account of all the relevant factors and sees no reason to quarrel with the list of criteria contained

[49] See above [42].

> in the Instruction. In saying this, it is conceding that race and gender are legitimate touchstones of employment equity and so it accepts that it is legitimate for the National Commissioner to take account of these matters in the course of a judicious consideration of the compendium of relevant factors."

[57] It then became clear that in this Court, the respondent had turned her guns on the decision of the National Commissioner as injudicious and one that ought to be set aside. This is how she formulated the issue:

> "What is centrally in issue is whether the National Commissioner, in making his decision, in fact followed the approach mandated in the Instruction and by the EEA. This entails an examination of his reasons or, to put it more correctly, the reasons that were legitimately tendered in the course of the legal proceedings. Since, it was common cause, the decision was taken in pursuit of the prevailing employment equity plan, the Plan itself becomes a source for determining the content of his decision."

[58] The gut of the complaint is that in declining to appoint her, the National Commissioner made an unlawful and unreasonable decision which must be set aside. To bolster the contention, she advanced a number of criticisms. The National Commissioner did not properly take into account her merit and competence. He had not brought to reckon all relevant factors before deciding on the promotion. He rather attached undue weight on demographic equity at the expense of her personal competence. The impugned decision was unreasonable because he furnished inadequate reasons for it. His letter in response to the recommendation of the interviewing panel was silent on the factors he weighed. That showed that he did not consider relevant factors other than those reflected in the rejection letter. Relying on

WC Greyling,[50] the respondent contended that where a decision maker exercises his power with a closed mind he will reach an unreasonable decision.

[59] This is a new cause of action that departs from the respondent's averments in the statement of claim in the Labour Court. It is directed, not at unfair discrimination based on race under section 6(1) of the Act, but at reviewing and setting aside the National Commissioner's decision not to appoint her. It will be remembered that before the Labour Court, the National Commissioner decried the fact that no relief was sought to review his decision. Ms Barnard did not adjust her statement of claim to meet the response of the National Commissioner. Her present complaint amounts to a review of an impugned decision. It is urged upon us at the final appellate stage and as a new line of attack. This is impermissible.

[60] The bid to review and set aside the decision of the National Commissioner is not properly before us. If he were not to be prejudiced, the National Commissioner was entitled to a proper notice of the review relief now sought.[51] This would be in accordance with the principle of legality and also, if applicable, the provisions of Promotion of Administrative Justice Act (PAJA).[52] Another consideration relates to

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[50] *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* and *Others* 1982 (4) SA 427 (A) at 449D-E (*WC Greyling*). The respondent also relied on *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) (*Phambili Fisheries*) at para 40.

[51] Rule 7A of the Labour Court Rules. Rule 7A(1) provides:

> "A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties."

[52] 3 of 2000. Section 6(1) provides:

the common law time limits for bringing review proceedings[53] as well as the PAJA 180-day rule, if applicable.[54] We have no explanation that would entitle us to overlook the delay. This belated attempt to seek the review and setting aside of the National Commissioner's decision must fail.[55] Even if I were benevolently to entertain the review, it is without merit. This I say for the reasons that follow.

[61] The respondent is correct in contending that the decision of the National Commissioner must be adjudged against the selection criteria for promotion prescribed by the Instruction. It will be recalled that earlier we recited the criteria.[56] The candidate must have existing or potential competence to do the job applied for. Seemingly, competence could be evidenced by ancillary criteria listed, like prior learning and training, past experience and satisfactory performance and suitability. The latter is defined as an ability to function at the next higher post level.[57] There are two self-standing additional requirements. The candidate must have an acceptable record of conduct and the promotion must heed the Employment Equity Plan of the

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> "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action."

[53] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 83. See also *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; 2005 (2) SA 302 (SCA) at paras 46-8.

[54] Section 7(1) of PAJA provides:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date".

[55] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (*Everfresh*) at para 27; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 31; and *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) (*Kyalami Ridge*) at para 88.

[56] See [46] above.

[57] Rule 2(g).

relevant business unit.[58] Should the Provincial or Divisional Commissioner recommend a promotion that does not address representivity at the level of the post in the business unit, she or he must record this with full motivation.[59] It is against this consideration that we must evaluate the decision of the National Commissioner.

[62] 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.

[63] Next is the issue of service delivery. It is so that Ms Barnard scored very well before the interviewing panel, not once but twice. On the second occasion,

[58] Rule 12(1)(d) and (g).

[59] Rule 13(3).

Mr Mogadima and Mr Ledwaba also scored well above average. Both obtained slightly lower scores than Ms Barnard. Ms Barnard correctly conceded that they were both appointable, that they would have provided satisfactory service and would not have compromised service delivery and had they been appointed, she would not have felt aggrieved.

[64] But the issue is whether Ms Barnard's non-appointment would have sacrificed service delivery. The Supreme Court of Appeal thought so. Before this Court she accepted, contrary to the finding of that Court, that the decision not to appoint her did not adversely affect service delivery. It is so that the post was filled on an interim basis and later re-advertised. This does suggest that the position was needed. But, then again, the post was listed as non-critical, and the facts show that it was never ultimately filled. The National Commissioner chose to reconfigure the division concerned. There is no valid cause to reject the National Commissioner's operational assessment that service delivery would not have suffered from not appointing Ms Barnard.

[65] What remains is the mainstay of Ms Barnard's contentions. Is the decision of the National Commissioner injudicious and invalid because he over-emphasised representivity at the expense of her competence? The question recast: was the National Commissioner entitled to refuse to fill the vacancy for the reason that it would have negatively affected the numerical targets of the Employment Equity Plan? If so, did he under-value the competence of Ms Barnard? More aptly, was the

decision of the National Commissioner reviewable because it was unreasonable and thus unlawful?

[66] The Employment Equity Plan obliged the National Commissioner to take steps to achieve the targets, provided he acted rationally and with due regard to the criteria set by the Instruction. He was within his right and indeed duty to take steps that would achieve the set targets. It is so that the implementation of a valid plan may amount to job reservation if applied too rigidly. But was that the case here? For several reasons, I do not think that the National Commissioner pursued the targets so rigidly as to amount to quotas. First, over-representation of white women at salary level 9 was indeed pronounced. That plainly meant that the Police Service had not pursued racial targets at the expense of other relevant considerations. It had appointed white female employees despite equity targets. Had the Police Service not done so, white female employees would not have been predominant in any of the levels including salary level 9 nor would they have been able to retain their posts.

[67] Second, the decision not to promote Ms Barnard did not bar her from future promotions. She was at the time of the hearing in this Court a Lieutenant-Colonel. If her progress through the ranks of the Police Service was subject to strict equity considerations alone, she would have never been promoted past salary level 9 to a level 10 or higher post. Her stellar rise through the ranks needed more than racial representivity alone to preclude it. Clearly, the National Commissioner's decision was nowhere near an absolute bar to her advancement.

[68] Another consideration is that, although Ms Barnard was unhappy about the outcome of her promotion bid, she was well aware that the interview and selection would occur within the strictures imposed by employment equity. She was alive to the targets under the Employment Equity plan and she accepted beforehand that although she may become the best candidate, that was not the only relevant consideration for appointment. Ms Barnard candidly testified that she knew when she applied for the promotion that the National Commissioner might decline to appoint her in pursuit of equity targets. Also, she was aware that there was an over-population of white female employees at salary level 9. She knew and accepted the targets under the Employment Equity Plan. She added that, had Mr Mogadima or Mr Ledwaba been appointed ahead of her, she would have had no grievance.

[69] I am unable to agree that the reasons furnished by the National Commissioner for not appointing Ms Barnard are scant and attract an inference of unreasonable decision-making and illegality. Earlier, I have quoted verbatim the letters setting out the National Commissioner's reasons for declining to appoint Ms Barnard.[60] The reasons must be read in conjunction with the comprehensive letter of the Divisional Commissioner in glowing support of Ms Barnard's candidature. The National Commissioner made express reference to the letter and must have been aware of Ms Barnard's competence. Even so, he chose to create an opportunity to enhance employment equity goals by not appointing her.

[60] See [15] to [16] above.

[70] In my judgment, the National Commissioner exercised his discretion not to appoint Ms Barnard rationally and reasonably and in accordance with the criteria in the Instruction, in pursuit of employment equity targets envisaged in section 6(2) of the Act. The attempt at reviewing and setting aside his decision would, in any event, have failed.

[71] Lastly, I have read the three carefully crafted concurring judgments of my brothers: Cameron J, Froneman J and Majiedt AJ; Van der Westhuizen J; and Jafta J. I concur in the judgment penned by Jafta J.

Conclusion

[72] The appeal should succeed and the order of the Supreme Court of Appeal should be set aside. There should be no order as to costs.

Order

[73] The following order is made:

1. Leave to appeal is granted.
2. Condonation for the late filing of written argument is granted.
3. Leave to supplement the record is granted.
4. The appeal against the decision of the Supreme Court of Appeal is upheld.
5. The order of the Supreme Court of Appeal is set aside.

6. The order of the Labour Appeal Court is upheld subject to paragraph 7 of this order.

7. There is no order as to costs in the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and in this Court.

CAMERON J, FRONEMAN J AND MAJIEDT AJ:

[74] As Moseneke ACJ observes in the main judgment, this case raises difficult and often emotive questions of equality, race and equity in the workplace.[61] The main judgment eloquently sets out the constitutional principles and values that underlie the assessment of these questions.[62] We concur in that reasoning and the outcome of the appeal. But we write separately in order, first, to discuss the tensions that accompany the formulation and implementation of restitutionary measures that give effect to the transformative demands of the Constitution. We consider this important, since frank acknowledgment of these tensions is necessary to allow our society to move forward and to ensure a rational discussion that provides hope for the future for all.

[75] Second, we analyse the appropriate standard that should apply when a litigant challenges the implementation of a constitutionally compliant restitutionary measure in a particular case. The main judgment finds it unnecessary to deal with this standard. We disagree. Ms Barnard brought her case squarely within the parameters of the Employment Equity Act (Act). Her statement of case sets out the essential

[61] At [1].

[62] At [28] to [39].

factual allegations on which she relies for setting aside the National Commissioner's decision not to promote her, including the inadequacy of his stated reasons for doing so. These reasons inform the determination of whether the National Commissioner's decision was permissible under the Act. We therefore consider it necessary to determine the feasibility of her claim, both in fact and law. This is the first case before this Court that deals with the standard to be applied in assessing the lawfulness of the individual implementation of constitutionally compliant restitutionary measures. It is important to give guidance on this difficult issue.

[76] We consider the appropriate standard to be fairness. We elaborate on that standard below.[63] We also discuss the importance of giving due recognition to the possible infringement of dignity in the implementation of restitutionary measures and the importance of giving adequate reasons for these decisions.

Transformative tension

[77] This case shows how balancing important constitutional imperatives can give rise to tensions. The Constitution commits us to recognising and redressing the realities of the past.[64] And it is committed to establishing a society that is non-racial, non-sexist and socially inclusive.[65] These two commitments can create tension. And there is a tension between the equality entitlement of an individual and the equality of society as a whole. A tension also arises when our laws attempt to advance multiple

[63] See [93] to [98].

[64] See the Preamble.

[65] See especially section 1(b).

groups of previously disadvantaged persons that do not fully overlap. The resolution of this case should address these tensions and provide a framework that permits these constitutional goals to be read harmoniously.

[78] The basic legal framework outlined in the main judgment allows for a harmonious reading.[66] It correctly observes that the Constitution has a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of apartheid.[67] It does so even though this commitment means that individuals may be adversely affected by the process of transformation. As this Court has previously observed:

> "[T]ransformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution."[68]

[79] But, as the main judgment points out, the process of transformation must be true to the Constitution.[69] This means, in the first place, that we should pause to recognise the perils that may beset affirmative action. Remedial measures may exact a cost our racial history demands we recognise. The Constitution permits us to take

[66] See [28] to [39].

[67] At [29].

[68] *Bato Star* above n 22 at para 76.

[69] At [30]. See also *Bato Star* id.

past disadvantage into account to achieve substantive equality.[70] But it does so generous-heartedly and ambitiously: it licenses reparative measures designed to protect or advance all persons who have been disadvantaged by any form of unfair discrimination. For reasons of history, racial and gender disadvantage are the most prominent. But they are not the only. They do not exclude other signifiers of disadvantage, like social origin or birth.[71] We must implement affirmative action bearing the breadth of this power in mind.

[80] We should also be careful not to allow race to become the only decisive factor in employment decisions. For this may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race. Over-rigidity therefore risks disadvantaging not only those who are not selected for a job, but also those who are.

[81] Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race.

[70] Section 9(2) of the Constitution provides:

> "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."

