The re-evaluation of principles of fairness, rationality and proportionality in affirmative action cases in South Africa

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ABSTRACT

The purpose of this study is to determine what role fairness, rationality and proportionality play in the implementation and interpretation of employment equity plans and affirmative action in South Africa. The recent judgment of the Constitutional Court in *S.A. Police Service v Solidarity obo Barnard* was the second case where the affirmative action clause in South Africa's Constitution was directly considered by the Constitutional Court. The majority judgment re-affirmed the rationality standard as the standard by which the constitutionality of affirmative action measures should be tested. However, two of the minority judgments held that the appropriate standard should be fairness and proportionality respectively.

Chapter 1 of this study is an introductory chapter providing the reader with the problem statement, research question, research methodology and a general overview of the research. Chapter 2 consists of an overview of affirmative action in South Africa. It provides an overview of the pre-1994 apartheid laws and policies, whilst considering the Employment Equity Act, and some of the issues which may arise in the implementation of affirmative action measures. Chapter 3 critically analyses the concepts of formal equality and substantive equality. Chapter 4 consists of a critical analysis of fairness, rationality and proportionality in order to determine their role in affirmative action cases. A legal comparative analysis is undertaken in chapter 5 to determine what lessons can be learned from the Canadian experience.

The conclusions that can be drawn from this study are the courts have required that affirmative action measures must be implemented in a fair, rational and proportional manner. The rationality standard, although not perfect, is nonetheless the most suitable standard by which the constitutionality of affirmative action measures ought to be tested as opposed to either a fairness or proportionality standard.

**Keywords:** affirmative action, fairness, rationality, proportionality, standard.
OPSOMMING

Die doel van die studie is om te bepaal watter rolle regverdigheid, rasionaliteit en proporsionaliteit speel in die implémentering en interpretasie van gelyke indiensnemingspllane en regstellende aksie in Suid-Afrika. Die onlangse beslissing van die Konstitusionele Hof in *S.A. Polisiediens v Solidariteit obo Barnard* was die tweede saak waar die regstellende aksie-klousule in die Suid-Afrikaanse Konstitusie direk deur die Konstitusionele Hof oorweeg is. Die meerderheid beslissing het herbevestig dat die rasionaliteitstandaard die standaard is waarmee die konstitusionaliteit van regstellende aksie maatsawwe getoets behoort te word. Twee van die minderheidbeslissings het volgehou dat die mees geskikte standaard onderskeidelik dié van regverdigheid en proporsionaliteit is.

Hoofstuk 1 van die studie is ’n inleidende hoofstuk wat die leser die probleemstelling, navorsingsvraag, navorsingsmetodologie en algemene oorsig van die navorsing verskaf. Hoofstuk 2 bestaan uit ’n oorsig van regstellende aksie in Suid-Afrika. Dit gee ’n oorsig van die pre-1994 apartheidswette en beleide, terwyl dit die Wet op Gelyke Indiensneming in oënskou neem en na sekere kwessies kyk wat mag voortspruit uit die implementering van regstellende aksie maatsawwe. Hoofstuk 3 analiseer uit ’n kritiese oogpunt die konsepte van formele gelykheid en substantiewe gelykheid. Hoofstuk 4 bestaan uit ’n kritiese analise van regverdigheid, rasionaliteit en proporsionaliteit om hul rol in regstellende aksiesake te bepaal. ’n Regsvergelikende analise word in hoofstuk 5 gedoen om vas te stel watter lesse uit die Kanadese ervaring geleer kan word.

Die gevolgtrekkings wat uit die studie gemaak kan word, is dat die howe bepaal het dat regstellende aksie maatsawwe in ‘n regverdige, rasionele en proporsionele wyse geïmplementeer moet word. Die rasionaliteitstandaard – dalk nie perfek nie – is egter die mees geskikte standaard waaraan die konstitusionaliteit van regstellende aksie maatsawwe getoets behoort te word teenoor die standaarde van regverdigheid en proporsionaliteit.
**Sleutelwoorden:** regstellende aksie, regverdigheid, rasionaliteit, proporsionaliteit, standaard.
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<th>Full Name</th>
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<tr>
<td>CILSA</td>
<td>Comparative and International Law Journal of Southern Africa</td>
</tr>
<tr>
<td>ILJ</td>
<td>Industrial Law Journal</td>
</tr>
<tr>
<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<tr>
<td>TSAR</td>
<td>Journal of South African Law</td>
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<tr>
<td>SA Merc LJ</td>
<td>South African Mercantile Law Journal</td>
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<tr>
<td>SALJ</td>
<td>South African Law Journal</td>
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<td>SAPL</td>
<td>South African Public Law Journal</td>
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Chapter 1 – Introduction

1.1 Problem statement

Affirmative action is a topic with "a tendency to evoke much emotion and spark heated debate among South Africans".¹ It is a term that originated in the United States of America (USA) and refers to a range of programmes directed towards targeted groups to redress their inequality.² In the area of employment, its objective is generally to ensure that the target group should be equitably represented in the workforce of a particular employer.³ Buchan uses the analogy of a race to illustrate what affirmative action seeks to achieve. He says:

If a race has started between two runners, and one is shackled, simply removing the chains and allowing the runners to continue is insufficient, because one runner has had a head start. The race must be started again, more realistically, the previously chained runner must be moved up to an equal position.⁴

Section 9 of the Constitution of the Republic South Africa, 1996 guarantees, inter alia, the rights to equality and freedom from discrimination. Recognising the inequality created by apartheid, section 9(2) explicitly provides that legislative and other measures to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Apartheid and its discriminatory laws and policies have created disparities in employment.⁶ The Employment Equity Act 55 of 1998 (the EEA) was enacted to address these disparities.⁷ The EEA gives effect to sections 9(1) and (2) of the Constitution⁸ and has two purposes: (1) to eliminate unfair discrimination and (2) to implement

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¹ Coetzer 2009 SA Merc LJ 92.
² Dupper 2002 SA Merc LJ 275.
⁵ The Constitution.
⁶ McGregor 2006 CILSA 393.
⁷ Preamble of the EEA.
⁸ Preamble of the EEA.
affirmative action measures to redress the disadvantages in employment experienced by designated groups (black people, women and disabled persons), in order to ensure their equitable representation in all occupational categories and levels.⁹

In terms of the EEA, designated employers must prepare and implement an employment equity plan.¹⁰ Where a plan does exist, the courts may scrutinise its content to determine whether it is consistent with the Act and or the Constitution and whether it was properly applied.¹¹ Affirmative action measures may be challenged as being unfair, either in principle or in their implementation.¹²

It has been suggested that in earlier cases (for example Public Servants Association v Minister of Justice¹³) the courts interpreted the law conservatively by placing more focus on the protection of individual rights (formal equality) than the promotion of transformation (substantive equality).¹⁴ It has also been suggested that the courts have generally played a restrictive role and have been a blunt weapon for transformation.¹⁵

The courts have often held that affirmative measures must be implemented in a fair and rational manner.¹⁶ The different levels of scrutiny raise the question as to the role of the courts, and in particular, the standard of scrutiny which courts should apply in order to determine whether affirmative action measures are lawful.¹⁷

Minister of Finance v Van Heerden¹⁸ was the first case where the Constitutional Court dealt directly with the affirmative action clause in the constitution. In determining whether affirmative action measures are consistent with the Constitution, the court extracted the conditions for constitutional validity of affirmative action measures from

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⁹ Section 2 of the EEA.
¹⁰ Section 13(2)(c) read with section 20.
¹³ 1997 18 ILJ 241 (T).
¹⁴ Rycroft 1999 ILJ 1412.
¹⁵ Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314.
¹⁶ Van Niekerk and Smit Law @ Work 136.
¹⁷ Fredman "Facing the future: substantive equality under the spotlight" 24.
¹⁸ Minister of Finance v Van Heerden 2006 4 SA 121 (CC) (hereafter Van Heerden).
section 9(2) in isolation.\textsuperscript{19} It has been suggested that this approach means that in-principle fairness (in terms of section 9(3)) and proportionality (in terms of section 36) are not part of the requirements for valid affirmative action.\textsuperscript{20} The rationality test in \textit{Van Heerden} has been criticised for its restrictive and deferential nature, and for the fact that it does not contain any elements of fairness and proportionality.\textsuperscript{21} Like rationality, both fairness and proportionality have also been subjected to criticism.\textsuperscript{22}

\textit{Van Heerden} rejected the template laid down in \textit{Public Servants Association v Minister of Justice}.\textsuperscript{23} The principle established in \textit{PSA} was that affirmative action measures were themselves unfair discrimination which had to be justified in order to be found to be fair. Contrary to the standard adopted by the Constitutional Court in \textit{Van Heerden}, the Labour Court in several cases (for example \textit{Solidarity obo Barnard v S.A. Police}\textsuperscript{24}; \textit{Willemse v Patelia}\textsuperscript{25} \textit{et cetera.}) has applied both the standards of fairness and rationality.

