Reportable

THE LABOUR COURT OF SOUTH AFRICA,

JOHANNESBURG

Case no: J 879/12

In the matter between:

SOLIDARITY	Applicant
and	
THE MINISTER OF SAFETY AND SECURITY	First respondent
THE MINISTER OF LABOUR	Second respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Third respondent
THE SOUTH AFRICAN POLICE UNION	Fourth respondent
POLICE AND PRISONS CIVIL RIGHTS UNION	*Amicus Curiae*

Delivered: 26 January 2016

Summary: (Employment Equity Plan – compliance with Employment Equity Act – Compliance with s 9(2) of the Constitution (substantive equality) – numerical targets in plan amounting to quotas – plan in breach of Constitution and Employment Equity Act – Evidence that equity plan not comprehensively implemented in practice – declaratory relief only – Equity plan not implemented contrary to s 27(2) of SAPS Act – Use of national demographics not in breach of s 195(1) of the Constitution)

JUDGMENT

LAGRANGE J

Introduction

[1] This application seeks to challenge the validity of the South African Police Service Employment Equity Plan applicable from 1 January 2010 until 31 December 2014 ('the plan'). The applicants sought a declarator that the plan is invalid and of no force and effect because it contravenes one or more of the following:

1.1 sections 15 (3) and, or alternatively, 42 of the Employment Equity Act, 55 of 1998 ('the EEA');

1.2 provisions of the South African Police Service Act 68 of 1995 ('the SAPS Act'); and/or

1.3 section 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); and/or

1.4 Sections 1, 9 and/or 195 (1) of the Constitution of South Africa, Act 8 of 1996 ('the Constitution').

[2] At the hearing of the matter, I was advised that the applicants, by agreement with the respondents, would not pursue the review under PAJA, so that cause of action falls away. In the event a declarator is granted the applicants seek to have the plan set aside in its entirety. Apart from seeking to have the plan set aside the applicants also seek an interdict restraining the SAPS from implementing or giving effect to the plan by applying quotas in determining appointments and promotion within the police service and rejecting appointments to posts or positions based purely on criteria such as quotas. As will become apparent from the rest of the judgement, a central thrust of the applicants' attack is directed at the numerical targets set out in the plan, which they contend amount to nothing more than impermissible quotas under section 15 (3) of the EEA.

[3] I am indebted to the parties and the *amicus curiae* for their detailed original and supplementary submissions and for their patience. Though some reference was made by counsel for the *amicus* to USA jurisprudence for the reasons which follow I believe the key legal

questions which arise are ones that can best be addressed within the ambit of our own jurisprudence on substantive equality, as set out below.

[4] When the matter was heard in June 2014 the judgment of the Constitutional Court in ***SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)***[1] was still pending. The parties made supplementary written submissions in September 2014. I should mention also that at the commencement of proceedings the citation of the Police and Prisons Civil Rights Union was amended to that of amicus curiae.

Statutory framework

[5] The touchstone by which any measures dealing with the promotion of equality must ultimately accord with is s 9 of the Constitution, which states:

> '9 Equality
>
> (1) Everyone is equal before the law and has the right to equal to protection and benefit of the law.
>
> (2) Equality includes the full an 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.
>
> (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.

[1] **(2014) 35 *ILJ* 2981 (CC)**

In this regard, it is s 9(2) which articuluates the right to substantive equality which is central to the constitutional questions arising in this matter.

[6] The EEA is intended to give effect to the right to equality in the sphere of employment. Amongst other things, it stipulates the requirements, and governs the implementation, of affirmative action measures pursuant to the objective of substantive equality expressed in s 9(2) of the bill of rights. The pertinent provisions for the purposes of this matter are sections 2,5,6,15,20 and 42, which read:

"**2 Purpose of this Act**

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.

…

5 Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

6 Prohibition of unfair discrimination

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

(2) It is not unfair discrimination to-

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

15 Affirmative action measures

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational 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-

(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.

…

20 Employment equity plan

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

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

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

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

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

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

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

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

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

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

(i) any other prescribed matter.

(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-

(a) formal qualifications;

(b) prior learning;

(c) relevant experience; or

(d) capacity to acquire, within a reasonable time, the ability to do the job.

(4) When determining whether a person is suitably qualified for a job, an employer must-

(a) review all the factors listed in subsection (3); and

(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

(6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.

…

42 Assessment of compliance

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must[2], in addition to the factors stated in section 15, take into account all of the following:

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

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

[2] The word “must” was replaced with “may” by the Employment Equity Amendment Act 47 of 2013, with effect from 1 August 2014.

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor."

[7] Section 195(1)(i) of the Constitution states:

"Public administration must be broadly representative of the South African people, this with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."

[8] Section 27 of the SAPS Act provides that:

"27 Filling of posts

(1) Subject to Chapter 6A and subsection (2), the filling of any post in the Service, whether by appointment, promotion or transfer, shall be done in accordance with this Act.

(2) Subsection (1) shall not preclude compliance with measures designed to achieve the objects contemplated in sections 8 (3) *(a)* and 212 (2) of the Constitution."

[9] The references to the Constitution in s 27 of the SAPS Act are to the Interim Constitution (Act 200 of 1993). Section 8(3)(a) of the Interim Constitution reflected the initial formulation of the constitutional right to substantive equality.[3] Section 212 (2) of the interim constitution stipulated

[3] Section **8 of the IC read:**

"8 Equality

(1) Every person shall have the right to equality before the law and to equal protection of the law.

amongst other things that the public service must be: nonpartisan, career orientated and function according to and equitable principles; promote an efficient public administration broadly representative of the South African community, and be regulated by laws specifically dealing with such service including its structure functioning and terms and conditions of service. Section 212 (4) and (5) read:

> "(4) In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account.
>
> (5) Subsection (4) shall not preclude measures to promote the objectives set out in subsection (2)."

> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> (3) *(a)* This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
>
> *(b)* Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
>
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."
>
> (emphasis added)

Thus, the SAPS Act while stipulating operational priorities when posts are to be filled recognises that in filling posts affirmative action measures to achieve substantive equality may modify the way in which those selection criteria are applied, without identifying the criteria affirmative action measures must satisfy in that process. For this, recourse must be had to the EEA and s 9(2) of the Constitution.