[71] Section 9(3) prohibits discrimination on the following grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Different causes of action

[82] As the main judgment explains, Ms Barnard chose not to bring a formal judicial review application. In the light of this Court's decision in *Gcaba*,[72] it is unclear whether she could have done so in these proceedings. But that does not matter. The point is not dispositive of Ms Barnard's case. This is because there is another challenge, one Ms Barnard clearly did raise. As the main judgment explains at the very outset, the "core issue" throughout the litigation has been whether Ms Barnard was unfairly discriminated against.[73] That is a challenge that is squarely before us. It is distinct from an administrative-law review. It is a cause of action that arises directly from the Act, which prohibits unfair discrimination by an employer against an employee or applicant for employment.[74] This Court's task is therefore to mediate the tension between that prohibition and the Act's recognition that affirmative action measures are justified,[75] and to formulate a suitably robust, constitutionally compliant standard by which to adjudicate Ms Barnard's claim.

[83] We must do so mindful of the fact that the lawfulness of the SAPS's Employment Equity Plan (Plan) is not at issue. In oral argument before us Ms Barnard accepted that the Plan was not the subject of her attack. To that extent, we agree with the main judgment.

[72] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

[73] At [1].

[74] Section 6(1), read with section 9, of the Act.

[75] See, for example, sections 2(b), 6(2)(a) and 13(1) of the Act.

[84] But Ms Barnard did strongly contend that the individual implementation of the Plan as it applied to her was unlawful. The main judgment holds that we should not decide even this issue.[76] We disagree. Even if Ms Barnard did not seek the judicial review of the National Commissioner's decision, she did urge, in all four courts, that it discriminated against her unfairly. It seems to us impossible to decide Ms Barnard's complaint, or the SAPS's appeal against the Supreme Court of Appeal judgment, without determining how courts ought to evaluate the National Commissioner's decision against the requirements of the Act.

Individual implementation

[85] There is no doubt that Ms Barnard brought her claim in the Labour Court in terms of the provisions of the Act. The Labour Court has "exclusive jurisdiction to determine any dispute about the interpretation or application of the Act, except where the Act provides otherwise".[77] In performing this function, courts have the power to review the conduct of the National Commissioner.[78] According to section 10(1) of the Act, a dispute about an unfair dismissal is excluded and must be dealt with in terms of the Labour Relations Act.[79]

[86] The Act prohibits unfair discrimination.[80] As stated, Ms Barnard's complaint was that the National Commissioner's decision, which denied her promotion because

[76] At [59] to [60].

[77] Section 49.

[78] Section 50(1)(h).

[79] 66 of 1995.

[80] Section 6(1).

she was white, fell foul of this prohibition. The difficulty Ms Barnard faces is that the Act says "[i]t is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act".[81] The SAPS defended the National Commissioner's decision on this basis. But, crucially, this defence avails the SAPS only if the National Commissioner's decision is "consistent with the purpose of [the] Act". So the Court's task here is to understand what that purpose is, and to determine whether the National Commissioner's decision was consistent with it.

[87] The Act's explicitly stated purpose is to achieve workplace equity including by "implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels".[82] This, by itself, does not determine when a restitutionary measure or its implementation is permissible. But the Act provides important clues elsewhere.[83] First, it makes plain that the Act does not

[81] Section 6(2)(a). The Act thus mirrors the provisions of the Constitution, which prohibit unfair discrimination (section 9(3)) but say that, nevertheless, affirmative action measures "designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" are permissible (section 9(2)).

[82] Section 2.

[83] A good starting point is section 15, which is headed "Affirmative action measures" and provides:

> "(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
>
> (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—

sanction affirmative action measures that are overly rigid. As discussed in more detail below, this is because affirmative action measures "include preferential treatment and numerical goals, but exclude quotas".[84] And the Act does not countenance employment decisions "that would establish an absolute barrier" to the employment or advancement of those not from designated groups.[85]

[88] In addition, the Act aims to advance several different "designated groups".[86] The Act defines "designated groups" to mean "black people, women and people with disabilities", and "black people", in turn, encompasses Black Africans as well as persons previously designated Coloured and Indian.[87] Employers "must" implement affirmative action measures that benefit people from all designated groups.[88] So no affirmative action decision is consistent with the purpose of the Act unless it considers the advancement of each of the different categories of persons designated by the Act. A decision that redresses racial disadvantage but grossly aggravates gender

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(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and 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."

[84] Section 15(3).

[85] Section 15(4).

[86] Section 2(b).

[87] Section 1.

[88] Section 13(1).

disadvantage, for example, might be impermissible, as might a decision that advances only one disadvantaged racial group while limiting the others.

[89] Finally, the Act insists on affirmative action measures "based on equal dignity and respect of all people".[89] In doing so it reiterates dignity's fundamental constitutional importance, both as a right and underlying value,[90] in compliance with which the Act must be interpreted.[91] Generally speaking, the advancement of those previously disadvantaged marks the equal dignity of all.[92] But affirmative action measures can also undermine the dignity of those negatively affected by them. The Act requires us to be vigilant against that threat.[93] And, of course, an applicant's merit cannot be disregarded,[94] especially when it affects the SAPS's ability to provide a vital public service efficiently.[95]

[90] We develop these ideas in what follows. For now, it is important to note the provisions of section 15(4):

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[89] Section 15(2)(b).

[90] See sections 1(a), 7(1) and 10 of the Constitution.

[91] Section 3(a).

[92] Section 9(2) of the Constitution states that affirmative action measures are "[t]o promote the achievement of equality". See also *Bato Star* above n 22 at para 74; *Van Heerden* above n 23 at para 30; and the main judgment at [35].

[93] Needless to say, this does not mean an affirmative action measure may never impair the interests of the previously advantaged. Frequently the goals of transformation are more important. But their realisation must accord with the Constitution. See *Bato Star* above n 22 at para 76. This means, as this Court held in *Van Heerden* above n 23 at paras 41 and 44, the measures "must be reasonably capable of attaining the desired outcome", may not be "arbitrary, capricious or display naked preference" and "should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened." The Act has given additional content to this constitutional standard.

[94] In terms of section 15(1), affirmative action measures are measures that advance "suitably qualified" people from disadvantaged groups. See also section 15(2)(d)(i).

[95] See the discussion at [108] below.

> "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." (Emphasis added.)

This provision makes it clear that the Act not only addresses the requirements of affirmative action measures in general, but also proscribes the individual implementation of those measures based on absolute barriers to non-designated groups. As noted in the main judgment, this is exactly Ms Barnard's complaint.[96]

[91] It is also relevant to consider section 15(3) of the Act, which states that remedial measures may "include preferential treatment and numerical goals, but exclude quotas." The main judgment holds this is not an appropriate case to determine the difference between numerical goals and quotas.[97] In our view, Ms Barnard has placed this question directly before the Court, and we must determine whether the National Commissioner's implementation of the Plan was indeed so rigid as to constitute the use of quotas instead of numerical goals.

[92] In her statement of claim Ms Barnard comprehensively particularised the facts upon which her claim was based. She then set out the legal issues arising from these facts. These were wide-ranging but, crucially, included the following:

[96] At [55] to [58].

[97] At [42].

> "[Ms Barnard] was not considered for promotion simply because she is a white person.
>
> . . .
>
> As a result the [SAPS]'s failure to appoint [Ms Barnard] on the reasons provided is both irrational and unfair and sustains [her] submission that the [SAPS] has an irrational and haphazard pursuit of representivity which is contrary to the scope and purpose of the Employment Equity Act".

Ms Barnard's statement of claim, relying on the Act, adequately raised the allegedly unfair implementation of the SAPS's affirmative action measures, on the basis that they amounted to an absolute bar because of her race. The trial was conducted on that basis. The individual implementation of the Plan and the standard to be applied in determining whether that implementation was lawful are before us, as they were in the lower courts.

The applicable standard

[93] These questions are important because care must be taken to ensure that remedial measures do not infringe unduly an individual's right to dignity. After all, remedial measures are an exception to the important general principle that personal attributes such as race and gender are not proper bases for granting or refusing employment or other opportunities. This is because they have no bearing on an individual's capacity, ability or intelligence. The Constitution makes an exception because it recognises that substantive equality can be achieved only by providing advantages to groups of people upon whom apartheid imposed heavy disadvantages.[98] Even so, we must note with care how these remedial measures often utilise the same

[98] See authorities above at n 92.

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."[99]

[94] 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."[100] But we differ from the main judgment's assessment of a standard to determine whether the implementation of a remedial measure has adequately balanced substantive equality with the dignity of the person negatively affected by the measure. The main judgment itself considers a standard by which the National Commissioner's decision may be adjudged.[101] It concludes that the implementation of remedial measures should be rationally related to the terms and objects of the measure.[102] We agree that rationality is the "bare minimum" requirement.[103] It can hardly be otherwise. In our law all exercises of public power must at least be rational.[104]

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[99] At [30].

[100] At [32].

[101] On this basis, we disagree with Jafta J that it is unnecessary for the Court to consider any standard at all (see [221]). For the reasons we have stated, we consider that the validity of the National Commissioner's implementation of the Plan is before the Court. We do not consider applicable *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 67. Here, Ms Barnard's challenge, in its essence, concerned the fairness of the National Commissioner's application to her of the Plan.

[102] Main judgment at [39].

[103] Id.

[104] *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

[95] But adjudicating Ms Barnard's challenge requires us to apply a less deferential standard than mere rationality. Her complaint was that she had been unfairly discriminated against, in contravention of the Act. In our view, that Act imposes a standard different from, and additional to, rationality. The important constitutional values that can be in tension when a decision-maker implements remedial measures require a court to examine this implementation with a more exacting level of scrutiny.

[96] This heightened scrutiny does not mean that courts should second-guess the reasoned choices of other branches of government. But it does require that judges ensure a decision-maker has carefully evaluated relevant constitutional and statutory imperatives before making a decision that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by section 9(3) of the Constitution. Were we to adopt the more deferential standard suggested by the main judgment, it would be difficult ever to hold that a decision-maker had impermissibly converted a set of numerical targets into quotas. Any decision that accords with the numerical targets would bear at least some rational connection with the measure's legitimate representivity goals. But a decision-maker cannot simply apply the numerical targets by rote. Similarly, a rationality standard does not allow a court to interrogate properly a decision-maker's balancing of the multiple designated groups, or of their interests against those adversely affected by the restitutionary measures.

[97] We acknowledge that the nature of the rights to just administrative action, fair labour practices and non-discrimination often overlap and cannot be compartmentalised into watertight categories.[105] There is nevertheless a need to deal with the requirements and complexities of each in a specific way. That much was recognised in *Gcaba* in relation to unfair labour disputes.[106] Alleged discrimination under the Constitution similarly raises its own problems. We must therefore formulate a standard specific to the Act, one that is rigorous enough to ensure that the implementation of a remedial measure is "consistent with the purpose of [the] Act" – namely, to avoid over-rigid implementation, to balance the interests of the various designated groups, and to respect the dignity of rejected applicants.

[98] For these reasons, we consider the appropriate standard to be fairness.[107] Unlike mere rationality, it is sufficiently encompassing to allow courts to assess consistency with the provisions and purposes of the Act, which recognise the importance of "fair treatment in employment".[108] In addition, fairness is a foundational constitutional value. In *Mphaphuli* O'Regan J stated:

> "Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the

[105] See, for example, *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 112, which discusses how the rights to just administrative action, fair labour practices and access to courts overlap and complement one another.

[106] *Gcaba* above n 72 at para 56.

[107] We have had the benefit of reading the concurring judgment of Van der Westhuizen J and consider invaluable his detailed treatment of dignity and proportionality. Our own comments on dignity are merely complementary to his more elaborate treatment. As far as his suggestion of proportionality as the exclusive standard is concerned, we think that proportionality can be accommodated within the broader standard of fairness. The added advantage of fairness is it may also cater for situations where proportionality is not necessarily at the heart of alleged unfair implementation.

[108] Section 2(a).

> Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution."[109]

And it is a standard the Constitution recognises in the specific context of employment practices and in relation to restitutionary measures.[110]

[99] There are two objections to the use of fairness as a standard. First, it is too vague; second, it may be internally inconsistent in individual implementation cases, where the general restitutionary measures or policies have already passed constitutional muster and thus do not constitute unfair discrimination.[111] Neither objection is convincing.

[100] Fairness is an open-ended norm. But so are norms of reasonableness, proportionality, wrongfulness and negligence in delict, and public policy and good faith in contract. Over time the application of these norms becomes more certain as precedent is built up. Today the unfair labour practice norm in labour law is hardly questioned. It was not so in the days of its birth. So too will the fairness norm here crystallise over time while at the same time giving courts the necessary flexibility to

[109] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Mphaphuli*) at para 221.

