



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 566/2011

In the matter between:

JENNILA NAIDOO

Applicant

and

THE MINISTER OF SAFETY AND SECURITY

First Respondent

THE NATIONAL COMMISSIONER OF THE

SOUTH AFRICAN POLICE SERVICE

Second Respondent

Heard: 20 December 2012

Delivered: 15 February 2013

Summary: appointment process and procedure and affirmative action measures

JUDGMENT

SHAIK, AJ

- [1] This dispute concerns an appointment made in the South African Police service for the post Cluster Commander Krugersdorp. The Applicant alleges that she suffered unfair discrimination on the ground of her race and gender.

Background

- [2] The South African Police Service ("SAPS"), on or about the 14 April 2009, declared and advertised vacancies for several positions at national and provincial levels. Amongst the posts advertised, 5 positions were for Cluster Commander in the Gauteng region.
- [3] The Applicant submitted an application for post number 09/04/2011, which was the position of 'Cluster Commander: Krugersdorp'. She was subsequently shortlisted for the position.
- [4] During June 2009, a selection panel evaluated the Applicant for the position during a two-day assessment centre that was conducted in accordance with the prescripts of the National Instruction 3/2000. The Applicant was allocated scores for written appreciation, a drafting test and role-play. The total mark allocated to the Applicant was 74, 2% and she was placed second in the field of candidates that applied for the post.
- [5] On 22 June 2009, the provincial selection panel recommended the appointment (or rather promotion) of the Applicant as the candidate with the second highest score and because her appointment would address gender equity. The candidate with the highest score was recommended to another cluster commander position. In the event that she could not take up the position, T S Maswanganyi was recommended as the second preferred candidate and A du Bruin as the third candidate. The total mark allocated to T S Maswanganyi was 71, 1% and he was placed fourth amongst the candidates that applied.
- [6] On 24 July 2009, the national panel did not approve the appointment of the Applicant on the basis that it would not enhance employment equity and would not be consistent with service delivery objectives. The candidate ranked second in the order of preference, T S Maswanganyi, was appointed

to the post of 'Cluster commander: Krugersdorp' with effect from 1 August 2009.

- [7] Subsequently, the Applicant lodged an internal grievance and as the matter remained unresolved, a dispute was referred first to the bargaining council and then to the Commission for Conciliation, Mediation and Arbitration that issued a certificate that the matter be referred to the Labour Court for adjudication.
- [8] The Applicant alleges that she suffered unfair discrimination in that the Equity Plan constitutes an absolute barrier to her appointment and that the manner in which the Equity Plan is implemented and targets applied are inconsistent and arbitrary and therefore unfair.
- [9] The Respondent denies the appointment made was only on the basis of numeric targets set out in the Equity Plan and argues that there was more to it. Even so, it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Equity Act or to prefer any person on the basis of an inherent requirement of a job.

Summary of evidence

The following facts are common cause:

- [10] Appointments to post 13-15 are regulated by the National Instruction 3/2000. This instruction provides, *inter alia*, for applications, requirements for appointments, composition of selection panel, selection process, evaluation of applications, the conduct of assessments, recommendations by a selection panel, the consideration of recommendations made and contracts of employment.
- [11] The relevant provisions of the National Instruction referred to are the following:
 - (a) Section 10.1: candidates must be assessed in a process involving an assessment centre and candidates are to be treated in an objective, fair and unbiased manner;

- (b) Section 10.5: The assessment centre performance of a candidate must be reflected in the rating of the candidate in accordance with the rating system determined by the national Commissioner;
- (c) Section 10.8: negative information regarding a particular candidate may not be taken into account if the information has not been put to the candidate during the assessment and he or she was not afforded the opportunity respond to such information.
- (d) Section 11.3: a candidate who obtains the highest score is not entitled to be appointed to the advertised post;
- (e) Section 11.7: if the national commissioner does not approve the appointment of the recommended candidate he or she may consult with the relevant provincial commissioner or the selection panel if he or she deems it necessary and either appoint another candidate of his or her choice from the recommended list submitted by the selection panel or direct that the post be re-advertised;
- (f) Section 11.9: the reasons for any decision taken by the national commissioner must be recorded.

[12] The SAPS is a designated employer and in terms of Section 23 of the Employment Equity Act, 55 of 1998. A designated employer is required by law to have an Equity Plan in place. At times relevant, an Equity Plan was prepared and adopted by the employer for the period 1 January 2007 to 31 December 2010.

[13] This Plan sets out its purpose, namely:

'The South African Police Service has developed this subsequent Employment Equity Plan that will span from 1 January 2007 to 31 December 2010 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.'

[14] To advance these purposes, and in particular, the purpose of achieving "a diverse workforce broadly representative of the South African community" the Plan sets out numeric targets. The targets are formulated on the basis of the 2001 Census Report and in that report it is said the national population is composed of "79% Africans, 9.6% White, 8.9% Coloured and 2.5% Indians". The numeric targets are so formulated in accordance with this ratio.

[15] The Census Report is used only for the formulation of targets on the basis of race. It is not used for the formulation of targets on the basis of gender. For whatever reason, and none was advanced, in the equity plan, the gender target was Male 70% Women 30%.

[16] The 30% target for women is expressed as follows:

'30% of all posts will be allocated to women as a designated group in their race groups." Thus, and to illustrate the application of targets, say 10 posts are vacant it will be filled accordingly, for the African group in mind:

79% of 10 results in 8 posts available for Africans and of that 8 posts 30% are to be filled by African women, for convenience, it is said 2 positions of the 8 posts available will be filled by African women.'

[17] The Census Report of 2001 held that women constituted 51% of the population. No reason was proffered as to why only 30% was formulated as a target for the employment of women in SAPS.

- [18] The employment of women in the public service was a concern raised by the then Minister for Public Service and Administration: Mz GJ Fraser-Moleketi with the then Minister of Safety and Security Mr. C Nqakula. On the 31 March 2006, Minister Fraser-Moleketi wrote to Minister Nqakula and advised him amongst other things that:

'In reflecting on the success achieved to date in increasing the overall rate of employment of women in the Senior Management Service (SMS), we would need to make progressive decisions to work towards equality. Strategically aligning with the African Union and our international commitments, Cabinet approved a 50% equity target for women at all levels of the sms by March 2009.' [Her emphasis]

- [19] This concern and the decision of Cabinet were communicated to SAPS and its management and influenced the decision making in promotions and appointments. On the 28 April 2009, Divisional Commissioner MA Nchwe addressed a letter to all Divisional Commissioners, Provincial Commissioners, Component Heads, Chairpersons: National Executive Council of the Women's Network, and Women's Network Champions wherein he stated:

'Subsequent to the concerns raised by the DPSA and Presidency in terms of reaching the 50/50 allocation for women representation on the SMS level by March 2009, it is imperative that SAPS utilize and seize the opportunity to fill most of the posts advertised in the current round of appointments with women to adhere to the ratio approved by the Cabinet.'

- [20] And again, it also finds expression in an instruction issued by the Divisional Commissioner J K Phahlane on the 20 October 2009 to all Deputy National Commissioners, Divisional Commissioners, Heads of Departments and Section Heads in the following terms:

'POST PROMOTIONS: PHASE 1-2009/10: LEVEL 8 AND BAND C AND HIGHER LEVELS

Your recommendations for promotions to level 8 and band C and higher levels for the phase 1-2009/10 promotion process refers:

2. Divisional/ Provincial Commissioners and Component Heads are hereby directed to review their promotion to level 8/band C and higher levels recommendations for the phase 1-2009/10 to realize the 50/50 male/female gender distribution as directed by the National Commissioner in line with government policy.
3. Divisional/Provincial evaluation committees must be reconvened to revisit the recommendations for promotions for level 8/Band C and higher levels to achieve the 50% female representivity per level, without compromising /condonation of the requirements.
4. Your revised recommendations (reflecting at least 50% female representivity per level) must reach this office not later than 28 October 2009. In view of the fact that the phase 1 promotion process needs be finalized, no extension will be granted.
5. No deviation from this instruction will be entertained.'

[21] On or about 22 June 2009, the Provincial Panel, made up of Provincial Commissioner P.Naidoo, Deputy Provincial Commissioner G H Bester and Deputy Provincial Commissioner R.N. Mdluli made the following recommendation:

'The panel recommends Director J Naidoo as the first candidate due to the fact that the candidate with the highest mark is already recommended for post2009. In the event that she cannot take up the post, Director TS Maswanganyi is recommended as the second candidate and Director A Du Bruin as the third candidate. The recommendation will address gender equity.'

[22] The recommendation of the provincial panel served before a national panel comprised of the Acting National Commissioner TC Williams, Deputy National Commissioner LCA Prius and Deputy National Commissioner HM Hlela and on the 24 July 2009, this panel made the following decision:

'Recommendation not approved in respect of Director J Naidoo. The appointment not enhancing employment equity. The panel's recommendation

not consistent with the service delivery objectives. The second candidate Director Maswanganyi's appointment to the post approved.'

It is this decision and the manner in which it is made that is the subject of the attack.

[23] To summarise: the management prerogative was circumscribed by firstly, the National Instruction 3/2000; secondly, the Employment Equity Plan for the period 1 January 2007 -31 December 2010; and thirdly, the Cabinet Decision on gender representivity which was adopted by SAPS and given effect thereto by way of instruction issued by Divisional Commissioner: Career Management MA Nchwe and Divisional Commissioner: Personnel Services J K Phalane.

[24] I turn to deal with the evidence received and the versions presented by the parties. For convenience, the summary of evidence set out below is culled from the heads of argument and accords with the testimony received.

The Applicant's Case

[25] The Applicant called General Bester to testify as a witness. General Bester was a member of the provincial panel that interviewed and assessed the Applicant and that made the recommendation that she be appointed to the position of Cluster Commander: Krugersdorp. General Bester was the Deputy Provincial Commissioner: Gauteng and the recruitment, selection and promotion of SMS members were part of her responsibilities.

