



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 469/12

SOLIDARITY

First Applicant

J.P.L VAN DER WALT

Second Applicant

J.E STONE

Third Applicant

N. LE ROUX

Fourth Applicant

and

SA POLICE SERVICES

First Respondent

**THE MINISTER OF SAFETY AND
SECURITY N.O.**

Second Respondent

**THE NATIONAL COMMISSIONER OF
THE SA POLICE SERVICE N.O.**

Third Respondent

SOUTH AFRICAN POLICING UNION

Fourth Respondent

**POLICE AND PRISONS CIVIL RIGHTS
UNION**

Fifth Respondent

**THE SAFETY AND SECURITY
BARGAINING COUNCIL**

Sixth Respondent

Heard: 27 January 2015

Delivered: 2 April 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The applicants approached the Court in terms of Rule 6 of the Rules of this Court read with various provisions of the Employment Equity Act¹ ('The EEA') and section 157 of the Labour Relations Act² ('The LRA'). Solidarity contends that the SAPS promoted members pursuant to a Collective Agreement by reference to race and gender quotas, to the exclusion of other relevant factors and in contravention of the provisions of sections 9(3) of the Constitution³ and those of the EEA.
- [2] The application initially concerned the Second to Fourth Applicants (the individual Applicants), whom Solidarity had alleged were unfairly discriminated against in not being selected for promotions in accordance with the new ranking structure as effected in terms of a Collective Agreement. The applicants further challenge the lawfulness and validity of that Agreement and its implementation on the basis that it was discriminatory and quota based.
- [3] SAPU and POPCRU were joined to these proceedings by consent in terms of an order granted by this Court on 28 August 2012. SAPU however did not oppose the application and sought to abide by the Court's decision whilst being allowed a watching brief.
- [4] At the commencement of the trial, it was agreed between the parties that the dispute was to be divided into two, with a determination to be made by this Court only in relation to the lawfulness and the validity of the collective agreement complained of. The claim in respect of the individual applicants was to stand over for determination at a later date. In the light of these developments, oral evidence was not deemed necessary, and the matter was thus determined on the basis of the pleadings, the oral and written arguments presented by the parties' respective representatives.

¹ Act 55 of 1998

² Act 66 of 1995

³ Constitution of the Republic of South Africa, Act no 108 of 1996

[5] Effectively then, the issue for determination before the Court is whether the Collective Agreement is unlawful under the Employment Equity Act No 55 of 1998 (The EEA), and whether it amounts to a breach of sections 1, 9 (3) and 195 (1) of the Constitution. According to the applicants' pleadings, they seek an order;

- i. "declaring the race based allocation of posts contemplated in the Agreement to be unlawful under the Employment Equity Act;
- ii. declaring the faithful implementation of the Agreement through the promotion of SAPS personnel in accordance with race and gender quotas reflecting the national demographic profile of the South African population, to be unlawful under the Employment Equity Act;
- iii. directing the first, second and/or third respondents to consider all relevant factors in the determination of the identity of candidates to be promoted to vacant positions in the ranks affected by the Agreement; and
- iv. directing that the hearing to determine whether or not the application of the race and gender based criteria contemplated in the Agreement to the Second, Third and Fourth applicants constitutes unfair discrimination as against them be set down".

[6] Further in the light of the narrowed issues to be determined, Solidarity seeks an *interdict* against future promotions under what it terms the 'quota system'. The peculiarity of this prayer was pointed out by POPCRU, which contended that such a prayer presupposes that that it has already been established that the Agreement countenances a "quota" when no evidence has been led to establish this.

Background:

[7] In September 2009, a decision was taken by SAPS introduce a new rank structure, and to create two new ranks of Lieutenant and Major. The new ranking structure in order of seniority was to be and is currently as follows:

- General
- Lieutenant General
- Major General
- Brigadier
- Colonel
- Lieutenant-Colonel
- Major
- Captain
- Lieutenant
- Warrant Officer
- Sergeant
- Constable

[8] This structure was advertised in the Government Gazette⁴ and was implemented as of 1 April 2010 following approval by the Minister of Police⁵. The new ranks were to be filled by existing members of the SAPS who would be promoted into the positions created. According to SAPS, the new rank structure was meant to address bottlenecks created at the level of Warrant Officer, it being contended that once promoted to that level, members essentially got stuck without the prospects of future promotions. Furthermore, the new structure was meant to instil discipline in members and to boost morale. It was also envisaged that the new structure would be a useful tool in regards to issues of protocol and command in the event of joint operations between the SAPS and the South African Defense Force.

[9] Following the adoption of the new structure, a dispute arose with POPCRU and SAPU, the trade unions representative at the level of the SSSBC and

⁴ On 1 April 2010 in Gazette No 33068

⁵ By way of amendment to Regulation 8 of the Regulations for the South African Police.

SAPS, as to how the promotions and population of the new ranks were to be effected. Solidarity is not a recognised representative at the level of the SSSBC and was accordingly not involved in the dispute. With a view of resolving the dispute, POPCRU, SAPU and SAPS concluded a Collective Agreement on 5 April 2011 at the level of the SSSBC ('The SSSBC Agreement 2/2011'), which is the subject matter of this dispute.

The Agreement:

- [10] Part A of the Agreement confirms that the two new ranks are to be introduced taking effect from 1 April 2010. It sets out the level at which the ranks of Lieutenant and Captain as well as that of Major and Lieutenant-Colonel were to be filled and the principles underpinning the process. Pertinently, the agreement further records that;

"2.1 A once-off promotion process will be embarked upon in the 2011/2012 and 2012/2013 financial year to provide for the promotion of members to the ranks of lieutenant, captain and major.

2.2 The promotion process will be informed by the criteria as set out in Annexure "B"

- [11] Annexure 'B' of the Agreement sets out the criteria for promotion from rank of Warrant Officer to Captain, Warrant Officer to Lieutenant, and Captain to Major as follows;

- **"Representivity;** the representivity guidelines and number of posts be the baseline for the filling of the posts, provided that in the case of the same race group only, male members may supplement the shortfall of female members."
- **Qualification;** at least a NQF 4/equivalent qualification
- **Seniority;** the most senior members (as on 30 June 2010) per each race group be considered:
 - Limited to the number of posts per each race group;