[110] Section 195(1)(i) of the Constitution obliges our public administration to apply "employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[111] See Van der Westhuizen J's judgment at [157] to [159].

deal with new cases. Indeed, the Act already gives considerable content to the fairness standard, as explained above.[112]

[101] Assessing the fairness of the individual implementation of affirmative action measures is different to deciding whether those measures amount to unfair discrimination. The latter enquiry is at the general level of determining whether the formulation and content of a restitutionary measure are constitutionally compliant. The former enquiry examines whether a specific implementation of a measure that is constitutionally compliant in its general form is nevertheless in conflict with the provisions of the Act. We must insist that the specific implementation as well as the general formulation of remedial measures be fair.

[102] We must therefore determine whether the National Commissioner's decision not to appoint Ms Barnard was a fair implementation of the Plan. In doing so, we examine both the objective facts of the case and the reasons the National Commissioner gave for his decision. Here, we also differ from the main judgment, which says that an evaluation of these reasons is not before the Court.[113]

[103] This is not a review challenge. Had it been, the sufficiency of the National Commissioner's reasons, and their connection with his decision, would have been squarely in issue. But what Ms Barnard did challenge was the implementation of the Plan under the Act. (This challenge means that the time limits in PAJA are not

[112] See [87] to [89].

[113] At [59] to [60].

applicable and therefore that the concerns the main judgment raises about them are undue.)[114] And the reasons the National Commissioner gave are important. This is because they provide evidence whether his implementation was fair.

[104] The reasons are particularly important here, because other evidence is limited. The SAPS did little else to justify its decision. The National Commissioner did not depose to an affidavit explaining his decision, or his reasoning in making it. The SAPS did not elaborate on the stated reasons in the lower courts or in its arguments here. We ultimately find that this is not fatal, because there are sufficient external facts to determine that the National Commissioner's decision was fair. But in another case the reasons provided could be the only evidence demonstrating that a decision-maker implemented a plan fairly, especially if the external facts point to the opposite conclusion.

[105] This only reinforces the need for decision-makers to give adequate reasons for their decisions. Our constitutional values of accountability, transparency and openness require this.[115] And to truly qualify as reasons, they should be properly informative.[116] In *Phambili Fisheries* the Supreme Court of Appeal explained:

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[114] At [60].

[115] See sections 1(d), 32, 41(1)(c) and 195(1)(g) of the Constitution.

[116] Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 461 states that "[r]easons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information." (Footnote omitted.) See also *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) (*Cape Bar Council*) at para 46, citing Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 228, and *Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others* [1986] ZASCA 20; 1986 (2) SA 756 (A) at 772I-773B.

> "[T]he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say, in effect: 'Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.'
>
> This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement."[117]

[106] The need for a decision-maker to give adequate reasons is particularly important when the decision was based primarily on race or any other attribute listed in section 9(3). Knowing why the decision was adverse enables the aggrieved person to understand – an understanding that encourages participation in rebuilding our divided country.

[107] Here, as the Supreme Court of Appeal noted,[118] the paucity of the National Commissioner's reasons makes his decision, at best, opaque. While the National Commissioner may in fact have taken all relevant considerations into account and balanced them in a fair way, this was not, on the face of it, evident from the reasons he put forward for denying Ms Barnard the promotion she sought. We consider the

[117] *Phambili Fisheries* above n 50 at para 40, quoting *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* [1983] FCA 179; (1983) 48 ALR 500 at 507.

[118] Supreme Court of Appeal judgment above n 1 at para 76.

National Commissioner's stated reasons incomplete in two respects. The first relates to what he said about service delivery. The second relates to whether promoting Ms Barnard would have addressed representivity.

[108] As a public service provider, the SAPS is required to prioritise service delivery. The Constitution requires the SAPS to carry out its functions with special regard to the efficiency and quality of its service.[119] Its Plan recognised this.[120] And the importance of service delivery was reflected in the letter of 7 June 2006 that the National Commissioner addressed to all provincial commissioners, divisional commissioners and deputy national commissioners. This letter stated expressly that interviewing panels should focus on the appointment of personnel who would enhance service delivery.[121] This indicates how important that goal was generally within the SAPS. The Act does not require the SAPS in every case to prefer service delivery

[119] Section 205(3) of the Constitution entrusts the SAPS with vital public functions; its objects are "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law". Section 205(2) requires legislation to "enable the police service to discharge its responsibilities effectively". As part of the public administration, the SAPS must promote the "[e]fficient, economic and effective use of resources" (section 195(1)(b)) and be responsive to the public's needs (section 195(1)(e)). Section 206(3)(b) prizes "the effectiveness and efficiency of the police service".

[120] The Plan's executive summary refers to the SAPS's "objective of achieving service delivery improvement which permeates across all sectors of Human Resource practices".

[121] This letter reads in relevant part:

> "The promotion of a candidate must add value to service delivery . . . [and] must therefore ensure that recommended candidates display the necessary competence/potential and do meet the inherent requirements of the job. Inherent requirements of the job means 'those competencies which have been proved to be required by an employee to carry out a job' and competence means 'the blend of knowledge, skills, behaviour and aptitude that a person can apply in the work environment, and which are indicative of that person's ability to meet the requirements of a specific post' . . . .
>
> The investments by the [SAPS] in the development of their employees in their specific career streams should not be jeopardised and should be taken into account by the panels in making their recommendations."

over all other considerations. But it does require it to justify decisions that do not enhance service delivery.

[109] The National Commissioner decided here that not appointing Ms Barnard would not adversely affect service delivery. But the Divisional Panel thought the opposite. It recommended Ms Barnard's promotion "in the interest of service delivery". The National Commissioner chose to prioritise representivity over the increase in service delivery that Ms Barnard's appointment would have achieved. This was an operational decision. It was one the National Commissioner was well-placed to make, and the Court owes his hands-on expertise some measure of deference. But that does not relieve him of his duty to justify the factors he took into account in reaching his conclusion.

[110] If a decision-maker does not justify how he or she balances the important considerations of representivity and service delivery, remedial measures will suffer an invidious gloss. A decision-maker could prize representivity over service delivery without sufficient regard to the specific facts of a case. This would suggest that representivity is always more important than the quality of service provided by a public body. But this is a false choice. There is no evidence that we must sacrifice the quality of our public bodies to achieve the important goals of representivity and to redress past disadvantage. Persons disadvantaged by our history are just as capable and talented as Ms Barnard. This observation is especially true given the Act's definition of "suitably qualified" as someone "with the capacity to acquire, within a

reasonable time, the ability to do the job".[122] If the widely used term "affirmative action" means anything, it recognises that we may have to make an extra effort to find and support those capable persons, who may not brandish the traditional signs of successful candidates.[123] But if decision-makers continually disregard talented candidates while searching for capable individuals from disadvantaged backgrounds, it creates the false impression that the candidates who are eventually chosen are not as capable as those who are rejected. This impression injures the dignity not only of the candidates who are rejected, but also of the candidates who are appointed.

[111] To avoid this, a clear explanation is necessary. The decision-maker must explain how he or she balanced the concerns of both representivity and service delivery with regard to the facts of the specific case.

[112] The Divisional Panel that recommended Ms Barnard provided an example of precisely such an explanation. It recognised that appointing her would exacerbate the over-representation of white women at salary level 9. But it found that this consideration should yield to the important gains in service delivery that Ms Barnard's promotion would enable, especially as Ms Barnard had by then applied twice for the same position and been consistently rated the most talented and capable candidate.

[122] Section 20(3)(d).

[123] Compare section 15(2)(d)(ii), which says affirmative action measures "must include" measures to "develop people from designated groups" and "appropriate training measures".

[113] The National Commissioner had the power to disagree with the Divisional Panel, for the ultimate decision was his to make. But he was required to explain his disagreement and give reasons why he chose representivity over service delivery. His failure to do so provides some evidence that he was not implementing the Plan fairly when he declined to promote Ms Barnard.

[114] We are hesitant about accepting the National Commissioner's reasons because of a second consideration, namely his use of representivity as the primary motivating factor. Ms Barnard is a white woman and her appointment to salary level 9 would have exacerbated over-representation at that level. But Ms Barnard is both white and a woman. We must be judicious about grouping these elements of identity together. As a white person, Ms Barnard is a member of a group that has been historically advantaged. But as a woman, Ms Barnard is a member of a group that has faced a history of discrimination. As explained above, women are one of the Act's designated groups.[124] The Act requires employers to implement affirmative action measures to redress disadvantage to women.[125] And the National Commissioner must interpret the Plan harmoniously with the Act.

[115] But were women under-represented in the police force? According to the equity targets provided by the Plan, there were 122 employees in this branch of the SAPS at the time Ms Barnard applied for promotion. Of these, 61 were men and 61 were women – an even split. But there was a striking disparity in salaries. The

[124] See [88] above.

[125] Id.

National Commissioner is required to approve appointments to the highest salary positions in that branch, namely levels 8 to 12.[126] At these levels, there were 53 male employees but only 25 female employees. There was thus a substantial pay gap between women and men in the branch where Ms Barnard worked. Her promotion to level 9 would have alleviated this imbalance, and would also have addressed gender representivity[127] at that level, where 13 women were employed compared to 16 men.

[116] So Ms Barnard's appointment could have ameliorated one representivity problem even if it would have exacerbated another. Ms Barnard's case thus demonstrates the intersection of different categories of advantage and disadvantage. However, the National Commissioner was not obliged to promote her simply because there was a salary gap between women and men. He was entitled to prefer racial representivity over gender representivity, provided he had a justification for that decision.

[117] In other words, it is not necessarily an injury to dignity to view a person only through the lens of one ground listed in section 9(3), provided the reason for doing so is to redress historical inequality. But this becomes dissonant if we ascribe only one identity at the cost of seeing the multitudes that make up each individual.

[126] Rule 13(1) of the National Instruction.

[127] The Plan refers to "gender" representivity to mean the relative representation of men and women in the workforce. The more appropriate word may be "sex", which refers to biological rather than social traits. Nevertheless, we retain the Plan's term in this section.

[118] The courts should give deference where decisions are made in a way that balances the mandate to achieve representivity with a full appreciation of the individual. But the courts must insist that the decision-maker has, at a minimum, taken into account the relevant aspects of a candidate's identity and the ways in which he or she could advance representivity in a manner consistent with the Act.

[119] This is so because section 9 of the Constitution and section 15(4) of the Act mandate a holistic approach to an employment equity plan, one that accords with the Act's requirements and objectives. To do otherwise would be to sanction rigidity that would convert the numerical targets specified in the Plan into impermissible quotas.[128] For instance, an overly rigid interpretation of the numerical targets could have adverse effects for Indian or Coloured people. The Plan's ideal target for Indian women is 0.4 employees, or fewer, at every salary level. An overly rigid approach to the Plan would require that the National Commissioner never approve the appointment of an Indian woman. That would not only be absurd, it would be a bitter irony because Indian women have also suffered past discrimination.

[120] Demanding that the National Commissioner consider the numerical targets holistically and in the light of the statute's requirements is critical. Because women are included as a designated group, the National Commissioner is required to consider how a recommended candidate would address gender representivity as well as racial representivity. His failure to even mention that Ms Barnard was a member of a

[128] See [87] above.

designated group is further evidence that he was not implementing the Plan in a fair manner.

[121] So the National Commissioner's stated reasons, on their own, provide sparse evidence that he implemented the Plan fairly. Despite this, we conclude the National Commissioner's decision not to promote Ms Barnard was fair. Our reason is this: neither the National Commissioner's failure to address adequately the question of service delivery, nor his failure to mention gender representivity, is on the facts before us a sufficiently compelling indication of unfairness.

[122] As set out in the main judgment, the National Commissioner explained that the division was being restructured and that the post did not need to be filled until restructuring was complete.[129] Ms Barnard presented no evidence to cast doubt upon this. It is thus not clear that her promotion would have achieved the service-delivery gains the Divisional Commissioner sought. Similarly, the gender discrepancy in the branch of the SAPS that employed Ms Barnard was not nearly as acute at salary level 9 as it was at other upper-level positions. This means the National Commissioner could fairly have determined that racial representivity was a more urgent problem at salary level 9 than gender representivity. Moreover, Ms Barnard never pressed an argument about gender. Nor did she challenge the Plan or the racial and gender targets it embodied. In the absence of proper challenge and argument, the Court cannot undercut the decision-maker's stated reasons on this point.

[129] At [16].