Briefly, it was the testimony of General Bester that:

- (a) The National Instruction 3 of 2000 regulates the procedures to be followed for the appointment of individuals on salary level 13 – 15;
- (b) The selection panel would consider the inherent requirements and core functions of an advertised position, the ability and potential of the applicants to function in the position and the status of every applicant in terms of employment equity
- (c) Every candidate is assessed fairly and objectively and the panel is not supposed to put matters to candidates that are not related to the

inherent requirements of the post and any negative information regarding a candidate may not be taken into account if the information has not been put to the candidate during the process and he or she is granted an opportunity to respond to that;

- (d) Each candidate was assessed by an assessment centre and that entails a written appreciation, crisis management, role play and presentation. This is provided for in National Instruction 3 of 2005;
- (e) For the post of Cluster Commander: Krugersdorp the results produced at the Assessment Centre were the following:

MM MOTLHALA	77.2%	Male	1st
J NAIDOO	74.2%	Female	2nd
JT PHARASI	71.5%	Male	3rd
TS MASWANGANYI	71%	Male	4th
A DU BRUYN	65%	Male	5th
NP MASIYE	64.1%	Female	6th
D BAIJNATH	61.6%	Male	7th

- (f) The Applicant's overall score on all the assessment criteria was 74,4% and was the second highest of all the candidates and General Maswanganyi's score was 71,1% and he was placed 4th;
- (g) The same panel interviewed the positions for Cluster Commander: Johannesburg Central, Hillbrow, Krugersdorp, Orlando and Sebokeng and recommended two African females, two African males and one Indian female for appointment. The Indian female recommended was the Applicant.
- (h) The Applicant was recommended for appointment to the post of Cluster Commander: Krugersdorp because the candidate with the highest mark was already recommended for another position and the Applicant

had the second highest score and her appointment would have enhanced race and gender equity;

- (i) The Applicant had the ability, potential, qualifications and experience to function in the position of Cluster Commander and she was the best candidate to be recommended;
- (j) The Provincial Panel firstly considered the merit of the Applicant and her ability to function in the position and the second consideration was race and gender equity;
- (k) The provincial equity experts, the career management unit, provided the provincial panel with a document titled Gauteng Equity Allocations for Externally Advertised Posts Phase 1/2009/10 Salary Level 14 indicating that in Gauteng province and for the positions of Cluster Commanders the ideal allocation would be one African male, two African females, one Coloured female and one Indian female and this was considered by the panel. It is important to mention here that the Respondents challenge the correctness of the equity target set out in this document and as it will be mentioned elsewhere for convenience, this document will hereinafter be referred to as the Gauteng Equity Allocation. Also it needs be mentioned that General Bester admitted under cross-examination that the provincial panel is not at liberty to make recommendations contrary to a determination by the head office on how the equity allocations were to be implemented. The provincial authorities have no discretion to apply such directives in a manner other than as determined by the national office.
- (l) In the view of General Bester, gender equity was an important consideration, especially in view of the document received from the national office dated 28 April 2009 stating that the 50/50 representation on SMS level should be achieved as the SAPS had only 21% females on SMS level and this applied to the positions of Cluster Commander as it was imperative for SAPS to reach the 50% female target.

- (m) Cabinet had approved a 50% equity target for women at all levels of the SMS by 31 March 2009 and the 50% target to appoint females on SMS level had been considered by the Provincial Panel and it was one of the reasons for recommending the Applicant;
- (n) The National Panel did not approve the recommendations of the Provincial Panel in respect of the Applicant as her appointment would not enhance employment equity and would not be consistent with service delivery objectives and the second recommended candidate, Maswanganyi, was appointed;
- (o) The National Panel approved and implemented the recommendations of the Provincial Panel in respect of the other four candidates, only the recommendation in respect of the Applicant was not approved;
- (p) The Provincial Panel recommended the appointment of two African females, two African males and one Indian female as no Coloured female applied;
- (q) In the approved structure, referred to as the RESOURCE Allocation Guide (RAG) the current distribution and the ideal representation for Indian females all reflected zero Indian females to be appointed. This, she said, was not a fair reflection of what was needed in the Gauteng province;
- (r) The Applicant was an ideal candidate because there were no Indian females on level 14 in Gauteng, the Applicant had the required experience and background and they had to achieve a 50% female target on SMS level and her appointment would have contributed to achieving the target;
- (s) General Bester received a phone call from General Phahlane and he asked her why the Provincial Panel recommended the appointment of Ndaba (African female), de Lange (African female) and the Applicant. In respect of the Applicant she explained to him that the Applicant was qualified for the position and that she also addressed gender equity

whereupon General Phahlane responded that the Applicant is a support person as opposed to an operation focussed person. She did not agree with that and referred him to the Applicant's CV and to the Provincial Commissioner. There is a dispute about all that which was discussed in the telephonic discussion but it is of no consequence.

- [26] The Applicant testified and it was her case that she joined the SAPS in 1989 as a student constable and she underwent training and was transferred to various units until she was promoted to her current rank in 2001 when she was appointed as Deputy Area Commissioner, specifically responsible for operations and exercised command and control over seven police stations. Her current post is that of Provincial Head of visible policing and she is responsible for visible policing at 141 police stations within the Gauteng province. The Applicant provided an overview of her experience and knowledge, which included both operational and support functions.
- [27] The Applicant applied for the contested position because she had 24 years of experience with the SAPS; she has functioned at all levels of policing – station level, provincial level and cluster level; and, most importantly, she held the position of Deputy Area Commissioner for five years and the functions listed as the core functions for the contested position are the precise functions she carried out as a Deputy Area Commissioner. She had the necessary experience in all the core functions and was competent to perform those.
- [28] She testified that she had the experience in functional and support environments and had delivered on all these core functions associated with the contested position and did not agree that her appointment would not have enhanced service delivery. She also did not agree that Maswanganyi had more experience.
- [29] She was never granted an opportunity to respond to the notion that her appointment would not enhance service delivery objectives. The Applicant was one of the first people appointed to a position similar to that of cluster commander and she had seven police stations reporting to her. She denied

that she would have needed tutoring and would not have been able to make an immediate contribution.

- [30] Her appointment would have enhanced equity as she is part of a designated group and at the time the contested position was filled. There was a drive to appoint females and there was not a single Indian female General in the whole country, let alone Gauteng;
- [31] The Section 21 report for Gauteng for the period March – June 2009, the period within which the contested position was advertised and interviewed, showed a zero allocation for Indian females on level 14 but showed an overall shortage of 52 Indian females and a shortage of 17% and this indicated that there was room for Indian females to be appointed in Gauteng;
- [32] The allocation for Indian females on the approved structure (RAG) indicated a zero provision for Indian females, the current distribution was zero and the ideal distribution was zero, meaning that a zero was ideal and that made it impossible for her to progress to level 14 and beyond;
- [33] Two Indian females were appointed on level 14 subsequently and almost one year later. The Applicant testified that she could not understand how Indian females could not have been appointed when the Employment Equity Plan made zero provision for Indian females on level 14; the conclusion the Applicant drew was that there was a deviation from the Equity Plan and if that was possible and she could have been appointed as well.
- [34] The Applicant testified that this has affected her very negatively as she sacrificed 24 years of her life and family for the SAPS and she has risked her life for the SAPS.

Respondent's Case

- [35] Broadly, the Respondents' case was that it did not discriminate against the Applicant on the basis of her gender or race and deny that their conduct constituted unfair discrimination. The National Commissioner appointed Maswanganyi to the contested position, despite the recommendation of the

Provincial Panel that the Applicant be appointed and in doing so, he considered the fact that Africans were under represented and Indian females had an ideal representation. The ideal being zero or stated differently the ideal and the target provided that no Indian females may be appointed.

- [36] Maswanganyi's appointment would have addressed the issue of the under representation of Africans. Maswanganyi had superior operational experience compared to the Applicant and he would make a better and more meaningful and immediate contribution to service delivery, whereas the Applicant would have needed tutoring.
- [37] The Respondent firstly called Colonel Ramathoka to testify. He explained that at the time the contested position was considered, the allocation for Indians was 2,5% of the total number of posts that were available in terms of race and 70% of the 2,5% will be allocated to Indian males and 30% of the 2,5% to Indian females. This allocation is determined by having regard to the national demographic representation of Indians in the general population as determined by the census report.
- [38] Colonel Ramathoka testified that to diversify the workforce on specific salary level, positions will firstly be allocated in terms of race and thereafter in terms of gender. The 30% (and later 50% allocation) for women is allocated within their specific race groups. In other words, the order of preference and priority as set out in the Equity Plan for the purposes of affirmative action was race and thereafter gender.
- [39] It was put to Colonel Ramathoka that equity, applied to both race and gender, and in respect of gender its importance was underscored by the Cabinet decision to pursue a target of 50/50 employment. To this he replied that '[i]t is crucial.' However, to explain the variance between the Cabinet decision and the SAPS Equity Plan, he testified that the police implemented a 70/30 ratio being quite aware of the Cabinet instruction and irrespective of it.
- [40] And again if the national demographics were used as a criterion for employment, that criterion did not apply for the appointment of women. For women, the equity target provided for in the Equity Plan was 30% even

though women represent more than 50% of the general population. He testified that '[a]ll circulars or letters written within the organisation has to be read with the available policies and precepts. So based on that, I still stick to what I said earlier on to say 70/30 ratio was applicable up until it was changed in a subsequent Employment Equity Plan. And that was the decision taken by the Executing Authority.'

- [41] He conceded that the Gauteng Equity Allocations is a document produced by SAPS produced in the provincial office. Nevertheless, he testified that the allocation of one (1) Indian Female, as a target for employment equity appointment, is wrong. It ought to have been zero. To explain away the Gauteng Equity Allocations he had this to say: '[i]t seems to me as the equity expert from head office I still have a lot of work to do in the Gauteng Province because the calculation and the way they do things is totally not in line with the Employment Equity Plan as well as the instructions from head office.'
- [42] In respect of Gauteng Province, there were 19 positions on level 14 allocated. By the time the five positions of Cluster Commander were advertised, the remaining 14 positions were filled by seven African males, one Indian male, one Coloured male, two White males, one African female, zero Indian females, zero Coloured females and two White females;
- [43] The calculation used to determine the race and gender allocation was explained as follows: 19 positions on level 14 are multiplied by the national demographic figure for a specific race group eg 19 positions x 79% Africans = 15 of the 19 posts must be filled by Africans, then 15 x 70% = 11 positions to be filled by African males minus the current status of seven meaning there is a shortage of four African males.
- [44] For Indian females the calculation is $19 \times 2,5\% = 0,5$ positions to be filled by Indians, then $0,5 \times 30\% = 0,1$ Indian females and that is rounded off to zero. Of the five available positions 0,125 could go to Indians x 30% gender allocation means 0.037 could be allocated to Indian females and that is rounded to zero.