The recent judgment of the Constitutional Court in \textit{S.A. Police Service v Solidarity obo Barnard}\textsuperscript{26} was the end of a legal marathon that lasted nine years. The Labour Court\textsuperscript{27} and the Supreme Court of Appeal\textsuperscript{28} found in favour of Barnard while the Labour Appeal Court\textsuperscript{29} and Constitutional Court found in favour of the South African Police Service. The majority judgment applied the rationality test laid down in \textit{Van Heerden}. The minority judgment penned by Cameron J (with Froneman J and Manjadet J concurring) held that the appropriate test should be fairness. Furthermore, Van der Westhuizen J, in a separate judgment, saw proportionality as being the appropriate standard. This case

\begin{itemize}
\item \textsuperscript{19} Pretorius 2010 \textit{SAJHR} 536, 537.
\item \textsuperscript{20} Pretorius 2010 \textit{SAJHR} 537.
\item \textsuperscript{21} Pretorius 2010 \textit{SAJHR} 537, McGregor 2013 \textit{TSAR} 655-657.
\item \textsuperscript{22} Fergus and Collier 2014 \textit{SAJHR} 488-489; Van der Westhuizen J in \textit{SA Police Service v Solidarity obo Barnard} 2014 35 ILJ 2981 (CC) paras 157-159.
\item \textsuperscript{23} 1997 18 ILJ 241 (T) (hereafter \textit{PSA}).
\item \textsuperscript{24} 2010 31 ILJ 742 (LC).
\item \textsuperscript{25} 2007 28 ILJ 428 (LC).
\item \textsuperscript{26} 2014 35 ILJ 2981 (CC).
\item \textsuperscript{27} \textit{Solidarity obo Barnard v SA Police Service} 2010 31 ILJ 742 (LC).
\item \textsuperscript{28} \textit{Solidarity obo Barnard v SA Police Service} 2014 2 SA 1 (SCA).
\item \textsuperscript{29} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC).
\end{itemize}
also highlighted the often conflicting imperatives (at least in the public service) of attaining an efficient public service and promoting representivity.

The law on affirmative action and employment equity plans in South Africa is unclear and thus requires further research. Like the South African Constitution, the Canadian Constitution\(^{30}\) (section 15 thereof) guarantees equality, but at the same time provides that affirmative action measures may be taken. The Supreme Court of Canada in a number of cases\(^{31}\) has grappled with defining discrimination, equality and identifying the most appropriate standard to apply in determining whether affirmative action measures are consistent with the Constitution. Therefore, the Canadian perspective may provide much needed answers for South Africa.

### 1.2 Research question

What role does fairness, rationality and proportionality play in the implementation and interpretation of employment equity plans and affirmative action in South Africa?

### 1.3 Research methodology

The study will be characterised by a literature study whereby primary sources (including legislation and case law) as well as secondary sources (including law journals, books and electronic sources) will be consulted. Furthermore, a legal comparative study will also be undertaken to compare the position in South Africa to the position in Canada. As stated above, the Canadian experience could provide much needed answers for South Africa.

### 1.4 Relevance for the research unit

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The proposed study falls within the broad focus of the Research Unit namely Development in the South African Constitutional State. The study relates directly to employees' and employers' rights and duties and will accordingly contribute to legal development in the field of labour law and rights in South Africa. The study falls to some extent within the scope of the sub-project: Developing and utilising labour law to promote decent work in South Africa and the SADC region.

1.5 Framework of the study

The research will be divided into six chapters. Chapter 1 will be an introductory chapter providing the reader with the problem statement, research question, research methodology and a general overview of the research.

Chapter 2 will consist of an overview of affirmative action in South Africa. The objectives of the chapter will be to briefly explain the legal history underpinning the need for affirmative action in South Africa; to identify relevant laws applicable to affirmative action in the workplace today, in particular recent amendments to the EEA; to identify the beneficiaries of affirmative action; employment equity plans and to consider the criticisms often levelled at affirmative action in South Africa.

In chapter 3 the concepts of formal equality and substantive equality will be critically analysed in order to determine their impact in affirmative action cases. Chapter 4 will consist of a critical analysis of fairness, rationality and proportionality in order to determine their role in affirmative action cases. The criticisms levelled against these principles will also be critically analysed.

Chapter 5 will be the comparative perspective. As stated above, The Supreme Court of Canada in a number of cases has also grappled with identifying the most appropriate standard to apply in determining whether affirmative action measures are consistent with the Constitution. A legal comparative analysis will be undertaken in order to determine what lessons can be learned from the Canadian experience. Finally, in
chapter 6 conclusions will be drawn and used to make recommendations for the way forward.
Chapter 2 – An overview of affirmative action in South Africa

2.1 Introduction

This chapter provides an overview of affirmative action in the workplace. Firstly, the discussion looks at the history underlying the justification of affirmative action in South Africa. Secondly, the current legal framework will be considered. The chapter concludes with a discussion of some of the criticisms often levelled against affirmative action in South Africa.

To understand why South Africa has the affirmative action legislation that it has today, it is necessary to consider its history, since it is this history which is relied upon to justify affirmative action today. It is said that South Africa's past reveals inter alia a history of discrimination which was perpetuated through the establishment of practices and laws resulting in systematic and structural discrimination and inequality for the black majority, other non-white minorities and women. Although this history is said to go back some three hundred years, for the sake of brevity, only the 1900s will be considered.

Industrialisation is said to have begun in South Africa in the 1920s. With this development came competition for jobs between white workers, European immigrants and African migrants who were willing to work for much lower wages than their white counterparts.

The Industrial Consolidation Act 11 of 1924, said to be "the historical centrepiece of collective bargaining legislation in South Africa", was enacted as a response to more than a decade of violent labour unrest, and it was meant to be South Africa’s first

32 Preamble of the EEA; Explanatory Memorandum to the Employment Equity Bill (published in 1998 19 ILJ 1345) 1346, 1347.
33 McGregor 2006 Fundamina 87.
34 McGregor 2006 Fundamina 87.
35 Lowenberg and Kaempfer The origins and demise of South African apartheid.
36 Lowenberg and Kaempfer The origins and demise of South African apartheid.
comprehensive piece of labour legislation. More importantly, it was enacted to secure the support of white labour for the system of white minority rule. By 1924, however, a policy known as the "civilised labour policy" had already been introduced to distinguish between "civilised" white and "uncivilised" black labour. The policy protected poor white labour by inter alia rewarding firms for hiring white workers.

The 1924 Act made provision for the establishment of bargaining councils. However, for more than fifty years black (but not coloured) workers, who constituted the overwhelming majority of the working class, were denied access to the bargaining councils by law. In 1956, the Industrial Consolidation Act 11 of 1924 was replaced by the Labour Relations Act 28 of 1956 (the 1956 LRA). The latter Act entrenched racial segregation by targeting trade unions which had both white and coloured members: the registration of these unions was prohibited, mixed-unions already in existence were required to establish separate branches for these members and only white members could hold executive office.

The National Party government of the time officially introduced its apartheid policies in 1948 by enacting legislation for a racially segregated society. According to Lowenberg and Kaempfer, apartheid could be described as "an exclusionary white form of socialism, or affirmative action programme for white workers". In creating a legal basis for the preferential treatment of whites, the regime inter alia sought to gain voter support in

40 Lowenberg and Kaempfer The origins and demise of South African apartheid 2; McGregor 2006 Fundamina 90.
41 Lowenberg and Kaempfer The origins and demise of South African apartheid 2; McGregor 2006 Fundamina 90.
44 McGregor 2006 Fundamina 92; Lowenberg and Kaempfer The origins and demise of South African apartheid 2; Deane 2005 Fundamina 5.
45 Lowenberg and Kaempfer The Origins and Demise of South African Apartheid 1.
future elections.\textsuperscript{46} According to Steenkamp, "after 1948 the Afrikaner made great economic strides".\textsuperscript{47}

The apartheid regime, in the context of the workplace, enacted laws such as the 1956 LRA (discussed above) and the \textit{Mines and Works Act} 27 of 1956.\textsuperscript{48} The latter provided for job reservations for whites and coloureds.\textsuperscript{49} Also, the \textit{Native Building Workers Act} 27 of 1951 prohibited blacks from engaging in construction work in white urban areas.\textsuperscript{50} Furthermore, the \textit{Wage Act} 5 of 1957 allowed for differentiation in wage determinations based on race and sex.\textsuperscript{51} The \textit{Group Areas Act} 41 of 1957 is said to have restricted the movement of black female jobseekers\textsuperscript{52} whilst the \textit{Unemployment Insurance Act} 30 of 1966 provided for unequal benefits for men and women.\textsuperscript{53} In the public sector, the \textit{Public Service Act} 54 of 1957 sanctioned discrimination based on sex.\textsuperscript{54} Du Toit neatly sums up the apartheid era in the context of the workplace as follows:

\begin{quote}
Under apartheid, discrimination against workers on grounds such as race and sex was not only permitted; it was legally enforced.\textsuperscript{55}
\end{quote}

The first democratic elections were held in South Africa in 1994.\textsuperscript{56} Replacing the \textit{Interim Constitution},\textsuperscript{57} the \textit{Final Constitution} came into force in 1997:\textsuperscript{58} a constitution which recognises what the Constitutional Court has called "remedial or restitutory equality".\textsuperscript{59} Since then, legislation (for example, the EEA) has been enacted to address

\begin{thebibliography}{99}
\bibitem{Deane2005} Deane 2005 \textit{Fundamina} 5.
\bibitem{AlsoKnownAsColBarAct} Also known as the \textit{Colour Bar Act}. See Steenkamp 1990 \textit{South African Journal of Economic History} 54.
\bibitem{Deane2005} Deane 2005 \textit{Fundamina} 5.
\bibitem{McGregor2006} McGregor 2006 \textit{Fundamina} 92; Deane 2005 \textit{Fundamina} 7.
\bibitem{McGregor20062} McGregor 2006 \textit{Fundamina} 92, 93.
\bibitem{McGregor20063} McGregor 2006 \textit{Fundamina} 93.
\bibitem{McGregor20064} McGregor 2006 \textit{Fundamina} 93.
\bibitem{DuToit2007} Du Toit 2007 \textit{Law Democracy and Development} 1.
\bibitem{Deane2005} Deane 2005 \textit{Fundamina} 9.
\bibitem{Deane2005} Deane 2005 \textit{Fundamina} 9.
\bibitem{MinisterOfFinancevVanHeerden} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 30.
\end{thebibliography}
the disparities caused by apartheid and its policies in the workplace. The Constitution and EEA are considered next.