- *Provided that the number of years service in the rank of Captain may not be less than 8 years service in the rank of Captain;*
- *To differentiate between members with the same number of years service in the rank of Captain and of the same race and gender, preference be given to members with the most years of service/public service;*
- *To differentiate between members of the same seniority and race and gender, preference be given to members with NQF 6 and higher qualifications.”*
- **Uninterrupted service in the Service;** *a minimum of one year uninterrupted service in the Service on the level of Warrant Officer as of 30 June 2010.*
- **Performance;** *at least an annual rating of satisfactory for the 2009/2010 PEP performance cycle.*
- **Suitability;** *suitability for promotion to function effectively at the next higher level which may be affected by any convictions/pending cases-criminal and/or departmental.*
- **Transferability;** *be willing to be transferred to a vacant post identified by the relevant Provincial/Divisional Commissioner (in consultation with his/her Human Resources Utilization/Personnel Management and management Services*

[12] The Agreement in question is a Collective Agreement as contemplated within the meaning of section 213 of the LRA. Section 23 of the LRA regulates the legal effect of collective agreements and provides that;

“(1) A collective agreement binds-

- (a) *the parties to the collective agreement;*
- (b) *each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;*
- (c) *the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-*

- (i) *terms and conditions of employment; or*
- (ii) *the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;*
- (d) *employees who are not members of the registered trade union or trade unions party to the agreement if-*
 - (i) *the employees are identified in the agreement;*
 - (ii) *the agreement expressly binds the employees; and*
 - (iii) *that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.*

[13] Other than contending that the Agreement is unlawful and breaches the provisions of the Constitution and those of the EEA, Adv Brassey on behalf of Solidarity further submitted that Solidarity did not deem itself bound by it. This contention however has no merit in the light of the following pertinent clauses of the Agreement;

Clause 6 provides that;

SCOPE OF APPLICATION

"This agreement applies to all employees appointed in terms of the provisions of the South African Police Service Act, 1995 as well as the Public Service Act, 1995 (where applicable)"

And clause 8 provides that:

"This agreement binds the parties to the agreement and all employees who are not members of a registered trade union admitted to the Sectoral Bargaining Council, as well as all members of registered trade unions admitted to this Sectoral Bargaining Council who are not parties to this agreement"

And Clause 9 which provides that:

"This agreement shall be subject to the provisions of any applicable Act of Parliament, or secondary legislation promulgated in terms thereof"

- [14] In the light of the above provisions, it cannot therefore be correct that this Agreement is not binding on members of Solidarity, who are in the service of the SAPS. The submission made on behalf of Solidarity that clause 8 of the Collective Agreement is irrelevant has no merit in that by virtue of the provisions of section 23 (1) (d) (i) and (ii) of the LRA, its members have been identified and/or expressly deemed to be bound by clauses 6 and 8 of that Agreement. More significantly, I did not understand from Solidarity's pleadings that it had always been its case that the Agreement was not binding on it, and for all intents and purposes, since arguments in this regard appear mainly to have been made from the bar, nothing further turns on them.
- [15] The fact that the Collective Agreement is binding on members of Solidarity is however not the end of the matter, as it is trite that a Court should intervene where the provisions of an agreement which is the product of collective bargaining offends against the principles and values of our Constitution⁶, or where the enforcement of a collective agreement provision may result in an injustice or unfairness, or where the provisions are plainly unlawful.
- [16] A collective agreement such as the one that is being impugned given its context and purpose is subject to the Constitution and the Employment Equity Act⁷, and the fact that it was a product of negotiation does not necessarily make it fair or lawful⁸. Section 3 of the EEA requires that Act to be interpreted in compliance with our international law obligations and in particular, International Labour Organisation Convention (111) concerning Discrimination

⁶ See *Larbi-Odam v MEC for Education (North West Province)* (1998) 3 LDD 102 (CC) at para 28 where it was held that;

"...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 too is subject to constitutional challenge where it discriminates unfairly against vulnerable groups..."

⁷ *Janse van Vuuren v South African Airways (Pty) Ltd and Another* (2013) 34 ILJ 1749 (LC) and also by virtue of the provisions of clause 9 which provides that;

"This agreement shall be subject to the provisions of any applicable Act of Parliament, or secondary legislation promulgated in terms thereof"

⁸ See *South Africa Airways (Pty) Ltd v G J Jansen Van Vuuren and Another* [2014] 8 BLLR 748 (LAC) at para 58 where it was held that;

"Thus, the fact that a collective agreement was a product of negotiation between the appellant's (alleged) representatives and the second respondent does not in itself make it fair, either constitutionally or in terms of the EEA, its discriminatory contents, because if it were to do so, it would undermine both the EEA and the Constitution in a fundamental respect"

in Respect of Employment and Occupation. In regards to agreements, Article 2(e) of the ILO Recommendation of 1958 calls upon member states to ensure that collective agreements do not contain provisions of a discriminatory nature. Thus parties may not contract out of the fundamental rights and protections afforded under the Constitution or the EEA to the *undue* detriment of non-parties to that agreement.

The legal framework:

- [17] Human dignity, the achievement of equality, the advancement of rights and freedoms, non-racism and non-sexism are the founding values of our constitutional democracy⁹. It was contended on behalf of the First and Third Respondents that Solidarity was not entitled to rely directly on the provisions of the Constitution when there was legislation which gave effect to the right in issue, and that the principle of constitutional subsidiary prohibited the direct reliance on the Constitution¹⁰. The issue however is that the arguments raised in this application goes to the heart of our employment equity dispensation, and it would be remiss of this Court not to consider this matter within the context of our constitutional framework. Notwithstanding the objection raised thereto, and since the issue of equality is central to this dispute, the starting point for our purpose should be section 9(2) of the Constitution, which expressly provides that;

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

And,

Section 9 (3) of the Constitution, which provides that;

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender sex, pregnancy, marital

⁹ Section 1 (a) and (b) of the Constitution

¹⁰ In reference to *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC)

status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”

[18] The Employment Equity Act was designed to give effect to the above constitutional right to equality, and since a number of its provisions appear to be the basis of Solidarity’s objections to the Agreement, it would be useful to re-state those provisions in full. Section 6¹¹ specifically prohibits unfair discrimination, whilst section 6 (2) (a) and (b) provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act; or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. Section 15(1) of the EEA defines affirmative action measures as –

“... 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.”

And

Section 15 (2)¹² provides that the affirmative action measures 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 –*

¹¹ s6 (1) “No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth;”

¹² section 15 (2) (a)- (d) and subsection (3)

- (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.*

[19] Section 15 (3) provides;

“The that the measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas”

And,

Section 15 (4) further provides that;

“Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups”

[20] Solidarity does not question the Collective Agreement as an affirmative action measure as contemplated in section 15(1) and authorized by 6 (2) (a) of the EEA. It however argued that the impugned Agreement was in conflict with the provisions of section 15 (3) of the EEA, which provides that measures referred to in subsection (2) (d)¹³ should include preferential treatment and numerical goals, but excludes quotas.

