



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA23/13

In the matter between:

SOLIDARITY

First Appellant

P J DAVIDS

Second Appellant

C F FEBRUARY

Third Appellant

A J JONKERS

Fourth Appellant

L J FORTUIN

Fifth Appellant

G M BAARTMAN

Sixth Appellant

D S MERKEUR

Seventh Appellant

T S ABRAHAMS

Eight Appellant

D R JORDAAN

Ninth Appellant

J J KOTZE

Tenth Appellant

D M A WEHR

Eleventh Appellant

And

DEPARTMENT OF CORRECTIONAL

SERVICES

First Respondent

THE MINISTER OF CORRECTIONAL

SERVICES

Second Respondent

THE NATIONAL COMMISSION OF THE DEPARTMENT

OF CORRECTIONAL SERVICES

Third Respondent

THE MINISTER OF LABOUR

Fourth Respondent

POLICE AND PRISONS CIVIL RIGHTS UNION

AMICUS CURIAE

Heard: 19 February 2015

Delivered: 10 April 2015

Coram: Waglay JP, Davis JA et Mngqibisa-Thusi AJA

JUDGMENT

WAGLAY JP and DAVIS JA

Introduction

[1] This case involves an enquiry into the constitutional and legal scope of the implementation of positive measures designed to achieve equality through the medium of employment equity plans. The present dispute follows hard on the heels of the recent decision in *South African Police Services v Solidarity obo Barnard*¹ (“Barnard”). This judgment of the Constitutional Court notwithstanding, the law relating to racial quotas and targets and other mechanisms to achieve

¹ 2014(6)SA123 (CC)

representivity in the workplace remains uncertain. It is within this context that the present dispute must be located.

- [2] Second to eleventh appellants (individual appellants) are represented by Solidarity, a trade union, which is the first appellant. The individual appellants applied for particular posts in the organisation of first respondent, the Department of Correctional Services ('DCS'). All these appellants, save for fifth appellant, were unsuccessful in that they were not appointed to the positions for which they had applied. Subsequently, they launched an unfair labour practice dispute on the basis that third respondent's (the National Commissioner of the DCS) failure to appoint or promote them constituted an unfair labour practice based on discrimination. In essence, they contended that DCS' employment equity plan for the period 2010 to 2014 ("the plan") constituted a contravention of the Employment Equity Act 55 of 1998 ("EEA").

- [3] Appellants contend that the DCS acted unlawfully by making appointments, transfers and promotions in terms of the plan but in breach of the EEA, as the plan required a rigid application of quotas based on demographic representivity. In appellants' view, the plan was both racist and sexist in its utilisation of rigid quotas. They further contend that the plan took no account of regional demography.

- [4] It appeared to be common cause before the court *a quo* that, as a result of the plan, the application of the individual appellants for promotion had been declined, where otherwise their applications might have been successful. Save for fourth appellant, the remaining appellants had been recommended for employment by the relevant selection panel which had been constituted to conduct the necessary interviews for the advertised posts.

- [5] In approaching the court *a quo*, the individual appellants sought relief by way of actual promotion in cases where the posts had not been filled or alternatively constructive promotion; that is to be provided with pay and other benefits that they would have obtained had their applications been successful.

- [6] In the judgment of 18 October 2013, Rabkin-Naicker J ordered the DCS to take immediate steps to ensure that both national and regional demographics be taken into account in respect of members of designated groups when setting equity targets at all occupational levels of its workforce but dismissed the balance of the application for substantive relief which had been brought by the appellants. There was no order as to costs.
- [7] Pursuant to this finding, appellants have appealed against the decision to the extent that the court *a quo* refused appellants' relief. Respondents have filed a cross-appeal with regard to the finding that the plan did not take account of both national and regional demographics.
- [8] It is apparent from the manner in which the case was litigated before the court *a quo* and argued on appeal that the factual matrix is not the subject of any significant contest. The issues for determination on appeal depend, to a very large extent, upon the interpretation of the appropriate legislation and the application thereof to the plan. For this reason, we turn to deal first with the plan and then with the applicable law.

The DCS Plan

- [9] Since January 2000, DCS, through the development and adoption of various employment equity plans, sought to comply with its obligations under the EEA. For the purposes of this case, the most recent of these plans was one which was approved and adopted on 7 September 2010 and continued to be in force until December 2014.
- [10] This plan records that:
1. significant progress has been made in the transformation of the personnel profile of DCS including "marked progress and employment of females within the department" and good progress with "down management of Whites".

2. past recruitment and selection processes “were not always EE Plan driven as some appointments that were made were not compliant with the EE targets”.