[10] It should also be mentioned that the respondents sought to place some reliance on a collective agreement concluded in the Safety and Security Sectoral bargaining Council ('SSSBC'). Agreement 10/2001 of 3 August 2001 entitled "The Promotion of Employment Equity and Unfair Discrimination Policy" mandates the use of numerical targets in the following terms:

> "5.11 Management of numerical goals
>
> 5.11.1 Numerical goals must be developed and implemented to achieve the equitable representation of employees in all occupational categories and levels to make the workforce reflective of the demographic of the country.
>
> 5.11.2 To ensure consistency and accuracy in the development of numerical goals, the national Commissioner shall provide national and provincial formulas to determine the proportion of representation of all categories of employees from both designated and non-designated groups.
>
> 5.11.3 The numerical goals must direct all employment policies and practices to ensure the achievement of the employment equity objectives and affirmative action measures.
>
> 5.11.4 Where any employment practices undertaken which does not support the numerical goals of a particular workplace, motivation therefore shall be provided to the national Commissioner.
>
> Subsequent to any recruitment, promotion or appointment process, the Divisional Commissioner Career Management shall advise the National Commissioner of the extent to which such processes have supported greater representation in respect of workplaces."

(emphasis added)

Relevant case law

[11] At the time that the matter was argued, judgment was pending in the Constitutional Court case of *Barnard*. Since that judgment was handed down there have been other matters in which the requirements of valid employment equity plans have been considered. In this regard the cases of ***Solidarity and Others v SA Police Services and Others (JS 469/12)***[4]***, Solidarity & others v Department of Correctional Services & others (Police & Prisons Civil Rights Union as Amicus Curiae)***[5]***,SA Police Service v Public Service Association of SA & others***[6] and ***Minister of Safety and Security and others***[7] are of interest.

[12] In *Barnard,* the Constitutional Court held that it was not dealing with a case in which the validity of the SAPS plan was being impugned, as the following passage from the majority judgment, per Moseneke ACJ, in the course of identifying where the SCA erred, makes clear:

> "[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 s 9(2) of the Constitution and s 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.
>
> [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

[4] [2015] ZALCJHB 120 (2 April 2015)

[5] **(2015) 36 *ILJ* 1848 (LAC)**

[6] **(2015) 36 *ILJ* 1828 (LAC)**

[7] **[2015] 11 BLLR 1129 (LAC)**

> 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 authorized by s 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."[8]

(emphasis added).

[13] Although it was not necessary for the Constitutional Court in *Barnard* to evaluate whether the SAPS plan in question was unfairly discriminatory, the court reiterated some of the considerations which a proper approach to challenges of that kind entail:

> "[30] Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. 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 themselves previously disadvantaged.
>
> …
>
> [35] An allied concern of our equality guarantee is the achievement of full and equal enjoyment of all rights and freedoms. 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.

[8] At 2998.

> [36] The test whether a restitution measure falls within the ambit of s 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.
>
> [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. It says measures of this order may be taken. Section 6(2) of the Act, whose object is to echo s 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair."[9]

(footnotes omitted)

The principle that qualifying restitution measures to achieve substantive equality are not a diminution of the right to equality, was already established by the Constitutional Court in ***Minister of Finance & another v Van Heerden***[10].

[14] In *Barnard* the Constitutional Court also did briefly refer in passing to the plan's numerical targets, and the prohibition against targets being applied as quotas, but found it was not necessary for the purposes of the judgment to delve deeper into the question of when a numerical target might be construed as a quota:

> "[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

[9] At 2993-4.

[10] (2004) 25 *ILJ* 1593 (CC) at 1609-10, viz:

> "[37] When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated in s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination."

> treatment and numerical goals but must exclude 'quotas'. 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 s 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups."[11]

Also, after noting that the respondent in *Barnard* had abandoned an attack on the plan and the national instruction, the Constitutional Court observed, in passing, that:

> "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 s 15(3) of the Act."[12]

[15] Before either of the judgments in *Correctional Services* or *Public Servants Association* were handed down, Tlhotlhalemaje AJ handed down judgment in ***Solidarity and Others v SA Police Services and Others (JS 469/12)***.[13] In that matter, the court had to determine if a collective agreement concluded between the SAPS and other unions, but not Solidarity, was a valid affirmative action measure. For the purposes of that judgment, the Labour Court accepted that the SAPS plan was valid, as set out in the following passages:

> "[33] The Collective Agreement is an affirmative action measure as conceded by Solidarity. For the purposes of these proceedings, I did not understand Solidarity's case to be that it challenged the Employment Equity Plan as adopted in the Collective Agreement in its form, nor were the numerical targets set out in that Plan challenged. It is common cause that Solidarity has since lodged an application in this Court under case number J879/12 to seek an order setting aside the SAPS' current Employment Equity Plan on the basis that it does not comply with the Constitution and

[11] At 2996.

[12] At 2999, para [54].

[13] See fn 5.

other various statutory enactments. That matter is pending before this Court. Furthermore, Solidarity's application in this Court under case number: J 2145/14 to seek an order that it be consulted at the level of the SSSBC in respect of the design of the Employment Equity Plan itself was dismissed, and an appeal has since been lodged in that regard.

[34] For the purposes of this application, and since it was accepted by Moseneke ACJ in *Barnard* that the validity of the SAPS Employment Equity Plan (A collective agreement) nor its fairness was not placed in question, the Plan is indeed a valid affirmative action measure authorized by section 6(2) of the Employment Equity Act[14]. Equally more important is that the Plan passes the three-pronged test laid out in *Van Heerden* and *Barnard.* In this regard, Van der Westhuizen in a separate but concurring judgment in *Barnard* held that;

"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"*[15]*

and,

"Therefore the implementation of the measure satisfies the third leg of the Van Heerden enquiry in that it promotes the achievement of equality…."*[16]*

[35] The fact that the Employment Equity Plan is a valid affirmative action measure, or that it passed the *Van Heerden* test does not however necessarily imply the same with the Collective Agreement impugned despite it being accepted as an affirmative action measure. This is so in that unlike the Plan, which normally has a lifespan of five years, the Agreement was put in place for a particular purpose, and as a once-off measure or process, to populate the ranks as per the new structure over a period of 24 months. Although in implementing the Agreement numerical targets set out in the Plan were adapted, the Agreement has its own unique

[14] At para 52

[15] At para 144

[16] At para 156

features, which as I understand Solidarity's arguments are on their own or as implemented with the Plan, objectionable."

[16] The *Correctional Services* judgment of the LAC dealt with a factual scenario which raised issues of law and principle, which in important respects are indistinguishable from the ones in this matter. That case concerned a number of individual coloured Correctional Service employees who believed they had been unfairly denied the opportunity of appointment or promotion because, in particular, the Correctional Services employment equity plan had failed to take account the particular regional demographics of the Western Cape, where coloureds comprise a higher proportion (approximately 50%) of the regional population than they do nationally (approximately 8.8 %).