[21] From the reading of section 9 (2) of the Constitution, read together with section 6 (1) and (2) of the EEA, it is apparent that the purpose of affirmative action measures is to advance persons from designated groups and it is

¹³ Which provides that:

- (i) *“subject to subsection (3), measures to- 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”*

ameliorative in nature. It seeks to advance people prejudiced by past discrimination and injustices, to create equality in opportunities and to correct imbalances in social standings between people from different groups. As Moseneke ACJ held in *South African Police Service v Solidarity obo Barnard*¹⁴ (Barnard);

“We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.”

- [22] In the light of our painful history of sustained and institutionalized discrimination, the debates surrounding the purpose, efficacy and even the legitimacy of affirmative action measures will linger on for generations. The overall consequences of the legacy of institutionalized discrimination are deeply embedded in the polity, society and economy of the country and will not be resolved overnight, even in the face of the political transformation that has occurred and the elimination of discriminatory laws and practices.
- [23] The drafters of the EEA never envisaged the implementation of reverse racism when they had affirmative action measures in mind. Their intentions were always noble and in addressing the imbalances of the past, it was indeed foreseen that the implementation of remedial measures such as affirmative action will always lead to unequal treatment of others in the short term, in the interests of ultimately achieving equity in the long term. It was in the light of these considerations that the provisions of section 15 (4) of the EEA were carefully worded to ensure that those excluded from affirmative action measures do not face absolute barriers in their future or continued employment, it being appreciated that that they also enjoy protection against discriminatory policies and practices.

¹⁴ 2014 (6) SA 123 (CC) At para 30

- [24] The EEA requires that a designated employer must, as part of its Employment Equity Plan, determine numerical goals¹⁵ to achieve equitable representation of suitably qualified people from all designated groups, including persons with disabilities, within each occupational category of the workforce. However, affirmative action measures are 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. It could never have been intended with these measures that mediocrity, ineptness and a sense of entitlement should be promoted¹⁶.
- [25] It therefore follows that those excluded from such measures, but who steadfastly hold the view that they are more suitably qualified or worst still, were equally affected by past discriminatory practices will feel hard done or discriminated against. Van der Westhuizen J in *Barnard*¹⁷ held that the appropriate assumption under our constitutional framework was that

¹⁵ Numerical goals are developed in accordance with the guidelines set out in CODE OF GOOD PRACTICE: PREPARATION, IMPLEMENTATION AND MONITORING OF EMPLOYMENT EQUITY PLANS (GN R1394 in GG 20626 of 23 November 1999) provides that;

“8.4 Numerical goals

“8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.

8.4.2 In developing the numerical goals, the following factors should be into consideration-

- *The degree of under-representation of employ employees from designated groups in each occupational category and level in the employer's workforce present and planned vacancies;*
- *the provincial and national economically active population as presented in form EEA 8;*
- *the pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;*
- *present and anticipated economic and financial factors relevant to the industry in which the employer operates;*
- *economic and financial circumstances of the employer;*
- *the anticipated growth or reduction in the employer's workforce during the time period for the goals;*
- *the expected turnover of employees in the employer's workforce during the time period for the goals; and*
- *labour turnover trends and underlying reasons specifically for employees from designated groups.”*

¹⁶ See *Barnard* at para 41

¹⁷ At para 137

restitutionary or affirmative measures should be welcomed rather than viewed with suspicion, and that they must be understood as equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory. That assumption will however not in the short-term turn into reality and be fully appreciated by those excluded from these measures. This should be expected, in that our approach towards equality should unashamedly go beyond mere equal treatment (formal equality) of individuals, to some understanding of historical, social and economic equality between individuals and groups (substantive/restitutionary equality)¹⁸. That approach must for all intents and purposes, take into account the historical context within which those who are currently privileged or hold positions of seniority within the public service find themselves in those positions¹⁹.

- [26] It should not be forgotten that the apartheid government used the public service with good effect in effecting its wayward policies including job reservation. To put on blinkers to these historical realities in our approach towards an equal society, and to attempt to redress inequality with the starting point as the adoption of the new Constitution in 1996 is doomed to fail. Our struggle for equality goes beyond 1996, and any contrary approach would merely address the symptoms rather than the root cause of inequality.
- [27] Equally important is the fact that caution however has been drawn to how these measures are to be implemented. Thus, they must be implemented in a way that advances the position of people who have suffered past discrimination, and they must not unduly invade the human dignity of those affected by them²⁰. The fact that measures falling within the ambit of section 9(2) of the Constitution and section 6(2) of the EEA are protected does not however imply that they are immune from the scrutiny of the Courts insofar as determining whether they are legitimate restitution measures within the scope

¹⁸ See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at para 60 and also referred to by Westhuizen J in *Barnard* at paras 137-138

¹⁹ See Jafta J's separate judgment in *Barnard* at para [230], where it was held that;

"An enquiry into the implementation of a restitutionary measure cannot leave out of account the historical context that led to white employees being over-represented in managerial and supervisory posts"

²⁰ *Barnard* at para 32

of the empowering section 9(2) of the Constitution, and secondly, whether the properly adopted restitution measures were correctly and legitimately applied²¹. This is according to the Constitutional Court in *Barnard*, necessitated by the fact that a validly adopted Employment Equity Plan must be put to use lawfully, and may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose²².

- [28] The Constitutional Court in *Barnard* further held that a measure taken pursuant to section 9(2) and falling properly within the scope of the section will not offend the provisions of section 9(3) as it will not be unfair discrimination on the grounds of race. Affirmative action measures are however not a license for reverse discrimination as already pointed out, nor are they an end in themselves. In order to pass constitutional muster, they must meet the test laid out by Moseneke J (as he then was) in *Minister of Finance and another v Van Heerden*²³ in the following terms:

“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 the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality”

- [29] In regards to the first leg of the enquiry, the reality and irony of the consequences of the grand design of the system of apartheid is that eligibility for affirmative action measures will continue to be determined by the very stratification formerly used by that system. Race and gender conscious categorization is and will continue to be necessary for the eradication of disadvantage and attainment of equality, which our Constitution implores us to achieve. It is in the light of these considerations that section 1 of the EEA identifies race (Black), gender and disability as the criteria to determine eligibility for affirmative action benefits. This group is branded “designated”

²¹ *Barnard* at para 37-38

²² *Barnard* at para 38

²³ 2004 (12) BLLR 1181(CC) para 37. See also *Barnard* at para 36

and there is no reason to doubt that it was this group that bore the ultimate brunt of the system of apartheid.