[123] We conclude that the facts show that the National Commissioner's decision passes the fairness standard. While we find this a close call, what has proved determinative to us is the pronounced over-representation of white women at the salary level to which Ms Barnard was applying. This was not just by one or two, but by many. There was thus greater justification for prioritising racial representivity over other considerations. Similarly, Ms Barnard's eventual promotion to Lieutenant-Colonel shows that the National Commissioner's decision not to promote her to salary level 9 in this instance did not constitute an absolute bar to her continued advancement in the SAPS. Both of these facts provide a basis for concluding that the National Commissioner was interpreting the numerical targets as permissible goals and not as impermissible quotas. The National Commissioner was therefore applying the Plan in a fair manner.

[124] We thus agree with the principled approach set out in the main judgment, and, ultimately, with the outcome it reaches.

VAN DER WESTHUIZEN J:

Introduction

[125] "It is the fate of this generation . . . to live with a struggle we did not start, in a world we did not make."[130] These words of former American President

[130] State of the Union Address, 11 January 1962 reproduced in Sorensen (ed) *"Let the Word Go Forth": The Speeches, Statements, and Writings of John F. Kennedy 1947 to 1963* (Dell Publishing, New York 1991) at 231-2. This was said in the context of the United States of America's obligations after the Second World War.

John F Kennedy capture something of the responsibility to deal with the consequences of the past, falling even on those who played no part in it. History is inclined to target the innocent for retribution and restoration following on gross injustice committed by those who thrived on the systematic violation of the human dignity of others. This often seems unfair. Clichés like "two wrongs don't make a right" express the perceived unfairness.

[126] A generation of Germans, too young to participate in the atrocities of Nazism and the Second World War or not yet born at the time, had to suffer not only the devastation of their country, but the understandable resentment of and ongoing negative stereotyping by the world. Many waited decades before they dared to ask their parents why they had indulged in evil, or allowed it to happen. Other nations have also had to deal with the consequences of unjust wars they waged and destruction they caused in order to gain temporary material and other benefits.

[127] The United States of America has implemented "affirmative action" in an attempt to achieve racial equality after a long history of slavery and discrimination.[131] It has been the topic of court challenges and ongoing emotive debates cutting through the core of the American dream. In these, alleged disadvantages to society – not only those required to forego opportunities in the process but also those supposed to benefit – have been put forward. On occasion this led to the abandonment of such

[131] Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (Cambridge University Press, New York 2009) at 174. The US's affirmative action practices were initiated by President Kennedy's executive order, rather than enacted into federal legislation.

measures.[132] Professor Stephen Carter pointed out the difficulties of an honest debate about racial preferences.[133] White people who criticised affirmative action risked being called racists and black people who did the same were accused of treason. After stating "I got into law school because I am black", he explained his frustrations as an "affirmative action baby" and argued that affirmative action had failed to promote equality and allowed the United States of America to escape inexpensively from its moral obligation to undo the legacy of slavery.[134] Professor Carter was heavily criticised for his views. This is but one example of the complexity and sensitivity of the debate.

[128] So it may be a historical fact that the innocent often have to account for sins committed before they were born or able to act independently. However, "innocence" of conduct by one's ancestors or predecessors that in hindsight are widely recognised as morally repulsive, does not mean that the innocent have not over time benefitted

[132] Id. Kende explains that "[t]he US Supreme Court . . . has generally prohibited affirmative action plans for broad social purposes." For relevant case law, see *Regents of University of California v Bakke* 438 US 265 (1978), which upheld affirmative action in California state education but found quotas unconstitutional; *Gratz v Bollinger* 539 US 244 (2003), which found that the University of Michigan's point system of admissions that awarded "bonus points" for minority prospective students amounted to a quota and did not account for students' individuality and was therefore unconstitutional; *Grutter v Bollinger* 539 US 306 (2003), which found that race-based admissions policies at the University of Michigan that intended to create a "critical mass" of minority students were narrowly tailored, for instance because they were limited in time, and were thus constitutional; *Parents Involved in Community Schools v Seattle School District No 1* 551 US 701 (2007), which struck down a race-based school desegregation plan despite acknowledging arguments from the school district about promoting diversity and curbing racial isolation; *Schuette v Coalition to Defend Affirmative Action* 572 US (2014), which affirmed the State of Michigan's ban on race-based affirmative action in state education; and *Fisher v University of Texas at Austin* 570 US (2013), which found that affirmative action should be subjected to strict-scrutiny review and remanded the case to the Fifth Circuit, which, in *Fisher v University of Texas at Austin* 2014 WL 3442449 (5th Cir 24 June 2013), ruled that affirmative action in the University's admissions policy was permitted even under that more searching standard. At least one state prohibits affirmative action in its constitution. In 1996 Proposition 209 amended California's constitution to prohibit any state decisions based on race, sex and other considerations. This amendment effectively eliminated affirmative action in California.

[133] Carter *Reflections of an Affirmative Action Baby* (BasicBooks, New York 1991) throughout and, for example, at 169-72.

[134] Id at 11 and following.

from injustice. One can benefit from a wrong without being guilty of wrongdoing. Unjustified enrichment as a cause of action is an example.[135] Nor does it mean that measures to restructure a society, heal a country and promote dignity and equality are not necessary. Several societies have struggled with efforts to overcome past discrimination and injustice. Others have neglected to do so and allowed people to be separated further from each other and painful cleavages to deepen.

[129] Over centuries millions of South Africans suffered because of gross discrimination and the denial of the fullness of their human dignity. This happened especially on the basis of race, colour and ethnicity, but also gender, sex, marital status, sexual orientation, disability and other grounds. "We, the people of South Africa, [r]ecognise the injustices of our past".[136] We "[b]elieve that South Africa belongs to all who live in it, united in our diversity". Therefore we adopted a Constitution to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and to "[i]mprove the quality of life of all citizens and thus free the potential of each person". It is founded on values including human dignity, the achievement of equality, non-racialism and non-sexism.[137] And it recognises fundamental rights in the Bill of Rights. The first is equality;[138] the next is human dignity.[139]

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[135] Ackermann *Human Dignity: Lodestar for Equality in South Africa* (Juta & Co Ltd, Cape Town 2012) at 345-6 notes that, like unjustified enrichment, restitutionary measures do "not rest upon *proof of guilt*, but on *proof of unjustified enrichment* on the part of the advantaged." See generally Visser *Unjustified Enrichment* (Juta & Co Ltd, Cape Town 2008).

[136] The Preamble to the Constitution.

[137] Section 1(a) and (b).

[138] Section 9.

[130] Our challenge is to understand and apply these provisions as an integrated project to achieve equality, within the context of the rest of the Constitution, our history and the future of which we dream. Discrimination may be motivated by several urges, from simple greed to the need for identity, or inferiority or superiority complexes. But ultimately it boils down to the denial of human dignity, the first-mentioned of the founding values of the Constitution.[140]

[131] In this instance Ms Renate Mariette Barnard – perhaps like others disfavoured by section 9(2) measures – has been understandably frustrated and disappointed because of the impact on her of an attempt to achieve equality; this despite her proven skill and experience and her high score at two interviews. She may well be innocent of participating in the apartheid past. As a member of a racially privileged group she might have benefited from it though. She has shown a commendable understanding of the need for and importance of restitutionary measures. How do her positive attributes sit with the constitutional responsibility to heal the divisions of the past and promote the achievement of equality? Is she the victim of unfair discrimination? Or of irrational decision making? Was her dignity diminished? If so, is this justified in pursuit of the aim of equality to restore some of the dignity of those humiliated by apartheid? Or is she simply unfortunate to fall on the wrong side of one of the distinctions the law often has to make?

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[139] Section 10 provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[140] Section 1(a).

[132] I agree with the outcome of the main judgment by Moseneke ACJ and of the other judgments. With the reasoning of Moseneke ACJ about the aim and meaning of section 9 and the legislation and policies resulting from it, I also agree. I rely on the main judgment's exposition of the facts and history in this matter. In order to give my somewhat different reasoning on a few aspects, I write separately.

[133] The main judgment finds that an enquiry into the decision of the National Commissioner is not properly before us because Ms Barnard's case is not a bid to review and set aside the decision of the National Commissioner.[141] I do not agree. She brought a complaint to Court, namely that a decision taken by her employer in implementing its Employment Equity Plan, pursuant to the Act and section 9(2)[142] of the Constitution, was not lawful. In order to determine whether it was lawful or not, this judgment examines whether the policy and its implementation meet the standard set out by this Court in *Van Heerden*,[143] including whether they promote equality. Then it goes further to determine whether the implementation impacts on any other constitutional rights, in particular the right to human dignity. I offer some thoughts on human dignity and propose an analysis in so far as rights may compete in their exercise or enforcement. The interest of the public in efficient service delivery by SAPS is then also considered.

[141] At [59] to [60].

[142] See [134] below for the full wording.

[143] Above n 23.

Section 9

[134] Section 9(1) of the Constitution recognises equality before the law. Section 9(2) then states:

> "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."

Subsections (3), (4) and (5) prohibit unfair discrimination:

> "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[135] The measures provided for in section 9(2) are aimed neither at punishment of the previously advantaged, nor at retribution or revenge. They do not represent a settlement or compromise between races or other groups; and they are certainly not intended to foster discrimination and division. The aim is stated in section 9(2): to promote the achievement of equality, which includes the full and equal enjoyment of all rights and freedoms, in view of past unfair discrimination. Subsection (2) addresses the wrongs of the past. Subsections (3), (4) and (5) prohibit unfair

discrimination to prevent the proverbial second wrong that would not make a right. This is the constitutional concept of equality on which we as a nation agreed. In view of our history, equality cannot merely be a formal requirement – it has to have substance.

[136] Understood within the context of a holistic reading of section 9, the measures provided for in section 9(2) are not exceptions to the right to equality. They form part of it. This Court stated in *Van Heerden*:

> "[Restitutionary measures] are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. . . . [W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reasons a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."[144]

[137] The appropriate assumption under our constitutional framework is that restitutionary or affirmative measures should be welcomed rather than viewed with suspicion. They must be understood as equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory.[145] In *Stoman* it was held

[144] Id at paras 30-1. In Mokgoro J's judgment, she states at para 95: "A measure enacted in terms of section 9(2) is not an exception to our notion of equality; it is an integral part of it".

[145] In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) at para 60 this Court affirmed the importance of remedial measures to achieve this substantive equality:

> "It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes are eliminated, and unless remedied,

that—

> "the recognition of substantive equality means . . . that equality is more than mere non-discrimination. When a society, and perhaps the particular role players in a certain situation, come from a long history of discrimination, which took place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination."[146]

[138] Affirmative measures are critical to realising the constitutional promise of substantive equality.[147] The structure and wording of section 9 indicate that measures meeting the requirements of section 9(2) cannot be unfair discrimination under section 9(3) to (5).[148]

[139] Race continues to be an important component of many restitutionary measures. However, previous disadvantage because of unfair discrimination is not restricted to racial groups. The Constitution clearly recognises that unfair discrimination, based on a range of grounds including social origin, disability, culture, language and birth, is unacceptable. It envisages measures to protect those disadvantaged by unfair discrimination on any of these grounds. In this matter race is principally at issue.

> may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."

[146] *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 477F-H.

[147] *National Coalition* above n 145 at para 60 and *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (*Walker*) at para 46.

[148] See, for example, Mokgoro J's judgment in *Van Heerden* above n 23 at paras 80-1; section 6(2) of the Employment Equity Act; section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; and Brickhill "Testing Affirmative Action under the Constitution and the Equality Act" (2006) 27 *ILJ* 2004 at 2012.

[140] Affirmative measures and their implementation are not immune from scrutiny,[149] as is clear from the main judgment. The Constitution states that the measures must be designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. Schemes and conduct based on race, which arbitrarily benefit some and violate the rights of others, can never qualify as a legitimate measure under section 9(2).

Testing

Rationality

[141] On the facts of this case, the National Commissioner's decision could in principle possibly be subject to review on the basis of rationality. This follows as a natural consequence of the principle of legality and the rule of law, because it can be argued that the decision amounts to an exercise of public power. It seems that the nature of the National Commissioner's position and the decision's potential effects make it public in nature. Ms Barnard did not bring this case as a legality review though. Chapter III of the Act applies to any designated employer.[150] Therefore we are required to evaluate the National Commissioner's decision as if it were made by any private or public employer.

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[149] See also, for example, De Vos "The Past is Unpredictable: Race, Redress and Remembrance in the South African Constitution" (2012) 129 *SALJ* 73 at 88:

> "The fact that the Constitutional Court has embraced a substantive notion of equality and has emphasised that corrective measures were both constitutionally permissible and sometimes mandated in order to achieve substantive equality, does not mean that the Constitution places no limitation on the measures that may be taken".

Ackermann above n 135 at 364 states:

> "What section 9(2) clearly does not do is give a blanket guarantee that *any* 'measure' taken under its provisions will be constitutional, irrespective of the nature or extent of its impact on affected parties."