2.2 The Constitution

As the supreme law of the Republic, section 9(1) of the Constitution guarantees the right to equality for everyone and further provides that no person may unfairly discriminate directly or indirectly against anyone based on race, gender, sex, disability and et cetera. For the purpose of section 9, the test for determining unfair discrimination was laid down in Harksen v Lane as follows:

Does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established... If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed.

Section 9(2) explicitly provides that legislative and other measures to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. The EEA gives effect to sections 9(1) and (2) of the Constitution. It is said that the formulation of the right to equality in terms of section 9 acknowledges two dimensions, namely formal and substantive equality. These concepts will be considered in detail in the next chapter.

2.3 The Employment Equity Act 55 of 1998

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60 In terms of section 2 thereof.
61 Section 9(3) read with (4).
62 Harksen v Lane 1998 1 SA 300 (CC).
63 Harksen v Lane 1998 1 SA 300 (CC) para 54.
64 Preamble of the EEA.
65 Van Niekerk and Smit Law @ Work 117.
2.3.1 Application of the Act

With some exceptions,\textsuperscript{66} Chapter II of the Act applies to all employees and employers while Chapter III applies only to designated employers.\textsuperscript{67} For persons excluded from the ambit of the EEA, they are covered by the \textit{Promotion of Equality and Prevention of Unfair Discrimination Act} 4 of 2000 (hereafter PEPUDA).\textsuperscript{68} PEPUDA does not apply to persons covered by the EEA.\textsuperscript{69}

2.3.2 Purpose of the Act

According to Parington and Van der Walt, the EEA "signifies the most significant attempt by the post-apartheid government to achieve equality in the workplace".\textsuperscript{70} The purpose of the EEA is to achieve equality in the workplace by:

(1) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
(2) to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups [black people,\textsuperscript{71} women and disabled persons], in order to ensure their equitable representation in all occupational categories and levels.\textsuperscript{72}

With a few additions, the EEA prohibits unfair discrimination based on grounds\textsuperscript{73} similar to those found in section 9(3) of the Constitution. The EEA "does not prohibit discrimination, only unfair discrimination".\textsuperscript{74} It is therefore important to draw a

\begin{footnotesize}
\begin{itemize}
\item[66] In terms of section 4(3) the Act does not apply to members of the National Defence Force, National Intelligence Agency, the South African Secret Service or South African National Academy of intelligence.
\item[67] In terms of section 4(1) and (2) of the EEA. Like the EEA, PEPUDA gives effect to section 9 of the by promoting equality and prohibiting unfair discrimination. Whereas the EEA is applicable in the workplace, PEPUDA is applicable to all spheres of social activity. In this regard, see sections 2, 6-12 and 14 of PEPUDA. See also Cooper 2001 \textit{ILJ} 1532-1544 where she discusses the two Acts side-by-side.
\item[68] \textit{Du Preez v Minister of Justice} 2006 27 ILJ 1811 (LC) provides a good example on how PEPUDA is to be interpreted and applied. See also Brickhill 2006 \textit{ILJ} 2004-2014 where he discusses this case in detail.
\item[69] In terms of section 5(3) of PEPUDA.
\item[70] Van der Walt 2005 \textit{Obiter} 595.
\item[71] In terms of section 1 of the EEA, the term "black people" refers to Africans, Coloureds and Indians.
\item[72] Section 2 of the EEA.
\item[73] In terms of section 6(1) of the Act.
\item[74] Van der Walt \textit{et al} \textit{Labour Law in Context} 54.
\end{itemize}
\end{footnotesize}
distinction between "fair" discrimination and "unfair" discrimination. Both the Constitution and the EEA prohibit unfair discrimination but they do not define it.\textsuperscript{75} According to Du Toit and Potgieter, the term "discrimination" in the Act must be given the same meaning as that in the Discrimination (Employment and Occupation) Convention (No.111) of 1958.\textsuperscript{76}

2.3.3 The burden of proof

Section 6(2) of the EEA provides an employer with two defences (referred to as "statutory defences" by Du Toit and Potgieter\textsuperscript{77}) in cases where it is accused of unfair discrimination by an employee: (1) affirmative action and (2) inherent requirements of the job. These defences are complete defences to an allegation of unfair discrimination.\textsuperscript{78} Section 11 of the EEA as amended by the Employment Equity Amendment Act 47 of 2013 (the EEAA) provides that an employer must prove (on a balance of probabilities) that the alleged unfair discrimination did not take place or that such discrimination is rational and fair. Therefore, from 1 August 2014 when the amendments came into effect, section 11 of the EEA requires employers to not only prove the fairness, but also the rationality of alleged unfair discrimination.\textsuperscript{79} According to Fergus, the amendments to section 11 of the EEA are based on the notion of proportionality.\textsuperscript{80} In South African Airways v Van Vuuren,\textsuperscript{81} the Labour Appeal Court explained the nature of the section 11 fairness inquiry (which involves both proportionality and rationality) as follows:

The employer has an onus to establish fairness on a balance of probabilities. An enquiry into fairness contemplated in the EEA will necessarily involve more than a consideration of the moral issues and the impact of the discriminatory action on the complainant. It will also include the impact of the discriminatory action on the complainant. \textit{It will also}

\textsuperscript{75} Du Toit and Potgieter Unfair Discrimination in the Workplace 16.
\textsuperscript{76} Du Toit and Potgieter Unfair Discrimination in the Workplace 17-18.
\textsuperscript{77} Du Toit and Potgieter Unfair Discrimination in the Workplace 79.
\textsuperscript{78} South African Airways v Van Vuuren 2014 35 ILJ 2774 (LAC) para 45; Naidoo v Minister of Safety and Security 2013 34 ILJ 2279 (LC) para 113.
\textsuperscript{79} Fergus 2015 \textit{ILJ} 43.
\textsuperscript{80} Fergus 2015 \textit{ILJ} 52.
\textsuperscript{81} South African Airways v Van Vuuren 2014 35 ILJ 2774 (LAC).
include a consideration and require balancing of the defences raised by the employer for the discrimination as well as issues such as proportionality of the measure, the complainant's right that he alleges has been infringed, the nature and purpose of the discriminatory measure, and the relation between the measure and its purpose.82 (Emphasis added)

It is important to note that it has been suggested that in accordance with the principle laid down by the Constitutional Court in Van Heerden that restitutionary measures are not subject to a presumption of unfairness; the same principle should apply to sections 6 and 11 of the EEA, and that "there appears no alternative manner in which to construe sections 6 and 11 of the EEA consistently with the constitution".83

2.3.4 The beneficiaries of affirmative action

As noted above, one of the purposes of the EEA is to implement affirmative action measures to redress the disadvantages in employment experienced by "designated groups". The term "designated groups" means black people, women and disabled persons who are citizens of South Africa.84 In short, only able bodied white men and non-citizens are excluded as beneficiaries of affirmative action. Prior to the EEAA, there was no statutory requirement that a person from a designated group should be a South African citizen. However, in Auf der Heyde v University of Cape Town,85 a case decided more than a decade before the said EEAA, the Labour Court had held that non-citizens are not beneficiaries of affirmative action.86 The issues surrounding the beneficiaries of

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82 South African Airways v Van Vuuren 2014 35 ILJ 2774 (LAC) para 46. See also Department of Correctional Services v POPCRU 2012 2 BLLR 110 (LAC) para 24 where the court observed that "the test of unfairness focuses on the impact of the discrimination, any impairment of dignity and the question of proportionality".
83 Fergus 2015 ILJ 66. See also Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 51-53; Naidoo v Minister of Safety and Security 2013 34 ILJ 2279 (LC) para 113 where the court held that affirmative action measures which comply with section 6(2)(a) of the EEA are not presumptively unfair.
84 In terms of section 1 of the EEA. However, in Chinese Association of South Africa v Minister of Labour Case No. 59251/2007, the High Court held that South African Chinese people "fall within the definition of 'black people' in section 1 of the EEA".
85 Auf der Heyde v University of Cape Town 2000 21 ILJ 1758 (LC).
86 Auf der Heyde v University of Cape Town 2000 21 ILJ 1758 (LC) 1774B-J.
affirmative action are as interesting as they are many. They have been discussed in
great detail elsewhere, a similar exercise will not be undertaken herein.

2.3.5 Employment Equity Plans

In Willemse v Patelia, the court stated that "affirmative action measures should not be
applied in an arbitrary or unfair manner". The EEA requires designated employers to
prepare and implement an employment equity plan, and this plan is said to represent
a "critical link" between a workforce profile and the implementation of affirmative action
measures. In Independent Municipal & Allied Workers Union v Greater Louis Trichardt
Transitional Council, the Labour Court made it clear what the importance of an
employment equity plan and the consequences of not having one were. The court held
that:

There appears to be no doubt that for affirmative action to survive judicial scrutiny the
following is relevant:

(1) there must be a policy or programme through which affirmative action is to be
effectuated;
(2) the policy or programme must be designed to achieve the adequate advancement
or protection of certain categories of persons or groups disadvantaged by unfair
discrimination.