- [45] Indian females on level 14 were ideal because there was none and the ideal was zero. There was one Indian male on level 14 but there ought to be none, whether male or female as the ideal for Gauteng was zero and no Indian could be appointed.
- [46] He could not respond to the proposition that equity and representivity on all occupational levels and categories could not be achieved if the goal for Indian females is zero. He merely reverted to the demographics and the calculations he did on that and persisted that '... the ideal was zero and it was just like that.'
- [47] The witness was also unable to respond to the proposition that the way representivity for Indian females are calculated will always be a percentage too low as they are such a minority group and it will never be enough to justify the appointment of one person. An Indian female could not have been promoted to level 14 as that would have created an over representation, despite the fact that the targets for females in general were not met.
- [48] The entire SAPS workforce increased from 2006 to 2009 with 29 189 positions and during the same period the Indian females increased with 39 individuals, that is 0,133%. Seemingly, the trend revealed that Indian females were not being appointed. The exchange between Counsel for Applicant and Colonel Ramathoka is instructive:

MS PRINSLOO: What is so wrong in recommending an Indian female when the 70/30 gender equity had not been reached?

COLONEL RAMATHOKA: There was not any provision made for the appointment of Indian females according to the Employment Equity Plan of SAPS. The ideal is zero.

MS PRINSLOO: But you are blocking Indian females from promotion completely?

COLONEL RAMATHOKA: We do not block Indian females, to any promotion, but we have to adhere to our own policies and precepts as the organisation, in this regard being the Employment Equity Plan.

He explained that to the extent there was an under representation in terms of gender, one had to address (also) the under representation of African females and Coloured females and I got the impression he implied in that order of preference, regard being had to the national demographic of the country.

- [49] Colonel Ramathoka testified the Resource Allocation Guide that featured at page 123 of the trial bundle summarises the correct application of the distribution of posts in the Province of Gauteng at salary level 14. This document shows that no allocation was made for Indians (male or female) and that the status of Indian females, for purposes of the application of the approved equity plan at the time, was “ideal”. In his view, as the employment equity expert, General Bester and the Provincial Panel was wrong to rely on the document referred to as the Gauteng Equity Allocations where it is recorded that there was provision for one post to be allocated to Indian females.
- [50] The Colonel testified that during 2010 two Indian females were indeed appointed, one at Legal Services and one in Kwa-Zulu Natal, as the implementation plans for those divisions made provision for the appointment of Indian females. In making these appointments, there is no deviation from the national plan. The witness was, however, unable to show in the National Employment Equity Plan where provision is made for the appointment of two Indian females. It remains an assertion made in the absence of any evidence that the implementation plan and section 21 reports for the two divisions that appointed Indian females, provided for that.
- [51] The only way for the Applicant to be promoted is for her to apply for a position in a business unit where Indian females are underrepresented.
- [52] The second witness for the Respondents was General Phahlane. He testified that he wrote the comment that the Applicant’s appointment would not enhance equity and would not be consistent with the service delivery

objectives. This comment, he testified, was the culmination of the “deliberations and decisions” of the national panel. He did not serve on the national panel as a member or participate in the deliberations or decisions taken but merely acted as the recorder and or liaison.

[53] General Phahlane testified that the representations made by the Applicant in 2007 regarding her transfer to a post were considered in the deliberations of the national panel and taken into account in not making her appointment.

[54] Having regard to the scoring of Brigadier Maswanganyi, he felt there was unfairness and had this to say: ‘[t]he panel arrived at the conclusion that there was an injustice if you consider the allocation of scores on knowledge and ability, managerial ability, experience, relevant experience of these two candidates.’ He testified that General Bester opted to underscore Brigadier Maswanganyi and that was the reason for the scores attained by Brigadier Maswanganyi. It was a deliberate effort that he said that ‘to come to a predetermined conclusion’ and that ‘there is a specific panel member that was orchestrating this.’ He named General Bester as the culprit.

[55] With regard to the scoring of candidates by the provincial panel at the Assessment Centre, he testified that it was the views expressed by members of the national panel, there was a bias against Brigadier Maswanganyi that resulted in him being under scored. As a result of this belief, the scoring of the Assessment Centre was not accepted fully. He testified as follows:

[56] With regard to the reason for the appointment of Brigadier Maswanganyi he testified as follows:

‘In this particular case the national panel was convinced that someone is deliberately being overlooked, who (1) has got experience (2) has got potential to function, great potential and had a track record of performance in the post where he was coming from, and lastly the fact that his appointment would have enhanced the equity profile of the particular environment as it is evidenced in the 50/50 split which I testified here.’

[57] Lt-General Phahlane explained the decision-making process when the National Commissioner considered the recommendation concerning the

Applicant. It was his testimony that the National Panel was concerned that the recommendation of the Applicant by the provincial panel did not appear to reflect the preliminary view of the National Panel when that panel was deliberating on the recommendation in the light of information available to the National Panel about the two candidates. Lt-Gen Phahlane was tasked with making enquiries from the Provincial Commissioner, in order for the National Panel to better understand the reasoning and justification by the provincial panel.

- [58] Lt-Gen Phahlane made enquiries with General Bester, who was the Acting Provincial Commissioner at the time. The enquiry to General Bester was not limited to the Applicant. It also related to recommendations on two other clusters. General Bester was unable to give a proper motivation to Lt-Gen Phahlane regarding the recommendation of the Applicant. General Bester could only say that the provincial panel had recommended the Applicant.
- [59] Lt-Gen Phahlane testified that the National Panel held the view that T S Maswanganyi was “miles ahead” of the Applicant, when taking into account what the two candidates said about themselves in their respective CVs. This was also informed by the National Panel’s prior knowledge that the Applicant had refused to be moved to an operational environment; in circumstances where those members were also familiar with the work of T S Maswanganyi, including at the 10111 centre.
- [60] As General Bester failed to provide an explanation during her exchange with Lt-Gen Phahlane, the National Panel became fortified in its preliminary views and confirmed the appointment of T S Maswanganyi over the Applicant. The National Commissioner having formed the view that T S Maswanganyi had superior operational experience (based on what the panel members knew already from the past, together with information as stated in his CV).
- [61] The National Panel and the Commissioner disagreed with the provincial panel’s view that the recommendation would address gender equity. The National Panel had regard to the approved structure in terms of the RAG, the current distribution, and the under and over representation at salary level 14

in Gauteng. The Commissioner formed the view that the recommendation on gender equity was not sustainable when the indicated position for Indian female was shown as “ideal”; together with the fact that coloured females and African females were under-represented.

- [62] The Commissioner’s decision was based on the dictates of the equity plan and how it related to the approved RAG for salary level 14 in the Province of Gauteng at the time. That decision was informed by objective considerations regarding compliance with SAPS’ equity plan at the time.
- [63] Lt-General Phahlane told the Court that the decision by the National Commissioner was not based simply on implementing numerical targets agreed in the equity plan and in this regard he mentioned four considerations, namely (and in that order): the inherent requirements of the post; experience of the candidate in the environment; the impact on service delivery, and equity.

Submissions

- [64] The gravamen of the Applicant is that she suffered unfair discrimination on the basis of her gender and race. It was submitted on behalf of the Applicant:
- (a) The fact that the Applicant is an Indian female was an important and convincing consideration and it caused for her not to be promoted as her race and gender would not enhance employment equity.
 - (b) The discrimination was unfair in that it was but naked preference which imposed substantial and undue harm to the Applicant who is part of a vulnerable minority and as a member of the designated group and had to be protected and advanced.
 - (c) The Equity Plan and the manner in which targets are to be calculated by use of the national demographics as a criteria will always produce a zero target for Indian females and in the result an absolute barrier is created.

(d) Notwithstanding the Equity Plan, the appointment of the Applicant was a decision that was inconsistent, arbitrary and unfair.

[65] The argument advanced by the Respondent was that the appointment was based on four considerations, namely and in that order, inherent requirements of the post, experience of the candidate in the environment, the impact on service delivery and equity.

[66] In amplification, so the argument went, that in the exercise of discretion, the national panel reached a contrary conclusion to that of the provincial panel which conclusion was justified and justifiable. There was no improper exercise of discretion by the National Commissioner and in the absence of justification this court ought not to second guess the National Commissioner in the exercise of power vested in him.

[67] It is said that the considerations taken into account did not rest solely on the numeric targets. At any rate even if there was discrimination, such discrimination was not unfair as it formed part of an affirmative action measure as envisaged in terms of section 6 (2) of the Employment Equity Act. The targets were flexible and last only for the duration of the Plan. Even so, the numeric targets represent a rational programme aimed at achieving the required demographic representivity as set out in the equity plan.

Analysis

[68] In general, appointments and promotions fall within the management prerogative of the employer. That prerogative is however constrained by law.

[69] The Labour Relations Act No 66 of 1995 requires employers to treat employees fairly when they apply for promotions and in this regard section 186 (2) is relevant. The Employment Equity Act No 55 of 1998 prohibits unfair discrimination, inter alia, on the basis of race and or gender in terms of section 6.

[70] Whilst acknowledging the management prerogative this court would nevertheless interfere with a decision made by a functionary if it is proved that

the decision maker acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud or failed to apply his or her mind or unfairly discriminated. The Labour Relations Act No 66 of 1995 requires employers to treat employees fairly when they apply for promotions and in this regard section 186 (2) is relevant.