[17] Like the matter before me, the complaint in the *Correctional Services* case was not that the employer had refused to deviate from the plan in particular instances, which was the underlying factual issue in *Barnard*, but that the equity plan itself made provision for transfers or promotions with reference to quotas strictly reflecting the national demographic representation of race and sex in the population.[17]

[18] In *Van Heerden,* the constitutional court (per Moseneke, J as he then was) set out, in summary, the three requirements of demonstrating that an affirmative action measure meets the constitutional standards set out in s9(2) of the Constitution:

"It seems to me that to determine whether a measure falls within s9 (2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."[18]

[17] At 1862, par [38].

[18] At 1610, par [37]. The court elaborated on these criteria in paragraphs [38] – [44] of the judgment.

[19] In *Correctional Services*, the LAC reiterated the constitutional requirements of restitutionary measures mentioned in *Van Heerden* with reference to the facts before it:

> "[51] Because Barnard was concerned with the decision by the National Commissioner not to appoint Captain Barnard to an advertised position, the court in that case did not have to examine the equity plan. It follows that the test set out in Van Heerden was not strictly applicable to the determination thereof. But in this case, the three criteria which the court in Van Heerden isolated in s 9(2) to test restitutionary measures are directly relevant. To recapitulate: the measure should target a category of beneficiaries disadvantaged by unfair discrimination. This is reflected in the very nature of the DCS plan. Secondly, the measure must be 'designed to protect or to advance such persons or categories of persons, and must be reasonably capable of obtaining the desired outcome'. In terms of the plan, there is a provision for deviations, which can be implemented in the event that a rigid implementation of a plan would compromise service delivery or where it would not be possible to appoint suitably qualified people from designated groups to the relevant occupational categories and levels in the workforce. If rationally implemented, these deviations ensure that the plan does not have to be implemented in a rigid fashion, in which case the plan is reasonably capable of obtaining its desired outcome of a representative workforce which is suitably qualified and achieves service delivery. Thirdly, the court in Van Heerden held that the measure must promote 'the achievement of equality'. Hence, the test is concerned to ensure that the plan does not impose disproportionate burdens or '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'. It is here that the rights of persons who are not part of the designated category can be protected. That this protection must pass through the prism of the substantive nature of the right to equality makes this the most difficult part of the enquiry.
>
> [52] It is clear from the testimony of Mr Magagula and Mr Bonani that this was the objective which the DCS had in mind when it developed its plan to ensure substantive equality for those who suffered the most egregious forms of discrimination under apartheid. In the light of our observation

> regarding the third leg of the enquiry, there is a further important consideration which adds weight to the respondents' case; that is that the EEA must be read through the prism of s 9(2). Inevitably, on the reading we have given to s 9(2), weight is accorded in the balancing act to the position of the individual appellants even though there cannot be a blanket deference to a decision to promote disadvantaged groups. The EEA however recognises a need for balance. In the first place, a person appointed from a designated group must be suitably qualified for the position. Secondly, where an individual applicant possesses scarce or unique skills which are relevant to the organisational needs of the designated employer, these must be taken into account; hence the prohibition against an absolute bar to employment. Thirdly, for reasons which will become apparent presently, a consideration of regional demographics in terms of s 42 of the EEA may well come to the aid of categories of applicants who otherwise were unduly burdened by the implementation of the plan."[19]

(emphasis added – footnotes omitted)

[20] The *PSA* matter, like *Correctional Services* concerned alleged unfair discrimination against a specific individual from a designated group, in that instance an Indian male. One of the issues the court had to decide was whether the SAPS equity plan at that time (2000) was in line with the EEA. Once again, the LAC emphasised the primacy of the three pronged test for testing whether a restitution measure is compatible with what the Constitutional Court first described in detail in *Van Heerden* and mentioned again in *Barnard*.[20]

[21] On the facts of the case in *PSA*, the court found that the plan passed the first requirement of targeting a class of persons who had been susceptible to unfair discrimination and was designed to protect and advance the employment of applicants from that class. In dealing with the last prong of the test, the court found that the complainant had not been unfairly discriminated against for two reasons. Firstly, at all levels of the organisation, Africans were "hopelessly under-represented" and the plan

[19] At 1865-6.

[20] At 1839, paras [36]-[37].

was trying to ensure restitution took place "…in order that a broadly non-racial police force could emerge in Kwazulu-Natal, one that was not predicated on previous historical patterns". Secondly, the difference in scores between the successful African candidate and the complainant was insignificant and the African candidate had the necessary ability to serve in the post with distinction.[21] Thus, having regard to the specific demographics in the province and the racial profile of the workforce with reference to the targets in the plan together with the ordinary selection criteria the balance struck between employment equity imperatives and operational needs was achieved relatively easily.

[22] In *Naidoo's* case, the LAC found that the court *a quo* had erred in dealing with the validity of the plan because that had not been in issue before it.[22] Consequently, this judgment is of limited relevance to the current matter.

[23] In *Correctional Services*, the LAC concluded that the Department had failed to take account of regional demographics, which at the time was a mandatory requirement in terms of s 42(a)(i) of the EEA:

> "[59] In summary, the respondents failed to take account of the particular regional demographics of the Western Cape which was a mandatory requirement at the time that the plan was conceived. The failure to do so

[21] At 1839-1840,paras [38]-[42]

[22] At 1139, viz:

> [38] I agree with Mr *Ngcukaitobi* that the validity of the employment equity plan and the National Instruction was not challenged by the respondent. The respondent's case was that she was unfairly discriminated against and that the employment equity plan was implemented incorrectly in her case. The court *a quo* was therefore wrong to review the employment equity plan under circumstances where the validity of the plan was not challenged and where there was no proper case made out for its review. In *Barnard*, Moseneke ACJ stated:
>
> "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 s 9(2) of the Constitution and s 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."11
>
> [39]It was not open to the court *a quo* to review the employment equity plan or the National Instruction."

> could result in a large-scale reduction in the workforce of members of the designated group, who themselves had suffered egregious discrimination as a result of apartheid. Even if the word 'may' is employed in this enquiry, it is our view that, given South African history, the failure to take account of the impact of regional demographics on the nature and purpose of the plan adversely reduces the contribution of restitution towards substantive equality and hence the attempt to achieve the effective goal of developing a non-racial and non-sexist society. This complete failure to examine the region in which the plan is conceived, constitutes a sufficient legal obstacle against the plan being held to be in compliance with the EEA."[23]

(emphasis added)

[24] Clearly, a feature of that case which had a material bearing on the LAC decision was that the complainants belonged to a designated group of previously disadvantaged persons and a primary objective of their challenge was to assert a claim to improve their position relative to other previously disadvantaged groups in line with their demographic profile in the economically active population in the Western Cape. In this case, the plan is attacked not with reference to the prejudice allegedly suffered by a particular group of individual employees. Rather, the applicants contend that the very schema of the plan is such that it establishes absolute barriers to appointment or promotion the effect of which are indistinguishable from the operation of quotas.