In the following paragraph, the court went on to say:

These requirements ensure that there is accountability and transparency. They ensure
that there is a measure or standard against which the implementation of affirmative

87 See Benatar 2008 SALJ 282, 283, 284; Brassey 1998 ILJ 1364, 1365, 1366; Van Wyk 1998 South
African Business Review 2, 3; Duppe 2008 SAJHR 427, 436; Parington and Van der Walt 2005 Obiter
599; McGregor 2002 SA Merc LJ 266, 267, 268; Van Niekerk and Smit Law @ Work 165-169;
88 Willemse v Patelia 2007 28 ILJ 428 (LC).
89 Willemse v Patelia 2007 28 ILJ 428 (LC) para 34.
90 In terms of Section 13(2)(c) read with section 20 thereof.
91 In terms of item 4.2 of the Code of good practice: Preparation, implementation and monitoring of
employment equity plans.
92 2000 21 ILJ 1119 (LC).
93 Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council 2000 21
ILJ 1119 (LC) 1125G-H.
action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action.\textsuperscript{94}

More recently, the Supreme Court of Appeal in \textit{Gordon v Department of Health}\textsuperscript{95} was seemingly of the view that in order for affirmative action measures to survive judicial scrutiny, a properly drafted employment equity plan goes a long way in satisfying the requirement of rationality.\textsuperscript{96} It is worth noting that before the enactment of the EEA, affirmative action in the workplace was regulated by Item 2(2)(b) of Schedule 7 of the LRA. Unlike the EEA, it did not expressly provide that employers should have employment equity plans. In turn, this allowed aggrieved persons to successfully challenge affirmative action measures as being irrational, ad hoc and random where no employment equity plan existed.\textsuperscript{97} It has been suggested that the issue of employers not having employment equity plans is not likely to feature as much since the promulgation of the EEA as it makes it clear what is expected of designated employers.\textsuperscript{98} It has also been suggested that there has been a shift in emphasis away from the design of the plans to the way in which they are implemented.\textsuperscript{99}

In terms of the EEA, the primary duty of designated employers is said to be to follow the procedure set out in Chapter III for drawing up and implementing an employment equity plan.\textsuperscript{100} In terms of section 13(2), designated employers must, in order to achieve employment equity, implement affirmative action measures for people from designated groups. Section 15(1) defines the term "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

\textsuperscript{94} Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council 2000 21 ILJ 1119 (LC) para 19.
\textsuperscript{95} Gordon v Department of Health 2008 BLLR 1023 (SCA).
\textsuperscript{96} Gordon v Department of Health 2008 BLLR 1023 (SCA) para 22.
\textsuperscript{97} For example, in Coetzer v Minister of Safety and Security 2003 24 ILJ 163 (LC); Public Servants Association v Minister of Justice 1997 18 ILJ 241 (T); Gordon v Department of Health 2008 11 BLLR 1023 (SCA).
\textsuperscript{98} McGregor 2002 SA Merc LJ 259.
\textsuperscript{99} McGregor 2002 SA Merc LJ 261.
\textsuperscript{100} Du Toit \textit{et al} Labour Relations Law 593.
categories and levels in the workforce of a designated employer. The terms "equitably represented" (used in section 15) and or "employment equity" (used in section 13) raises several crucial issues in relation to employment equity plans, namely numerical goals; quotas; and demographics. These issues are considered separately below. Before doing so, it is vital to note that the EEA seeks to ensure that the goals of affirmative action and the means to achieve such goals are rational.\(^{101}\)

Regarding numerical goals, section 20(2)(c) of the EEA provides that an employment equity plan must state the numerical goals to achieve equitable representation of suitably qualified people from designated groups. It is important to note that the numerical goals are set by designated employers where underrepresentation of persons from designated groups has been identified.\(^{102}\) Basically, it can be said that employment equity is essentially a numbers game and the question to be asked is what percentage do persons from the designated groups represent in the workforce of a designated employer? As Faundez points out, correctly so it is submitted, "the use of numbers and percentages is necessary to monitor progress in an affirmative action programme".\(^{103}\) Willemse v Patelia\(^{104}\) provides authority for the proposition that once an employer has reached its numerical goals or representivity set out in its employment equity plan; it may not discriminate in the name of affirmative action.

In a number of cases,\(^{105}\) most recently in SA Police Service v Solidarity obo Barnard\(^{106}\) (Barnard CC) the issue of representivity versus efficiency in the context of the public service\(^{107}\) had arisen. In the majority of these cases (if not all), the employer

101 Van der Walt et al Labour Law in Context 65.
102 Section 20(2)(c) of the EEA.
103 Faundez 1994 15 ILJ 1187.
104 Willemse v Patelia 2007 28 ILJ 428 (LC). See also Reynhardt v University of South Africa 2008 29 ILJ 725 (LC).
105 Public Servants Association v Minister of Justice 1997 18 ILJ 241 (T); Stoman v Minister of Safety and Security 2002 24 ILJ 1020 (T); Coetzer v Minister of Safety and Security 2003 24 ILJ 163 (LC); SA Police Service v Solidarity obo Barnard 2014 35 ILJ 2981 (CC).
106 SA Police Service v Solidarity obo Barnard 2014 35 ILJ 2981 (CC).
107 In the context of the public service, the Constitution requires efficiency and representivity in terms of sections 195(b) and (I) read with section 205(2).
refused to appoint/promote white people because to do so would not have advanced representivity and or contrary to its affirmative action numerical targets. In *Stoman v Minister of Safety and Security* the court identified some key principles regarding the relationship between efficiency and representivity, including that efficiency and representivity are closely linked and cannot necessarily be separated from each other and that the attainment of the two goals "should not be viewed as separate competing or even opposing aims". The court also held that where a tension exists between the two, a balance must be struck. In *Coetzer v Minister of Safety and Security* the court held that although the Constitution does not prescribe how the two imperatives (efficiency and representivity) should be balanced, it should be a rational one. This is said to mean, according to McGregor, that the balance must "be endowed with reason, be sensible, sane, moderate and not foolish, absurd or extreme". Therefore, a "rational balance rejects that which is unreasonable".

Regarding quotas, it has been suggested that in many cases employment equity plans have veered towards a quota system which deals with employment equity on a purely numerical basis. The EEA allows a designated employer to set numerical goals in its employment equity plan but not quotas. The first thing to note is that the term "quota" is not defined in the Act. Du Toit *et al* define the term as "a fixed ratio or number for the recruitment and employees from designated groups". Goals (numeric) and quotas are said to be distinguishable by the fact that the former is understood as being more flexible than the latter.

108 *Stoman v Minister of Safety and Security* 2002 24 ILJ 1020 (T).
109 *Stoman v Minister of Safety and Security* 2002 24 ILJ 1020 (T) 1034.
110 *Stoman v Minister of Safety and Security* 2002 24 ILJ 1020 (T) 1034.
111 *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC).
112 *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC) para 32.
113 McGregor 2003 *SA Merc LJ* 93.
114 McGregor 2003 *SA Merc LJ* 93.
116 Section 15(3) of the EEA.
117 Du Toit *et al* *Labour Relations Law* 608.
118 Benatar 2008 *SALJ* 280.
In *Solidarity obo Barnard v SA Police Service*\(^{119}\) (*Barnard SCA*) the Supreme Court of Appeal observed that the mechanical application of numerical targets would effectively amount to a quota and that this is prohibited by section 15(3) of the EEA.\(^{120}\) The court further held that representivity and numerical targets cannot be "absolute barriers for appointment", because to adopt such an approach "would turn numeric targets into quotas".\(^{121}\) Similar views were expressed in *Naidoo v Minister of Safety and Security*\(^{122}\) and in *Health and Other Service Personnel Trade Union obo Klaasen and Paarl Hospital*.\(^{123}\) According to Faundez, the issue of quotas may arise when an employer finds that members of a designated group are underrepresented. The employer then sets goals to address this problem, but if these goals are interpreted too rigidly they could easily become quotas.\(^{124}\)

Regarding demographics, media reports indicate that in 2014 the Department of Labour had wanted to introduce regulations which would have empowered the labour minister to create regulations to specify situations in which employers would have to use either the national or regional demographics of the economically active population. In terms of the regulations a designated employer with 150 or more employees would have to use national demographics for top and senior managers, and an average of national and regional demographics for lower level workers.\(^{125}\) The proposed regulations were controversial *inter alia* due to the fact that Coloureds make up around 50% of the economically active population in the Western Cape, but only around 10% nationally.\(^{126}\) It was further reported that the Ministry was forced to capitulate due to fierce opposition by organised business, the Democratic Alliance, the African National

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\(^{119}\) *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA).

\(^{120}\) *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 23.

\(^{121}\) *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 68.

\(^{122}\) 2013 34 ILJ 2279 (LC) para 209.

\(^{123}\) 2003 24 ILJ 1631 (BCA) 1369.

\(^{124}\) Faundez 1994 15 JLJ 1192.