[11] Employing these recordals as the frame of reference, the plan created “approved targets” by race and gender for the relevant period. It undertook a “gap analysis” by reference to departmental units broken down into salary levels. The targets, informed by national demographics as estimated in 2005, were as follows: African males and females 79.3%; White males and females 9.3%; Coloured males and females 8.8% and Indian males and females 2.5%.

[12] Paragraph 24 of the plan sets out its key recommendations thus:

‘At salary levels 3-8, 60:40 (60% males and 40% females) should remain’; At salary levels 9 and 10, 50:50 (50% males and 50% females) is proposed; At salary levels 11 and 12, 50:50 (50% males and 50% females) is proposed; and At salary levels 13 – 16; 50:50 (50% males and 50% females) as per Cabinet requirement.’

[13] The plan also provided for so called “deviations”. In particular, it provided that Regional Commissioner and Chief Deputy Commissioners:

‘must ensure that deviations or any appointment that is against the EE Plan is effected by the National Commissioner as the only person mandated to do so by the approved DCS AA Programme. All scarce skills are considered where candidates from the underrepresented group are not available. Reasons for deviation request must thus be provided in a memorandum format. Non-discriminatory operational requirements/critical positions that are central to core business delivery may be considered by the National Commissioner.’

[14] Supporting this plan, although distinct therefrom, is the DCS affirmative action plan designed to uplift people previously disadvantaged by discrimination. It is described as “a separate tool within the DCS EE plan to assist in fast tracking the desired achievements for employment equity”. It recognises that the country’s demographics are not reflected in the workforce. It then states “inequitable

representation of employers from designated groups (continues) to prevail within the organisation". It records its objectives as including:

1. Mainstreaming of employment equity into all policies, procedures, practice systems and budget
2. Improving and transforming service delivery through the realisation of demographic changes at all levels, and
3. Facilitation of robust human resource development.

Paragraph 2.2 provides a qualification:

'While the programme targets employees from the designated groups, the department acknowledges the need to accommodate required scarce skill areas, the need for mentoring and coaching and as such non-designated employees would not be excluded.'

[15] Paragraph 2.4 then provides:

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

[16] The program also identifies recruitment in selection practices as a barrier when representatively is not considered. Accordingly, all recruitment practices are required to comply with the DCS plan, specifically by ensuring that "shortlisting processes (are) driven by Employment Equity Targets".

[17] It then makes clear that "Directorate Equity ... be informed in advance of envisaged advertisements to enable the directorate to provide accurate targets to relevant areas and responsible persons".

- [18] Paragraph 10 of this program refers to deviations which are available as “the Commissioner has the prerogative to appoint any candidate in accordance with the DCS plan and is the only person who may deviate with valid documented reasons that will stand the test in the court of law”.

The approach of the court *a quo*

- [19] In the court *a quo*, Rabkin-Naicker J made two essential findings. She held that the equality protection in terms of s9(1) of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) and particularly the provisions to promote equality as set out in s9(2) of the Constitution “were both necessary and mutually reinforcing”. These sections promoted a substantive conception of equality inclusive of measures to address existing inequality. The court *a quo* was not faced with an attack on the constitutionality of the EEA but rejected the argument that the restitutionary measures promoted by the EEA and implemented by respondents were discriminatory and thus stood to be set aside.
- [20] The learned judge then turned to deal with the individual appellants, who are classified as Black persons in terms of the EEA, but are members of the Coloured community in the Western Cape. Their case had been that they were unfairly discriminated against by virtue of the selection process followed by the DCS. In the view of Rabkin-Naicker J, s42 of the EEA, “guides the administrators of the EEA on how to gauge compliance with it”. In terms of this section, both regional and national demography had to be taken into account. While national demographics provide a safeguard which recognises that there is an African majority in this country who were most severely impacted by apartheid, regional demography had also; to be considered and, in this case, the regional demography of the Western Cape. As the policy of the DCS had taken no cognisance of the regional demographics of the Western Cape, the selection and recruitment process amounted to discrimination which was not protected by s6(2) EEA nor by s9(2) of the Constitution. Accordingly, the plan was unfair.

The Appeal

[21] In order to examine the merits of appellants' case, it is now necessary to turn to the relevant law. It is evident from the description of the central facts in this case that the Constitution is central to the disposition of this dispute; in particular s9 thereof. It reads as follows:

'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.'

[22] The pivotal section in this dispute is s9(2). It received a luminous treatment in *Minister of Finance and Another v Van Heerden* ("van Heerden")², where Moseneke J (as he then was) said:

'When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it

² 2004 (6) SA 121 (CC)

promotes the achievement of equality and its designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within s 9(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 requirements is whether the measure promotes the achievement of equality.’