[25] Although it was hoped that the decision in *Barnard* would clarify some of the issues important to this judgment because the focus of the Constitutional court was on the administrative review of the Commissioner's specific decision not to appoint Captain Barnard to an advertised post, it shed little new light on the more difficult aspects of evaluating equity plans as such. The LAC decision in *Correctional* Services is more useful in relation to the critical aspect of the applicant's case, namely whether the plan erects barriers to the employment of persons from non-disadvantaged groups amounting to quotas.

[23] At 1868.

Important elements of the SAPS plan for 2010-2014

[26] The preamble of the plan announces, inter-alia, that:

> "The South African Police Service has developed this subsequent Employment Equity Plan that spanned from 1 January 2010 to 31 December 2014 which is geared to:
>
> - Promote the constitutional right of equality and the exercise of true democracy;
> - Eliminate unfair discrimination in employment within the South African Police Service;
> - Ensure proper and effective implementation of Employment Equity within the South African Police Service to redress the effects of past practices;
> - achieve a diverse workforce broadly representative of the South African community; and
> - Promote economic development and efficiency in the workforce."

[27] Paragraph 2 of the plan contains the plan's vision statement, viz:

> "Emanating from the aim is derived from the Employment Equity Act no 55 of 1998, the South African Police Service is committed to ensuring broad representation of its Human Resources based on the racial, gender and disability demographics. This shall be implemented in all occupational categories/levels/classes nationally and provincially in relation to each and every workplace."

[28] In terms of paragraph 4 of the plan, owing to the vast size of the SAPS which at the time employed 185 369 members, it was to be implemented through business units. Explaining how this was supposed to work, the plan stated:

> "SAPS has consequently subdivided the organisation into Business Units which will be manageable, large enough to have a standardised approach and small enough to cater for specific needs and unique circumstances, but the ultimate objective being alignment with national demographics since SAPS is a national institution."

Each of the thirty business units identified in the plan was to develop their own implementation plan aligned to the national plan. In terms of

paragraph 8.2.2 of the plan the implementation plans of the business units were to be "derived from and informed by" the national plan. None of these business unit implementation plans formed part of the papers relied on by any of the parties, and for the purposes of this judgement, I must assume that they did not modify the national plan in any material way that would be pertinent to the case that was argued before me.

[29] Paragraph 6 of the plan deals with enforcement and stipulates that every manager's performance agreement must be linked with the implementation of the employment equity program to ensure accountability for delivery of the program. In the latter part of the plan dealing with steps already taken to promote employment equity, it is reported that "(a)ccountability to enhance representivity was embedded in each manager's performance agreement". It also provides that disciplinary measures may be used to deal with breaches of the 'objectives and intentions' of the plan. Paragraph 10 of the plan dealing with monitoring and evaluation requires each business unit to submit quarterly reports to the National Equity office, which must make recommendations to the national Commissioner for any sanctions relating to non-compliance with the national plan.

[30] Paragraph 14 of the plan reads:

> "NUMERIC TARGETS FOR THE SAPS EMPLOYMENT EQUITY PLAN
>
> The South African police service commits itself anew to reach the equity targets agreed upon in the section 20 plan in favour of the designated group by the year 2014. In the process of striving to achieve the equity targets of this section 20 plan, the SA PS has to create capacity within the organisation. To ensure the realisation of this process, posts must become available to apply and promote employment equity by making use of the following options/opportunities;
>
> - Natural attrition
> - Movement to the ideal establishment.
> - Offering severance package or any other available programs subject to Cabinet approval. Should Cabinet to prove severance packages or any other similar programs for the South African police service, the

implementation or execution of such severance package program should be geared to support this section 20 plan in re-addressing the imbalances in the organisation. This means that designated members/officials be appointed in the vacancies created by personnel take severance packages.

- Continuous implementation and close monitoring of the six focus areas of affirmative action including other relevant programs (i. e. Accelerated development, Succession Planning, Shadow Posting, Bursaries and Learnerships, Secondments, fixed term contracts)."

[31] The plan includes a table which sets out the overall targets for the SAPS for each year for the duration of the plan. Different numerical targets by race and gender were identified in each of four categories of personnel, namely Senior Management level (salary levels 13-16), Middle Management level (salary levels 9-12), Junior Management level (salary level 8) and Production level (salary levels 1-7). Two types of targets were stipulated for each racial and gender category, namely an "Ideal" and "Realistic" percentage of the workforce. Thus, for example, the 'ideal' proportion of female members in the SAPS is set at 40% of all members at the Production level, but sets a 'realistic' percentage target of 32.32% in 2010 moving to 35.59% in 2014 for that level.

[32] The plan itself does not explain how the 'realistic' targets were arrived at, but states that the 'ideal' targets were derived from the 2006 mid-year population estimates in terms of which Africans, whites, Indians and coloureds constitute 79.35%, 9.34%, 2.46% and 8.85% of the national population. In her answering affidavit, the National Commissioner attempts in rather sweeping and vague terms to explain the derivation of the 'realistic' target percentages:

> "In developing the plan, cognisance was taken of the fact that 2006 midyear population estimates were ideal figures. As a result the plan includes realistic figures, which are informed by inter-alia the progress made during the previous Employment Equity Plans with reference to workforce movements, the pool of suitably qualified candidates and forecasting/projections made considering the Resource Allocation Guide which is determined by the availability of funds from National Treasury in

> terms of the Medium Term Expenditure Framework. This is done by the National Equity Unit of the SAPS and the Human Resources, Planning and Utilisation Unit of the SAPS. Cognizance is also taken of the number of people that would have matric and a driver's license in relation to the entry-level into the SAPS; and the number of people with specialised training and qualifications for specialised posts, for example those requiring training and experience in psychology and related social sciences."

The Commissioner's assertion of how the 'realistic' targets were arrived at is unsupported by any other affidavits or documentation which might have elucidated how the welter of factors mentioned were weighted and evaluated to arrive at the very specific percentages identified as targets. Consequently, the derivation of those targets remains opaque and poorly substantiated.