[30] The measure designed to protect or advance such persons or categories of persons can only be in terms of a formal and carefully thought out plan²⁴ in order to avoid arbitrariness in its implementation. Section 20 of the EEA prescribes that the employment equity plan must achieve reasonable progress towards employment equity in the workforce.

[31] In regards to the third leg of the enquiry, the measure must have as its main objective, the attainment of substantive equality. As stated in *Van Heerden*²⁵;

“Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past. As Ngcobo J observed in Bato Star:

“The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities”.(Citations omitted)

[32] What has to be determined therefore in the light above background is whether the Collective Agreement impugned as an affirmative action measure passes the constitutional test set out in *Van Heerden* and *Barnard* for the purposes of section 9 (3) of the EEA. A few matters aligned to this application however should be disposed of prior to dealing with the main arguments.

[33] The Collective Agreement is an affirmative action measure as conceded by Solidarity. For the purposes of these proceedings, I did not understand Solidarity’s case to be that it challenged the Employment Equity Plan as adopted in the Collective Agreement in its form, nor were the numerical targets set out in that Plan challenged. It is common cause that Solidarity has

²⁴ *Public Servants Association v Minister of Justice* 1997 (5) BCLR at 640.

²⁵ At para 44

since lodged an application in this Court under case number J879/12 to seek an order setting aside the SAPS' current Employment Equity Plan on the basis that it does not comply with the Constitution and other various statutory enactments. That matter is pending before this Court. Furthermore, Solidarity's application in this Court under case number: J 2145/14 to seek an order that it be consulted at the level of the SSSBC in respect of the design of the Employment Equity Plan itself was dismissed, and an appeal has since been lodged in that regard.

- [34] For the purposes of this application, and since it was accepted by Moseneke ACJ in *Barnard* that the validity of the SAPS Employment Equity Plan (A collective agreement) nor its fairness was not placed in question, the Plan is indeed a valid affirmative action measure authorized by section 6(2) of the Employment Equity Act²⁶. Equally more important is that the Plan passes the three-pronged test laid out in *Van Heerden* and *Barnard*. In this regard, Van der Westhuizen in a separate but concurring judgment in *Barnard* held that;

*"The constitutional validity of the Act was not attacked. Section 6(2) of the Act specifically states that affirmative measures do not constitute unfair discrimination. The Employment Equity Plan as a measure (with its accompanying guidelines) passes the first two prongs. It identifies and targets categories of persons previously disadvantaged by unfair discrimination and categorises them in designated groups which must be advanced and promoted according to numerical targets"*²⁷

And,

*"Therefore the implementation of the measure satisfies the third leg of the Van Heerden enquiry in that it promotes the achievement of equality...."*²⁸

- [35] The fact that the Employment Equity Plan is a valid affirmative action measure, or that it passed the *Van Heerden* test does not however necessarily imply the same with the Collective Agreement impugned despite it

²⁶ At para 52

²⁷ At para 144

²⁸ At para 156

being accepted as an affirmative action measure. This is so in that unlike the Plan, which normally has a lifespan of five years, the Agreement was put in place for a particular purpose, and as a once-off measure or process, to populate the ranks as per the new structure over a period of 24 months. Although in implementing the Agreement numerical targets set out in the Plan were adapted, the Agreement has its own unique features, which as I understand Solidarity's arguments are on their own or as implemented with the Plan, objectionable.

The main submissions:

[36] Solidarity argued that in the scheme, the selections for promotion were made within 'silos' defined by race and gender. As I understand the argument, the implication is that individual members were promoted or populated into the ranks solely from a fixed pool of individuals as defined by race and gender, and without any scope of manoeuvre or flexibility, and to the exclusion of other considerations. In amplification thereof, Solidarity further submitted that;

36.1 The Agreement created silos based on race and gender within which seniority is to be evaluated, and it mechanically bases promotion on the results of this analysis. Accordingly, it was argued that the numbers were merely put in machines (silos) within race groups, resulting in rigidity, quotas, and non-consideration of individual attributes, thus not achieving equitable representation.

36.2 The scheme, taken as a whole, is arbitrary, and displays a naked preference or amounts to quotas in implementation. Since the Agreement propagated the numerical allocations, this amounted to the use of a quota system, which was specifically prohibited by the EEA.

36.3 The measures taken in terms of that Agreement amount to unfair discrimination, and in the alternative, the Agreement amounts to nothing other than a quota system.

- 36.4 No effort was made to determine how individuals are to be treated by reference to their performance, the disadvantage they might personally have suffered, or the needs of the service.
- 36.5 The allocation of posts according to race created an assumption that equitable allocation was an end when in reality other elements of the plan were not incorporated.
- 36.6 By making representitivity the 'baseline for the filling of the posts', the Agreement thus gave officers a right to promotion on the basis of length of service (formal criteria aside) within the silos of race and gender it postulated.
- 36.7 Solidarity emphasized that it not contest the need for affirmative action, but however contended that the mechanical application of numerical quotas in order to secure demographic representation was impermissible.
- 36.8 Solidarity further contended that SAPS made no serious effort to deny that the Agreement created a structure of quotas, but however sought to justify the use of such quotas as sanctioned by the constitutional imperative to remedy past discrimination based on race and gender. It disputed that the scheme was not applied inflexibly or that there were any deviations from its terms as implemented.

[37] The arguments advanced on behalf of POPCRU were that the applicants' case was untenable, with certainty in respect of the challenge to the promotions effected based on racial considerations having been made in *Barnard*. POPCRU argues that the measures taken are affirmative action measures which do not unfairly discriminate against members of the SAPS based on their race, but rather the measures have been taken to address past disparities which still perpetuate the employment demographics today and that these have been done lawfully and fairly in accordance with the Employment Equity Plan.

- [38] It was submitted on behalf of the first to third respondents that the scheme in issue herein passes the test in *Van Heerden* and *Barnard*, as it targets a particular class of persons, namely, the promotion of black people and women, in accordance with their population representation. The scheme identified and targetted categories of persons previously disadvantaged by unfair discrimination, and categorised them in designated groups which must be advanced and promoted according to numerical targets as envisaged in the Employment Equity Plan. It was further submitted that the scheme promoted the achievement of equality which could not be achieved without taking into account the extent to which each designated group was numerically represented in the workplace.

Evaluation:

(a) *The outcomes of the implementation of the collective agreement:*

- [39] Since it is more the implementation of the Agreement that is under attack rather than its form as an affirmative action measure, the starting point would be to examine how it was implemented. The Collective Agreement does not indicate the number of positions to be allocated to each racial and gender group but simply refers to the seven criteria to be applied. SAPS contention is that guidelines in this regard are set out in the Employment Equity Plan, which aims to *inter alia*, promote the constitutional right to equality, the elimination of unfair discrimination, the proper and effective implementation of employment equity in order to redress the effects of past practices and to achieve a diverse workforce broadly representative of the South African community. The Plan further affirms SAPS' commitment to ensuring broad representation of its Human Resources based on racial, gender and disability demographics. This is to be implemented in all occupational categories/levels/classes nationally and provincially in relation to each and every workplace.