[23] This approach to s9(2) flowed from the recognition by the Constitutional Court of the need for “a credible and abiding process of reparation for past exclusion, disposition and indignity within the discipline of our constitutional framework”³ and further “a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised – underprivilege”⁴. Of critical importance to the foundations upon which this interpretation of s9(2) was based was the observation that “[r]emedial measures are not a derogation from, but a substantive and composite part of the equality protection envisaged by the provisions of s 9” and “differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9 (2)”⁵.

[24] In a careful analysis of this decision, Professor Cathi Albertyn (“*Adjudicating Affirmative Action within the Normative Framework of Substantive Equality in the Employment Equity Act – an Opportunity Missed? South African Police Services v Solidarity obo Barnard 2015 SALJ (in press)*”) describes four important indicators which flow from the *van Heerden* judgment with regard to the standards and methods for evaluating both the content and implementation of remedial measures. Firstly, the judgment suggests that the evaluation entails a proportional assessment of purpose and impact including the various interests affected by the measure or decision⁶. Secondly, the mandated enquiry is a contextual one in which it is incumbent to examine the issue holistically comprehending the structures of

³ *Van Heerden* at para 25.

⁴ *Van Heerden* at para 31.

⁵ *Van Heerden* at para 32.

⁶ See paragraphs 45-52;53-56

advantage and disadvantage that underpin the measure which has been taken⁷. Thirdly, there is a need to appreciate the effect of the measure taken in the context of the broader South African society. In a concurring judgment in *van Heerden*, Sachs J notes:

‘The overall effect of s 9(2) ... is to anchor the equality provision as a whole around the need to dismantle the structures of disadvantage left behind by centuries of legalised racial domination and millennia of legally and socially structured patriarchal subordination⁸.’

[See also Shamima Gaibie “*The Constitutional Court decision in Barnard: A sequel to the van Heerden Judgment*” 2015 (36) ILJ 80; and 2014 (35) ILJ 2655].

[25] In seeking to achieve a balance between the competing interests and principles that might emerge in any such an enquiry, s9(2) mandates that the balance must be heavily weighted in favour of opening up and extending opportunities for the disadvantaged. In this enquiry, the required approach is different from that for evaluating unfair discrimination in terms of s9(3). In short, in a s9(3) enquiry, individual impact, measured by the effect of a measure on individual dignity is determinative, whereas in s9(2), the goal of remedying group based disadvantage must be given particular weight.

[26] Apart from these provisions of the Constitution, careful consideration must be given to the EEA, which was the specific legislation enacted to further the objectives of s9 of the Constitution and, in particular, s9(2) thereof. Section 2 of the EEA reads thus:

‘The purpose of this Act is to achieve equity in the work place by-

(a) promoting equal opportunity and fair treatment in employment through the eliminations of unfair discrimination; and

⁷ At paragraph 44

⁸ At paragraph 14

- (b) implementing affirmative action measure 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.'

This section needs to be read together with s6 which provides as follows:

'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; or

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

- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

[27] An examination of s2 of the EEA reveals both a clear statement of purpose and further an express means by which to achieve this defined purpose. The purpose is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. To ensure that equal opportunity and fair treatment in employment takes place, given the racist and sexist context of this country's history, the EEA envisages that affirmative action measures must be implemented to address the disadvantage in employment which continues to be experienced by designated groups. The purpose of the adopted measures is to ensure equitable representation in all occupational categories and levels in the workforce. The definition of designated groups is also reflective of the country's history and its ambition for the development of a non-racist and non-sexists society,

for the definition refers to Black people, without any distinction between African, Coloured and Indian people, women and people with disabilities.

- [28] Aware of a potential tension between an equality entitlement of an individual and affirmative action measures which are to be implemented, s6(2) of the EEA expressly provides that it is not unfair discrimination to take affirmative action measures which are consistent with s2 of the EEA.
- [29] Section 15 of the EEA entitled “Affirmative Action Measures” sets out the requirements for these measures, particularly in s15 (2). Section 15(3) then provides that the measures referred to in s 15(2)(d) (measures to ensure the equitable representation of suitable qualified people from designated groups in all occupational categories and levels in the workforce) “include preferential treatment and numerical goals but exclude quotas.” (our emphasis)
- [30] These provisions thus provide certain restrictions in respect of the affirmative action measures which are legally permissible. In summary, persons appointed pursuant to affirmative action measures must be suitably qualified. Secondly, the measure may include preferential treatment and numerical goals but cannot include a quota. The term quota is not defined, although these provisions received the highest attention in *Barnard*, The Court in *Barnard* did not believe it necessary to define quota stating that it was not the appropriate case to so do. Moseneke ACJ did however say with reference to s15(4) of the EEA that there was a necessity for flexibility in the plan and “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 the designated groups”.⁹
- [31] In his judgment, Moseneke ACJ provided further guidance as to the meaning of “quota” when he concluded that the appellant in *Barnard* had not pursued the targets so rigidly as to justify the conclusion that a quota was implemented. He proffered the following reasons therefore:

⁹ *Barnard* at para 42.