[33] The plan records certain other pro-active measures such as preferential training programs which had already been undertaken to address identified barriers to appointment and promotion. It also contains a section dealing with non-numeric targets which are described in very general terms only, viz:

> "The analysis of the 30 SAPS Business Unit Plans indicates that the following non-numeric targets are prioritised and action plans in this regard to be developed at Business Unit level.
>
> The SAPS will ensure the achievement and sustaining of the equity objectives through diligent pursuance and attainment in making equity and explicable part of every component/divisions/problems within the entire institution.
>
> Properly trained and developed employees for improved service delivery and broadly representative of the community of South Africa. SAPS institutionalised a culture that is inclusive of and values the diversity of personnel within the SAPS and one that supports the affirmation of historically disadvantaged individuals."
>
> (*sic*)

[34] The only reference in the plan to preventing the creation of absolute barriers to employment is set out after the end of the tables containing the numerical targets:

> "Recruitment, promotion and appointment drives will be informed by actual needs.
>
> During promotion all the available posts will be distributed in terms of the national demographics amongst all race groups. This will ensure that no absolute barrier is placed with regard to the advancement of any group with in the SAPS."

No elucidation is provided as to what is meant by available posts being 'distributed in terms of the national demographics amongst all race groups' and it is unclear on the face of it why this would ensure that no barrier is placed to the advancement of any group. It is unfortunate that what is clearly seen by SAPS to be an important provision supposedly ensuring that absolute barriers are not erected by the plan is phrased in such a way that its meaning remains obscure.

[35] The plan also provides that 50% of all posts on salary level 8-16 and 60% of posts on salary levels 1-7 "… will be allocated to wom[e]n (Females) as a designated group in their race groups", though no similar provision is made for the allocation of posts to different racial groups. How this apparent reservation of posts on the basis of sex was to be practically implemented is not set out in plan.

Issues in contention

The applicant's claim

[36] Central to Solidarity's attack on the plan is its objection that "the gender and racial targets set by the plan amount to 'nothing but a compendium of absolute quotas'. The applicants state that:

> "This much is clear from the fact that the plan states as its objective representation of races based on the national demographic and the fact that it employs a system of allocation of positions on the basis of racial profiling. An applicant, however appropriate and extensive his qualifications and experience, will be rejected unless he or she falls within the group-male or female on the one hand and white, coloured, Indian and African on the other-that is under-represented in the SA PS taken nationally. In its most egregious form, the implementation of the plan leads to the outright

refusal to appoint or promote suitable staff to vacant positions on the grounds that the pursuit of strict demographic representation will potentially be frustrated. Ultimately, Solidarity contends that the SAPS is not entitled, under the enabling legislation, to engage upon social engineering, and neither is it entitled to approach categories of disadvantaged persons in the absolute fashion when a nuanced and ad hominem approach is called for."

[37] The applicants contend that the approach of the SAPS in the way that it uses targets in the plan is not mandated by the Constitution nor by the EEA. In particular, the EEA, does not:

37.1 make provision for subdividing the designated groups of people identified as the intended beneficiaries of affirmative action measures to redress the disadvantages in employment they experience into the further subcategories of coloured, Indian and African in, which the plan identifies specific targets for;

37.2 permit the use of the national demographic as a standard by which the representation of designated groups may be evaluated in terms of the plan;

37.3 permit quotas, nor

37.4 permit an employer to place absolute barriers to the employment or advancement of employees.

[38] Even if the use of what the applicants characterised as "absolute targets" based on demographics was a legitimate feature of a plan, the applicants argue that the national demographic standard adopted by the SAPS is an arbitrary one. Firstly, they say the plan takes no cognizance of the fact that the respective proportions of Indians and coloureds in the economically active population in each province differ significantly from their representation in the nationally economically active population. Appointments made in conformity with national targets in terms of the plan would not result in a provincial racial profile of the SAPS which was broadly representative of the racial composition of the economically active population in that province. Secondly, even if the use of national demographics is permissible, by not using the economically active population as the benchmark, the SAPS arrives at targets unrelated to the

job seeking population. If only the national economically active population as reflected in the 2011 Census is considered, then the national employment profile of the SAPS would already appear to be broadly representative of that population.

[39] Furthermore, Solidarity argues that the SAPS Act effectively outlaws the failure to appoint a suitably qualified person to an existing post solely because such an appointment would not help to achieve race or gender targets in the plan. In part this appears to echo one of the complaints in *Barnard's* case[24], though now it is raised in the form of an alleged defect in the plan itself.

[40] The applicants also make specific reference to National Instruction 2/2008 in terms of which the national Commissioner assumed the power to reserve promotional posts on certain grounds including, employment equity and the strategic objectives of SAPS; the prevailing lack of representivity that cannot be expected to be addressed through normal promotion processes; a lack of applications received from candidates whose promotion or appointment would have enhanced representivity; and applications received from candidates whose promotion or appointment would promote representivity, but to require further development to make them suitably qualified to fill the higher posts. However, Instruction 2/2008 itself is not the object of attack in this application, though the issues raised by it might warrant consideration.[25] In this instance, Solidarity's attack is confined to the plan itself and therefore the question is whether such a prohibition against appointing someone on the grounds of their sex or race alone follows directly from the terms of the plan rather than from the National Instruction.

[41] Lastly, Solidarity related some of the events leading up to this application as evidence of the allegedly inflexible approach adopted by SAPS and what compelled it to bring a broad application of this nature. In particular,

[24] At 2999, [55].

[25] The interplay between the requirements of effective service delivery and employment equity imperatives is a matter that enjoyed considerable attention in all the judgments of the Constitutional Court in *Barnard*. See 3002 [63]-[64], 3014-6 [108]-[113] and 3018 [122]-[123], 3036-3037 [184]-[189].

Solidarity refers to decisions or recommendations resulting in the deferment of the appointment process apparently in the hope that candidates who might fulfil representivity objectives could be obtained by re-advertising posts, advertising externally, or by requiring provinces or divisions to revise recommendations. I note that some of the examples referred to in the founding affidavit pre-date the 2010-2014 plan.

The employer's defence

[42] SAPS retorts that the applicant cannot argue that it actually applies national demographics rigidly because in fact, the plan recognises that it is not realistic to do so. Further, section 195 of the Constitution mandates the use of national figures as a benchmark by stating that the public service must be broadly representative of South African people. It also argues that the use of national demographics "to determine the composition of the workforce of a particular employer" is permissible under the EEA because the code of good practice on the preparation, implementation and monitoring of equity plans states that:

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

[43] Regulation 2(5) of the EEA General Administrative Regulations of 2009 states among other things that when a designated employer conducts the analysis required by section 19(1) of the EEA, the employer may refer to form EEA 8. The analysis in question is the analysis a designated employer must conduct of its employment policies, practices, procedures and working environment in order to identify employment barriers adversely affecting people from designated groups. Section 19(2) of the EEA requires the employer to include a profile of its workforce within each occupational category and level to determine the degree of underrepresentation of people from designated groups in the workforce.