- [40] The Plan however refers to the 2006 national demographic estimates and utilises same as the employment equity plan targets which the SAPS strives to attain by 2014. The 2006 national demographics estimates were 79.35% for Africans, 9.34% for Whites, 8.85% for Coloureds and 2.46% for Indians.

The Plan envisages 'ideal' race representation targets and 'realistic' ones with the application of targets to be applied differently depending on the level occupied by the relevant member during its lifespan. The Plan is further divided amongst levels of employees in the SAPS hierarchy being:

- Senior Management Level – salary levels 13 – 16;
- Middle Management Level – salary levels 9 – 12;
- Junior Management Level – salary level 8;
- Production Level – salary levels 1 – 7;

[41] When effecting the promotions in accordance with the Collective Agreement, SAPS utilised the above principles and national demographics to allocate the available positions between the relevant race and gender groups. It needs to be said at the outset that SAPS' approach in utilising the national demographics cannot be faulted, for the simple reason that the Plan and the numerical targets set out therein remains unassailable following from *Barnard*.

[42] The applicants for the posts were further informed that in terms of the promotion criteria as contemplated in Annexure B of the Agreement, the most senior members per each race and gender group, limited to the number of posts per race group, had to be considered for promotion, and not all members that met the minimum requirements were to be promoted. The Agreement further made it clear that seniority in the ranks was only applicable within each specific race or gender group. It is common cause that the number of members who qualified for the promotions far exceeded the number of members who were promoted with differing discrepancies in the different racial and gender groups.

[43] As a consequence of the first phase of the implementation of the Agreement and the Plan in 2012, a total of 5209 members were promoted to the ranks of Lieutenant, Captain and Major with effect from 1 April 2011. A lot more people than the 5209 qualified to be promoted, but only a few were actually promoted. During the second implementation phase in 2013, 1 838 posts were made available, and 1 645 members were promoted to fill those positions.

[44] In promoting members to the ranks of Lieutenant, Captain and Major (respectively), SAPS relied on the criteria set out in Annexure B of the Agreement, as well as the Plan. The figures of appointments from those that qualified and those that were promoted according to race groups are as follows;

Qualified for Lt/Captain:	Promoted:	Qualified for Major:	Promoted
African males – 21 393	2 951	African males –1 033	308
African females – 902	764	African females –108	105
Coloured males –2 785	187	Coloured males - 201	25
Coloured females – 269	203	Coloured females – 47	23
Indian males – 1 270	48	Indian males -262	7
Indian females-123	51	Indian females- 55	7
White males-7 032	186	White males-1 431	27
White females-1 801	178	White females- 461	24

[45] When promoting members to the rank of Lieutenant, Captain and Major, the criteria set out in Annexure B of the agreement as well as the Plan was utilized and the following allocations/appointments were made;

To the rank of Lieutenant:

African:	Males -1514	Females-1515
Indian:	Males - 47	Females- 47
Coloured:	Males -169	Females – 169
White:	Males – 178	Females – 178

To the rank of Captain:

African:	Males – 20	Females – 742
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Indian:	Males – 0	Females – 1
Coloured:	Males – 0	Females – 49
White:	Males – 0	Females – 0

To the rank of Major:

African:	Males – 204	Females – 203
Indian:	Males – 6 (7)	Females – 6 (7)
Coloured:	Males – 23 (25)	Females – 23
White:	Males – 24 (27)	Females - 23

- [46] It was not disputed that in populating these positions at the level of Major, the representivity guidelines set a target of 24 White males for promotion and 27 were instead promoted; the targets for coloured males was 23 whilst 25 was promoted; the target for Indian males was 6 but 7 were promoted; for Indian females it was 6 however 7 were promoted. A similar variance between the targets and actual promotions was found in the population of posts at the level of Lieutenant.
- [47] The sticking point as appears from the above figures is the appointments made at the level of Captain, where members from the White race, Coloured and Indian males were not appointed. This was however to be expected in view of the variance between the 'ideal' race representation targets set by the Plan for each year between 2010 and 2014, and 'realistic' race representation targets set at all levels, more in particular for 2014. It was not in dispute that race representation at the levels of Senior Management (Salary level 13 -16) and middle management (Salary levels 8-12) was still a concern as white members were overpopulated at those levels. This is apparent from the above figures, which shows that more white male members qualified for promotion at all the ranks. Only in respect of the position of Lieutenant/Captain did African Males surpass the number of white males who qualified, and the number of white female members that qualified for promotions at all levels surpassed that of African females, Coloureds and Indians.

[48] The population of the new ranks was effected in accordance with the numerical targets as contained in the Plan, with minor deviations as indicated above. It has already been accepted that the Plan as adopted and as implemented is an affirmative action measure contemplated in section 6 (2) of the EEA; that the Plan is a measure that targets persons or categories of persons who have been disadvantaged by unfair discrimination; and further that the Plan is designed to protect or advance such persons or categories of persons, and promotes equality. In the light of these considerations, it is indeed mind boggling for Solidarity to persist with the argument that notwithstanding the validity of these numerical targets and from the text of the Agreement, the latter propagates a quota system. These numerical targets are sourced from the Plan and were adapted to the positions available.

[49] The Constitutional Court in *Barnard* accepted that the EEA did not allow strict and rigid quotas to be enforced, but did allow an employment equity plan to set targets to be pursued by an employer. It was also held that rigid quotas would in effect place an absolute bar on the employment or promotion of a member of a privileged group, and having considered the SAPS' employment equity plan, the Constitutional Court also held that it did not impose such rigid quotas and neither did the manner in which the Plan was being implemented. However since Solidarity persists that the Agreement propagates 'quotas' within 'silos', it would be useful to examine what this term implies as against what the Agreement sought to achieve.

(b) "Quotas"

[50] The term "quota" is not defined in the EEA, and Moseneke ACJ in *Barnard* had refrained²⁹ from attributing any meaning to it, other than to state that;

"Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the Act. The same section endorses numerical goals in pursuit of work place representivity and

²⁹ at para [42]

equity. They serve as a flexible employment guideline to a designated employer.”³⁰

- [51] The terms ‘quota’ and ‘numerical goals’ found elucidation in *Munsamy v The Minister of Safety and Security*³¹. Katz AJ in *South African Restructuring And Insolvency Practitioners Association v Minister of Justice And Constitutional Development and Others; In Re: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice And Constitutional Development and Others (“SARIPA”)*³² explored further meaning to the terms and held that:

“Some guidance as to the distinction between targets and quotas can be obtained from American jurisprudence. In Local 28, Sheet Metal Workers’ International Association v EEOC, quotas and targets were distinguished as follows:

‘A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications.... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job.’