‘[o]verrepresentation of white women (respondent was a 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...[t]he decision not to promote Ms Barnard had not barred her from future promotions.’¹⁰

[32] Much of the dispute in *Barnard’s* case turned on whether the National Commissioner for Police had exercised his discretion not to appoint Captain Barnard in a rational and reasonable fashion and in accordance with Employment Equity targets which had been envisaged in terms of s6(2) of the EEA. In other words, *Barnard’s* case concerned an inquiry into the exercise by the National Commissioner of this discretion to refuse to appoint Captain Barnard, the interviewing panel’s recommendations notwithstanding. Although Moseneke ACJ eschewed a final determination of the standard to be applied in the determination of the legality of an affirmative action measure, he nodded fairly vigorously in the direction of a rationality test as is evident from the following passage.

‘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’.¹¹

[33] By contrast, in a concurring judgment, Cameron, Froneman JJ and Majiedt AJ insisted that the test to determine the legality of a remedial measure could not simply be one which examined whether the measure is rationally related to the terms and objects of the measure. This test, in the learned judges’ view, was an excessively deferential and hence inappropriate standard. In order to determine whether the National Commissioner’s decision not to appoint Captain Barnard

¹⁰ *Barnard* at paras 66-67.

¹¹ *Barnard* at para 39.

represented a fair implementation of the relevant equality plan, the court was required to examine both the objective facts of the case and the reasons provided by the National Commissioner for his decision in order to determine whether this specific implementation as well as a general formulation of remedial measures was fair¹². The standard of fairness to be applied was designed to focus upon the refusal of the National Commissioner to appoint Captain Barnard. As the three judges said:

‘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.’¹³

After evaluating the facts, they concluded:

‘[t]he 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.’¹⁴

[34] In a separate concurring judgment, Van der Westhuizen J engaged in depth with the relationship between restitutionary measures and dignity. He warned that “an atomistic approach to the individual’s self-worth and identity is not appropriate”.¹⁵ In his view, “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.”¹⁶

[35] Van der Westhuizen J’s judgment makes it clear that in any exercise which has to be undertaken to achieve a balance between the purpose of the restitutionary

¹² *Barnard* at paras 98-102

¹³ *Barnard* at para 102.

¹⁴ *Barnard* at para 123.

¹⁵ *Barnard* at para 174.

¹⁶ *Barnard* at para 175.

measure and the dignity of the individual affected by the measure, account must be taken of whether “the measure undermines the goal of s 9 to promote the long term vision of the society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and underprivilege in society.”¹⁷ Applying this approach, Van der Westhuizen J came to the same conclusion as the other justices, namely that the decision of the National Commissioner not to appoint Captain Barnard was not unlawful.

Appellants’ case

- [36] In attempting to apply this jurisprudence to the present case, it is important to emphasise that, in this case, appellants focussed their attention on the plan itself. It was not the decision to refuse to grant a deviation which was central to the focus of the case which appellants argued before the court *a quo* or indeed in this Court. For this reason, this case differs from the dispute which the Court was obliged to resolve in *Barnard*.
- [37] Mr Brassey, who appeared together with Ms Englebrecht on behalf of the appellants, focussed his submissions almost entirely on the argument that the DCS plan embodied a quota system which had failed to take account of the individual circumstances of the appellants. Mr Brassey pointed out that, from the very outset of the case before the court *a quo*, appellants had emphasised that the DCS plan made provision for appointments, transfers or promotions within the department “by reference to what we condemn as quotas strictly reflecting the demographic representativeness of the races and sexes throughout South Africa”.
- [38] Mr Brassey submitted further that the existence of this quota system was reflected in the fact that Whites were to be preferred for appointment at certain levels with African and Coloured persons being overlooked, notwithstanding the sustained history of racial oppression under apartheid. By contrast, these groups were surely to be the beneficiaries of restitutionary measures under the Constitution and the EEA. At other levels in the workforce, the application of the plan meant that white

¹⁷ *Barnard* at para 148.

males simply could never be promoted. In developing this argument, Mr Brassey submitted that the court *a quo* had ignored appellants' central objection to the DCS plan, that it was based upon "race and gender norming" without any proper regard to questions of past disadvantage. The unfair discrimination which was implicit in this approach was well illustrated when the circumstances of the individual appellants, who, with one exception, formed part of the designated group in terms of the definition of the EEA, were taken into account.