- [71] The Employment Equity Act No 55 of 1998 prohibits unfair discrimination, *inter alia*, on the basis of race and or gender in terms of section 6. However, an affirmative action measure, in terms of the Act, to the extent that it embodies a preference, whether on the ground of race or gender, is not unfair discrimination, if it is designed to promote substantive equality of a designated group.
- [72] The essence of affirmative action is to differentiate and to prefer a member of a designated group in order to promote and attain substantive equality. Its purpose is to redress the effects of past discrimination and end discrimination and by these means promote equality.
- [73] I turn to deal with the submission made by the Respondents and the procedure followed and reasons given for the non appointment.

Inherent requirements

- [74] The submission that the appointment was based on the inherent requirements of the post is founded on the evidence of Lt General Phalane but is not the reason why he recorded contemporaneously and the reason that the national panel members signed off on. The reason that the members of the national panel advanced is firstly, the appointment of the Applicant would not enhance employment equity and, secondly, such an appointment would not be consistent with “service delivery objectives.”
- [75] I am not inclined to accept this *post facto* explanation that there were inherent requirements that precluded the appointment of the Applicant. This assertion simply is put out without any explanation whatsoever. What were the inherent requirements that the Applicant did not meet? He does not say so; it is just a

phrase he used without explanation or content or context. The phrase used in this manner is meaningless.

- [76] It needs be borne in mind that Lt. General Phalane did not serve on the national panel; he was merely a recorder of its decisions. It is the decision of the National Commissioner that matters and the reasons that the National Commissioner puts forward to justify the decision made. Inherent requirements were not among the reasons set forth and recorded.
- [77] Even so, In *Whitehead v Woolworths (Pty) Ltd*,¹ Waglay J, as he then was, held that an inherent requirement implies an “indispensable attribute” of the job, which must “relate in an inescapable way to the performing of the job required”. An inherent requirement is one that if not met an applicant would simply not qualify for the post.
- [78] The provincial panel did not consider that there were any inherent requirements of the job that the Applicant did not satisfy. And, they would know if there was indeed any ‘inherent requirements’.
- [79] There is no basis having regard to the evidence on hand to conclude that there were any inherent requirements of the job that the Applicant could not meet.

Experience

- [80] Again, this is not a reason recorded for the non appointment. For the reasons mentioned above, I do not accept that “experience of the candidates in the environment” was a reason for the non-appointment. If indeed it was, the National Commissioner and the national panel members would have said so and it would have formed part of their comments made and or reasons for the decision taken.
- [81] At any rate the experience of the Applicant and Brigadier Maswanganyi (as he then was) was comparable. At the Assessment Centre, the Applicant scored

¹ (1999) 20 ILJ 2133 (LC) at para 36,

7.3 and Brigadier Maswanganyi scored 7.5 - the difference was not significant but it none the less favoured Brigadier Maswanganyi.

- [82] Another reason Lt. General Phalane advanced, contending that it was the view of the National Commissioner and the members of the national panel, that some years before, at a time when the Police Service was being restructured, the Applicant expressed a preference to perform in a service environment as opposed to an operating environment. Lt. General Phalane testified that the national panel members were aware of this preference and for that reason too she was not appointed as the post of cluster commander was an operating environment post.
- [83] But this is not borne out by the facts of the matter. At the time when the candidature of the Applicant for the post was considered, she was serving in an operational environment and had been doing so for a good many years. It is objectionable at any rate for this representation made in the context of restructuring, to be used as justification for a non appointment. As a reason, it sounds contrived. The national panel did not cite this as their reason for the non-appointment.
- [84] The scoring of the provincial panel on the say so of Lt General Phalane was not accepted by the national panel. Apparently, according to him, it revealed the bias of General Bester. Brigadier Maswanganyi should have received a higher score and the score he was awarded was the product of her manipulation.
- [85] There is no evidence and none that he refers me too that justifies the conclusion to be drawn that General Bester manipulated the scoring of candidates such that the Applicant was awarded a higher score. In fact, with regard to experience, Brigadier Maswanganyi received the higher score.
- [86] If the national panel rejected the scoring of the provincial panel, on account of bias, Lt. General Phalane did not raise this in his telephonic conversation with her. And neither was this allegation put to her in cross examination.

- [87] More importantly, in terms of the National Instruction, it is the Assessment Centre and the provincial panel that is charged with the duty to conduct assessments of candidates. If the national panel was of the view that the scoring was not a fair reflection of the candidates that it ought to have requested a re-examination and by a differently constituted panel. It was not entitled to reject the scoring and substitute their own if indeed that is what they did. And then too, it is not known what score was allocated to the candidates by the national panel if indeed they scored the competing candidates themselves.
- [88] Lt. General Phalane testified that the national panel did not accept the scores allocated by the provincial panel in respect of (a) knowledge and skills, (b) ability and competence, (c) managerial ability, (d) relevant experience, (e) prior learning/training and development and finally, the total score awarded to candidates. This represents 5 out of 10 competency areas. In the result I must assume that the total score awarded to each candidate by the provincial panel was simply disregarded.
- [89] So how thereafter was the assessment of the competing candidates conducted, by who, on what basis and what were the results of that assessment? Lt. General Phalane testified that Brigadier Maswanganyi was “miles ahead” of the Applicant. At the provincial level when the competing candidates were assessed the scores attained were:

J Naidoo	74.2%	2 nd position
TN Maswanganyi	71.1%	4 th position

This scoring was rejected by the national panel on the basis of bias and manipulation. Lt. Phalane testified that the national panel formed their own assessment. The manner in which this assessment was performed as testified by Lt. General Phalane was that the national panel reviewed the curriculum vitae of each candidate and had regard to their personal knowledge of the candidates and their working experience.

[90] The national instruction 3/2000 regulates the conduct of assessments for the purpose of appointment and promotion. The purpose of the National Instruction is recorded to be the following:

‘The purpose of this instruction is to regulate the procedure for appointing applicants in advertised posts on salary levels 13 to 15, excluding deputy national commissioners. This procedure is based on the principles of open competition, competency, objectivity and fairness, and is aimed at creating a workforce which is broadly representative of the South African population, in particular as far as race, gender and disability are concerned.’[The emphasis is mine]

Amongst other matters under the heading Assessment, it is provided at clause 3 that:

‘During the assessment, the selection panel members’ must-

- (a) Put the same type of questions to each candidate;
- (b) Afford every candidate the opportunity to participate in the assessment process and to respond to any questions put to him or her;
- (c) Afford every candidate the opportunity to place any information which he or she deems necessary, at the disposal of the selection panel and to put any question to the panel;
- (d) Afford every candidate the opportunity to ask any question for the sake of clarity; and
- (e) Treat candidates in an objective, fair and unbiased manner.’

[91] If Lt. General Phalane is to be taken at his word, this was a shocking violation by the national panel of the National Instruction that regulates the assessment of candidates. As the national panel had abrogated the provincial panel scoring of the candidates, on the serious charge of bias and manipulation, and assumed the responsibility to evaluate the candidates themselves, still, they were obliged to follow a fair procedure and abide by the National Instruction 3/2000 in the manner in which assessments were to be conducted.

- [92] The national panel did not meet the competing candidates, did not afford them any opportunity to participate in the process and did not afford them the opportunity to place information relevant and necessary; this in turn compromised the National Instruction to “treat candidates in an objective, fair and unbiased manner.” At the very least, the candidates ought to have been made aware that the results of the assessment centre were nullified and their assessment was being conducted by the national panel and the process that would be followed.
- [93] Lt. General Phalane testified that the panel had regard to the curriculum vitae of the competing candidates and the prior knowledge of the candidates and in the case of the Applicant, her previous representation to be transferred to the support services. As the Applicant curriculum vitae was sparse on matters concerning operational experience that was taken into account in forming an impression of the candidates and the ability and potential to perform. Brigadier Maswanganyi on the other hand had set out his experience in full detail.
- [94] It is of relevance to the Applicant that the national panel took into account her representation filed during or about 17 September 2007, about two years earlier. Essentially, in that representation all she sought was a clear career path and if possible, to render service in a training environment. For whatever reason, that representation is treated as “negative information” and is held against her and the conclusion is drawn that the Applicant seeks to serve in the support service section instead of the operating section.
- [95] The National Instruction stipulates at clause 8 that:
- ‘Negative information regarding a particular candidate may not be taken into account if the information has not been put to the candidate during the assessment and he or she was not afforded the opportunity to respond to such information.’
- [96] The competing candidates had no meaningful opportunity to press their candidature on the national panel. As a result of national panel nullifying the scoring of candidates done at the assessment centre and by the provincial panel, the taking into account irrelevant considerations, the absence of any

process let alone one that was objective and fair caused for the principles of open competition to be violated and as a result of such violation the Applicant was made to suffer prejudice.

- [97] Strangely so, Lt. General Phalane testified that the national panel accepted the scoring of the provincial panel with regard to the four other cluster commander positions. The allegation of bias and manipulation in the circumstance rings hollow.
- [98] At the very least, the testimony of Lt. General Phalane betrays the fact that the national panel disregarded the provincial panel assessment and scoring of the candidates and in turn conducted their own assessment of the competing candidates, and in doing so disregarded the provisions of the National Instruction and even so the procedure they adopted for the conduct of the assessment was flawed such that it can be said it was arbitrary, capricious and unfair and this was to cause the Applicant to suffer prejudice.
- [99] In the result, I am not prepared to accept his testimony to the effect that it was the view of the National Commissioner and members of the national panel that Brigadier Maswanganyi was “miles ahead” of the Applicant. That opinion is not the product of an object and fair process and smacks of arbitrariness.

Service Delivery

- [100] I understood the testimony of Lt. General Phalane that ‘service delivery objectives’ referred to the operational dynamics that prevailed then in the Krugersdorp Cluster. But, it is not apparent and he did not testify why, in the view of the national panel, the Applicant would not have performed ably in the position and inspire confidence in the top management that the ‘service delivery objectives’ would be met.
- [101] At provincial level, the Applicant was recommended as she had attained the higher mark and her appointment would address gender equity. In the assessment of the provincial panel, the Applicant was competent, experienced and equal to the task on hand of serving as a cluster

commander. The considerations that underlie the provincial panel recommendation were competence and gender equity.