[150] Section 4(2) of the Employment Equity Act.

Van Heerden

[142] In *Van Heerden* this Court established a three-pronged test to determine whether an affirmative or restitutionary measure passes constitutional muster.[151] The question is whether it—

(a) targets persons or categories of persons who have been disadvantaged by unfair discrimination;

(b) is designed to protect or advance such persons or categories of persons; and

(c) promotes the achievement of equality.

[143] The first two prongs test whether the measure itself, in its design, is rationally connected to the end it aims to achieve,[152] in accordance with the wording of section 9(2) which provides for measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. The focus of the third prong is somewhat different. It is on the measure, but also on its implementation. The word "achievement" implies some effect or impact. This could hardly be tested without contemplating some action taken in terms of the measure. *Van Heerden* thus acknowledges some distinction between a measure and its implementation. A decision or other action taken in terms of an affirmative measure, as well as the

[151] Above n 23 at para 37.

[152] See *Stoman* above n 146 at 480 discussing rationality in the context of affirmative measures:

> "[A] policy or practice which can be regarded as haphazard, random and overhasty, could hardly be described as measures designed to achieve something. There must indeed be a rational connection between the measures and the aim they are designed to achieve."

measure itself, must be constitutionally compliant.

[144] The constitutional validity of the Act was not attacked. Section 6(2) of the Act specifically states that affirmative measures do not constitute unfair discrimination. The Employment Equity Plan as a measure (with its accompanying guidelines) passes the first two prongs. It identifies and targets categories of persons previously disadvantaged by unfair discrimination and categorises them in designated groups which must be advanced and promoted according to numerical targets.

[145] Something more is needed though when a *measure* as well as its *implementation* are evaluated. A measure might be legitimate in form, but its application may be unlawful. The main judgment recognises this and states that, "a validly adopted Employment Equity Plan must be put to use lawfully".[153] Section 15(4) of the Act also focuses some attention on *decisions* concerning an employment policy or practice. Once the measure is found to fall within section 9(2) and is thus not unfair discrimination under section 9(3), the effect and impact of its implementation must be evaluated.

Is equality promoted?

[146] Because the third *Van Heerden* prong – that the measure must promote the achievement of equality – requires an appreciation of the effect and impact of the measure, more than mere abstract rationality testing is required. The impact of a

[153] At [38].

measure is ascertained by looking at how it is implemented.

[147] *Van Heerden* stated:

> "[A] measure should not constitute an abuse of power or impose such a substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened."[154]

[148] This enquiry should go beyond mere abuse of power and undue harm. It requires a judgment – within the ambit of the right to and value of equality – of whether the measure "serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved".[155] This must take into account whether the measure undermines the goal of section 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society.

[149] Before focusing specifically on the facts of this case, it must be pointed out that equality can certainly mean more than representivity.[156] 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.

[154] Above n 23 at para 44.

[155] Sachs J's judgment id at para 142.

[156] The Employment Equity Act also recognises that equality includes more than just representivity. See, for example, sections 13 and 15.

For example, if a population group makes up 2 or 3 percent of the national demographic, then, in an environment with few employees, the numerical target for the group would be very small or even non-existent. If a candidate from this group is not appointed because the small target has already been met, this may unjustly ignore the hardships and disadvantage faced by the candidate or category of persons, not to mention the candidate's possible qualifications, experience and ability.

[150] This is not the case here, though. Did the National Commissioner's decision promote the achievement of racial equality? The necessary corollary of the duty to promote racial equality must be, at the very least, the duty to avoid aggravating inequality. Although equality can manifest in various forms, in the context of this case it takes the form of representivity. By appointing Ms Barnard, her designated group would have been significantly over-represented and her appointment would have aggravated racial inequality. Accordingly, the decision not to appoint Ms Barnard fulfilled this corollary duty.

[151] But what of the decision not to appoint anyone, including Captain Ledwaba and Captain Mogadima? On the face of it, their appointment would have increased racial representivity. The National Commissioner's reasons for their non-appointment are not before us and other legitimate considerations, beyond their obvious ability to enhance racial representivity, may have played into his decision. Further, Ms Barnard's claim does not arise from a decision about another candidate, but from

the decision not to appoint her. The decision not to appoint other candidates is of little relevance for the lawfulness of the decision on her appointment.

[152] Was the National Commissioner's decision not to appoint Ms Barnard contrary to the long-term, equality-related goal of a non-sexist society? Measures under section 9(2) do not relate to race only. She is a woman and therefore a member of a group that suffered unfair discrimination and in many respects still does. Appointing a member of this group may well enhance the achievement of equality.

[153] Privilege often manifests in an individual in a multiplicity of different, intersecting and mutually constructive or destructive ways. One must account for interactions between the different aspects of identity and privilege when reviewing whether an affirmative measure was acceptably implemented. Because Ms Barnard's traits sit at the intersection of privileged and under-privileged identities, she might suffer harm in unique ways compared to members of other groups, designated or not.[157] A woman in her position has probably not suffered the unfair discrimination that black women did, but also not enjoyed the privilege of white men. Her position and history of privilege are undeniably different from that of a black man and may require more promotion in some contexts and less in others.

[154] The Act recognises this by leaving open how an affirmative policy should promote each designated group and does not mandate that they are all promoted

[157] See generally Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241.

equally in every context. SAPS acknowledges this unique intersectionality by identifying white women as a designated group which must be advanced in terms of their Employment Equity Plan and in accordance with the Act. The Employment Equity Plan – within the latitude permitted by the Employment Equity Act – uses targets to denote the degree of promotion it considers desirable for each group in different income levels and areas of speciality.

[155] Women of all races have not been adequately represented in traditionally male-dominated sectors such as law enforcement. But the fact that Ms Barnard belongs to a designated group that is promoted and advanced in terms of SAPS's Employment Equity Plan and was already over-represented at salary level 9, in this case adequately accounts for the interaction between her privilege as a white person and her under-privilege as a woman. The decision not to appoint her cannot be said to be contrary to the long-term goal of a non-sexist society.

[156] Therefore the implementation of the measure satisfies the third leg of the *Van Heerden* enquiry in that it promotes the achievement of equality. However, the question whether the implementation passes constitutional muster also has to take into account how it may affect other constitutional rights and values. A separate enquiry – one which does not use only equality as a barometer – needs to be undertaken. What barometer would be appropriate to test the impact of the implementation?

Fairness

[157] The judgment by my colleagues Cameron J, Froneman J and Majiedt AJ proposes fairness as a test. This may be a possibility. But I am somewhat sceptical of a fairness standard when dealing with the constitutional validity of the implementation of section 9(2) measures.

[158] If "fairness" here relates to the unfair discrimination prohibition in section 9(3), relying on it with regard to affirmative measures under section 9(2) may risk internal inconsistency. Section 9(3) deals with differentiation which amounts to unfair discrimination. By definition, measures under section 9(2) do not amount to unfair discrimination. I understand that a *fair measure* may theoretically be *implemented unfairly*. However, it may in practice seem incoherent to subject the implementation of a section 9(2) measure to section 9(3) fairness considerations. Once a measure has withstood the section 9(2) *Van Heerden* enquiry and is found not to be unfair, another investigation into its fairness, informed by section 9(3) considerations, may not always make practical sense.[158]

[159] Fairness is of course not only a section 9(3) concept. The term is used in a wider, more general sense. If it means something more general, I would not be enthusiastic about it as a standard in this context. It is vague. Life is not always "fair" and neither is the law. It often imposes restrictions which might seem "unfair", at least in its impact on the individuals involved. The requirement that a person be at

[158] *Van Heerden* above n 23 at paras 33 and 36. See also Brickhill above n 148 at 2013 and De Vos above n 149 at 88.

least 18 years old to hold a driver's licence may well be unfair to 17 year-old skilful drivers; but practical realities often require the law to draw a line based on reasonable general assumptions.

[160] The *Van Heerden* test has been criticised for failing to incorporate a fairness standard.[159] It should be considered as a threshold for the constitutional validity of affirmative measures and the third prong has to be fleshed out with regard to the circumstances in which it applies. But courts would rightly be reluctant to second-guess policies that clear the *Van Heerden* prongs.[160] *Van Heerden* considered the concept of strict scrutiny to be an inappropriately high standard for review of an affirmative policy. We should indeed not subject the measures to an unrealistically high standard of review which would thwart a constitutional objective.

Measuring impact

[161] Courts are generally reluctant to presume that provisions in the Constitution operate in tension and so try to construe them harmoniously.[161] This does not mean that we may overlook the impact of one right on other rights in specific situations, or that we must interpret rights narrowly from the outset to avoid possible tension. Constitutional provisions – including those protecting rights – have to be interpreted within the context of the Constitution as a whole. No provision may be interpreted in

[159] See McGregor "Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures" (2013) 4 *TSAR* 650 at 655.

[160] See Sachs J's judgment in *Van Heerden* above n 23 at para 152.

[161] *United Democratic Movement v President of the Republic of South Africa and Others (No 2)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at paras 12 and 83.

isolation and no right protected and enforced without regard to other rights. Especially the exercise of one constitutional right may often have to be balanced against another. Courts are regularly called upon to do so[162] thoughtfully and candidly.[163] To a considerable extent, this is what constitutional adjudication is about.

[162] No right is absolute. Sections 7(3) and 36 of the Constitution[164] say that rights are subject to limitations contained in the Bill of Rights or in other provisions of the Constitution. Section 36 is not directly applicable here, because it deals with the limitation of rights by "law of general application". Whereas the Act is law of general application, the implementation of an affirmative measure by the National Commissioner's decision is not. We are not dealing here with the limitation of a right

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[162] Chaskalson "Human Dignity as a Foundational Value of Our Constitutional Order" (2000) 16 *SAJHR* 193 at 201. Chaskalson also quotes with approval Lord Steyn's observation that—

> "[c]ourts will sometimes have to balance the protection of the fundamental rights of individuals against the general interests of the community. Individualised justice and the stability needed in any democratic society may be in contention. . . . Often courts will have to choose between competing values and make sophisticated judgments as to their relative weights."

[163] Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* Service 3 (2011) vol 2(2) at 34–99 notes that, when confronted with "hard choices", the Court—

> "must not view the choice of one good over another good in hard cases as arbitrary. Instead, it must be candid about the reasons for its choices and hope that its candour about the reasons for its choices ultimately reflects the exercise of good judgment."

[164] Section 7(3) of the Constitution provides that "[t]he rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill", while section 36(2) sets out that "[e]xcept as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." Subsection (1) states:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

resulting in a finding that the limitation is justifiable or not. But *why* do rights sometimes have to be limited? One reason is that the law often limits a right in order to protect the exercise of other rights.[165] At its heart a limitation analysis is an acknowledgment that constitutional democracies are faced – and must wrestle – with complex competing interests, rights and values.

[163] The Constitution recognises this. It requires that the limitation of a right must be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". A range of factors must be taken into account in order to determine whether it is. These include the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether the purpose could be achieved by means with a "less restrictive" impact on the right.

[164] Even though we are not dealing here with the limitation of a right by a law of general application, this formula helps with the task of measuring the impact of the enforcement of one right on another. Instead of interpreting the ambit and nature of a right restrictively so as to mask the reality that courts are compelled to make difficult choices, the appropriate route is often to interpret rights holistically and robustly and then consider whether intrusions into those rights are reasonable and justifiable in a democracy. Amongst the factors to be considered is whether the impact of the

[165] *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions, Western Cape* [2007] ZASCA 56; 2007 (5) SA 540 (SCA) at para 9. See also *Holomisa v Khumalo and Others* 2002 (3) SA 38 (T) at 68B-D and Rautenbach "Introduction to the Bill of Rights" in *Bill of Rights Compendium* Service 22 (LexisNexis, Durban 2008) at 1A–95.

implementation of a section 9(2) measure on other rights is more severe than necessary to achieve their purpose. This follows from the mention of the extent of the limitation and less restrictive means in section 36. No single consideration is determinative; rather, "the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list".[166]

[165] This Court has found that a proportionality analysis, while not the only appropriate method, is often well-placed for navigating the contested terrain of competing rights or values.[167] This concept is embedded in and consistent with the Bill of Rights and its spirit, purport and objects.[168] Sachs J stated in a concurring judgment in *Van Heerden*:

> "[W]here different constitutionally protected interests are involved, it is prudent to . . . opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation."[169]

[166] This not only involves balancing in the abstract, but requires a case-sensitive and concrete assessment of the competing rights.[170] A right or value should not be

[166] *S v Manamela and Another (Director-General of Justice intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32.

[167] See, for example, *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at paras 125-6; Sachs J's judgment in *Van Heerden* above n 23 at para 140; *Carmichele* above n 55 at para 43; and *Kyalami Ridge* above n 55 at para 102.