- [39] In dealing with the provision contained in the DCS plan which permitted deviation, Mr Brassey submitted that this provision focussed exclusively on the operational needs of the DCS and took absolutely no account of the individual characteristics of the particular appellants, their history, their background and thus the potential for their dignity to be infringed by way of a decision which effectively excluded them from any consideration for appointment to the positions for which they had applied. In amplification of what Mr Brassey described as the "racial barrier erected under the plan", he noted that the barrier may even operate against Africans who were over-represented at level 3 and 5 within the DCS as they presently occupied 88% and 86% of the provisions respectively. The plan further recorded that at "level 3 only Whites and Indians should be appointed." In Mr Brassey's view, these consequences of the plan brought the entire plan into war with s15(3) of EEA which does not allow for the implementation of quotas in any remedial system.

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 s15(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 (s15(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 *The South African Restructuring and Insolvency Practitioners Association v The Minister of Justice and Constitutional Development and Others* 2015 WCC (Case no. 4314/2014).

[42] Mr Bonani, the Director for Equity and Gender in the DCS, testified about the approach to deviations from the plan. He confirmed in his evidence, “a deviation takes place where scarce skills from the underrepresented group are not available. Non-discriminatory operational requirements/critical positions” that are central to the core business may then be considered by the National Commissioner.

[43] When asked what he meant by “operational requirements on a non-discriminatory basis” he testified as follows:

‘Operational requirements include positions that are required by areas that have challenges, hotspot areas. They are management areas that were referred to as hotspot areas. For an example three years back Pollsmoor was one of the hotspots. So when we have such management areas and there are applications to fill positions, when it comes to those we are not really strict when it comes to equity. If the regional commissioner says in this region this management area is a hotspot for me and I believe that I have a candidate that can do the job for me, and that candidate may not necessarily be in line with the EE Plan, I therefore request that commissioner IDV it based on operational requirement. That’s what we’re talking about and we are saying we don’t want those to be discriminatory. We look at issues where heads of – or area commissioners would ordinarily say I want to

appoint a head of the centre and I don't want a female, without really having tangible reason why he can't or she cannot appoint a female to head correctional centre. So that's why we are saying they should not be discriminatory.'

- [44] There was supporting evidence that the third respondent had, *inter alia*, approved of 13 deviations in the Western Cape during the period 2010 to 2013. Further evidence of this was recorded in paragraph 27 of the respondents' statement of defence of 9 June 2012.
- [45] These figures, uncontested as they were, tend to indicate that there was not an absolute bar to promotion or appointment and that there had not been an inflexible adherence by the DCS and, in particular, third respondent to the plan. Mr Brassey, however, submitted that in order for a deviation to pass legal muster, regard had to be given to the individual applicant and, in particular, the effect on his or her self-worth, dignity and other individual characteristics that may well be relevant in the assessment of that applicant's case for appointment or promotion.
- [46] The problem confronting the court is that the appellants did not base their case specifically on the decision to refuse deviation in individual cases but focussed rather on the plan itself, which it is alleged acted in a discriminatory fashion towards the individual appellants. It is thus difficult to know precisely what considerations may or were taken into account by third respondent in refusing to deviate in these cases.
- [47] The following exchange did take place between Mr Magagula the Regional Head: Corporate Services Western Cape and Mr Brassey:

'Now my understanding of what you are saying is that the decision as, the decision of the commissioner is by reference to the needs of the Department? --- It is correct. Yes.

In other words, what is termed here operational requirements of the Department? Is that right? ---That is correct.

It is not by reference to the excellence or otherwise of the individual candidate or matters of compassion in relation to the individual candidate or the like? It is nothing to do with that? --- Obvious that will also play a role for us to can submit a request to the national Commissioner.'

- [48] Mr Brassey's insistence that a deviation, which would render a plan legal, must be based on the assessment of the individual condition of an applicant raises a central question in this case: that is the relationship between individual and collective interests. Expressed differently, if substantive equality is to be achieved, what balance must be struck between an individual claiming a post as opposed to the need to recognise the group as the central concept with which Apartheid worked to undermine the dignity of millions of South Africans which remains central to the journey to be taken to move society away from this sorry past.
- [49] Much of this problem thus turns on the scope and meaning of substantive equality which is to be employed in South African constitutional jurisprudence. From early in its history, the Constitutional Court considered dignity to be "a loadstar of equality". See LWH Ackerman *Human Dignity. Loadstar for Equality in South Africa* (Juta, 2012); see also *Harksen v Lane*¹⁸. But in *van Heerden*, the court began to develop a concept of equality which was not merely an extension of dignity, but particularly its emphasis on the individual rather than that it should be understood separately. In *van Heerden*¹⁹, Moseneke J began the jurisprudential development of ensuring that substantive equality was a self-standing right to be determined within its own parameters and not as derivative from an individualistic concept of dignity, which characterised early Constitutional Court jurisprudence. See for example, *President of Republic of South Africa v Hugo*²⁰. In particular, Moseneke J said the following:

'This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persists. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of

¹⁸ 1998 (1) SA 1300 (CC) at para53

¹⁹ At paragraphs 26 and 27

²⁰ 1997 (4)SA 1 (CC)

disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation sensitive approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.'²¹

A thoughtful attempt to give dignity a less individualistic concept and hence its potential contribution to the development of a coherent meaning of equality is well set out in an article by Henk Botha "*Equality Plurality and Structural Power*"²².