[102] The provincial panel members were all familiar with the Krugersdorp Cluster Command, the competing candidates who at the time fell under their command and the service delivery requirements of that Cluster. No doubt, service delivery, would have been high on their minds. They considered the Applicant to be equal to the task to execute the service delivery requirements and recommended her appointment.

[103] I got the impression General Bester was astounded when in a telephonic discussion with Lt. General Phalane he raised the operating experience of the Applicant in an operating environment. To which she replied 'General, go and read her CV!'

[104] With regard to the comment that the recommendation was not consistent with service delivery, General Bester declared "that is totally untrue." It was apparent to General Bester, having regard to the comment (s) of Lt. General Phalane that the national panel had not applied their minds to the matter on hand.

[105] Commenting on the decision of the National Commissioner and the national panel and the reasons cited for the decision made she said:

'I do not know if they had the CV but if I read that comment it becomes obvious to me that they did not have [regard to] her experience, her background or anything in front of them, because if they saw her CV and they saw what her experience was in the field of crime prevention, service delivery, of every aspect that was in the advertisement that they had to comply with then they would because she complied with all the requirements of the post. I would not have made that comment if I had the information in front of me.'

[106] Whilst the comment "[t]he panel's recommendation not consistent with the service delivery objectives" is put up as a reason for rejecting the recommendation, this reason is not self explanatory. Without more, it is difficult to understand it. It is vague and nebulous.

- [107] I got the impression from the evidence of Lt. General Phalane that the national panel was concerned about the Applicant and her experience in the operating environment. Stated differently, their concern was whether the Applicant would have been able to ensure that the Krugersdorp Cluster under her command would meet the service delivery objectives.
- [108] This is a justifiable concern. The National Instruction 3/2000 provides for the manner in which such concerns are to be raised, canvassed and addressed in a manner that would promote fair and open competition amongst candidates whilst at the same time creating a capable and competent Police Service, broadly representative of the South African population.
- [109] I am quite sure that General Bester was not aware that the national panel had abrogated the provincial panel's scoring assessment and was in the process of conducting their own assessment and as matters then stood, the fate of the Applicant hung in the balance at the time when she made the comment referred to above.
- [110] This reason however does not appear to be the convincing consideration or even a consideration at all. Lt General Phalane testified with regard to the appointment made that 'it was not about her' and her abilities or experience. He went on to say it was about the employment equity profile that was "dictating" the decisions to be made at the time.
- [111] This view was also expressed by Colonel Ramathoka in his testimony. As far as he was concerned, the appointment of the Applicant was a statistical impossibility. The evidence shows that employment equity was the convincing consideration for the non-appointment of the Applicant.

Employment Equity: Affirmative Action Measures

- [112] Discrimination is not actionable in our law; only when such discrimination is unfair may a litigant be entitled to relief. Discrimination is not unfair if it is proved that the discrimination was necessary in order to implement affirmative action measures consistent with the purpose of the Employment Equity Act.

[113] Affirmative action measures which comply with section 9 (2) of the Constitution and section 6 (2) (a) of the Employment Equity Act are not presumptively unfair and constitute a complete defense to a claim of unfair discrimination.

[114] In the Employment Equity Act, affirmative action measures are defined as follows:

'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.'

[115] In the assessment of compliance of affirmative action measures, section 42 list a number of factors to be considered, namely:

- '(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;

- (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.'

[116] Concerning the approach to application of affirmative action measures, Justice Moseneke writing on behalf of the majority in *Minister of Finance v Frederick Jacobus van Heerden*² had this to say:

'This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns disadvantage. It is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discrimination 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. The unfair discrimination enquiry requires several stages. These are set out by this court in *Harksen v Lane NO and Others*.'

In *Harsen v Lane NO*,³ it was held that there is a three-stage test for establishing whether there was unfair discrimination namely:

- (a) Was there differentiation which amounted discrimination?

² [2004] 12 BLLR 1181 (CC) at para 27.

³ 1997 (11) BCLR 1489 (CC) para 53.

- (b) Is the discrimination unfair?
- (c) If the discrimination arises out of a law of general application, is it justified?

He went on to say, referring to the affirmative action measures and the Constitution, that:

'Legislative and other measures that properly fall within the requirements of section 9 (2) are not presumptively unfair. Remedial measures are not derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, 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 section 9(2). When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9 (2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether a 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 equality.'⁴

[117] The Employment Equity Act is legislation enacted to further the objectives of section 9 of the Constitution and provide for the adoption of remedial measures as a means to address the adverse effects of apartheid and promote transformation. It is important to bear in mind that whilst employment equity prohibits unfair discrimination it promotes non racialism and non sexism. That is the essence of the transformation agenda envisaged in the Constitution. Employment equity, in so far as it is a remedial measure contemplated within the meaning of section 9 (2), carry the imprimatur of the Constitution. It requires no further justification. For this reason, the remedial

⁴ Van Heerden above n 2 at para 32.

measures must be appropriate and crafted with great care and circumspection. The danger presented was made clear by Mokgoro J in her minority judgment:

'It would therefore be improper and unfortunate to section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect will be to render constitutionally compliant a measure which has the potential to discriminate unfairly. This cannot be what section 9(2) envisages.'

[118] The purpose of the Employment Equity Act is clear:

'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

[119] The implementation of affirmative action measures is not a choice; it is mandatory. Designated employers must design and implement affirmative action measures for people from designated groups.

[120] The South African Police Service had developed and designed affirmative action measures which are set out in the Employment Equity Plan for the period 1 October 2007 to 31 December 2010. This was the second plan. The first plan covered the period 1 October 2001 to December 2006.

[121] It is important in analysing an affirmative action measure to examine the measure from the perspective of the group to be advantaged. An analysis that is from the vantage of the group to be disadvantaged is to miss the point of affirmative action and give undue focus to the rights and interest of this group. In the comparative to be made, the exceptions and tiny minorities are to be disregarded and the focus maintained on the majority.

⁵ Section 2 of the Employment Equity Act.

[122] The Constitutional Court object to be pursued, in the words of Justice Moseneke “is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, rule of law, a democratic ethos and human rights”.⁶ The target of affirmative action measures, the design and its purpose and the manner in which they implemented, are all to be reviewed and tested against the standard of substantive equality and the pursuit thereof.

[123] The Employment Equity Act does not provide for disparate treatment of members of a designated group on the basis of degrees of disadvantage suffered in the past within and between the designated groups nor does the Act recognise the notion of multiple disadvantages which for example is the condition of women presently in South Africa.

[124] The Act advocates the notion of ‘equitable representation’ in order to determine the appointment of members of different designated groups on the basis of affirmative action.

[125] The ideal profile that the Constitution and Employment Equity Act envisages and the Employment Equity Plan of SAPS embraces is that the workforce be “broadly representative of the South African community”.

[126] It is with these laws and jurisprudence in mind and the perspective and constitutional objectives, I turn to consider the equality claim of the Applicant.

[127] Firstly, is the target of the affirmative action measure persons or categories of persons from the designated group ?

It is self evident that Equity Plans sets out affirmative action measures in general that target persons and categories of persons previously disadvantaged and who fall within the designated group.

[128] Secondly, is the measure designed to protect or advance such persons or categories of persons within the designated group?

It is the complaint of the Applicant that the affirmative action measures, whilst intended to redress the disadvantages in employment experienced by

⁶ Id at para 26.

members of the designated group, in fact, creates an entry barrier to some within the designated group and, rather than promote equitable representation in all occupational categories and levels in the workforce, undermines that purpose. I am called to consider if the affirmative action measures as embodied in the Equity Plan and as applied in SAPS does indeed have those effects and to the extent that it does, it may be self defeating and for that reason undermine the third leg of the enquiry, the promotion of substantive equality.

[129] The Employment Equity Plan that is of relevance is for the period 1 January 2007 to 31 December 2010. The Plan is designed to, amongst other things, achieve a diverse workforce broadly representative of the South African community. In order to achieve a diverse workforce, the Executing Authority together with SAPS Management Team designed an ideal workforce profile.

[130] In the design of the ideal workforce profile it is recorded in the Equity Plan that:

'Ideal figures with regard to race are based on the 2001 census report. (79% Africans, 9.6% White, 2.5% Indians and 8.9% Coloureds)

30% of all posts will be allocated women as a designated group in their race groups.'

[131] The affirmative action measure was designed on this construct and these criterion:

131.1 For race, it is said the ideal workforce profile and numeric targets be 79: 9: 8: 2 in respect of Africans, White, Coloured and Indians.

131.2 For gender, it is said the ideal workforce and numeric targets be 70:30 in favour of men over women.

[132] It is important to note this construct is at variance with the stated purpose in the Equity Act and Equity Plan to create a workforce that is 'broadly representative of the South African community'.

[133] In addition, the construction of using proportional representation of the population is at odds with section 42 (a) (i) of the Equity Act that refers to the 'demographic profile of the national and regional economically active population'.

[134] This construct is also at variance with section 15 (1) of the Equity Act that states:

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

[135] Following on this particular construct of the ideal workforce profile and numeric targets, the employment of Indians are limited to 2.5% for the whole group and for Indian Females it is 30% of 2.5% or .75%. The effect of this calculation is that the ideal profile and numeric target for the employment of Indian females in the salary band 14 is zero. That is to say the ideal profile provides that no Indian females are to be employed and the numeric target provides for zero as the ideal.

[136] At times relevant, there were no Indian females employed in the salary band 14 in the Gauteng Province, being the business unit. In fact there were no Indian females in that band in the whole country. There was only one Indian male employed in that band in Gauteng. The approved Resource Allocation Guide, based on the ideal workforce profile, provided that no Indians, male or female, may be employed in that band and beyond that band. The fact that one Indian male was in employment at that time that created a "over representation".

[137] The Applicant contends this workforce profile and numeric target was adopted as the "ideal" by SAPS and as such it constitutes an absolute barrier to her career advancement as an Indian female and was the cause of her non-appointment to the advertised position.