Congress in the Western Cape, Solidarity and the SA Clothing and Textile Workers Union.\textsuperscript{127} The detractors \textit{inter alia} contended that the proposed regulations were unconstitutional, and that they were prepared to challenge them in court if they became law.\textsuperscript{128}

The EEA\textsuperscript{129} and the code of good practice issued in terms of the EEA\textsuperscript{130} both refer to the demographic profile of the regional and national economically active population. Does this mean that an employer can choose to use either regional or national demographics when setting numerical goals, or is the employer required to use both? In \textit{Naidoo v Minister of Safety and Security},\textsuperscript{131} the employer opted to use national demographics and one of the consequences of doing so was that its numeric targets for Indians at senior management positions (level 13-16) was zero. Prior to the EEAA, section 42(1)(a) of the EEA provided that:

\begin{quote}
In determining whether a designated employer is implementing employment equity in compliance with the Act, the director general or any body or person applying this Act must, in addition to the factors in section 15, take the following into account: (a) the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in the employers workforce in relation to the demographic profile of the National and Regional economically active population.
\end{quote}

One of the changes introduced by the EEAA is that the word "must" in the above quote has been substituted with "may".\textsuperscript{132} The issue of which demographics (national or regional) a designated employer ought to use was squarely before the Labour Court in \textit{Solidarity v Department of Correctional Services}.\textsuperscript{133} In this matter, the applicants were employed by the respondent in the Western Cape. The employer had used national

\begin{itemize}
\item \textsuperscript{127} Bdlive 2004 http://www.bdlive.co.za/national/labour/2014/05/27/demographic-requirement-dropped-from-job-equity-rules.
\item \textsuperscript{128} Bdlive 2004 http://www.bdlive.co.za/national/labour/2014/05/27/demographic-requirement-dropped-from-job-equity-rules.
\item \textsuperscript{129} In terms of section 42(3).
\item \textsuperscript{130} Item 8.4.2 of the Code of good practice: Preparation, implementation and monitoring of employment equity plans (GN 1394 in GG 20626 of 23 November 1998).
\item \textsuperscript{131} 2013 34 ILJ 2279 (LC).
\item \textsuperscript{132} By section 16 of the Employment Equity Amendment Act 47 of 2013.
\item \textsuperscript{133} \textit{Solidarity v Department of Correctional Services} 2014 35 ILJ 504 (LC).
\end{itemize}
demographics and the numerical targets in its employment equity plan were 9.3% white, 79.3% African, 8.8% Coloured and 2.5% Indian. As noted above, Coloureds make up 50% of the economically active population in the Western Cape, but only around 10% nationally. The Court noted that there were conflicting provisions in the two codes of good practice\textsuperscript{134} issued in terms of the EEA regarding which demographics an employer ought to use.\textsuperscript{135} Given these conflicting codes of good practice, the court held that "it must prefer those provisions which support the provisions of the EEA and the Constitution", namely the provisions which provide that both national and regional demographics should be used.\textsuperscript{136} The court reasoned as follows:

...the fact that national demographics must factor into all employment equity plans provides for a safeguard recognising that it was the African majority in this country that were most severely impacted by the policies of apartheid. However, that regional demographics must also be considered, asserts the right of all who comprise black persons in terms of the EEA to benefit from the restitutionary measures created by the EEA, and derived from the right to substantive equality under our Constitution.\textsuperscript{137}

Also, the court went on to say that:

\textit{The EEA allows for proportionality, balance and fairness when it requires that both national and regional demographics to be taken into account.}\textsuperscript{138} (Emphasis added)

When this case went on appeal, the Labour Appeal Court, in a recent judgment delivered in April 2015, came to the same conclusion that both national and regional demographics should be used.\textsuperscript{139} Regarding the change of the word "must" to "may" in section 42(1)(a) of the EEA, the Labour Appeal Court observed that:

\begin{flushleft}
\textit{}\textsuperscript{134} The Code of good practice: Preparation, implementation and monitoring of employment equity plans (GN 1394 in GG 20626 of 23 November 1998) refer to national and regional demographics. However, item 5.3.11 of the Code of good practice on The Integration of Employment Equity into Human Resource Policies and Practices (GN 1358 in GG 27866 of 04 August 2005) provides that "Employers should set numerical targets... informed by underrepresentation in the workplace profile and national demographics".
\textsuperscript{135} Solidarity v Department of Correctional Services 2014 35 ILJ 504 (LC) para 40.
\textsuperscript{136} Solidarity v Department of Correctional Services 2014 35 ILJ 504 (LC) para 45.
\textsuperscript{137} Solidarity v Department of Correctional Services 2014 35 ILJ 504 (LC) para 45.
\textsuperscript{138} Solidarity v Department of Correctional Services 2014 35 ILJ 504 (LC) para 53.
\textsuperscript{139} Solidarity v Department of Correctional Services 2015 4 SA 277 (LAC) paras 57-58.
\end{flushleft}
Even though the word "must" has been replaced by "may", there will be factual contexts in which it is difficult to envisage how a plan could pass legal muster without considerations of regional demographics.\textsuperscript{140}

2.4 Criticisms against affirmative action in South Africa

According to Dupper, affirmative action "has emerged as one of the most controversial and divisive issues in post-apartheid South Africa".\textsuperscript{141} This controversy is said to emanate amongst other things due to the fact that affirmative action is seen by some as "a challenge to the liberal principle of equality".\textsuperscript{142} While it has been widely acclaimed,\textsuperscript{143} it is resented by others.\textsuperscript{144} Although the criticisms are many, only the three most prominent will be considered. It is said that the most popular criticism of affirmative action is that it is reverse discrimination.\textsuperscript{145} Van Wyk explains this criticism as follows:

According to this view 'affirmative action is a device to penalize the innocent and reward the unfortunate'; as such it is seen as a violation of our precepts of individual merit and equality before the law. This view is based on the belief that we should wipe the slate clean and start afresh with a society devoid of any form of discrimination.\textsuperscript{146} (References omitted)

Nobody can deny that affirmative action permits discrimination in favour of designated groups, and that it may be raised as a defence against a claim for unfair discrimination. The answer to whether affirmative action is reverse discrimination lies in one's perception of equality.\textsuperscript{147} The Constitutional Court, in several of its judgments, has ruled that equality must be interpreted to mean substantive equality.\textsuperscript{148} In directly addressing the question of whether affirmative action amounts to reverse discrimination, the court

\textsuperscript{140} Solidarity v Department of Correctional Services 2015 4 SA 277 (LAC) para 58.
\textsuperscript{141} Dupper 2008 SAJHR 426.
\textsuperscript{142} Faundez 1994 15 ILJ 1187.
\textsuperscript{143} Dupper 2004 SALJ 189.
\textsuperscript{144} Kanya 1997 Journal of Modern African Studies 231.
\textsuperscript{147} Parington and Van der Walt 2005 Obiter 596.
\textsuperscript{148} President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC) para 41; National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC); City Council of Pretoria v Walker 1998 2 SA 363 (CC); Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 27; more recently in SA Police Service v Solidarity obo Barnard 2014 35 ILJ 2981 (CC) para 29.
has said that they (affirmative action measures) are not "reverse discrimination or positive discrimination",\(^{149}\) and that they are not "punitive or retaliatory".\(^{150}\)

Another criticism is that affirmative action tends to benefit the wrong people and or is over-inclusive. According to this view, people within the designated group who suffered the least amount of prejudice due to discrimination are the ones that gain the most from affirmative action,\(^{151}\) and that similarly the persons who now have to bear the burden of affirmative action (young white men) are seldom the same persons who perpetrated the discrimination.\(^{152}\) Put differently, according to Jagwanth, it is often the case that the most deserving individuals "fall through the cracks, while the 'top layer' or relatively well-off members of the group are the main beneficiaries".\(^{153}\) When referring to the "top layer", Jagwanth is referring to the Indian Supreme Court Judgments which held that the "creamy layer" (the people who are well-off) in a designated group should be excluded as beneficiaries of affirmative action.\(^{154}\) Any attempts by South African courts to introduce a similar concept would probably be unsuccessful given the wording of the EEA and the right to equality protected by both the Constitution and the EEA.

In the context of South Africa, the people who are said to benefit the most from affirmative action are the black middle class and not the working class because the latter are already "overrepresented in their employment echelons".\(^{155}\) Since the concept of "individual disadvantage" has been rejected by the courts\(^{156}\) in South Africa, any black citizen (who is suitably qualified) qualifies as a beneficiary notwithstanding whether or not they have personally been disadvantaged by discrimination or whether

\(^{149}\) Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 30.
\(^{150}\) SA Police Service v Solidarity obo Barnard 2014 35 ILJ 2981 (CC) para 30.
\(^{152}\) Dupper 2004 SALJ 197; Benatar 2008 SALJ 282.
\(^{155}\) Brassey 1998 ILJ 1364.
\(^{156}\) Stoman v Minister of Safety and Security 2002 24 ILJ 1020 (T); Auf der Heyde v University of Cape Town 2000 21 ILJ 1758 (LC). See also Dupper 2002 SA Merc LJ 286; McGregor 2002 SA Merc LJ 268; McGregor 2002 Juta's Business Law Journal 147.
they are well-off. According to Dupper, responses that defenders of affirmative action may raise to counter this criticism include that:

Every member of a designated group has suffered from the effects of past discrimination and similarly every member of the non designated group has benefited (at least indirectly) from the effects of past discrimination; those who are to be compensated are not individual victims, but rather groups to which they belong.157

Furthermore, another criticism which is levelled at affirmative action is that it leads to inefficiency and lowering of standards.158 According to this view preferring to hire persons from designated groups entails the lowering of standards which leads to hiring of unqualified or under qualified persons, in turn, this is said to lead to the lowering of competitiveness and efficiency.159 Even Wan Wyk, a defender of affirmative action, does admit that by definition preferential hiring "does result in less than the best-qualified applicant being appointed".160 In a number of cases,161 the best candidate for a vacancy was not appointed in the name of affirmative action. It should be noted that section 15(1) of the EEA limits appointments in the name of affirmative action to suitably qualified persons and thus prohibits "tokenism".162 In support of this criticism, Benatar argues that:

The threat to standards is logically entrenched in strong-preference affirmative action. If less-qualified candidates are appointed, standards are obviously affected...The problem is particularly acute in a country like South Africa where the intended beneficiaries of affirmative action are the majority rather that the minority. Where the beneficiaries are a small minority, as they are in the United States, the system can take up the slack created by the minority of less-qualified people. However, when the system is pervaded by people who are less than qualified than those who would otherwise have been appointed, then the negative effects are multiplied.163

157 Dupper 2004 SALJ 197, 198.
162 Deane 2005 Fundamina 452; Dupper 2008 SAJHR 435 (note 60); Faundez 1994 ILJ 1190, 1191; Parington and Van der Walt 2005 Obiter 599.
163 Benatar 2008 SALJ 303-304.
The responses to this criticism include: preferential hiring does not always result in inefficiency;\textsuperscript{164} a slight drop in inefficiency is more than justified by the benefits to society of such a programme;\textsuperscript{165} and importantly studies have not shown a negative correlation between affirmative action and inefficiency.\textsuperscript{166}

\textbf{2.5 Conclusion}

The pre-1994 legal perspective shows the manners in which laws were used to not only encourage, but to perpetuate racial discrimination in the workplace. It has been shown that the EEA was enacted to redress the disparities caused by the pre-1994 racist apartheid policies and laws, and that it not only prohibits unfair discrimination in the workplace, but also creates a legal basis for employers to implement affirmative action measures. Affirmative action measures which comply with section 6(2)(a) of the EEA are not presumptively unfair.