- [50] Within the context of the EEA, it is clear from a reading of s2 that the achievement of equality is sought through the redress of structural disadvantage, which in turn, will create a more just and egalitarian social and economic order. Individual self-worth and thus the dignity of all who live in this country can only be attained by removing the hierarchy of privilege and power which was sourced in a racist and sexist system. This is manifestly the goal which s2(b) of the EEA seeks to achieve.
- [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 s9(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 desire outcome". In terms of the plan, there is a provision for deviations, which can be implemented in the event that a rigid

²¹ *Van Heerden* at para 27.

²² 2009 (25) SAJHR 1

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, supra* held that the measure must promote “the achievement of equality”²³. Hence, the test is concerned to ensure that the plan 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”.²⁴ 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 a most difficult part of the enquiry.

- [52] It is clear from the testimony of Mr Magabula 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 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 s9(2). Inevitably, on the reading we have given to s9(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 possess 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

²³ *Van Heerden at para 37*

²⁴ *Van Heerden at para 44.*

which will become apparent presently, a consideration of regional demographics in terms of s42 of the EEA may well come to the aid of categories of applicants who otherwise were unduly burdened by the implementation of the plan. Sachs J in *Van Heerden*; stated as follows:

‘Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged. That is what promoting equality (s 9(2)) and fairness (s 9(3)) require.’²⁵

- [53] In summary, in working with the approach as laid out in *van Heerden*, as well as the implicit content given thereto and portions of the *Barnard* judgment to which we have made reference, we are of the view that the DCS plan as presently constituted passes the test required in terms of the EEA reading it together with the Constitution.

The category of ‘designated groups’

- [54] Apart from the question of regional demographics, Mr Brassey also raised the point that the effect of the implementation of the plan by DCS was “particularly perverse” because a barrier was created which resulted in persons from designated groups (all the individual appellants save for second appellant) suffering discrimination. This argument raises great difficulties in that choices which are made may well affect certain categories of designated persons adversely. Take the case of White women who form part of the designated group. It may well be that a policy which is determined to address racial inequality will consider that Black persons within a designated group should have a greater claim to appointment than White women. Absent any other material evidence, it would be difficult to argue that this is impermissible. See *Motala and Another v the University of Natal*²⁶ where the Court was required to consider the competing claims of Indian and African pupils.

²⁵ *Van Heerden*; at para 152

²⁶ 1995 (3)BCLR 374 (D)

[55] Some assistance in this painfully difficult task can be derived from the Supreme Court of Canada in *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*²⁷ (“*Alberta*”) where the Court considered s15(2) of the Canadian Charter of Rights and Freedoms which permits inequalities which are associated with ameliorating programs aimed at helping the disadvantaged group. The relevant passages from McLachlin CJ’s judgment reads as follows:

‘If these conditions are met, s 15(2) protects all distinctions drawn on enumerated or analogous grounds that “serve and are necessary to” the ameliorative purpose: *Kapp*, at para. 52. In this phrase, “necessary” should not be understood as requiring proof that the exclusion is essential to realising the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s 15 goal of substantive equality. A purposive approach to s 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s 15’s purpose of promoting substantive equality.

The fundamental question is that: up to what point does s 15(2) protect against a claim of discrimination? The tentative answer suggested by *Kapp*, as discussed above, is that the distinction must serve or advance the ameliorative goal. This will not be the case, for instance, if the state irrational means to pursue its ameliorative goal. This criterion may be refined and developed as different cases emerge. But for our purposes, it suffices.

If s 15(2) does not protect the impugned distinction, the analysis returns to s 15(1) to determine whether the distinction constitutes substantive discrimination by perpetuating disadvantage or prejudice or by inappropriately stereotyping the excluded group.

If substantive discrimination is established under s 15(1), the final question is whether the government has shown it to be justified under s 1 of the *Charter*.

²⁷ [2011] 2 SCR 670

Section 15(2), understood in this way, permits governments to assist one group without being paralyzed by the necessity to assist all, and to tailor programs in a way that will enhance the benefits they confer while ensuring that the protection that s 15(2) provides against the charge of discrimination is not abused for purposes unrelated to an ameliorative program's object and the goal of substantive equality.'