- [138] She draws attention to the fact that this 'barrier' has been in place since 2001 as the Equity Plan then in force had the same profile. It will continue to be in place until 31 December 2014 as the third equity plan has the same profile.
- [139] It was the evidence received that an Indian female may not be employed in that band. Colonel Ramathoka impressed that fact and so did Lt. General Phalane. That fact is underscored in the comments made by the national panel when it did not approve the appointment of the Applicant as it cited the reason as "[t]he appointment not enhancing employment equity." It is not clear whether the national panel had in mind race or gender or both. However, it was the evidence of Lt. General Phalane and Colonel Ramathoka that it was race and gender.
- [140] Whilst at first glance it appears that this construct may be useful to achieve 'equitable representation' on closer examination it has a manifest exclusionary effect.
- [141] The exclusionary effect is exacerbated if gender representation is set at only 30% of the race group. This feature of the construct reduces Indian females to be a tiny minority within the designated group. If the ratio is set at 50:50 this minority status is improved. Thus a tiny minority is as a result of the construct used; it is the product of the criterion. And the criterion is incorrectly based on the proportional representation of the general population instead of on the "demographic profile of the national and regional economically active population."
- [142] The effect then on the Applicant on account of her race and gender is to cause her to suffer multiple forms of discrimination. When viewed through the lens of race she is according to the impugned construct and criterion part of a 'tiny minority'. When viewed through the lens of gender, and again using the impugned construct and criterion, she is part of a small group within the designated group. In both instances, the construct and criterion produces groups that is made to appear to be tiny or small but in fact is neither if the correct construct and criterion are used.

- [143] Thus the construct and criterion used creates a false reality and this has significant effects on the affected members within the designated group.
- [144] In the lower grades, the ideal representation of 2.5% allows for some Indians to be employed. But in the middle and top grades, when the number of posts is few, it causes for no Indians to be employed, male or female. The effect then on this race group is disproportionate in the upper echelons of the Police Service and a result of the use of percentages in formulating numerical targets.
- [145] Rather than promoting 'equitable representation' within each occupational category and level of the workforce it results in no appointment being made or the provision thereof for persons from the Indian community, women in particular.
- [146] The problem is best illustrated by having regard to the salary band 14 that of Cluster Commander at the level of Assistant Commissioner, the post to which the Applicant sought to be appointed to. In this band provision is made for the employment of 19 persons. Using this construct, it produces an ideal for Indians [2.5%] which it means no Indians may be employed. This conclusion is as a result of the formula: $[2.5\% \text{ of } 19 = 0.47]$ which equates to zero.
- [147] The management level of SAPS consists of salary levels 13-16. At the management level of SAPS, no Indians may be employed, male or female. The concept of proportional representation based on the general population at these levels has the effect of creating a barrier. They may not rise higher: men or women. Colonel Ramathoka expressed the predicament with candor when he testified: "...the ideal was zero and it was just like that."
- [148] And that is the complaint of the Applicant. She contends this constitutes an employment barrier. The barrier takes the form of a 'glass ceiling'. This barrier she says that is enforced and rigidly so. As a member of the designated group, on account of her race and gender, she complains that the affirmative action measures set out in the Equity Plan rather than present her with equal opportunity denies her any opportunity.

- [149] In the context of South Africa, members of the designated group, by law and practice were denied equal opportunity in employment and this has resulted in the disfigurement of our labour market.
- [150] In the context of the Safety and Security Services, and SAPS in particular, the designated group as a whole, was excluded, not entirely but more especially in the management echelons. The designated group suffered discrimination and exclusion almost uniformly. Their presence in the management echelon was perceived as a danger to the state and the promotion and maintenance of law and order. In the result, pre the democratic dispensation, no member of the designated group served in the upper echelon of the Police Service.
- [151] In the case of Indians, the ideal as embodied in the workforce profile continues with this past employment practice. To the extent that there are Indians in employment in the salary band 13 and higher such is considered as an 'over representation'. That is to say their employment in these bands is neither desirable nor sought in terms of the ideal workforce profile and the ideal numeric employment target.
- [152] The ideal so constructed, and as set out in the approved Resource Allocation Guide (RAG) in the grades 13 to 16, is evident of an 'absolute barrier'. There is no and can be no flexibility as evident in the testimony of Colonel Ramathoka, the equity expert.
- [153] This barrier is encountered in circumstance where there is as a matter of fact but one Indian male employed and no Indian female employed in the salary band in the Gauteng Region.
- [154] The fact that one Indian male was then in employment, that resulted in an "over representation". That "over representation" may well have contributed to the conclusion of the national panel that the appointment of the Applicant will not enhance employment equity. In effect, the Applicant was treated as if she was not a member of the designated group.
- [155] It needs be stressed that, at times relevant, there were no Indian females employed in the salary band 13-16. Subsequently, and in the kwaZulu-Natal

region two Indian females were appointed at the salary level 14. The Respondents use these appointments to contend that there is no employment barrier *per se* to the appointment of Indian females.

- [156] It is not conceivable that the subsequent appointment of Indian females in the kwaZulu-Natal Region was in accordance with an Equity Plan and a numeric target calculated on the existing formula. For that to have occurred, the formula for race and gender would have had to be changed and the management corps significantly enlarged. In all probability, their appointment was made on some other basis. At any rate, these are *post facto* events and apply to another province.
- [157] It was submitted further by the Respondents, in support of the contention that there is no barrier *per se* that if the salary band was to be expanded to 150, an Indian female could, theoretically, be appointed. But that contention rather than illustrate the absence of a barrier better illustrates the fact that there is a *de facto* barrier. In reality, SAPS can neither afford to nor will it enlarge its management corps eight fold merely to facilitate the appointment of an Indian female. It is in the way of a theoretical abstract.
- [158] The very purpose of employment equity is to redress the effects of past discrimination suffered by members of the designated group. Its purpose is not to create new *de facto* barriers to employment. The fact that the barrier is created and results in a person from a designated group suffering discrimination, both on the grounds of her race and gender, is perverse.
- [159] As mentioned before, the focus is to be on the group to be favoured and unduly focusing on the group to be disadvantaged holds potential to undermine the effort for remedial action and the pursuit of substantive equality. Although that view was expressed by Moseneke J in a different context it seems to me as an approach it may also hold true in the conduct of comparative within and between members of the designated group.
- [160] It may well be to achieve substantive equality and 'equitable representation' for a group within the designated group to be advanced whilst another disadvantaged. The disadvantage to be endured by the latter group is

incidental to the purpose of promoting substantive equality. The disadvantage suffered is in pursuit of a higher purpose and to the extent that the higher purpose is realised, the disadvantaged group also benefits. Thus advantage and disadvantage cannot be seen in a narrow context bound by the moment. A situation-sensitive approach is required.

- [161] Despite the laudable purpose of affirmative action, employees are not called upon to rest their hopes on a wing and a prayer and be differential to the equity plans of their employer. They are invited to participate in the development of equity plans and forge an acceptable compromise that is appropriate to the situation that prevails at any given time.
- [162] Our courts need review the Equity Plan and have regard to the fact it may be the product of a collective agreement or a compromise that was the subject of consultation which was accepted either impliedly or expressly by the majority in the collective bargaining unit and or Council concerned and, as it is a remedial measure, provided it is compliant with section 9 (2) of the Constitution, exercise due restraint and deference in reviewing the remedial measure.
- [163] In the context of the labour market, the remedial measure must fit within the four corners of section 9 (2) of the Constitution and be a measure envisaged in terms of the Equity Act. These laws set the parameters for remedial measures and provide the test for compliance.
- [164] It is self evident that the construct used to create the target workforce profile and the non appointment of the Applicant was the product of an affirmative action measure. The measure, however, creates a perverse competition within the designated group on the basis of their race and gender. It seems to me and in passing that I should say that its practical effect is to set a race and gender based preference and that preference is ordered as follows: African males, African females, Coloured males, Coloured females, Indian males and Indian females. The Applicant being a member of the last mentioned falls to be the last to be considered if considered at all. Being the last to be considered, it is as if it was she and her group is not the most disadvantaged

within the designated group to be preferred when the appointment fell to be considered.

- [165] The practical effect of this construct is to create in practice degrees of disadvantage and seemingly a ranking order for the grant of favour. Neither the Constitution, the Equity Act, the Equity Policy nor the Equity Plan provides for the notion of degrees of disadvantage. Our jurisprudence and laws call for 'equitable representation' and this requires a concrete, contextualised approach. We eschew a formulaic, mechanistic approach.
- [166] In section 42 of the Equity Act, the factors to be considered in assessing compliance are circumscribed and within the designated group there is no ranking order of preference for favour. It may well be that one or another group within the designated group at particular moments in time warrant special attention on account of the fact that they are simply not represented or sufficiently represented to a degree 'equitable'.
- [167] In this sense then, focus and attention of remedial measures may shift within the designated group whilst the goal of 'equitable representation' is pursued. So for this reason then, the situation-sensitive approach advocated by Moseneke J finds pragmatic value. A formulaic approach has the tendency to produce inflexibility and does not readily allow for a shift in focus and attention in the effort to remediate.
- [168] The Police Service has sought to promote employment equity since 1 October 2001. The construct that has guided the composition of what is said to be the ideal workforce profile and numeric employment targets has been the same. This construct and its criterion have not changed over the span of three Employment Equity Plans that covers the period 1 October 2001 to 31 December 2014. During this period the actual composition of the workforce has changed substantially and certainly so in the management echelon.
- [169] The impugned construct and criterion in so far as gender is concerned were partially eschewed by the Cabinet which had resolved that there be in the appointment of women, gender equality in the ratio 50:50. This resolution of Cabinet was adopted by SAPS and no other than Lt. General Phalane was to

write to the entire manage corps of SAPS and on 20 October 2009 to instruct them there would be “no deviation” permitted and he called on Deputy National Commissioners and Provincial Commissioners to revise their recommendations “to achieve the 50% female representivity per level”. This then was the first challenge of the construct and criterion launched by the Minister of Public Service and Administration and it must tantamount to a repudiation of the construct and criterion.