[168] *Carmichele* above n 55 at para 43.

[169] Above n 23 at para 140.

[170] *Independent Newspapers Holdings Ltd and Others v Suliman* [2004] ZASCA 57; [2004] 3 All SA 137 (SCA) at para 44.

compromised more than necessary, in the context of a constitutional state founded on dignity, equality and freedom in which government has positive duties to promote and uphold such values.[171]

[167] The implementation of an affirmative measure may impact on any number of rights and interests, both of the individuals concerned and of the public. The facts of each case will determine whether it does so. In the context of this case, the effect on the dignity of Ms Barnard as a human being has to be considered. Later I also deal with the significance of efficient service delivery in the balancing of rights, interests and constitutional demands.

Dignity

[168] Given that affirmative measures will generally emphasise the relative importance of a particular characteristic of a candidate over other attributes, their implementation has the potential to affect the right to human dignity of people, individually or as members of a group. Indeed, the Act mentions the "equal dignity and respect of all people".[172] In *Van Heerden* Moseneke J stated that the imposition of "such [a] substantial and undue harm on those excluded from [the measure's benefits] that our long-term constitutional goal would be threatened" is unacceptable.[173]

[171] *Carmichele* above n 55.

[172] Section 15(2)(b).

[173] Above n 23 at para 24.

[169] This is not to say that dignity will always be affected by the implementation of the measure. The rights to – and values of – equality and dignity are of course interdependent and complementary. But they may sometimes compete, as far as the scope of their implementation or enforcement is concerned. Aspects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages. Other times, the impact of equality-driven measures with laudable aims may not be justifiable in view of severe damage to human dignity. But we must first explore the meaning and scope of human dignity.

[170] Ms Barnard felt frustrated, disappointed and indeed wronged by the implementation of the affirmative measure. Thus she approached the courts. However, an exceedingly narrow and subjective view of dignity by overly focusing on how a litigant felt about impugned law or conduct is not, without more, appropriate in this context.[174] We are not dealing with a common-law civil claim based on the infringement of *dignitas*, or self-esteem. Dignity has a more objective and broader dimension. She also stated during cross-examination that it was hard to remain positive. If this means that she felt despondent and as if the Constitution and the law did not treat her as a fully recognised member of South African society, this aspect would require attention. The constitutional founding value and aim of a democracy founded on human dignity, equality, non-racialism and non-sexism[175] would not allow for exclusion.

[174] See, for example, Albertyn and Goldblatt "Equality" in Woolman et al (eds) *Constitutional Law of South Africa* Service 3 (2011) vol 2(2) at 35–9 commenting on the approach to dignity taken in *Harksen* above n 17.

[175] Section 1 of the Constitution.

[171] Was Ms Barnard treated as a mere means to reach an end, on the basis of her race only? As an individual, a woman and a public servant, she is also a member of a society deeply scarred by past and present inequality. Did the implementation of the measure impermissibly undermine her autonomy, including her ability to pursue her career goals?

[172] Philosophical thinking on human dignity by, for example, Immanuel Kant has influenced this Court's jurisprudence, including the emphasis that "human worth is impaired when persons are treated, not as ends in themselves, but as mere objects".[176] Human dignity is not only concerned with an individual's understanding of her self-worth, but more broadly affirms the inherent – and equal – worth of all human beings.[177] The recognition of this right represents a break from a past which systematically denied the dignity of most South Africans. Because the right to human dignity affirms the intrinsic worth of every person, it is foundational to several other rights in the Bill of Rights.[178] The right to and value of dignity therefore also inform

[176] Ackermann above n 135 at 100. See also *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) (*Dodo*) at para 38 and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 26.

[177] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) at para 27.

[178] See O'Regan J's judgment in *Makwanyane* above n 176 at para 328. See also McConnachie "Human Dignity, 'Unfair Discrimination' and Guidance" (2014) *Oxford Journal of Legal Studies* 1 at 9, who observes that—

> "if human dignity is an assertion of human beings' moral equality then it follows that most, if not all, serious wrongs against human beings are also inconsistent with the respect that is owed to others as moral equals".

constitutional interpretation and adjudication at multiple levels.[179]

[173] The value of the individual is safeguarded in our jurisprudence.[180] Every person should be treated as an end in herself and not as a means to an end only.[181] This is what blunt utilitarianism would allow. The concept of dignity also concerns an individual's sense of self-esteem,[182] and encompasses the idea that one is permitted to develop one's talents optimally.[183]

[174] An atomistic approach to individuals, self-worth and identity is not appropriate. This Court has recognised that we are not islands unto ourselves.[184] The individual, as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being.[185] Dignity contains individualistic as well as collective

[179] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[180] *National Coalition* above n 145 at para 28:

> "It is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society."

[181] *Dodo* above n 176.

[182] *Khumalo* above n 177.

[183] See, for example, *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at paras 49-50, which says in part:

> "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her talents optimally."

[184] See *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 150 and *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37.

[185] *Pillay* id at para 53, which affirms the "importance of community to individual identity and hence to human dignity", and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 65. See also Ackermann above n 135 at 109, who makes this point specifically with reference to dignity.

impulses.[186] Its collectivist attributes, including that we are "social beings whose humanity is expressed through . . . relationships with others",[187] find resonance in the South African idea of *Ubuntu*, which foregrounds "interdependence of the members of a community".[188]

[175] In the context of socio-economic rights, this Court has affirmed that the responsibility for the difficulties of poverty is shared equally as a community because "wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole".[189] This would also hold in the context of substantive equality. First, the way in which individuals interact with social groups and society generally has a direct bearing on their dignity.[190] This is true for members of both advantaged and disadvantaged groups. Second, this idea also gives effect to another Kantian way of understanding

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[186] See, for example, Cowen "Can 'Dignity' Guide South Africa's Equality Jurisprudence?" (2001) 17 *SAJHR* 34 at 51 which discusses a criticism of dignity that because dignity is individualistic, it is not well-equipped to meet the goals of equality. The author concludes, however, that because dignity also encompasses collective concerns and recognises that human worth and material position may be related, dignity can encourage rather than hamper a substantive equality analysis.

[187] *Dawood* above n 179 at para 30.

[188] *Makwanyane* above n 176 at para 224.

[189] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 74. In commentary on this case, Woolman "Dignity" in Woolman et al (eds) *Constitutional Law of South Africa* Service 3 (2011) vol 2(2) at 36–17 observes:

> "This virtuous circle [between enhancement of individual freedom, social development, and individual capabilities] would appear to be what the Constitutional Court in *Khosa* has in mind when it ties the well-being of the worst off to the well-being of the wealthy. The enhancement of individual capabilities of the poorest members of our political community enhances the development of South Africa as a whole. Or put slightly differently, the greater the 'agency' of the least well-off members of our society, the greater the 'agency' of 'all' the members of our society. This gloss on *Khosa* emphasises not the subjective sense of well-being that the well-off might experience by tying their well-being to that of the poor. Rather it emphasises an increase in the objective sense of well-being that flows from the enhancement of the agency of each individual member of our society."

[190] Cowen above n 186 at 50.

dignity – that it "asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves".[191] Measures to further substantive equality recognise this and embrace the importance of advancing societal members' welfare, material position and interests. The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.

[176] Dignity is connected to equality.[192] This Court has held that unfair discrimination is constitutionally unacceptable, because it involves treating people "differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".[193] We care about equality – both formal and substantive – because we recognise the equal and inherent worth of all human beings.[194] Apartheid was more than discrimination – it was the systemic denial of

[191] Woolman above n 189 at 36–63, which refers to Kant's four variations on dignity. At 36–15 Woolman refers to John Rawls' understanding of Kant, in the context of political philosophy:

> "[E]veryone recognises everyone else as not only honouring their obligation of justice and duties of virtue, but also, as it were, legislating law for their moral commonwealth. For all know of themselves and of the rest that they are reasonable and rational, and that this fact is mutually recognised."

[192] In *National Coalition* above n 145 at para 30 this Court recognised that "the rights of equality and dignity are closely related".

[193] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31. Ackermann above n 135 develops this argument. See McConnachie above n 178 at 11 for criticism of this position in relation to unfair discrimination.

[194] Cowen above n 186 at 40 and Rautenbach above n 165 at 1A–112. See also Chaskalson above n 162 at 202-3:

> "To be consistent with the underlying values of the Constitution, equality must also include equality of worth, requiring everyone be treated with equal respect and with equal

human dignity.

[177] So, to what extent was Ms Barnard's right to dignity impacted? Although our conception of dignity includes collectivist notions, it recognises the worth of a person as an individual with distinct aspirations. Her race was the determinative factor in the National Commissioner's decision not to promote her. Her attributes, experience and attitude were eclipsed by considerations of race. Her value as a human being in an employment environment was, to some extent, undermined. Whether this is reasonably and justifiably outweighed by the importance of promoting full equality must follow from measuring the impact of the National Commissioner's decision on Ms Barnard.

[178] In this case there is no single victim of past unfair discrimination whose position can be compared to that of Ms Barnard. Her dignity is not to be balanced against that of another individual. The dignity of millions of black people who were victims of apartheid's discrimination and who are still suffering its consequences can also not be weighed against the dignity of one white woman. The calculation required to restore the dignity of many after decades of unfair discrimination and the possible cost to the interests of individuals like Ms Barnard, was done when the Constitution was agreed on. Apartheid was a violation of human dignity, indeed a crime against

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> concern . . . . On this construction of the equality clause the relationship between equality and dignity is clear. It recognises a substantive content in equality and this is the approach that the Constitutional Court has taken to the interpretation and application of the equality clause of our Constitution."

See further *Egan v Canada* [1995] 2 SCR 513 at para 36, where Heureux-Dubé J noted that equality "means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences."

humanity.[195] That is why section 9(2) is in the Constitution. Measures to achieve equality are supposed to restore dignity. But their practical implementation could also impact on the human dignity of individuals. It is that impact we have to consider.

[179] If we move away from the facts of this matter, the process of testing the impact of the implementation of an affirmative measure on the human dignity of an individual may become clearer. The aim may not be to promote previously disadvantaged race groups, but instead to advance another category of people designated under the Act, for example, people with disabilities. If the implementation of the measure promotes a disabled black woman at the cost of an able-bodied black woman to the extent of blocking her career development for an unduly long time, her dignity cannot be weighed against that of many disabled people previously disadvantaged by unfair discrimination. But her human dignity may well be impacted on disproportionally. As indicated earlier, the grounds on which unfair discrimination happens often intersect. This intersection may present difficulties.

[180] Was the impact on Ms Barnard's dignity reasonable and justifiable in light of the goal of substantive equality? I consider two factors. First, she treated as a mere means to achieve an end? Did the decision reduce her to a member of an underclass to the extent that her place in society and in the Constitution is denigrated? Even the perception of this may threaten the pursuit of our constitutional goal of a society in

[195] According to the International Convention on the Suppression and Punishment of the Crime of Apartheid, UN General Assembly Resolution 3068 XXVIII of 30 November 1973.

which everyone, regardless of their differences, is equally valued and at home.[196] Second, does the measure's implementation amount to an absolute barrier to her advancement? If a measure is used to obliterate a person's chances at progressing in her chosen career, it would not pass constitutional muster.[197] It would constitute an impermissible barrier to an individual's ability to "develop [her] humanity [and] 'humanness' to the full extent of its potential".[198] The Act indicates a cognisance of the dangers of establishing "an absolute barrier to the prospective or continued employment or advancement of people".[199]

[181] Neither is present in this case. Ms Barnard failed to secure appointment because there was over-representation of people from her designated group. Had this over-representation not been present, the policy would not be a bar – let alone an absolute one – to her (or any other similarly qualified white woman's) appointment.

[182] Ms Barnard's career advancement within SAPS was not destroyed. The Employment Equity Plan has specific targets for different occupational levels and is flexibly used to cater for over- and under-representation. This flexibility ensures that

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[196] In *Walker* above n 147 at para 81 this Court affirmed:

> "No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups." (Footnote omitted.)

See De Vos above n 149 at 93; Brickhill above n 148 at 2013, discussing a measure which "creates new disadvantage" for the unfavoured group; and Ackermann above n 135 at 359.

[197] See Ackermann id at 360. See also *Du Preez v Minister of Justice and Constitutional Development and Others* 2006 (5) SA 592 (E) at para 30, which finds unfair discrimination where an affirmative action policy was so inflexible that it effectively prevented all white men from appointment.

[198] *Ferreira* above n 183 at para 49.

[199] Section 15(4).

she can be promoted to a higher occupational level should representation targets allow. By the time the case reached this Court, she had been promoted, albeit to a different department.