Cross-Appeal

- [56] In redressing the agony of our dreadful history, it is apparent that difficult choices have to be made. In this, the *Alberta* decision is helpful. But whatever respect must be accorded to the decision-maker in the evaluation of a plan designed to effect restitution, a balance must be struck so as to promote the dignity of all. This conclusion then leads to the question of the cross-appeal and the importance of the regional demographic. The cross-appeal turned on the decision of Rabkin-Naicker J that the recruitment process as derived from the DCS plan had taken no cognisance whatsoever of the regional demographics of the Western Cape. This omission amounted to discrimination which was not protected by s6(2) of the EEA. The respondents, and particularly Mr Ngalwana, who appeared with Ms Karachi on behalf of the *amicus*, submitted that the relevant provision, s42 of the EEA had been amended pursuant to the Employment Equity Amendment Act 47 of 2013. Prior to this amendment, the Act, to the extent that it is relevant, provided that 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 take into account (the) demographic profile of the national and regional economically active population (s 42 (a) (i)).
- [57] The 2013 Amendment Act replaced the "must" with a "may". Accordingly, it was argued by Mr Ngalwana that s42 no longer renders a consideration of regional demographic peremptory for testing compliance with the EEA.
- [58] There are at least two responses to this submission which we consider to be relevant. In the first place, the Amendment Act only came into force in August 2014 long after the plan was implemented, the matter was heard before the court *a quo*

or judgment was delivered on 18 October 2013. Hence at the time the plan was implemented, respondents had an obligation to take account of regional demographics. Secondly, even though the word “must” has been replaced by “may”, there will be factual contexts in which it is difficult to envisage how a plan could pass legal muster without a consideration of regional demographics. Within the Western Cape, where some 50% of the economically active population come from the “Coloured” group, an application of the present plan would result in significant discrimination in that the plan only envisages that 8.8% of the workforce should come from the Coloured population. Similarly, in a province where more than 79.3% of the population are African, this could result in a similar significant reduction in African employees in the province, which plan would again manifestly work to their disadvantage and constitute a clear infringement on dignity to those who were the very target of Apartheid’s racist policies.

- [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 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 effect 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.

Remedy

- [60] In her judgment, Rabkin-Naicker J referred to s50(2) of the EEA which provides thus:

‘(2) 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

- (a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;
- (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future of other employees.’

[61] She then held that “the most appropriate relief for the court to order in these circumstances is one that will benefit all employees of DCS in the Western Cape who are Black employees of the DCS and members of the Coloured community in the future.”

[62] Mr Brassey submitted that this approach was unacceptable in that persons whose rights had been violated were entitled to an effective remedy. He submitted further that the individual appellants had suffered unfair discrimination and that such discrimination provided the basis for their non-appointment. The court was in a position to order employment of the individual appellants concerned or, at the very least, to grant compensation in recognition of the adverse effect of the unfair discrimination committed by respondents. Such a remedy would be consistent with s50(2) of the EEA. Mr Brassey further submitted that the court *a quo* did not explain how it could be appropriate, just and equitable to ignore the plight of these individuals nor was any justification advanced for refusing to grant relief pursuant to a finding of discrimination.

[63] The finding of this Court is that the plan fails because respondents in the formulation of the plan did not take regional demographics into account in the consideration of who falls within a designated group and thus who should benefit from a restitutionary plan. On this finding there does not appear to be a basis by which second appellant’s case can be upheld, he being a White man, in

circumstances where his appointment was declined because it resulted in a deviation of the DCS. It was certainly not shown that a consideration of regional demographics would have affected second appellant. Accordingly, there is no case made out as to why he should obtain a remedy. Fourth appellant was not recommended by the interviewing panel for the post. His case therefore, is distinct from those of the remaining appellants. Fifth appellant was appointed to the post of Director Area Coordinator: Corrections, Pollsmoor Management Area from 1 July 2012 and therefore falls outside of the need for an individual remedy.

[64] The balance of the appellants however were recommended for appointment. The question arises as to the counterfactual: had regional demographics been a mandatory factor to be taken into account by third respondent at the time, would these appellants have been appointed or promoted?

[65] In seeking to answer this question, it is important again to have recourse to the case pleaded by appellants. Admittedly, appellants in their statement of case state:

‘The third respondent’s decision to refuse, whether pursuant to an application for deviation or otherwise, to promote the individual respondents to the aforesaid positions of posts is unreasonable, irrational unlawful within the contemplation of paras (e) (iii), (f) (ii) (h) and/or (i) of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’).’

[66] But it is in the foundation for their claim that the real case as pleaded is to be found. Appellants state in amplification of their legal submission:

‘The DCS EE Plan engages upon social engineering based on naked race and gender profiling, differentiates between members of the designated groups purely on the basis of their race, and sets targets that, properly analysed, constitute nothing but a compendium of absolute quotas. So much is clear from the fact that the DCS EE Plan states as its objective representation of races based on the national demographic and that fact that it employs a system of allocation of positions on the basis of racial profiling.’