In the South African context, Klinck & Nwena state:

“Quotas” refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups. This may be achieved through the setting aside of a specific number of positions for designated groups or by making designated group status the only or dominant criterion for eligibility for employment opportunities.’

³⁰ at para [54]

³¹ Case no:D253-03 – 3 April 2013, Where Witcher AJ (As she then was) held that;

“In terms of section 15 (3) of the Act, legitimate affirmative action measures include preferential treatment and numerical goals, but exclude quotas. The concept of preferential treatment and numerical goals to be achieved within a certain period of time differs quite significantly from the concept of quotas. The imposition of a strict quota is a rigid measure requiring a certain fixed proportion or percentage to be included whereas preferential treatment and goals is more flexible allowing the achievement of objectives over a period of time”.

³² At paras 212 - 214

According to Andre M Louw, quotas in the employment equity context are 'mandatory and represent a fixed number to be achieved, apparently at any cost', whilst targets are non-mandatory guidelines to achieve representation from designated groups in the workforce. Further, he argues that application of quotas is 'generally divorced from reality and the circumstances of the specific situation in which they are applied'. Louw argues that a target or numerical goal established in an Employment Equity Plan will only be legitimate if regard is had to the factors listed in s 42 of the Employment Equity Act. An element of such goal-setting is that it must be realistic in context.

What is clear, is that what is impermissible is rigidity – however it is named.”
(Citations and references omitted)

[52] The drafters of the EEA were careful to use the word '*numerical goals*' rather than '*quotas*'. The difference in the use of these terms is not semantic, and flowing from the distinction made in *Barnard* and other authorities referred to above, it is useful to add that '*numerical goals*' or '*targets*' within the context of employment equity plans are often voluntarily agreed between parties to set objectives and guidelines. Parties by agreement can adjust these numerical goals, and the EEA does not make provision for parties to be sanctioned when they do not meet those numerical goals. To the extent that it might be argued that Schedule 1 of section 65 of the EEA imposes fines in the event of its contravention, these fines are in respect of specific contraventions identified in the Schedule, being sections 16, 19, 20, 21, 22 and 23 of the EEA. None of these provisions however speak of '*quotas*'.

[53] "Quotas" on the other hand are externally imposed, (e.g by way of legislation, policy, regulations or even practice) and the failure to meet them is usually met with a sanction. They denote a *limitation*; a *fixed amount*; or a *maximum* of something related to a number, quantity, share, allocation or value, which an individual, individual group or entity is permitted or entitled to. 'Quotas' are an end in themselves, as they do not permit flexibility unless there is a change to the tool that enforces them.

- [54] Racial or gender quotas as applied within the workplace as indicated in *Barnard* equate to job reservation, and furthermore attract negative connotations and for good reasons. Not only are they inherently and irrationally discriminatory, they are also demeaning in implementation in that they fail to acknowledge an individual's worth. In most instances, and unwittingly so, they promote mediocrity and incompetence, and instil a false sense of entitlement. Invariably and whether rightly or wrongly, beneficiaries of the quota system will always be viewed as inferior and incompetent, as the assumption will always be that they got recognition or appointment simply to make up the numbers rather than based on their suitability or competencies. In a society such as ours and in our workplaces, where we are still battling the demons of racial polarisation and tensions, the use of quotas adds fuel to those tensions and creates further suspicions and resentment. Any affirmative action measure based on quotas is inherently 'arbitrary, capricious and displays naked preference', and would accordingly not pass constitutional test as stated in *Van Heerden and Barnard*.
- [55] POPCRU's contention was that Solidarity's argument about "absolute quotas" being applied was plainly wrong as there was no "absolute barrier" to the promotion of white people in the SAPS especially in accordance with the Plan or Agreement. It argued that the same argument was dismissed by the Constitutional Court in *Barnard*³³, and that employees from each designated group were promoted and numeric targets set for each race group were not rigidly observed.
- [56] The first and third respondents denied that the scheme was based on a quota, contending that the population of the ranks was informed by the Agreement, which set out seven criteria in its Annexure B. In regards to the criteria of 'representivity', no percentages or numbers were used or taken into account, and that for the rational implementation of the process, the number of posts available (5 209), had to constitute the baseline for the filling of those posts.

³³ At paras [66] and [67]

- [57] I am in agreement with the contentions made on behalf of the respondents that the Agreement cannot propagate the use of quotas as alleged, for the simple reason that the numerical goals and targets set out in the Plan were a result of an agreement between POPCRU, SAPU and SAPS at the level of the SSSBC. The fact that Solidarity was not a party to the setting of these numerical goals does not turn them into quotas.
- [58] The difficulty with the submissions made on behalf of Solidarity is that it seeks to divorce the Agreement from the Plan, and treat each as a stand-alone affirmative action measures when this is not the case. Having looked at the characteristics of a 'quota', there is nothing in the Agreement that remotely resembles any reference to fixed numbers according to race or gender for the purposes of populating the ranks. As correctly pointed out on behalf of the respondents, the Agreement sets out seven criteria for eligibility for promotion, and not a single reference is made in the Agreement to any number or figure. It therefore follows that the baseline for the filling of those posts had to be informed by the posts created as a result of the new structure, and there was therefore no other equitable way of allocating those posts other than in accordance with the numerical targets as set out in the Plan. The numerical targets were realistic in terms of the number of vacancies that arose as a result of the new structure, and the number of members that qualified in terms of the criteria set out in the Agreement.
- [59] It therefore follows that for SAPS to have adopted any other method of allocation on its own, and outside of the Plan, this would indeed have led to arbitrariness. There is no basis for a conclusion to be made that the application of numerical targets in accordance with the Plan in order to secure demographic representation in implementing the Agreement was impermissible. There is no substance in the allegation that the Collective Agreement propagated the use of quotas. The scheme, taken as a whole, was not arbitrary, nor did it display a naked preference in implementation. The Agreement was implemented in populating the ranks taking into account numerical targets in accordance with the Plan, and this could not possibly have led to the infringement of the provisions of the EEA.