[183] The goal of equality is being promoted in this case through representivity. The National Commissioner has a duty to achieve equitable representation in SAPS but, as stated above, this implies a corollary duty not to aggravate existing over-representation. Ms Barnard's appointment would have aggravated unacceptably the already significant over-representation of white women at level 9. In summary, the impact on her dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure.

Service delivery

[184] Human dignity is not the only right or value that may be impacted on by the attempt to achieve equality in this case. Ms Barnard argues that her appointment would have enhanced service delivery because she was the most capable and skilful candidate as judged by the Regional Commissioner.[200] She also submitted that the National Commissioner's decision not to appoint anyone to the post may have unacceptably hampered service delivery. Accordingly, in this instance, this Court is asked to balance the public's rights to security of the person,[201] the constitutional demand for an effective police force[202] and a functional public service[203] against the

[200] In both interviews Ms Barnard scored significantly higher than other candidates, and both interview panels recommended her as the "best candidate for the post".

[201] Section 12 of the Constitution.

promotion of full equality.[204]

[185] There may sometimes be tension between efficiency and representivity.[205] However, it is incorrect to assume that the ideals of representivity and efficiency are necessarily opposed.[206] They are in many ways interdependent and mutually reinforcing. Representivity may increase service delivery and efficiency, because it raises the legitimacy of a public institution in the eyes of the community it is meant to serve.[207] A police service which is representative of the community it serves is more likely to enjoy the trust, cooperation and support of that community.[208] This is important to the execution of police functions.

[186] When a balance does have to be struck between efficient service delivery and equality in the form of representivity,[209] the nature of the duties of the job, the needs of the workplace and the employer and the under- or over-representation of the group seeking to be advanced by the affirmative measure, must be considered. It would be unacceptable if an affirmative measure were implemented by appointing a wholly unqualified or incapable candidate,[210] or by ignoring the qualities of a candidate who

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[202] Sections 205 and 206.

[203] Section 197.

[204] See also *Coetzer and Others v Minister of Safety and Security* 2003 (3) SA 368 (LC) (*Coetzer*) at paras 31-2.

[205] See *Stoman* above n 146 at 482G and Pretorius "Legal Evaluation of Affirmative Action in South Africa" (2001) 26 *Journal for Juridical Science* 12 at 21.

[206] *Stoman* id at 481H-I.

[207] Id at 482C-E.

[208] Dupper "Affirmative Action: Who, How and How Long?" (2008) 24 *SAJHR* 425 at 438.

[209] *Stoman* above n 146 at 482F-G; Dupper id at 437; and *McInnes v Technikon Natal* 2000 (21) ILJ 1138 (LC) at 1150.

[210] *Stoman* id at 482H-I.

would clearly enhance service delivery.

[187] Ms Barnard's contention that her appointment would have enhanced service delivery is logical, at least in the abstract. The appointment of another qualified candidate might also have done so. The fact that a post exists implies that there is a function which needs to be performed; a vacancy would thus leave this function unperformed. However, practically, temporary vacancies in certain positions may well be less damaging than in others to SAPS's ability to execute its core mandate to protect citizens.[211]

[188] This differs from, for example, vacancies in the special explosives unit in *Coetzer*,[212] which required highly trained and specialised candidates and was fundamental to SAPS's core mandate. There is nothing to suggest that the division could not function effectively without filling this position. The division has in any event been restructured and was due for restructuring while her candidacy was being considered. In this case, any possible negative impact on service delivery was overshadowed by the fact that her appointment would have significantly aggravated unequal representation at salary level 9.

[189] Also, courts should be wary of making evaluations about service delivery – in the context of affirmative measures – from a distance. Without proper evidence or

[211] The division to which Ms Barnard applied is responsible for investigating broad-spectrum complaints by the public and public office-bearers concerning police services including inadequate investigations, improper police conduct and corruption.

[212] *Coetzer* above n 204.

specialist institutional knowledge, it may be difficult for a court to draw conclusions about the precise impact a policy, an appointment, or even a vacancy will have on service delivery. This is the reason for the National Commissioner's wide discretionary powers, particularly in the context of affirmative measures, to appoint a candidate or to keep a post vacant.[213] In this case, there is not enough evidence for this Court to impugn the decision on the issue of service delivery. It cannot be said that it was disproportionate for the National Commissioner to rank representivity higher than the possible impact on service delivery in this case.

Reasons

[190] I comment on one final point, namely Ms Barnard's right to reasons. Assuming that we may enquire into the reasons the National Commissioner provided, care must be taken to locate the right correctly.

[191] In the context of administrative law, a person whose rights have been materially and adversely affected by an administrative act may request reasons for that action.[214]

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[213] The National Instruction at rule 13(7) provides that the National Commissioner may "direct that the post be readvertised".

[214] Section 5(1) of PAJA. See also Olivier JA's minority judgment in *Transnet Ltd v Goodman Brothers (Pty) Ltd* [2000] ZASCA 62; 2001 (1) SA 853 (SCA) (*Goodman Brothers*) at para 42:

> "The right to be furnished with reasons for an administrative decision is the bulwark of the right to just administrative action."

Baxter above n 116, written before the new Constitution, discusses the right to reasons at 228:

> "In the first place, a duty to give reasons entails a duty to *rationalise* the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining *why* a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to

But we have not been asked – and it is not necessary – to determine in this judgment whether the National Commissioner's decision constitutes administrative action.[215]

[192] Simply because a decision does not constitute administrative action, does not mean that an applicant is not entitled to reasons. In *Cape Bar Council*,[216] which is helpful by analogy, the Supreme Court of Appeal found that a decision by the Judicial Service Commission (JSC) that was explicitly excluded from the definition of administrative action nevertheless engaged the right to receive reasons. There was no express constitutional obligation to provide reasons, but such an obligation was implied.[217] This was rooted in both the JSC's constitutional duty to exercise its powers in a way that is not irrational or arbitrary and its constitutional responsibilities as an organ of state. The obvious way to account for a decision – and in so doing, prove that it is neither irrational nor arbitrary – is to provide reasons for it.[218] Similarly, it could be argued that SAPS's obligation to provide reasons is implied by the Constitution.

> public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications." (Footnotes omitted.)

This passage has been quoted with approval in *Cape Bar Council* above n 116 at para 46 and *Goodman Brothers* at para 5.

[215] I note, however, that to argue that it is administrative action an applicant would need to take *Gcaba* above n 72 into account. At para 66, this Court noted that, usually, a decision not to appoint or promote an employee is a "quintessential labour-related issue", but that in exceptional circumstances it could fall within the ambit of administrative action if the decision has public impact that extends beyond the applicant herself.

[216] Above n 116. In this case, the Supreme Court of Appeal considered circumstances in which multiple candidates of different racial backgrounds were interviewed for three vacancies in the judiciary. The JSC put forward only one of these candidates – a black man – and declined to fill the other positions. The Cape Bar Council subsequently brought a complaint against the JSC. One of its primary arguments was that the JSC had no reason for not filling the other vacancies, which rendered its decision irrational and unconstitutional.

[217] Id at para 43, citing sections 195 and 239(b) of the Constitution.

[218] Id, citing *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

[193] Whether Ms Barnard was specifically entitled to reasons or whether they simply serve an evidentiary purpose, the question is whether the reasons provided were sufficient. They would be if they gave the affected individual enough information to understand which of her rights may have been infringed, so that she could then enforce these rights.[219] People can only enforce their rights if they understand what rights, if any, have been infringed and how.[220]

[194] The main judgment concludes that the reasons the National Commissioner gave are not "scant" and so do not "attract an inference of . . . illegality".[221] The judgment of Cameron J, Froneman J and Majiedt AJ finds that the reasons proffered were opaque and unsatisfactory, but ultimately refrains from impugning the National Commissioner's decision.[222] In my view the reasons are adequate. They could certainly have been formulated more comprehensively, accurately and lucidly. But they give Ms Barnard enough information to understand why she was not

[219] *Phambili Fisheries* above n 50 at paras 40 and 44. See also *Nomala v Permanent Secretary, Department of Welfare and Another* 2001 (8) BCLR 844 (E) at 856.

[220] In *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 159, Mokgoro J and Sachs J's judgment states:

> "The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law."

This seems pertinent considering the overall intention of the Constitution to foster a culture of justification. As stated in Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32:

> "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."

[221] At [69].

[222] At [104], [121] and [123].

appointed.[223] That her appointment would not have fulfilled representivity goals was stated clearly and repeatedly by the National Commissioner. This is what enabled Ms Barnard to approach a court and assert that her rights in terms of section 9 of the Constitution and section 6 of the Act had been violated.

Conclusion

[195] The Constitution recognises human dignity and the achievement of equality as founding values and fundamental rights. It prohibits unfair discrimination but permits measures designed to protect or advance people disadvantaged by past unfair discrimination. The statutory and other measures applicable to this case pass constitutional muster. Their implementation promotes equality in our society. But its impact on the right to human dignity must be considered; so too on the efficiency of SAPS, to which the public is entitled. The outcome of this analysis is that the decision of the National Commissioner was not unlawful. The reasons provided for the decision adequately explain the basis of the decision. The appeal must succeed.

[223] *Stoman* above n 146 notes that it was useless for the applicant to have complained about procedural errors in the appointment process because ultimately—

> "[t]he applicant [was] well aware of the main or only reason why the fourth respondent was promoted and appointed instead of him. The respondents [were] also forthright about this fact."

JAFTA J (Moseneke ACJ concurring):

[196] I have read the main judgment and other judgments prepared by my Colleagues in this matter. I agree that the appeal should succeed and that the order of the Supreme Court of Appeal should be set aside. The effect of this would be to revive the order issued by the Labour Appeal Court which was, in my view, the correct order. The Supreme Court of Appeal should have dismissed the appeal.

[197] I agree fully with the main judgment but disagree with the other judgments. I share the opinion that we should not determine the cause of action relating to the review of the National Commissioner's decision in terms of which Ms Barnard was not appointed. While I support the reasons advanced by the main judgment for this finding, it is necessary for me to set out additional reasons for not deciding the new cause of action.

[198] Having accepted the validity of the Employment Equity Plan, Ms Barnard's cause of action, raised for the first time in this Court, was formulated thus:

> "What is centrally in issue is whether the National Commissioner, in making his decision, in fact followed the approach mandated in the [National Instruction] and by the [Employment Equity Act]. This entails an examination of his reasons or, to put it more correctly, the reasons that were legitimately tendered in the course of the legal proceedings. Since, it was common cause, the decision was taken in pursuit of the prevailing Employment Equity Plan, the Plan itself becomes a source for determining the content of his decision."

[199] But the claim that was pleaded and pursued in the Labour Court was different. What emerges from the statement above is the fact that Ms Barnard now seeks to use the Employment Equity Plan as the benchmark against which the decision not to appoint her must be measured. The fact that the decision was taken in terms of the Employment Equity Plan, she argues, was common cause. But she invites us to examine the reasons furnished by the National Commissioner to determine whether the impugned decision accords with the Employment Equity Plan. The essence of the complaint is that the National Commissioner overlooked Ms Barnard's merit and that the reasons furnished in support of the decision were inadequate.

[200] As captured in its judgment, what she sought from the Labour Court was relief for unfair discrimination. In the opening paragraph of the judgment, the Court records:

> "She claims relief for unfair discrimination. Her cause of action is based on the principal allegation that she was denied promotion on two occasions for the sole reason that she is white."[224]

[201] The Supreme Court of Appeal too understood her claim to be that of unfair discrimination. That Court characterised the issue for determination in these terms:

> "The appeal concerns the grievance of an erstwhile police captain, who twice applied unsuccessfully for a promotion to the position of Superintendent in a specialised unit of the respondent, the South African Police Service (SAPS). It is the second rejection that is the subject of the present appeal. Her grievance is that despite it being admitted that she was the best candidate for the position she was denied the

[224] Labour Court judgment above n 6 at para 1.

> promotion solely because she was white and that such conduct on the part of her employer, the SAPS, constituted unfair discrimination."[225]

[202] This is the context in which the question whether Ms Barnard may be permitted to raise the new cause of action in this Court, must be answered. It is a principle of our law that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation. It promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution.[226]

[203] In *Everfresh*, this Court reaffirmed this principle in these words:

> "It is so that the test on proper pleading in *Prince* related to a challenge to the constitutional validity of a provision in a statute. That test, however, is of equal force where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change an existing precedent or a rule of the common law or of customary law in order to promote the spirit, purport and objects of the Bill of Rights. Litigants who seek to invoke provisions of section 39(2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it."[227] (Footnotes omitted.)

[225] Supreme Court of Appeal judgment above n 1 at para 2.

[226] Section 34 provides:

> "Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[227] *Everfresh* above n 55 at para 52.