Later in their statement of claim they aver:

‘When examined for coherence upon its own terms (i.e that absolute targets based on demographics are legitimate), the DCS EE Plan is hopelessly crude and arbitrary. No account is taken of regional differences in racial demographics so that, for example, the representation of coloured people is made to depend on national demographics despite the preponderance of such persons in the Western Cape. In the same vein, no account is taken of the incidence of economically active people in the country.

In the circumstances, the manner of implementation of the affirmative action measures in question conforms neither to the letter and the spirit of the EEA nor to s 195(1)(i) of (10) the Constitution. It places absolute barriers for appointment to all non-designated employees; it effectively establishes a quota system; the targets which it has set for itself do not comply with the statutory and constitutional obligation of achieving a workforce broadly representative, and/or the relevant respondents clearly fail to consider any of the factors which needs to be taken into consideration in terms of section 42 of the EEA.’

[67] In his opening address to the court *a quo*, Mr Brassey set out his case very clearly. He argued that the plan’s:

‘[p]rincipal concern is with producing a profile of the Department that accurately reflects the National racial distribution and National gender distribution of the population and we say that if there is one thing that is outlawed by the Constitution and if there is one thing that is not sanctioned by the Employment Equity Act it is race norming of this nature.

The second point that we will say about the plan is that it set absolute thresholds that must be surmounted and fails to mandate a sensitive, nuanced and thoughtful approach to who should and shouldn’t be appointed when matters of race and gender are given due weight in the process of appointment. ‘

[68] Turning to regional demographics, Mr Brassey informed the court *a quo*:

‘So the regions proceed, not unsurprisingly, but completely illogically on the supposition that every region is homogenous so far as demographic representation is concerned. Every region comprises the same demography and the consequence is that a region such as the Western Cape which comprises a preponderance of Coloured people is prejudiced though the target remained 8.8 percent. Now that is not a matter of Departmental bungling, it is a product as Your Ladyship will discover when we place the evidence before her of a determination of the part of the Department to assert that the National demographics shall be applied Regionally for were it not so, so there is one celebrated passage still to be celebrated in the papers. Were it not so then the Regional distributions of Coloured people for instance in the Western Cape, Asian and Indian people in Natal and so on which are said to be the consequence of apartheid policy would simply be perpetuated in future.’

- [69] Absent from any of these submissions, the evidence led or the cross-examination is any guidance to whether recourse to regional demographics in the Western Cape would have resulted in the individual applicants being appointed or promoted. Unless the regional demographics must be utilised in the form of a quota, it is impossible, on the available evidence, to make such a determination. The attack on the deviation programme was based solely on this submission articulated by Mr Brassey in his opening address:

‘The deviations have been treated in the same inflexible and insensitive manner as the plan proceeds that unless there is a compelling reasons why special skills should be solicited and obtained, no deviation should be granted.’

- [70] As indicated, we do not consider that a deviation plan that focusses 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.
- [71] In summary, given the paucity of evidence and the time that has lapsed between the central facts that gave rise to this dispute and this appeal, together with the fact that the appellants did not focus their attention on the deviation decision in sufficient

detail, this Court cannot grant a remedy of promotion. For similar reasons compensation for non-promotion is inappropriate. The issue of damages was neither canvassed nor pleaded. In light of the lack of certainty as to what outcome would have resulted had regional demographics been taken into account, it would be inappropriate to award damages.

[72] We have carefully considered whether further guidance should be given to respondents in the formulation of a plan that takes regional demographics into account. However, we are hesitant to attempt a prescription. Manifestly, recourse to the particular demography of a region should not result in the implementation of a quota. The animating idea behind these considerations should not be to freeze a pattern of regional demography, which is invariably a product of the vicissitudes of generation of racist rule. Hence, in the construction of a non-racial and non-sexist nation, the relationship between regional and national demographics requires nuance and flexibility. It is best left to the respondents to develop an appropriate plan as opposed to a judicial attempt at legislation.

[73] For these reasons, therefore, the following order is made:

1. The appeal is dismissed.
2. The cross-appeal is dismissed.
3. There is no order as to costs.

Waglay JP

Davis JA

Mngqibisa-Thusi AJA concurred with the judgment.

APPEARANCES:

FOR THE APPELLANTS: Adv.MSM Brassey SC with MJ Engelbrecht instructed by Serfontein Viljoen & Swart Attorneys

FOR THE RESPONDENTS: MTK Moerane SC; DB Ntsebeza SC; BM Legoge and N Mbelle instructed by the State Attorney

FOR THE AMICUS CURIAE: V Ngalwana SC with F Karachi instructed by Marais Muller Yekiso Inc.