It has also been shown that in the implementation phase of an affirmative action policy there are several issues that may arise such as numerical targets versus quotas, representivity versus efficiency, and national demographics versus regional demographics. What is clear is that the courts have emphasised that an affirmative action programme must be implemented in a fair and rational manner. In determining fairness, proportionality also comes into play. Affirmative action is as interesting as it is controversial: whilst it is heavily criticised by others, it has its defenders. As shown above, some of the criticisms of affirmative action in South Africa can be easily addressed whilst some are a bit difficult to dispel. Alluded to briefly in this chapter, substantive and formal equality are considered in more detail next.

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Chapter 3 – Substantive and formal equality

3.1 Introduction

This chapter explores the nature of the two conceptions of equality, namely formal and substantive equality. The main aim of the chapter is to determine how the perception or understanding of "equality" can impact affirmative action cases. In order to achieve this goal, the chapter begins by considering the principles of differentiation and discrimination. Thereafter, the two conceptions of equality are considered. As will be shown, by mainly referring to the equality jurisprudence of the Constitutional Court, affirmative action is not inconsistent with equality but plays an integral part in achieving substantive equality.

3.2 Differentiation and (unfair) discrimination

According to L'Heureux-Dubé J, a justice of the Supreme Court of Canada, equality is a topic of particular interest for jurists, because their goal is to enhance the quality of justice. In turn, this desire for justice is said to be the source of the desire for equality. For L'Heureux-Dubé J, "inequality is injustice". Notwithstanding this noble goal, the concept of equality is as interesting as it is controversial. As Vande Lanotte et al point out, "equality is a notoriously complex and elusive construct", and that while there is broad consensus in modern democratic states that equality is a good thing, there is no agreement on the nature of this concept. Furthermore, the learned authors submit that being conscious of the complexities surrounding the concept of equality, the South African Constitutional Court has decided to focus its equality jurisprudence on the concept of non-discrimination.

167 L'Heureux-Dubé 1997 SAJHR 335.
168 L'Heureux-Dubé 1997 SAJHR 335.
169 L'Heureux-Dubé 1997 SAJHR 335.
170 Vande Lanotte et al The principle of equality: A South African and Belgian experience 140.
171 Vande Lanotte et al The principle of equality: A South African and Belgian experience 140.
172 Vande Lanotte et al The principle of equality: A South African and Belgian experience 140.
The starting point is the concept or idea of differentiation, as it lies at the heart of equality jurisprudence.\textsuperscript{173} This concept is interlinked with the concept of equal treatment, that is to say, unequals should be treated unequally and equals should be treated equally.\textsuperscript{174} It has been pointed out that even great philosophers such as Aristotle and Plato believed in this ideal.\textsuperscript{175}

Notwithstanding the right to equality enshrined by section 9 of the Constitution (also by the EEA in the context of employment), there seems to be broad consensus that there are occasions whereby it may be right to treat people differently and even more favourably.\textsuperscript{176} In \textit{Prinsloo v Van der Linde},\textsuperscript{177} the Constitutional Court acknowledged the fact that in order to govern a modern country effectively "it would be impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently".\textsuperscript{178} Also, on reading the equality clause in section 8 of the Interim Constitution\textsuperscript{179} (which is now section 9 in the final Constitution), the court held that it deals with differentiation in basically two ways, namely differentiation which does not involve unfair discrimination and differentiation which does involve unfair discrimination.\textsuperscript{180} As noted above, for the purpose of section 9, the test for determining unfair discrimination was laid down in \textit{Harksen v Lane}.\textsuperscript{181}

In the context of employment, the need to draw distinctions among employees is said to be a fact of working life and or is the rule.\textsuperscript{182} An example is whereby the inherent

\begin{itemize}
\item \textsuperscript{173} \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC) para 23.
\item \textsuperscript{174} Freund 1979 \textit{Washington University Law Quarterly} 11.
\item \textsuperscript{175} Freund 1979 \textit{Washington University Law Quarterly} 11.
\item \textsuperscript{176} Van Niekerk and Smit \textit{Law @ Work} 115; Honeyball and Bowers \textit{Textbook on Labour Law} 228; Du Toit and Potgieter \textit{Unfair Discrimination in the Workplace} 18, 80; Van der Lanotte \textit{et al} \textit{The principle of equality: A South African and Belgian experience} 146, 147; Association of Teachers \textit{v} Minister of Education 1995 16 ILJ 1048 (IC) 1080; Ntai \textit{v} SA Breweries 2001 22 ILJ 214 (LC) para 17; \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC) paras 24, 52, 53.
\item \textsuperscript{177} \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC).
\item \textsuperscript{178} \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC) para 24.
\item \textsuperscript{179} \textit{Constitution of the Republic of South Africa} (Interim), 1993.
\item \textsuperscript{180} \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC), para 23.
\item \textsuperscript{181} \textit{Harksen v Lane} 1998 1 SA 300 (CC) para 54.
\item \textsuperscript{182} Du Toit and Potgieter \textit{Unfair Discrimination in the Workplace} 18, 80.
\end{itemize}
requirements of the job so dictate. Therefore, the right to equality of employees does not preclude their employer from treating them differently. Differentiation is said to only become discrimination "if it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". In much simpler language, the Labour Court in *Ntai v SA Breweries* held that mere differentiation only becomes discrimination when it is based or linked to an unacceptable ground such as race. The fact that differentiation has resulted in discrimination does not necessarily mean that such discrimination is unfair. For example, an employer may implement an affirmative action programme (which complies with the EEA) that differentiates in a discriminatory manner based on race or sex; this would not amount to unfair discrimination in terms of section 6(2) of the EEA.

### 3.3 Formal equality

Van der Lanotte *et al* describe formal equality as follows:

Formal equality presupposes that all persons are equal bearers of rights within a just social order. According to this view inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same 'neutral' norm or standard.

Also, according to Fredman, this understanding of equality "usually summed up by Aristotelian formula that likes should be treated alike", is based on the premise that individuals should be treated as individuals, on their own merit without taking into account irrelevant characteristics such as race and sex. In the legal context, it is said

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183 *Association of Teachers v Minister of Education* 1995 16 ILJ 1048 (IC) 1081A-C. However, the court stressed the fact that differentiation based on the inherent requirements of a particular job "should only be allowed in very limited circumstances and should not be allowed ...where the decision to differentiate is based... on a perception that one sex is superior to the other".

184 Van Niekerk and Smit *Law @ Work* 115.

185 Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18. See also *Association of Teachers v Minister of Education* 1995 16 ILJ 1048 (IC) 1080G-H.

186 *Ntai v SA Breweries* 2001 22 ILJ 214 (LC).

187 *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) para 17.

188 Van der Lanotte *et al* *The principle of equality: A South African and Belgian experience* 144.

189 Fredman "Facing the future: substantive equality under the spotlight" 17.

190 Fredman "Facing the future: substantive equality under the spotlight" 17.
to find expression in the principles of direct discrimination and or equal treatment, which prohibit differentiation based on unacceptable criteria. Furthermore, formal equality sees differentiation of any nature as discrimination regardless of whether the differentiation in question is aimed at redressing past disadvantage.

By its very nature, formal equality is opposed to concepts such as affirmative action as it (affirmative action) expressly permits "fair" discrimination based *inter alia* on race and sex. From this point of view, affirmative action can easily be seen as "reverse discrimination". The essence of this opposition to affirmative action was captured by Justice Thomas in his concurring judgment in *Adarand Constructors v Pena*, a case involving whether an affirmative action programme violated the principle of equality clause in the Fourteenth Amendment, as follows:

> The government cannot make us equal; it can only recognize, respect, and protect us as equal before the law...remedial racial classifications ultimately have a destructive impact on the individual and our society...In my mind, government-sponsored racial discrimination based on benign prejudice is just as toxic as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Despite its noble goals, formal equality is not without criticisms. It is seen by the supporters of its rival (substantive equality) as "a dangerous tool in the hands of the status quo". Fredman identifies five characteristics of formal equality, which she submits demonstrate its inability to eradicate inequality. She argues that:

> The first is the assumption that individuals can be abstracted their gender, race or other status and dealt with entirely on merit...Treating status as an irrelevant ground ignores the ongoing disadvantage experienced by individuals who have been previously unequal before the law or subject to social prejudice. The result is to entrench disadvantage. Secondly, formal equality assumes that the aim is identical treatment. In fact, given antecedent inequality, it may be necessary to provide very different treatment in favour of the disadvantaged...Thirdly, formal equality is premised on an

191 Fredman "Facing the future: substantive equality under the spotlight" 17.
192 Parington and Van der Walt 2005 *Obiter* 596.
193 Parington and Van der Walt 2005 *Obiter* 596.
196 Van der Lanotte et al *The principle of equality: A South African and Belgian experience* 144.
abstract and universal individual. However, the possibility of an individual abstracted from their status characteristics is illusory. In reality, the abstract individual is clothed with the characteristics of the dominant group, which are then asserted as if they were universal. Only those who can conform to this norm are sufficiently 'alike' to be entitled to 'like treatment'. The result is that formal equality demands conformity as a price for equal treatment...Fourthly, formal equality is a relative concept, agnostic as to the substantive outcome. It can therefore be fulfilled by treating everyone equally badly, or by removing benefits from the better off in order to bring them in line with the worse off. This means that the achievement of formal equality can be a hollow victory, or even a defeat. Finally, formal equality is based on a negative conception of liberty, aiming to restrain the state from interfering with the individual rights, rather than placing positive obligations on the state to promote equality.\textsuperscript{197}

It has been said that substantive equality is "born out of the disappointment and frustration at the limits of formal equality",\textsuperscript{198} and that "it takes up the baton where formal equality leaves off".\textsuperscript{199} The concept of substantive equality is considered next.