Obviously, 'underrepresentation' can only be determined against some kind of numerical norm.

[44] Form EEA 8, entitled 'Annexure 1: Demographic Data' reads:

> "Demographic Profile of the National and Regional Economically Active Population
>
> WHAT IS THE PURPOSE OF THE DEMOCRATIC PROFILE OF THE NATIONAL AND REGIONAL ECONOMICALLY ACTIVE POPULATION AND WHERE TO FIND THEM?
>
> Statistics South Africa provides demographic data using Labour Force Surveys from time to time. The Labour Force Surveys (LFS) that is normally released quarterly provides statistics on the national and provincial Economically Active Population (EAP) in terms of race and gender. Employers can access this information directly from Statistics South Africa. This information must be used by employers when consulting with employees, conducting an analysis and when preparing and implementing Employment Equity Plans."

[45] Further, SAPS argues that it was bound by the provisions of Agreement 10/2001 (mentioned above) that also required it to pursue the object of ensuring that it broadly reflects the demographics of South Africa. SAPS contends that the fact that it did not use the actual population estimates for 2006 but applied realistic targets showed that it did not inflexibly attempt to apply national demographic figures to the plan.

[46] Another argument advanced by SAPS was that using regionally derived figures would preserve the 'balkanisation' of the workforce by maintaining historic geographic racial distribution patterns. However, I do not understand that it is one of the recognised objects of the EEA, or any other legislation, to try to achieve an even distribution of all races in the composition of every provincial workforce irrespective of the existing racial contours of that province's economically active population. It also does not follow from the Constitutional object of achieving a public service that is broadly representative of the population. This is because a national workforce that corresponds at provincial level with the racial composition of the population in each province will necessarily also be broadly

representative of the national population at a national level. In any event, this particular defence of the use of national demographic targets relied on in argument was not one that was raised in the National Commissioner's answering affidavit and does not require further consideration.

[47] In relation to Solidarity's contention that the EEA does not permit the subdivision of the designated group of black people group into further racial categories for the purpose of identifying the numerical targets, SAPS claims that the union was adopting a too literal approach to interpretation of the statute and failed to appreciate the multi-layered nature of disadvantage suffered by various groups. As I understand the argument, it implies that - for example - if a numerical target could only be set for black women as a group, it would not fairly reflect the greater underrepresentation of African women relative to women of other races.

[48] Lastly, SAPS contends that in evaluating whether its approach to employment equity is inflexible, regard must be had not only to the plan itself but to other instruments such as National Instruction 2/2008. Accordingly, the National Commissioner mentions paragraph 4(11)(a) of the instruction, which provides that the criteria for selection of candidates based amongst other things on:

48.1 the candidate's competence based on the inherent requirements of the job or the capacity to acquire, within reasonable time, the ability to do the job;

48.2 the candidate's prior learning, training and development;

48.3 the candidate's experience gained in the field of post, and

48.4 representivity of the relevant division or province at the level that is applicable to the post in terms of the Employment Equity Plan of the relevant business unit.

SAPS further points out that paragraph 4(12)(d) of the National Instruction permits a Provincial or Divisional Commissioner to approve a promotion of an employee even if that promotion will not advance representivity at that particular post level. Similarly, for higher post levels the national

Commissioner has a discretion whether or not to prove recommended appointments in terms of paragraph 4(12)(c) of the instruction.

Evaluation

Compliance with the right to equality

[49] There seems to be no dispute that the plan clearly satisfies the first two legs of the constitutional test that a remedial measure must meet to qualify under s9(2) of the Constitution, as laid down in *Van Heerden*. The only issue is whether it also met the third leg, namely whether the plan promoted the achievement of equality. The LAC identified this as the most difficult part of the test, which entails determining if the plan does not impose disproportionate burdens or 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. In *Correctional Services* the equity plan under consideration did satisfy the third requirement because of the existence of a deviation policy in the equity plan.

[50] The third leg of the test is intimately bound up with the discussion of a deviation policy, which is dealt with below.

Compliance of the plan with the EEA

The reliance on national demographic targets

[51] It is clear from the provisions of section 42(a)(i) of the EEA and the regulations discussed that the intention of the EEA was that the comparator against which underrepresentation would be measured should be the 'relevant' national and provincial economically active population. The first point to note is that it is perfectly legitimate to have regard to national demographics in terms of the EEA and s 195 of the Constitution, but it is not sufficient to simply rely on national census figures of the general population for the purposes of the EEA. Rather, it is the economically active portion of the population against which the composition of the workforce must be compared. In so far as it is the

economically active population that is under consideration, both the national and regional economically active population figures must be considered in terms of s 42(1)(a)(i). Plainly, in relying only on the national population census estimates, SAPS plan did not consider either of these standards in identifying the numerical targets in its plan. At least in these respects, the plan does not comply with the EEA.

[52] In relation to the constitutional injunction that the public service must be broadly representative of the population, that imperative is perfectly consistent with a public service whose provincial racial profile matches that of the population in each province. There is no sense in which national demographic representation is in conflict with regional demographic representation: a nationally representative workforce that is also regionally representative, will fit the varying geographic racial contours of the population much more closely than one which is not.

The use of numeric targets for sub-groups of racially disadvantaged persons

[53] Is it permissible to identify numeric targets for subcategories of the designated group of 'black people'? The relevant definitions are contained in s 1 of the EEA and state:

> "'designated groups' means black people, women and people with disabilities;…
>
> 'black people' is a generic term which means Africans, Coloureds and Indians;…"

[54] One of the purposes of the EEA is "… to achieve equity in the workplace 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 in the workforce."[26] The applicants effectively argue that the designated group of 'black people' is indivisible and whenever targets are set for the advancement of members of that group the targets should relate to the group as a whole and not subcategories thereof. In my view, there is an irreconcilable conflict

[26] S 2(b) of the EEA.

between this argument and the argument that regional demographics are a necessary and relevant standard when setting numerical targets. Part of the argument in favour of the use of regional demographics is the uneven distribution of subcategories of black people in provincial populations and that a failure to recognise this could result in disproportionately advancing the interests of one category of racially disadvantaged persons at the expense of other categories of black people resulting in a provincial workforce composition that is out of kilter with the racial composition of the province.