- [170] It is to be noted that this adoption of the Cabinet resolution and the instruction issued was regardless of the fact that the Equity Plan of 1 January 2007 – 31 December 2010, stipulated a 70: 30 ratio in the appointment of men and women. That Plan then was changed and unilaterally so and by means of fiat. In effect, SAPS amended the formula that is set out in the Equity Plan. In the circumstances, it is difficult to understand why in the case of the Applicant, here and now, SAPS insist on the use of a construct and criterion that was repudiated.
- [171] Whilst the affirmative action measure targets persons or categories of persons who have been disadvantaged by unfair discrimination, and the measure is designed to advance such persons, it does so in a manner that is decidedly under-inclusive and preferential: firstly race and secondly men. There is no legislative authority for or legitimate government purpose to be served by a gender based preference.
- [172] Women, as the majority of the designated group, suffer and will continue to suffer under representation under this construct. Thus it can be said with justification that the affirmative action measure rather than promote equality maintains the historical disadvantage suffered by women in the labour market in general and in SAPS in particular.
- [173] It is not good enough to say that 30% is a start and it represents progress. I do nevertheless recognise that affirmative action in its very nature is a progressive measure or series of measures taken over time.
- [174] But this particular measure presents itself as a form of tokenism. It is minimalistic. We have embraced gender equality and this equality is the

hallmark in the composition of Parliament, Cabinet, State Owned Enterprises, and the senior management service (SMS) of the entire Public Service. In this regard, SAPS is out of kilt if regard is to be had to the Public Service in general.

[175] And, whilst the Constitution and Equity Act enjoins the creation of a 'broadly representative' Police Service by having regard to the "demographic profile of the national and regional economically active population" the targets and the target workforce profile set out in the Equity Plan create something else other than that.

[176] The workforce target profile in general and the numeric targets in particular must be measured against the constitutional objective of non-racialism and non-sexism. Seemingly, over a span of fifteen years, 'non-sexism', has been relegated as a secondary objective.

Do the affirmative action measures promote the achievement of equality?

[177] Patently, these plans in general, and the impugned measures in particular, undermine the constitutional objective of equality. Instead of promoting non-racialism it promotes and for the want of a better phrase –perverse race rivalry- and instead of embracing non-sexism it proffers tokenism.

[178] In a manner silly, it can be argued that as the affirmative action measure promotes some members of the designated groups, women and Indians included, it is notwithstanding its modest targets for those groups, and badly constructed criterion, is still an affirmative action measure as envisaged by section 9 (2) of the Constitution and the Equity Act and for that reason, demands deference.

[179] Whilst I acknowledge the affirmative action measures set out in the equity plan, holding the perspective of the group to be advantaged, promotes some from the designated group(s) its effects in the context of our broader society is disturbing.

- [180] Perhaps this accounts for the Cabinet resolution that intervenes in a manner insistent that there be 50/50 gender representation. The fact that cabinet eschewed the formula it cannot in all honesty be said the affirmative action measure served a 'legitimate purpose' of the Government. And SAPS too repudiated the Equity Plan that it at once seeks here and in this matter to uphold and enforce whilst in reality and practice the numeric target of 70/30 has long been abandoned. This approach is inconsistent and contradictory and smacks of arbitrariness.
- [181] Women are not a minority group; they constitute the majority of our population. Whilst the affirmative action measure and the numeric target set out there in presents itself as an aspiration it in fact operates in practice as a limitation to the attainment of equitable representation. The plight of the Applicant reveals that to be a fact and the current employment figures corroborates this fact.
- [182] In addition, the target workforce profile and the numeric targets born of it serve to exclude Indians entirely from the rank of management and Coloureds are in like fashion were limited. Certainly, in the pay grade 14, to which the Applicant sought entry, Indian females are effectively denied entry in Gauteng. And in this case the Applicant was denied equal opportunity for no reason other than her gender and race.
- [183] The overall effect of the affirmative action measure is then severely limiting on women in general, and Indians and Coloureds in particular. It is a windfall for African men who constitute say 40% of the national population. African men are not an insignificant group within the designated group. But they are not the overwhelming majority of the 'economically active population' within the designated group. It is as it were that two significant majorities are present: African men on one hand and Women on the other. The presence of women and their majority is simply not acknowledged. In the result, their presence is rendered sterile and they are limited to 30% as an employment target.
- [184] In many ways the numeric targets present itself as a quota rather than a target. The quota having being satisfied in the case of Indians results in an

'over representation' and as the target [read quota] provides for no Indian females, none may be employed and for this reason the Applicant was not employed.

- [185] As a majority of the population, and a majority within the designated group, in the comparative with any other group, the focus should be on the employment of women and rightly so. No one majority group within the designated group may be so preferred that results in disadvantage being suffered by the other designated group. Whilst maintaining the proper focus and balance, care must be taken to avoid naked preference and the creation of employment barriers. A contextualized approach is required in the pursuit of substantive equality as we strive to create a non-racial and non-sexist society.
- [186] Examining the impugned affirmative action measure, namely the ideal workforce profile and numeric targets it has spawned, new patterns of disadvantage and discrimination are created for women in general and Indian and Coloured people in particular and all the more so in the upper echelons of the Police Service but less so in the lower ranks. The impugned measure does indeed create a pattern as opposed to say a temporary condition. The pattern finds expression in the mindless repetition of the construct and criterion over the period of three equity plans spanning 15 years.
- [187] Viewed in the context of our society, and our past experience, this is an inherently dangerous course of action. It may have the effect of alienating women, Indians and Coloured communities as their aspirations for a better life are frustrated as they encounter 'barriers' and 'patterns' of race based preferences. In the case of Indian both men and women, the barrier is absolute. In the case of African women, the barrier is relative to the 30% target which in turn serves as an unjustified limitation on their employment opportunities.
- [188] It is in my view, referring to the aforementioned barriers, patterns and limitations, it is a price too high to pay by our society in general and the affected groups in particular. Instead of promoting harmony, peace and stability it holds potential for considerable inter group contestation, conflict and

protests amongst the designated groups. This undermines the pursuit of non-racialism and non-sexism.

- [189] The measure that was designed and that which is embodied in the affirmative action measure, does not appear to be “tightly circumscribed” and in accordance with the lawful criterion set out in the Equity Act. Whilst posing as a measure that is constitutionally compliant it in fact discriminates unfairly and unlawfully.
- [190] It may not have been the intended result to create barriers and patterns of disadvantage but it does in practice have such an effect. These effects, undermines equal opportunity and the pursuit of substantive equality. It undermines too the constitutional objective of creating a non racial and non sexist egalitarian society. This is so and regardless of the perspective, focus and vantage one holds in the consideration of the matter. It results in the naked preference of members drawn from the African men group. That naked preference is evident in the testimony of Lt. General Phalane.
- [191] It is artificial to say that the preference of one group, within the designated group, is for a limited period. This preference of one group (African men) following on a previous plan and carried through in subsequent plans, spans almost 15 years. The real danger exists, that it will entrench the notions of degrees of disadvantage and perverse race and gender rivalry and before long these notions will take hold in our society. These notions stand in stark contrast with the constitutional objective of non-racialism and non-sexism.
- [192] This in turn may lead women to give up on the legitimate expectation of gender equality and accept tokenism. And in the case of Indians the absolute barrier will telegraph the false message, that there is no promotion prospects in the Police Service. Justifiably so, they will leave the service and seek greener pastures elsewhere. This in turn will frustrate the other objective of retention of service of members from the designated group as envisaged by section 15 (2) (d) (ii). In the process, the pursuit of substantive equality will be frustrated.

- [193] In assessing how snugly the impugned affirmative action measure fits into section 9 (2) of the Constitution, I am of the view it fits poorly. The measure presents itself as an abuse of power and imposes substantial and undue harm on those excluded from its benefits that our long term constitutional goal is threatened.
- [194] In the upper echelon of management and in the bands 13-16, African men are presently the majority in employment. It need not be that no other group can be advanced until this group has enjoyed their full measure of preference. Commenting on progress made, National Commissioner Jackie Selebi acknowledged that "Despite all the problems that plague the SAPS, there has been much progress, which we need to celebrate". Subsequently, National Commissioner BH Cele made the exact same comment in reviewing progress made. They must have had in mind, the progress of African men. For women the progress was but 21% - by my way of thinking that is pitiful.
- [195] It is apparent that the first equity plan has served as a template and over time that template has come to be cast in stone. And the review and monitoring of the equity plan and its effects has come to be nothing more than an exercise in cut and paste such that two National Commissioners in different times say exactly the same thing. This is unfortunate and a telling indictment on the manner in which employment equity is pursued in the Police Service.
- [196] I have little doubt that the construct and the criterion it is based on may be one of the causes of such limited progress if not the most significant. This then results in the affirmative action measure being in itself as cause of discrimination that has a negative impact on the employment equity in the Police Service and the pursuit of substantive equality.
- [197] I find nothing in our laws or jurisprudence that affords African men a preferential status such that this group, within the designated group, should be advantaged to the detriment of all others within the designated group and for so long a period. This preferential treatment lacks any sense of proportionality.

- [198] We need recognise as Moseneke J does when he said that “ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes.” For this diversity to be celebrated it needs to find expression in our target workforce profile and all the more so in the South African Police Service that is charged with the duty to protect and defend all the communities that comprise our diverse society.
- [199] That capability will be compromised if the race and gender preference as set out in the construct and criterion upon which it is based is to continue unabated. As the evidence shows African men occupy more than 50% of the positions in the upper echelons of SAPS. To the extent that previous affirmative action measures were embarked, with this group in mind, such measures have resulted in considerable progress. And that fact is indeed to be celebrated.
- [200] Progress has been made, and the focus needs shift to others within the designated group. The workforce profile and the numeric targets set out in the impugned affirmative action measure does not show any shift in focus and attention.
- [201] As a result the diversity that Moseneke J refers to, unfair discrimination is not allowed to emerge in the upper echelons of the Police Service. According to this Plan, no Indians may serve in the upper echelons and only 30% women.
- [202] And for an Indian female, it is as it were, a statistical improbability for such an appointment to be made. The fact that women are limited to a 30% target within their race groups, has the effect that women, a majority of the designated group, are purposively limited in employment in the Police Service and subjected to double discrimination. The 30% ratio has a punishing effect on Indian women and results in a statistical improbability of appointment.
- [203] I have started on the premise that the impugned affirmative action measure is not presumptively unfair. I have sought to examine the impugned measure within the context of section 9 of the Constitution read as a whole. In the main, I have considered whether the impugned measure falls within the meaning of section 9 (2) and section 6 of the employment Equity Act and have assessed

it in accordance with section 15 and 42 of that Act. I have also conducted a comparative analysis of the affected classes in a situation-sensitive context and kept focus on the majority rather than the difficult minority. In my view, the plight of the Applicant is not an exceptional case; it is the plight of all of her race and her gender.