(c) “Seniority”

- [60] It is further not correct that the Agreement created silos based on race and gender within which seniority was to be evaluated, or that the Agreement mechanically based promotion on the results of this analysis. There was a justifiable reason for the Agreement to require that the most senior member be considered per each race group as can be gleaned from the number of white members who qualified for promotion as pointed out elsewhere in this judgment. Solidarity views this approach as a creation of silos, when in fact that approach was the most rational, equitable and sensible way of ensuring representivity at all senior levels. To have assessed seniority on a general level would not have achieved the desired results.
- [61] To the extent that the argument surrounding quotas has been rejected in this judgment it follows that the use of the term ‘silo’ loses any meaning or relevance. Furthermore, emotionally charged terms used in the applicants’ pleadings such as ‘*social engineering*’; and ‘*race and gender profiling*’ and their relevance to the Agreement were not pursued with any seriousness by Adv Brassey, and will not receive any attention in this judgment. It however needs to be mentioned that in my view, these terms, where bandied without any form of justification have no place in a society still grappling with the after effects of an evil system of apartheid. We do not need to be reminded that the apartheid system adopted and implemented the very mechanisms of social engineering and race profiling with such profound effect in achieving its evil ends.
- [62] It was not in dispute that seniority was one of the seven criteria used in implementing the Agreement, and within that criteria, there were several considerations to be taken into account. In my view, there was nothing unlawful or unfair for instance, where seniority had to be looked at in terms of the most senior member within each race group and allocate posts according to the Plan’s numerical targets, especially given the number of white males who qualified for promotions as against members from designated groups. If

this was not the case, the following scenario by way of an example would have ensued;

- [63] A total of 7 032 White males qualified for promotion to the rank of Lieutenant or Captain. If the number of African males who qualified is excluded, a total of 7 150 comprising of African females (902); Coloured males (2 785); Coloured females (269); Indian males (1270) and Indian females (123)) also qualified for the rank of Lieutenant or Captain. The argument that seniority was a more important consideration and that SAPS should have looked at this criteria in general without seeking to determine it per each race group however loses sight of the overall objective of attaining substantive equality. It implies that notwithstanding the aims of the affirmative action measure, more White males at that level would still have been promoted to the disadvantage of members of the designated group purely on the grounds of seniority. This could not in my view be countenanced as it would merely have perpetuated the racial imbalances at that level.
- [64] Solidarity's main complaint appears to be that the effect of the Agreement was that even though a white member of SAPS was senior and complied with the minimum or even exceeded the requirements, if the number of positions allocated to a specific race group were filled, he or she could not be promoted, notwithstanding the fact that a number of designated employees with far less seniority were promoted only due to the larger number of positions allocated to that race group.
- [65] We need to be reminded that one of the grand designs of the apartheid system was that seniority, especially within the public service was always associated with whiteness, and to be more precise, white male. This unfortunately created a false sense of entitlement which cannot be allowed to persist if we are to attain equality within the workplace. Solidarity's argument is with respect devoid of any logic, and refuses to accept the whole purpose and scheme of substantive equality dealt with elsewhere in this judgment. The argument surrounding seniority in effect seeks to perpetuate a lack of representivity at certain senior levels, and defeat the aims of restitutionary

measures. It overlooks the historical context within which a majority of white male members of SAPS in particular found themselves in those positions of seniority.

- [66] Inasmuch as the scheme of affirmative action is prohibited from propagating job reservation, it cannot in the same vein face opposition simply to permit or perpetuate job reservation in disguise. It needs to be emphasised that there is nothing wrong in challenging an affirmative action measure if it does not meet constitutional requirements. There is however something inherently wrong, when those measures are challenged simply to sustain privileges accumulated from the apartheid system. This point could never have been made more emphatic than in *Pretoria City Council v Walker*³⁴, as referred to by POPCRU, where the Constitutional Court held that;

“Courts should, however, always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.”

- [67] The grand scheme of the SAPS Employment Equity Plan as implemented with the Collective Agreement and the other criteria set out therein seeks to dispel the notion that white seniority is might and more competent. The criteria of seniority alone cannot put the brakes on SAPS’ transformative agenda. Inasmuch as Solidarity appreciates that representivity should be broad and equitable as required by section 195 (1) of the Constitution, it nevertheless holds the view that this can only be achieved on its own terms, and on the assumption that perpetuation of the status quo is defensible. The implementation of the Agreement in pursuance of demographic representation by SAPS is what is required of it in terms of its Plan. That Plan is for now unassailable, and accordingly meets the constitutional test. Furthermore, any assertion that seniority is completely ignored is dispelled by the items under that criteria that must be considered, one of them being that: *“To differentiate between members with the same number of years in the rank of Warrant*

³⁴ 1998 (2) SA 363 (CC) para [48]

Officer and of the same race and gender, preference be given to members with the most years in the Service/public Service". Other considerations taken into account in this regard includes whether a member has NQF and higher qualifications. Furthermore, even if there was any merit in the 'seniority' argument, Section 20(3) of the EEA makes it permissible to prefer persons with less qualifications or experience when hiring or promoting provided that they have the capacity to acquire the ability to do the job within a reasonable time. The raising of the 'seniority' flag within SAPS cannot therefore on its own advance an argument against transformation measures, because it simply seeks to perpetuate white male privilege.

- [68] In the light of what had been stated already, there is further no substance to the contention that the scheme, taken as a whole, is arbitrary, and displays a naked preference or amounts to quotas in implementation. As to whether any efforts were made to determine how individuals were to be treated by reference to their performance, the disadvantage they might personally have suffered, their individual attributes or the needs of the service, that is clearly a matter that required oral evidence, and for now, this remains a general observation on the part of Solidarity. A broad allegation that the implementation of the Agreement failed to take into account certain personal attributes cannot be sustained in the absence of evidence to show that this was indeed the case.

(d) *Service delivery*

- [69] It cannot be in doubt that the needs of the service and effective service delivery are equally paramount in making appointments. SAPS needs competent and dedicated members who would be equal to the task, and in making such appointments, such individuals should be "suitably qualified" as implored by section 15 (1) and (2) of the EEA. Solidarity's contention was that there was "irrational pursuit of affirmative action measures" which compromised effective service delivery. I could not agree more with POPCRU's observation that the argument is insulting and demeaning to members of other race groups or gender for that matter, who legitimately

benefitted from these measures on no ground other than that they were deemed to be suitably qualified. The argument further seeks to demean and belittle the restitutionary measures undertaken by SAPS. What can be read from the argument is that the members appointed consequent to these measures are incompetent, unqualified, and merely appointed to make up the numbers.