### 3.4 Substantive equality

In the context of South Africa, the starting point is section 9 of the Constitution and the equality jurisprudence of the Constitutional Court. Sub-sections (1) and (2) of section 9 provide as follows:

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

It should be noted that the two subsections referred to above do not define "persons, or categories of persons, disadvantaged by unfair discrimination". In the context of the

\textsuperscript{198} Fredman "Facing the future: substantive equality under the spotlight" 16.
\textsuperscript{199} Fredman "Facing the future: substantive equality under the spotlight" 16.
workplace, as noted before, the term "disadvantaged groups" refers to all South African citizens except white able-bodied men.

According to Van Niekerk and Smit the formulation of section 9 acknowledges that the concept of equality has two basic dimensions, namely equality as consistency also known as formal equality and substantive equality. As was pointed out by the court in *Van Heerden*:

> Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of the state to protect and promote the achievement of equality – a duty which binds the judiciary too.

*Van Heerden* is probably one of the most important decisions on affirmative action and equality jurisprudence. Firstly, it was the first case where the Constitutional Court directly considered the affirmative action clause in the section 9 of the Constitution. Secondly, it expressly rejected the rationale of earlier cases, particularly the *PSA* decision and in so doing clarified any ambiguity as to how the right to equality ought to be interpreted. The court emphasised the fact that the right to equality must be interpreted in light of South Africa’s history and the underlying constitutional values. The constitutional objective of creating a non-racial and non-sexist “egalitarian” society underpinned by human dignity was seen by the court as requiring “a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.” After considering

References:

200 Above at para 2.3.3. See also the authorities cited thereat.
201 See the definition of "designated group and "black people" in section 1 of the EEA.
202 Van Niekerk and Smit *Law @ Work* 117.
203 *Minister of Finance v Van Heerden* 2004 4 SA 121 (CC) para 24.
204 *Public Servants Association v Minister of Justice* 1997 18 ILJ 241 (T). In this matter, Swart J held that affirmative action policies are discriminatory and that an employer bore the onus of proving the fairness of such measures.
205 *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) paras 29-32. See also Rycroft "Transformative failure: the adjudication of affirmative action disputes" 313.
206 *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 26.
207 *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 26.
and rejecting the Supreme Court of the United States' approach to anti-discrimination,\textsuperscript{208} the court held that:

...our constitutional understanding of equality includes what Ackermann J...calls 'remedial or restitutiorial equality'. Such measures are not in themselves a deviation from, or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case.\textsuperscript{209}(References omitted)

In the following paragraph, the court unambiguously held that:

Equality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing...what is clear is that our constitution and in particular s 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality.\textsuperscript{210}

What then is substantive equality? According to Albertyn, the legal promotion of substantive equality in anyone jurisdiction "will almost inevitably focus on overcoming existing limitations in anti-discrimination laws and constitutional jurisprudence",\textsuperscript{211} and that this may \textit{inter alia} include positive measures within anti-discrimination laws.\textsuperscript{212}

One of the main features of the substantive notion of equality is said to be its asymmetry.\textsuperscript{213} As Dupper and Gabbers explain, this means that it acknowledges the connection between status and disadvantage.\textsuperscript{214} Substantive equality is understood as a remedy to systematic and entrenched inequalities.\textsuperscript{215} Cooper describes the term as follows:

The notion of substantive equality...recognises the deep levels of systematic inequality on the basis of race, gender and other grounds, which have been inherited from the past. It proposes that in order for full equality to be achieved, this systematic inequality

\textsuperscript{208} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 29.
\textsuperscript{209} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 30. See also \textit{President of the Republic of South Africa v Hugo} 1997 4 SA 1 (CC) para 41.
\textsuperscript{210} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 31.
\textsuperscript{211} Albertyn 2007 \textit{SAJHR} 258.
\textsuperscript{212} Albertyn 2007 \textit{SAJHR} 258.
\textsuperscript{213} Dupper and Garbers 2012 \textit{Acta Juridica} 252.
\textsuperscript{214} Dupper and Garbers 2012 \textit{Acta Juridica} 252.
\textsuperscript{215} Albertyn 2007 \textit{SAJHR} 259.
needs to be addressed and eradicated and that those who suffered from disadvantage in the past are entitled to positive unequal treatment in the present.\textsuperscript{216}

As noted above, substantive equality is meant to address the deficiencies of formal equality. This it does as follows:

Firstly, substantive equality does not aim to abstract the individual from the social context. It takes into account existing power structures and the role of status or identity within them. Status is not regarded as irrelevant... Secondly, and as a result of this, substantive equality is sensitive to outcomes rather than just to treatment. This opens the way to requiring different treatment in order to achieve equalities of outcome. Thirdly, substantive equality recognises that identity can be a source of value. It therefore does not aim to treat all individuals identically, but to affirm and accommodate differences... Fourthly, substantive equality is not neutral as to the outcome. Equality cannot be achieved by treating all equally badly, or by removing benefits from the advantaged class. It is substantive in the sense that it advances individuals rather than formal in ensuring only consistency. Finally, substantive equality can go beyond a fault based model to one which includes positive duties. To respect protect, promote and fulfil.\textsuperscript{217}

\textbf{3.5 Conclusion}

Although the concept of equality remains controversial, there is at least broad consensus that there are occasions which require people to be treated differently. It has been shown that mere differentiation becomes discrimination when it is based or linked to an unacceptable ground such as race. Moreover, as the main focus of this chapter was on formal and substantive equality, it has been shown that equality can be understood in a formal sense or in a substantive sense. Significantly, whilst formal equality is premised on the idea that inequality can be eradicated by treating all people in the same way, substantive equality on the other hand recognises that it may be necessary to give preferential treatment to those who have suffered disadvantage as a result of past (unfair) discrimination. Consequently, formal equality is opposed to affirmative action while substantive equality is not. Section 9 of South Africa's Constitution embraces a substantive conception of equality.

\textsuperscript{216} Cooper 2004 \textit{ILJ} 817.
\textsuperscript{217} Fredman "Facing the future: substantive equality under the spotlight" 18.
Having shown that affirmative action is not inconsistent with a substantive notion of equality; the next chapter will consider the standards and tests which are, or may be, used by the courts in South Africa to determine whether affirmative action measures are lawful, namely fairness, rationality and proportionality.
Chapter 4 – Rationality, fairness and proportionality

4.1 Introduction

This chapter considers the standards by which the constitutionality of affirmative action measures is/may be tested. The two main cases which will be considered will be the Constitutional Court's judgments in *Barnard CC*\(^{218}\) and *Van Heerden*. Therefore, the chapter begins by briefly stating the facts in each case. Thereafter, rationality is considered; secondly, fairness; and lastly, proportionality. Finally, conclusions are drawn.

4.1.1 The facts in Barnard

Briefly, the facts of the case are that a white woman, Mrs R.M. Barnard (hereafter Mrs. Barnard), was a captain in the South African Police Service (hereafter SAPS). In 2005 a position for superintendent was advertised (the vacancy was not reserved for any designated group). Mrs. Barnard and six other people applied. Interviews were conducted and she got the highest score. The interview panel recommended her as the number one candidate for the position. However, the divisional commissioner did not support the recommendation, because appointing her would not advance representivity. He decided that the vacancy should remain unfilled.

In 2006 a similar vacancy was advertised, it too was not reserved for designated groups. Mrs. Barnard together with seven other people applied. Once again she received the highest score at the interview. Once again, the panel recommended her as the most suitable candidate for the position. The Divisional Commissioner agreed with the recommendations of the panel as the appointment of Mrs. Barnard would advance service delivery in the SAPS. He (the Divisional Commissioner) wrote a letter to the National Commissioner in terms of which he recommended that Mrs. Barnard be appointed to the position. However, the National Commissioner did not agree with the

\(^{218}\) *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC).
recommendation as he believed that appointing Mrs. Barnard would not address representivity. No person was appointed to fill the vacancy.

Feeling aggrieved, Mrs. Barnard lodged a claim for unfair discrimination in the Labour Court. She believed that she was denied promotion on two occasions because of her race. For now, it suffices to merely mention that the Labour Court\(^\text{220}\) (\textit{Barnard LC}) and Supreme Court of Appeal\(^\text{221}\) (\textit{Barnard SCA}) found in favour of Mrs. Barnard while the Labour Appeal Court\(^\text{222}\) (\textit{Barnard LAC}) and Constitutional Court\(^\text{223}\) (\textit{Barnard CC}) found in favour of the SAPS.