[204] As this Court observed in *Prince*,[228] the purpose of the pleadings is to define and inform the court of first instance about the issues between the parties and also warn the other parties of the case they are required to meet, so as to give them the opportunity to present factual material and legal argument to meet that case. Here the claim that was pleaded was that the decision not to appoint Ms Barnard was based on her race and as such constituted unfair discrimination. This was the claim the Police Service was required to meet and it was the same claim that was decided by the other courts.

[205] In determining the matter, the Labour Court held:

> "It appears common cause that the National Commissioner could, had he so decided, have implemented the Employment Equity Plan directly by employing a suitably qualified black candidate to the post. Instead the National Commissioner declined to do so. It cannot be said, in my view, that the non-appointment of any candidate to the post was in fact a fair and appropriate method of implementing the Employment Equity Plan which was fair to the applicant. The non-appointment is no more than just that, a non-appointment. In my view, having decided not to implement the Employment Equity Plan by appointing a recommended black candidate it was unfair in those circumstances not to appoint the applicant, a member of a designated group in terms of the Employment Equity Act and the best candidate for the job."[229]

[228] *Prince v President, Cape Law Society, and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

[229] Labour Court judgment above n 6 at para 33.

[206] Consistent with this theme, the Labour Court reasoned that because the other two black candidates who were recommended were also not appointed, the failure to appoint Ms Barnard was unfair and irrational.[230]

[207] In a similar vein, the Supreme Court of Appeal held that Ms Barnard was not appointed because she is white and that constituted discrimination on one of the listed grounds. For this proposition reliance was placed on *Gordon*.[231] In *Gordon* the Supreme Court of Appeal held that the appointment of a black candidate ahead of a white candidate, who was recommended by the selection panel, amounted to discrimination on the basis of colour and race. The discrimination was found to be unfair owing to the fact that the Department of Health had no policy or plan in place for the implementation of affirmative action.

[208] Having found that the failure to appoint Ms Barnard constituted discrimination on the basis of race, the Supreme Court of Appeal went on to invoke the *Harksen* test[232] in order to determine the unfairness of the discrimination. I agree with the main judgment that the Supreme Court of Appeal approached the matter on an incorrect footing and applied the wrong test. The *Harksen* test does not apply where in defending a claim of unfair discrimination, the defendant argues that the impugned decision was taken in the furtherance of a restitutionary measure, contemplated in section 9(2) of the Constitution. In terms of section 6(2)(a) of the Act, it "is not unfair

[230] Id at para 35.

[231] *Gordon v Department of Health, Kwazulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA).

[232] *Harksen* above n 17. In *Harksen* this Court held that discrimination based on a listed ground must be presumed to be unfair unless it is justified under the limitation clause.

discrimination to take affirmative action measures consistent with the purpose of this Act".

May the new cause of action be determined?

[209] Once it is accepted that the decision not to appoint Ms Barnard was taken in terms of the Employment Equity Plan and the Instruction which form part of a restitutionary measure, the decision cannot be regarded as amounting to unfair discrimination. The claim by Ms Barnard must have failed and this ought to have been the end of the matter.

[210] In our system it is not permissible for a party to raise a constitutional complaint that was not pleaded. Recently, the Supreme Court of Appeal affirmed this principle in *Fischer v Ramahlele*:

> "Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct proceedings."[233] (Footnotes omitted.)

[211] In this Court Ms Barnard, without any motivation, sought to raise a different and new cause of action. In opposition the Police Service has contended that the

[233] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) (*Fischer v Ramahele*) at para 13.

determination of this cause of action will prejudice it as it was not afforded the opportunity to present facts to support the legal argument it could have advanced. In the light of the reasons set out in the main judgment on this aspect of the case, it is likely that the Police Service would be prejudiced by the determination of the new cause of action.

[212] Allowing a party to raise a new cause of action on appeal is a matter of discretion. The court of appeal may exercise its discretion to permit a party to do so if it will not be unfair to the other parties. Permission will ordinarily be granted where the cause of action was foreshadowed by the pleadings and established by facts on record. This is not the position here. The pleadings did not cover the review of the National Commissioner's decision on the grounds that he failed to take into account Ms Barnard's personal circumstances or that the reasons given for the decision were insufficient. This matter was also not canvassed fully in evidence because Ms Barnard had pursued an equality claim and not the review of the impugned decision.

[213] On what basis then may this Court allow her to raise a different and new cause of action? I am unable to find any. In *Barkhuizen*, this Court affirmed the principle of fairness on the exercise of discretion. Here is the formulation of the principle:

> "The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point.

> Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial."[234] (Footnotes omitted.)

[214] But even if Ms Barnard were permitted to raise the new cause of action, the case she sought to make was that the National Commissioner's decision was at variance with the Employment Equity Plan and the Instruction. These documents, she argued, required the National Commissioner to take into consideration "her competence, her prior learning, training and development, the quality of her performance and suitability for the post, and her disciplinary record". In short she contended that her merits as a candidate were overlooked by the National Commissioner when the decision not to appoint her was taken.

[215] Clearly, this does not raise the issue of the standard applicable to implementation of an affirmative action measure. Despite invitation from this Court, the parties failed to present full argument on the appropriate standard. The reason for this is not hard to find. It was not Ms Barnard's case in this Court (or in the other courts) that the National Commissioner followed the wrong standard in implementing the Employment Equity Plan and the Instruction.

[216] The appropriate standard was not an issue raised by any of the parties. The question that arises is whether this Court may, of its own accord, raise the issue. If so,

[234] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

the further question will be whether it is necessary in the present circumstances, for this Court to determine a general standard to be applied in implementing restitutionary measures in the workplace.

Raising the standard mero motu

[217] The general principle of our law is that it is the parties themselves who identify and raise issues to be determined by a court. The parties may have their own reasons for not raising an issue which the court finds interesting or important to determine. The scope of what falls to be determined depends on what the pleadings contain. In *CUSA*, this Court formulated the principle in these terms:

> "Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not, on its own, raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the [Labour Relations Act] specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not, on appeal, raise a new ground of review. To permit a party to do so may very well undermine the objective of the [Labour Relations Act] to have labour disputes resolved as speedily as possible."[235]

[218] However, this principle is subject to one exception. The point raised *mero motu* by the Court must be apparent from the papers in the sense that it was sufficiently canvassed and established by the facts, and that its determination must be necessary

[235] *CUSA* above n 101 at para 67.

for the proper adjudication of the case. Elaborating on the exception in *CUSA*, this Court said:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."[236] (Footnote omitted.)

[219] Here the appropriate standard was not canvassed at all on the papers and consequently was not apparent on the record. In addition, the failure to raise it was not owing to the common approach of the parties which proceeded from an incorrect understanding of the law. The parties here made their own choice as to the issue to be determined by the Court. That choice must be respected.

[220] In *Fischer v Ramahlele*, the Supreme Court of Appeal cautioned:

> "It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant

[236] Id at para 68.

> to future matters and the relationship between the parties. That is for them to decide and not the court."[237] (Footnotes omitted.)

[221] The determination of the appropriate standard is not even necessary for disposing of this case. Any opinion expressed on this issue would remain obiter and therefore will not bind other courts. In these circumstances I conclude that it is not competent for this Court to raise *mero motu* the question of the appropriate standard and determine what that standard should be.

Other considerations against laying down a standard

[222] There are further considerations that militate against the determination of the standard. First, in a collegial Court like ours, it is ill-advised to attempt to raise a legal point if members of the Court do not agree on what the point should be. Some members prefer fairness as the standard but others prefer proportionality. We have not had the benefit of argument on these issues.

Fairness

[223] Second, with regard to fairness, the difficulty I have is that it is not clear to me where the standard is sourced. In section 9(2), the Constitution mandates the adoption of restitutionary measures such as the Employment Equity Plan.[238] The Act, which was passed to give effect to section 9 of the Constitution in the workplace, proclaims

[237] *Fischer v Ramahlele* above n 233 at para 14.

[238] Section 9(2) provides:

> "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."

that to take affirmative action measures consistent with its purpose does not constitute unfair discrimination.[239]It will be recalled that such standard will be applicable to equality claims based on the Act and section 9 of the Constitution.

[224] It is true that the Police Service, in defending the unfair discrimination claim, invoked section 6(2) of the Act, and argued that the National Commissioner's decision was based on its Employment Equity Plan. It is also correct that section 6(2) requires that affirmative action measures must be consistent with the purpose of the Act. Here the National Commissioner decided not to appoint Ms Barnard because her appointment could have been contrary to the Police Services' Employment Equity Plan. White women were over-represented at the level of the post in which she sought to be appointed.

[225] The question that arises is whether the National Commissioner's decision is consistent with the purpose of the Act. The answer must be yes. The purpose of the Act is set out in plain terms in section 2. The section provides:

> "The purpose of this act is to achieve equity in the workplace by—
>
> (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
>
> (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."

[239] Section 6(2)(a) provides:

> "It is not unfair discrimination to take affirmative action measures consistent with the purposes of this Act."

[226] A reading of this section reveals that the achievement of equity in the workplace is the purpose of the Act. Furthermore, the section defines procedures which may be followed to achieve that purpose. One of those procedures is the implementation of "affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce." The other procedure is to promote equal opportunity and fair treatment by eliminating unfair discrimination. It is therefore not correct to look at other sections of the Act for clues on its purpose when the Act expressly states its purpose in section 2.

[227] By not appointing Ms Barnard and reserving the post for black officers, the National Commissioner sought to achieve representivity and equity in the Police Service. This accords with its Employment Equity Plan and is consistent with the purpose of the Act. Therefore, the National Commissioner's decision cannot constitute unfair discrimination nor can it be taken to be unfair. Consequently, unfairness as a standard cannot be sourced from the Act.

[228] Even if unfairness were to be consistent with the relevant governing law, I would still have difficulty with its application. As we know it, fairness is a double-edged sword. In determining what is fair in a given case account would have to be taken of competing interests. A court would have to weigh the interests of the

claimant against those of the class the restitutionary measure was adopted to advance, as well as the interests of an employer who is obliged by the Act to achieve equity.

[229] An approach of that nature would undermine the very objective which section 9(2) of the Constitution and the Act seek to achieve. The aim of these instruments is to achieve equality in the workplace. Such an approach would be inconsistent with the way our courts determine unfairness in an employment setting. In *National Union of Metalworkers of South Africa*, Smalberger JA formulated the correct approach thus:

> "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral value judgment to established facts and circumstances. . . . And in doing so it must have due and proper regard to the objectives sought to be achieved by the Act."[240]

[230] An enquiry into the implementation of a restitutionary measure cannot leave out of account the historical context that led to white employees being over-represented in managerial and supervisory posts. On this score, I can do no better than to refer to the eloquent judgment of the Labour Appeal Court. It reads:

> "The over representivity of white males and females is itself a powerful demonstration of the insidious consequence of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks. The over representivity of whites in level 9 is

[240] *National Union of Metalworkers of SA v Vetsak Co-operative Ltd and Others* [1996] ZASCA 69; 1996 (4) SA 577 (SCA) at 589B-C. See also *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA).

> a stark reminder of our past and indeed the present and yet another wake up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution."[241]

[231] The Labour Appeal Court held that, because "the essence of restitutionary measures is to guarantee the right to equality", their implementation cannot be subjected to an individual's right to equality. The Court reasoned thus:

> "On the basis of this discussion, it is clear that the Labour Court erred in treating the implementation of restitutionary measures as subject to the individual conception of a right to equality. This is more so as this approach promotes the interests of persons from non designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid. Treating restitutionary measures in this manner is surely bound to stifle legitimate constitutional objectives and result in the perpetuation of inequitable representation in the workplace."[242]

[232] The approach adopted by the Labour Appeal Court is not consistent with applying the proposed standards of fairness and proportionality. Yet we received no argument from the parties showing that the Labour Appeal Court was wrong. It will be recalled that the Labour Appeal Court and the Labour Court are specialist courts established specifically to decide labour law matters. Therefore, the development of our labour law jurisprudence must begin in those Courts. As observed by this Court in *NEHAWU*,[243] interference with that jurisprudence would be justified only if those courts were mistaken in the formulation or application of important principles.

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[241] Labour Appeal Court judgment above n 2 at para 38.

[242] Id at para 30.

[243] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 30-1.

[233] All these issues could have been addressed in argument if the question of standard had been raised. They were not. In these circumstances, it is only proper to defer the determination of the standard for another day.

For the Applicant:	H Maenetje SC and J Bleazard instructed by the State Attorney.
For the Respondent:	M Brassey SC and M Engelbrecht instructed by Serfontein, Viljoen & Swart.
For the Amicus Curiae:	V Ngalwana and F Karachi instructed by Grosskopf Attorneys.