- [70] There is absolutely no justification for such an assumption to be made as correctly pointed out on behalf of POPCRU, *moreso* since any such observation must be supported by evidence. Whether a candidate is ‘suitably qualified’ cannot be based on Eurocentric notions or on any other racially based standard. It must be based on the factors as set out in section 20 (3) of the EEA. To this end, it can thus be safely inferred that in the absence of any evidence to support that the candidates appointed did not meet any of the criteria set out in the Agreement or section 20 (3) of the EEA, or that their appointments would severely prejudice service delivery, any observations to the contrary can only be based on archaic racial and gender stereotyping, which unfortunately cannot assist in advancing a sensible or coherent argument, nor be wished away through legislative measures.

(e) *“Performance”*

- [71] One of the criteria set out in the Agreement is “performance” as based on at least an annual rating of satisfactory for the (period) PEP performance assessment cycle. Again, to the extent that this application is separated from that of the individual applicants, oral evidence to be led in the latter case might shed light on that issue, as there is a need for comparisons to be made between those appointed and those that were not. However for now, it is accepted in the absence of anything else that indeed individual members’ performance was taken into account, as this is what the Agreement implored SAPS to do.

(f) *“Rigidity”*

- [72] One of the fundamental complaints raised in regards to the Agreement was that it was rigid in implementation. Some aspects of this argument have already been dealt with above. However, Solidarity had further contended that SAPS made no serious effort to deny that the agreement created a structure of quotas, but however sought to justify the use of such quotas as sanctioned by the constitutional imperative to remedy past discrimination based on race and gender. It argues further that in the alternative, SAPS contended that the system was in any event not applied inflexibly and deviations from its terms in fact occurred. Some aspects of these arguments have been dealt with, but it is important that they be reiterated.
- [73] Despite Solidarity having pointed out that the first and third respondents had not in their pleadings refuted that the Agreement was rigidly applied, it was submitted on the latter's behalf that the text of the Agreement was not suggestive of a rigid or inflexible approach, and that to the contrary, the Agreement suggests a flexible approach as it used the words "*representivity guidelines*". It was further contended that a guideline was neither prescriptive nor mandatory, and sought to guide the decision maker on factors which must be taken into account in the course of making the decision. Secondly, it was pointed out that the Plan itself made it abundantly clear that the use of national demographics was not intended as an inflexible standard, and that the very reason that national demographics are to be used is to ensure that "*no absolute barrier is placed with regards to the advancement with any group within the SAPS*".
- [74] As it was already pointed out, the dilemma faced by Solidarity is that it seeks to treat the Collective Agreement as an independent affirmative action measure when this was not the case. There is a difference between attacking a measure on account that it propagates racism, inequality or inflexibility on its own, and asserting the same arguments in regards to the actual outcome of the implementation of that agreement. Clearly on its own reading the Agreement encourages flexibility in the absence of specific numbers or quotas being identified. In this case, amongst other things that were not disputed was that even more members across racial lines were promoted despite the valid

numerical allocations applicable. The vacant slots were not endless to enable the placement of every member or applicant that qualified, and I am not convinced that in view of the limited number of posts, the demands of the Plan and the Agreement, that SAPS would have sought to implement the Agreement without any variations.

- [75] There can be no quarrel with Solidarity's contentions that at the time when the ranks were to be populated, it was an explicit requirement of s 42 of the EEA that all relevant factors were to be taken into account - such as the extent to which suitably qualified people from and amongst the designated groups are equitably represented within the workforce in relation to: the demographic profile of the national and regional economically active population; and the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees.
- [76] The issue of the appointment of personnel that was 'suitably' qualified has been dealt with. The efficacy of the use of demographic profiles of the national and regional economically active population has equally been dealt with within the context of that the Plan, which profile SAPS had to take into account. Be that as it may, and as correctly pointed out on behalf of the first and third respondent, it is not for this Court to pronounce upon the validity of the employment of national demographics. Furthermore, as already illustrated with the variations to the numerical targets as opposed to actual appointments, there is no basis to conclude that these numbers or targets were implemented and applied rigidly and thus created barriers. The application of race and gender was not to the exclusion of other factors which the Agreement implored SAPS to consider. Where SAPS considered personal attributes of applicants within a particular race category as determined by reference to the representation in the national demographics, it cannot be faulted in that regards moreso since the quest for substantive equality required it to do so.

Conclusions:

- [77] The Constitutional Court in *Barnard* held that a measure taken pursuant to section 9(2) and falling properly within the scope of the section will not offend the provisions of section 9(3) as it will not be unfair discrimination on the grounds of race. Having considered the pleadings before the court, and further having had regard to the submissions made on behalf of the parties, I am satisfied that the scheme of the Agreement, as implemented together with the Plan, met the requirements of section 15 (1), (2) and (3) of the EEA, and does not offend against the provisions of section 9 (3) of the Constitution.
- [78] The Collective Agreement, as implemented together with the Plan are affirmative action measures contemplated in section 15 (1) of the EEA and are protected by section 6(2) of the EEA and section 9(2) of the Constitution. These measures meet the constitutional test set out in *Van Heerden* and *Barnard*, and do not offend against the provisions of section 15 (4), nor do they propagate quotas as prohibited by the provisions of section 15 (3) of the EEA. Importantly, the Agreement as can be gleaned from the criteria set out therein strives for substantive equality, and does not impose substantial and undue harm or disproportionate burdens on those who might find themselves excluded from it. In fact, there appears to be even more members of SAPS who fall within the designated group that have not benefitted from the scheme, and who might even have more cause to feel aggrieved. There is therefore no basis upon which it can be concluded that the scheme, as implemented in terms of the Plan and the Agreement, or the Collective Agreement on its own results in, or amounts to unfair discrimination.

Costs:

- [79] POPCRU's contention was that it was joined to these proceedings and wished to pursue costs as Solidarity's case was vexatious. I agree that Solidarity's attack on the Collective Agreement was untenable, and considerations of law and fairness dictate that the Respondents, with the exception of the Fourth, should be entitled to their costs.

Order:

- (i) The application as brought by the First Applicant (Solidarity) is dismissed.
- (ii) The First Applicant is ordered to pay to the First, Third and Fifth Respondents, the costs of this application.
- (iii) Solidarity may approach the Registrar of this Court for a set-down date in respect of the matter concerning the individual applicants.



Tlhotlhamaje, AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

On behalf of the Applicants: MSM Brassey SC with Adv MJ Engelbrecht

Instructed by: Serfontein, Viljoen & Swart Attorneys

On behalf of the First to Third Respondents: Adv T Ngcukaitobi with Adv N Muvangua

Instructed by: The State Attorney

On behalf of the Fifth Respondent: V Ngalwana SC with Adv F Karachi

Instructed by: Grosskopf Attorneys

On behalf of the Fourth Respondent: Van Der Merwe Du Toit INC
(Watching Brief)