- [204] I have concluded that African men are *de facto* treated as a favoured class within the designated group and taken note of the fact that the construct that produced this class was based on a wrong criterion namely proportional representation of the general population instead of on the demographic profile of the national and regional economically active population.
- [205] I have taken note too that this construct had the effect of creating a tiny minority for Indians in general and Indian women in particular when in fact this is not so if the economically active population is to be considered as a criterion.
- [206] I have also taken note of the fact that women are a majority group within the designated group by use of either criterion and ought not to suffer less favour in comparison to men in the designated group.
- [207] I have had regard to the progress made over the years and took note of the fact that for African men their position has been improved and significantly so such that presently they constitute the majority in the upper echelons of management.
- [208] I have taken note of the Cabinet resolution and the fact that in following the lead of Cabinet, the management of SAPS has eschewed the gender bias in favour of men evident in the impugned equity plan.
- [209] Whilst the impugned affirmative action measure is indeed designed to protect and advance members of the designated group, it has as its focus a much too narrow definition of the designated group and it is a feature of the flawed design that it is exclusionary rather than inclusive to a significant degree for the case of women; and in the case of Indians and Indian females it excludes

them entirely and in doing so sets up an employment barrier. In terms of the Equity Act, employment barriers are prohibited. And so are quotas.

- [210] The prejudice that this causes is not incidental; it is in fact the purpose of the impugned measure and the product of the construct and criterion upon which it is based. The interests of Indians in general are disregarded and that of women and for no reason at all, minimised. I have taken cognisance of the impact that the impugned measures have on the respective groups without giving undue focus on the position of the complainant.
- [211] I have illuminated the design flaw of the affirmative action measure and its perverse effects. This flaw in design is significant as it causes prejudice and not just to persons from the Indian community but also to a significant majority. A very real danger exists that this design flaw, will give rise to a perverse race and gender rivalry and produce in consequence confrontation and alienation and will in the long run, undermine the promotion of substantive equality and the creation of a non racial and non sexist society.
- [212] At any rate, the design flaw was recognized by Cabinet and management. In practice, the design of 50:50 men to women was adopted and given effect to by SAPS and the 70:30 ratio was jettisoned. But the Equity Plan was not amended to reflect this gender equality.
- [213] Opportunistically, SAPS in this matter seeks to uphold the 70:30 ratio even as it acknowledges that that ratio was abandoned. This results in inconsistency, confusion and contradiction. This is self evident in the fact that at the provincial level the numeric target is created based on 50:50 which presents the Applicant with an opportunity. However, at national level, the target produced is declared to be 'wrong' and the national office refuses to abide by it. In the absence of certainty, the opportunity for arbitrary conduct arises.
- [214] The criterion of preference of men over women as is evident in the ratio 70:30 and the use of the criterion proportionate representation of the general population are not to serve a legitimate government purpose and government itself has partially rejected the design of the affirmative action measure constructed on this basis. The fact that the formula was crafted in consultation

in the Safety and Security Bargaining Council, and features in a collective agreement does not constitute justification.

See *Larbi-Odam and Others v Member of the Executive Council for education (North-West Province) and Another*.⁷ Per Mokgoro J

‘Where the purpose and effect of an agreed provision is to discriminate unfairly against a minority, its origin in negotiated agreement will not in itself provide grounds for justification. Resolution by majority is the basis of all legislation in a democracy, yet it is subject to constitutional challenge where it discriminates unfairly against vulnerable groups.’

[215] Accordingly, I conclude the impugned affirmative action measures are not consistent with the purpose of the Employment Equity Act and the Constitution. For this reason it does not enjoy the protection envisaged in terms of section 9 (2) of the Constitution or section 6 of the Employment Equity Act.

[216] In as much as the affirmative action measure fails the test in terms of section 9 (2) it fails the test in terms of section 9 (3) of the Constitution and for much the same reasons. Whilst the Respondents pinned their colours to the mast that is section 9 (2), I have also considered the impugned measure in terms of section 9 (3). That is not to say I divided section 9 into artificial parts. It is the pursuit of substantive equality that I am most conscious of. In this regard, the test set out in *Harksen v Lane NO* is relevant.

[217] It is an inescapable conclusion to be drawn from the facts of this matter that the impugned measures affect the rights and interests of members of the designated group –Indians and woman- symbolised in the Applicant and led to an impairment of their and her fundamental human dignity. The discrimination was on a listed ground: gender and race. The discrimination in this matter creates real disadvantage and perpetuates the historical discrimination and disadvantage suffered in the past.

- [218] The management of SAPS, on a frolic of their own, not supported by Cabinet can hardly claim the impugned measure is a legitimate government purpose. There is no rational connection between the impugned measures and a legitimate government purpose and for this reason, section 9 (1) of the Constitution that embodies the equality guarantee, is violated.
- [219] The Applicant complained that her dignity was impaired by the non appointment occasioned as it was by discrimination on a prohibited ground. Indeed, it was an affront to her dignity that she should be denied equal opportunity on account of her gender and race. It is to be remembered that in the Police Service, members are called upon to render service and inherent in the rendering of such service is the danger to life. As a sector of the economy, the safety and security sector, presently, is a dangerous sector to render service.
- [220] In this context, it is crass to limit women and in the case of the Applicant to deny her altogether the opportunity for advancement even though she puts on life on the line to render public service to our country.
- [221] It is no less crass to say that the ideal for the appointment of Indians in the bands 13 to 16 is zero. This is to undermine the constitutional objective of non racialism and non sexism as it constructs an absolute barrier that is based on a prohibited ground. It has the unfortunate consequence of promoting cynicism and bringing affirmative action as a remedial measure into disrepute.
- [222] The use of affirmative action measures to promote substantive equality is necessary and in the context of our labour dispensation consultation and consensus is the bedrock of collective agreements. Thus there is a need for collective 'buy in' and acceptance of the affirmative measures. If cynicism was to flourish, that would be the death of consensus. Fiat will be the order of the day and the manner in which we order our labour relations, as is evidenced in this matter that possibility is all too real.
- [223] For all the reasons mentioned, the affirmative action measure in particular the construct and criterion set out there in bears no rational connection to a legitimate government purpose and the differentiation amounts to unfair

discrimination that cannot be justified under the limitation provision set out in the Constitution and the Equity Act.

- [224] In this instance, it seems to me that the affirmative action measure was made to serve an interest, narrowly defined to the detriment of the majority, if the designated group is constituted on the basis of gender. I have taken notice of the fact that the President appointed a woman to serve presently as the National Commissioner. If women are to continue to serve as National, Provincial and Deputy Commissioners then a cadet corps needs to be developed in the lower, mid and upper ranks of management and so present a pool of candidates that may serve as National Commissioners for the generations to come. The employment equity plans betray a systemic bias against women and vulnerable minorities.
- [225] In the context of South Africa, women have played that is at once a leading and remarkable role in bringing to an end Apartheid and the historically discrimination it codified. It is in recognition of that contribution that the constitutional objective is defined as “non racial and non sexist”. It is not by accident we eschew gender discrimination.
- [226] I am mindful that gender provides something of a catch-all net and under this guise those previously advantaged may seek entry into a favoured class. But that is not the case here. The Applicant is a member of the designated group on account of her race and her gender. A properly crafted affirmative action measure should promote and protect her as a vulnerable minority. The impugned measure does neither but in fact creates circumstance to continue the discrimination she and her group suffered in the past.
- [227] For all the reasons mentioned, the decision of the Commissioner was irrational and caused the Applicant to suffer unfair discrimination.

Conclusion

- [228] At the time the matter was argued before me, the post of Cluster Commander: Krugersdorp was vacant. Having regard to the egregious conduct of the national panel and the then National Commissioner, it seems inappropriate to

simply refer the matter back to the National Commissioner for the candidature of the Applicant to be reconsidered.

[229] The subsequent Equity Plan has not been amended to take into account the resolution of Cabinet which was adopted by SAPS and given effect to. This creates a false facade that the management of SAPS may hide behind as they have done in this matter. This is duplicitous conduct and is capricious.

[230] In addition, the current employment equity plan presents an absolute barrier to the appointment of Indians and Coloureds, both men and women, in the upper echelons. This barrier must be removed and forthwith. Persons of these communities are part of the designated group, and they are entitled to 'equitable representation' and if needs be by means of reasonable accommodation on account of the fact that they are a vulnerable minority in South Africa.

[231] The Equity Plan, and the affirmative action measures in particular the workforce profile and employment targets are constructed on a wrong and impermissible construct and criterion and the provisions of section 42 of the Equity Act are violated.

Order

[232] In the circumstances, I make the following order:

1. The Second Respondent unfairly discriminated against the Applicant on the ground of her race and gender and the non appointment of the Applicant was both substantively and procedurally unfair.
2. The Second Respondent is ordered to appoint the Applicant to the position of Cluster Commander: Krugersdorp with effect from 1 August 2009.
3. The Applicant is to be paid the difference in remuneration she would have earned as if she was appointed to the post of Cluster

Commander: Krugersdorp such pay to be calculated as from 1 August 2009.

4. The Applicant is to be paid compensation in the sum equivalent to twelve months (12) months remuneration calculated on the rate of pay applicable for that of Cluster Commander.
5. The Respondent is ordered to pay the costs of this suit.

SHAIK, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Advocate C. Prinsloo

Instructed by: C. Du Toit Attorneys

For the Respondents: Advocate Mooki

Instructed by: The State, Pretoria

LABOUR COURT