[55] In the concurring three-judge[27] minority judgement in *Barnard*, the following observations were made which are pertinent in this regard:

> "[88] In addition, the Act aims to advance several different 'designated groups'. 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. Employers 'must' implement affirmative action measures that benefit people from all designated groups. 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 disadvantage, for example, might be impermissible, as might a decision that advances only one disadvantaged racial group while limiting the others."[28]
>
> (references omitted).

[56] I believe it accords with the view expressed in the latter part of the quotation above not to interpret the use of the term 'black people' in the EEA as being intended to confine the implementation of affirmative measures to members of that group on the basis that they are part of an homogenous group. Rather, I understand the EEA's description of the term as a 'generic' one was simply intended to emphasise the common distinguishing characteristic of all members of that group, namely that they

[27] Cameron J, Froneman J and Majiedt AJ

[28] At 3008

are members of different racial groups who suffered gross forms of discrimination under apartheid because they were not white, which place them at a historical disadvantage relative to white persons. It is the historic racial character of their disadvantage, which distinguishes them from members of the two other designated groups of disadvantaged persons who are identified by reason of their sex or disability. Thus the term 'black people' is simply a convenient rubric to describe all those whose disadvantage stems from their racial designation under apartheid. It was not intended to avoid recognition of the varied racial composition of that group.

[57] Moreover, a failure to recognize the need for disaggregation can have perverse consequences, already alluded to above. For example, the advancement of a single person falling with the category of black people would enhance the representivity of black persons overall, but depending on which racial subcategory that person came from, might exacerbate the relative under-representation of African, coloured or Indian persons in that level of the workforce. Numeric targets relating to the different racial subdivisions of the group will reduce the likelihood of such an outcome. In the result, I do not think there is merit in attacking the plan on the basis that the use of numerical targets of subcategories of black persons is invalid in terms of the EEA.

The use of numeric targets in the plan

[58] Does the use of numerical targets in the plan amount to the imposition of quotas in breach of section 15(3) of the EEA? Achieving the goal of a public service which is broadly representative of the diverse South African population can hardly be pursued without identifying the specific racial and gender composition of the workforce which would correspond to that ideal, which necessarily entails the numeric expression thereof. Indeed, s 15(3) and s 20(2) of the EEA mandate the use of numerical goals. The key question is whether compliance with the plan necessitates that any promotion or appointment made by the SAPS must demonstrably advance the achievement of the numerical goals identified in the plan.

[59] In *Correctional Services* the LAC addressed the question of when numerical employment targets used in an employment equity plan could be construed as quotas prohibited by section 15(3):

> "Evaluation of appellants' argument
>
> [40] A 'quota' is defined in The Concise Oxford Dictionary, to the extent that it is relevant to this dispute, as 'a fixed number of a group allowed to do something eg. Immigrants entering the country'.
>
> [41] Much of the debate before this court turned on the distinction between a quota, which in terms of the EEA, is an impermissible mechanism, and the permissible concept of numerical targets. The key distinguishing factor between these two concepts turns, it appears, on the flexibility of the mechanism. An inflexible set of numbers with which the designated employer is required to comply 'come what may' constitutes a quota and would therefore be in breach of s 15(3) of the EEA. By contrast, a plan based on designated groups filling specified percentages of the workforce, but which allowed for deviations therefrom so that there was no absolute bar to present or continued employment or advancement of people who do not fall within a designated group (s 15(4)) would pass legal muster. Similarly, a plan which provides that the numbers provided for in the plan constitute a goal to be achieved over a defined period would be congruent with the EEA. Of course, even in this case, a target may be designed to achieve a defined goal in a specified period, after which, absent some room for flexibility, the target could become a quota. If the plan is inflexible, then it must be struck down. See in this connection SA Restructuring & Insolvency Practitioners Association v Minister of Justice & Constitutional Development & others (2015 WCC case no 4314/2014)."

(emphasis added)

[60] The LAC found that the Department of Correctional Services equity plan did provide for deviations from the attainment of numerical goals when making appointments or promotions or promotions in certain circumstances. This was sufficient not only to avoid the conclusion that the Correctional services plan did not establish quotas but was also sufficient for the plan to pass constitutional muster in terms of the third prong of the test set out in *Van Heerden* for evaluating remedial measures under s 9(2) of the Constitution:

> "In terms of the plan, there is a provision for deviations, which can be implemented in the event that a rigid implementation of a plan would compromise service delivery or where it would not be possible to appoint suitably qualified people from designated groups to the relevant occupational categories and levels in the workforce.[29]"
>
> and
>
> "As indicated, we do not consider that a deviation plan that focuses exclusively on organisational need and the consequent assessment of skills, experience and the ability of an individual applicant to fulfil these defined needs renders such a plan unconstitutional."[30]

[61] It seems also that the LAC also reached its finding that the deviation policy in the plan referred to above was sufficient to pass constitutional muster, mainly on account of the provision for deviations, but also because of evidence given during the trial which the court alluded to. Firstly, the court regarded as noteworthy the evidence of the Department of Correctional Services' Regional Head: Corporate Services Western Cape to the effect that the characteristics of an individual applicant could play a role in deciding whether to depart from the plan for operational reasons.[31] Secondly, the court observed that the fact that there was uncontested evidence that the third respondent had approved 13 deviations in the Western Cape during the period 2010 to 2013 tended to indicate that there was not an absolute bar to promotion or appointment and that the plan had not been inflexibly adhered to.[32] Lastly, the court took cognizance of the fact that the individuals who claimed to have been unfairly discriminated against in terms of the policy did not base their case on the department's refusal to consider a deviation from the policy but on the policy itself.[33]

[62] In this instance, unlike in the *Correctional Services* matter there is no provision in the SAPS plan setting out the circumstances in which a

[29] At 1865,[51].

[30] At 1871,[70].

[31] At 1863-4,[47].

[32] At 1864,[44]

[33] At 1863,[46].

deviation from the plan would be acceptable. Any member of SAPS management dealing with appointments or promotions would find no guidance in the plan as to when, or on what basis, it would be acceptable to make recommendations or decisions on employment or promotion that did not advance the numerical representation goals of the plan, and which also would not negatively affect their own performance assessment or possibly result in disciplinary action being taken against them. The National Commissioner claims in her answering affidavit that the plan does not make race or gender decisive considerations in appointments and promotions, but "… simply introduces them among the many factors to be taken into account when making employment decisions." However, none of the provisions of the plan indicate when any of those other factors might legitimately permit an appointment or promotion to be made which does not advance the pursuit of the numerical goals. On the wording of the plan itself, it does not cater for exceptions.

[63] In *Correctional Services* the LAC also mentioned, though it does not seem to have been raised in the case before it, that a plan in which the numeric targets are only a goal to achieve over a period of time would also be congruent with the EEA. Does that mean, as in this case, where the targets change from year to year during the five year duration of the plan that, the various annual numeric targets do not amount to quotas? Any equity plan must have a time frame or time frames for achieving numeric objectives. The issue whether those numerical targets can be construed as quotas will always depend on the rigidity with which they should be pursued, which will depend on the interpretation of the wording of the plan. In the case of the SAPS plan, there is nothing in the wording which suggests that the stipulated 'realistic' targets were merely figures that SAPS was aiming to achieve rather than fixed objectives which could result in poor performance assessments or even disciplinary sanctions if not met.

[64] Labelling a target 'realistic' does not in and of itself mean it is flexible when it comes to making a decision. What is lacking in the plan is a provision that tells decision makers under what circumstances the pursuit of the

targets can yield to other considerations when recommending or making an appointment.

[65] SAPS's answer that the plan must be looked at in the context of other instruments governing appointments is a poor one. The fact that other regulatory provisions might provide for a more nuanced approach to appointments and promotions does not detract from the rigidity of the conception of the plan itself as embodied in its provisions. If SAPS did not intend the numerical goals in the plan to carry overriding importance in employment and promotion decisions in all instances, then the plan itself ought to have said that either by way of express provisions explaining when non-adherence to the attainment of the numerical targets would be considered legitimate, or by express reference to other statutory instruments that provide for this. In the absence thereof, it is hard to escape the conclusion that the plan as such did not envisage a flexible approach being adopted in the pursuit of its numerical targets. In *Correctional Services* the LAC found that the numerical targets in that plan were not quotas because of the deviation provision it contained. The same cannot be said of the SAPS plan, which contains no equivalent provisions. For the same reason the absence of any mechanism which might ameliorate the impact of applying the targets rigidly on members whose race or gender would present an insuperable obstacle to their promotion means that the plan as such does not satisfy the third leg of the test for remedial measures aimed at achieving substantive equality.

[66] However, another defence advanced by SAPS is that the factual position belies Solidarity's claim that the plan is rigid and inflexible or that it erects absolute barriers to advancement of members of groups that are over-represented in a staff category. Thus, SAPS points out that since April 2000 to March 2012, 3549 white males and 5173 white females were promoted, which would not be possible if race and gender considerations were paramount. Solidarity did not take issue with these figures. It also did not argue that during the period from 2010 to 2012, which fell during the period of the 2010-2014 plan, the incidence of such appointments was not consistent with the pattern of such appointments before the plan was implemented.

[67] An allied contention of SAPS is that the issue of whether race and gender are ever decisive is not a matter that can be answered in the abstract but only with reference to actual employment decisions. The applicant retorts that SAPS ought to have taken the court into its confidence by stating how many candidates for promotion or appointment had been refused appointment solely only on the basis of that they were not appointed because they did not satisfy the racial profile required by the numerical target, and how many posts had not been filled because no suitable candidate satisfying the numerical goals could be found. However, in so far as the actual outcomes of appointment or promotion, decisions are decisive in this application, it is the applicant that should have sought to adduce such evidence in support of its claim that the plan raised insuperable barriers to the appointment of qualified candidates who would have been appointed but for their race or sex.

[68] In this instance, though I am satisfied that, in conception, the numeric targets amount to quotas, the factual position does show the plan was not followed to the letter and that in practice, other factors did play a role in determining appointments. In short, the plan itself was defective as a remedial measure in terms of s 9(2) of the constitution and did not satisfy all the requirements of the EEA, but was flexibly implemented despite the absence of provision for flexibility in the plan itself.

Compliance with s 27 of SAPS Act.

[69] It also follows that because the plan did not comply with s 9(2) of the Constitution, it could not by itself constitute a remedial measure designed to achieve the objects of s 8(3)(a) of the interim constitution and therefore was not a remedial measure which SAPS could rely on as a justification for departing from any of the precepts in the SAPS Act governing the filling of posts. However, since the wording of s 27(2) speaks of SAPS "compliance" with such a measure and in view of the conclusion, on the limited evidence available, that SAPS did not in fact implement the plan properly, it would be absurd to conclude that because the plan was defective SAPS had acted in breach of s 27(2) of the SAPS Act. As SAPS

had not complied with the defective plan in practice, it cannot be said to have acted in accordance with a plan which did not satisfy the requirements of achieving the objects contemplated in sections 8 (3) *(a)* and 212 (2) of the Constitution

Remedy

[70] By the time final submissions were made in September 2014, the 2010 – 2014 plan had virtually run its course. The relief sought was primarily declaratory. Secondly it was to restrain SAPS from implementing the plan by applying quotas based on demographic representation, or to make appointments based on such criteria. While declaratory relief would be competent in relation to whether the plan itself met the requirements of the EEA or breached the right to equality, it is not appropriate to make an order relating to the implementation of the policy, especially given the question mark that hangs over the extent to which it was implemented in practice. That is an issue concerning its implementation and will turn on what happened in the case of specific appointments.

[71] The matter is obviously an important one of principle for both parties and they have an ongoing relationship which would make an award of costs inappropriate in the circumstances.

Order

[72] In light of the above, I find that:

72.1 The SAPS employment equity plan for 2010-2014, attached as Annexure DJG2 to the applicant's founding affidavit ('the plan'), is invalid and of no force and effect because it contravenes:

72.1.1 sections 15 (3) and 42 of the Employment Equity Act, 55 of 1998 ('the EEA');

72.1.2 section 9(2) of the Constitution of South Africa, Act 8 of 1996 ('the Constitution')

72.2 The plan was not in breach of s 195(1) (i) of the Constitution.

72.3 The first respondent did not act in breach of s 27(2) of the South African Police Service Act 68 of 1995 in so far as it gave effect to the plan.

[73] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	MSM Brassey SC assisted by M J Engelbrecht instructed by Serfontein, Viljoen & Swart Attorneys
FIRST RESPONDENT, SECOND AND THIRD RESPONDENT:	H Maenejte SC, assisted by T Ngcukaitobi and S Tilly instructed by the State Attorney
FOURTH RESPONDENT:	(No appearance)
AMICUS CURIAE:	V Ngalwana SC assisted by F Karachi, instructed by Grosskopf Attorneys