\subsection*{4.1.2 The facts in Van Heerden}

The case involved the constitutional validity of certain rules of a pension scheme for parliamentarians.\(^\text{224}\) The scheme distinguished between those members who were elected to parliament for the first time in 1994 and those who were members of parliament before and were re-elected in 1994. The employer’s pension contribution for the former exceeded that of the latter. The complainants argued that measures adopted in terms of section 9(2) of the constitution when based on any of the grounds listed in section 9(3) constitute unfair discrimination and must therefore be presumed to be unfair.\(^\text{225}\)

For now, it suffices to note that the Constitutional Court set aside the judgment of the High Court in terms of which it (the High Court) had held that the rules of the fund were unfairly discriminatory and thus unconstitutional. For the High Court, a person who relies on section 9(2) to justify discriminatory measures bore the onus of establishing

\begin{flushleft}
\footnotesize
\textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) paras 5-10.
\textit{Solidarity obo Barnard v SA Police Service} 2010 31 ILJ 742 (LC).
\textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC).
\textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC).
\textit{The Political Office-Bearers Pension Fund}.
\textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) paras 3-11.
\end{flushleft}
that the measures were taken to promote the achievement of equality – such discriminatory measures had to be convincingly justified.\textsuperscript{226}

\section*{4.2 Rationality}

\subsection*{4.2.1 Pre-Van Heerden}

According to Rycroft, the early signs were that the courts interpreted the law conservatively by placing more focus on the protection of individual rights than the promotion of transformation. Therefore, according to him, the courts were "a blunt weapon for transformation".\textsuperscript{227} During these early days, affirmative action measures were considered to be an exception from the constitutional protection of equality.\textsuperscript{228}

The case which comes to mind when referring to the pre-\textit{Van Heerden} era is the \textit{PSA}\textsuperscript{229} case. Briefly, the case involved the filling of some 30 vacant posts in the offices of the State Attorney in various cities around the country. The Ministry of Justice decided to implement a policy (affirmative action "measures") designed to achieve representivity. Certain posts were earmarked for representative candidates. Sixteen white males applied for the earmarked posts. They were not interviewed as their applications were refused on the grounds of their race and gender. Instead, female employees of the offices of the State Attorney (with significantly less experience than their white male colleagues) were to be appointed. The ministry argued that the imbalances still prevalent in the State Attorney’s office justified the decision to prefer the candidates from disadvantaged backgrounds.

According to the court, the crux of the case was whether the measures implemented by the ministry were discriminatory and in conflict with the equality provisions in section 8 of the Interim Constitution. The court laid down what is sometimes referred to as the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{226} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 13.
\item \textsuperscript{227} Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314.
\item \textsuperscript{228} Ngcukaitobi 2007 \textit{ILJ} 1441.
\item \textsuperscript{229} \textit{Public Servants Association v Minister of Justice} 1997 18 ILJ 241 (T).
\end{itemize}
\end{footnotesize}
"PSA template". In essence the court held that affirmative action measures were themselves unfair discrimination which had to be justified in order to be found to be fair and that the onus of proving such fairness is on the employer. This view of affirmative action measures is said to be consistent with decisions of the United States Supreme Court which apply the strict scrutiny standard. In terms of the strict scrutiny approach, affirmative action measures are presumptively unfair. The test which is applied to determine the legality of affirmative action measures is whether the differentiation in race is a necessary means for the promotion of an overriding or compelling state interest.

4.2.2 The Van Heerden decision

In a unanimous decision, the court rejected the strict scrutiny approach and warned against importing "inapt foreign equality jurisprudence" – in particular, amongst other things, strict scrutiny. The court held that restitutionary measures that properly fall within the requirements of section 9(2) are not presumptively unfair. To hold otherwise, so the court held, would result in an internal inconsistency within section 9 of the Constitution. Writing for the majority, Moseneke J explained:

I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.

230 Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314.
231 Public Servants Association v Minister of Justice 1997 18 ILJ 241 (T) 295, 296. See also Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314; Ngcukaitobi 2007 ILJ 1442.
232 Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314.
234 Baqwa 2006 JLJ73.
235 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 29.
236 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 32.
237 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 33.
238 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 33.
Therefore, for the court, the pivotal enquiry before it was whether or not the restitutionary measures in question passed muster under section 9(2). The court made it clear that measures which do fall within the ambit of section 9(2) do not constitute unfair discrimination.\(^{239}\) Crucially, the court went on to hold that if a measure does not fall within the section, and it constitutes discrimination on a prohibited ground, only then would it be necessary to apply the test laid down in *Harksen v Lane* in order to determine whether the measure offends the anti-discrimination prohibition in section 9(3).\(^{240}\)

The question remains, how then should restitutionary measures be tested to determine whether or not they pass muster in terms of section 9(2)? The court laid down the following three-fold rationality test: (a) whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; (b) whether the measure is designed to protect or advance such persons or categories of persons; and (c) whether the measure promotes the achievement of equality.\(^{241}\) It should be noted that this test was re-affirmed by the Constitutional Court in *Barnard CC*.

Before considering each of these requirements in more detail, it is important to note that it has been suggested that it would be difficult, but not impossible, to convince a court that a programme which relies on racial categories and is aimed at redressing past unfair discrimination does not comply with these requirements.\(^{242}\) Regarding the first yardstick, it will be reached if it can be shown that the beneficiaries were disadvantaged by unfair discrimination.\(^{243}\) Although within each class, favoured or otherwise, there may indeed be windfall beneficiaries, this was found by the court not sufficient to undermine the legal efficiency of such programme.\(^{244}\) The question which has to be asked, as the court put it, is "whether an overwhelming majority of members of the favoured class are

\(^{239}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 36.
\(^{240}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 36.
\(^{241}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 37.
\(^{242}\) De Vos 2012 *SALJ* 89.
\(^{243}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 38.
\(^{244}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 39.
persons designated as disadvantaged by unfair discrimination”.245 Put simply, the court rejected the notion of "actual past disadvantage" – the idea that affirmative action should only benefit people who were themselves personally victims of past unfair discrimination.246 It has been suggested that discharging the onus in relation to this yardstick will not be difficult as most affirmative action policies usually refer to designated groups or the concept of disadvantage.247

Regarding the second yardstick – whether the measure is designed to protect or advance such persons or categories of persons – the court noted the fact that remedial measures are directed at an envisaged future goal.248 Although the future is hard to predict, the remedial measures must "be reasonably capable of attaining the desired outcome".249 However, as the court cautioned, if the remedial measures are "arbitrary, capricious or display naked preference, they could hardly be said to be designed to achieve the constitutionally authorised end".250 The court laid down two important principles regarding the interpretation of section 9(2): firstly, the text only requires that remedial measures should be designed to protect or advance (designated groups) and that it is sufficient if the measure carries a reasonable likelihood of meeting the end.251 Secondly, it is not necessary for a sponsor of remedial measures to show a necessity to disfavour one class in order to uplift another.252

Regarding the third yardstick – whether the measure promotes the achievement of equality – the court held that determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the

245 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 40.
246 De Vos 2012 SALJ 89. See also McGregor 2002 SA Merc LJ 266, 267, 273 where she discusses Labour Court judgments on this issue.
247 Rycroft "Transformative failure: the adjudication of affirmative action disputes" 316.
248 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 41.
249 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 41.
250 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 41.
251 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 42.
252 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 42.
measure in the context of our broader society.\textsuperscript{253} With reference to its previous judgment in \textit{Bato Star v Minister of Environmental Affairs;\textsuperscript{254}} the court noted the fact that the achievement of this goal (achievement of equality) may often come at a price for those who were previously advantaged.\textsuperscript{255} This has been interpreted to mean that the mere fact that race-based remedial measures may place a burden on white South Africans will not automatically render them in conflict with section 9.\textsuperscript{256} What has to be borne in mind, as the court further held, is the constitutional vision of a non-racial and non-sexist society in which each person is treated as a human being of equal worth and dignity.\textsuperscript{257} Significantly, the court cautioned that a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits, because to do so would threaten this goal.\textsuperscript{258}

4.2.3 Criticisms of the rationality standard

Although rationality has its defenders,\textsuperscript{259} the critics of rationality often begin by pointing out the fact that the \textit{Van Heerden} decision has been rarely referred to by the courts (the Labour Court and Labour Appeal Court included)\textsuperscript{260} or given the authority that one expect.\textsuperscript{261}

Pretorius, who is probably the strongest critique of the rationality standard, asserts that the rationality test does not contain any elements of fairness and proportionality and as such has been created in isolation from the requirements of sections 9(3) and 36.\textsuperscript{262} He argues that the court's approach in \textit{Van Heerden} of interpreting section 9(2) in isolation

\begin{itemize}
\item \textsuperscript{253} Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 44.
\item \textsuperscript{254} Bato Star v Minister of Environmental Affairs 2004 4 SA 490 (CC).
\item \textsuperscript{255} Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 44. See also Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 128.
\item \textsuperscript{256} De Vos 2012 SALJ 92.
\item \textsuperscript{257} Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 44.
\item \textsuperscript{258} Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 44.
\item \textsuperscript{259} The arguments they put forth in favour of the rationality standard will be identified when the criticisms of the fairness standard are considered below.
\item \textsuperscript{260} McGregor 2013 TSAR 655.
\item \textsuperscript{261} Rycroft "Transformative failure: the adjudication of affirmative action disputes" 313.
\item \textsuperscript{262} Pretorius 2010 SAJHR 536, 537.
\end{itemize}
"seems curious in light of its general sensitivity to the danger of reading specific constitutional provisions in isolation".\textsuperscript{263} For him, the court's approach "could undermine the ability of the Constitution to function as an instrument for the integration and accommodation of competing rights".\textsuperscript{264}

The third and last requirement of the \textit{Van Heerden} test has been described as "probably the most difficult and complex to comprehend"\textsuperscript{265} and "has proved to be more problematic to contain within the strictures of a rationality mould".\textsuperscript{266} One might ask if it goes beyond a mere rationality inquiry. It should be noted that the essence of rationality is said to be justification – the emphasis being on the decision-maker's justification rather than on the interests of those affected by the decision.\textsuperscript{267} According to Pretorius, the answer to the question posed above depends on the interpretation of section 9(2) – it can be understood narrowly or broadly.\textsuperscript{268} He explains the narrow understanding as follows:

\begin{quote}
If the 'promotion of equality' in this context is understood narrowly, i.e. as synonymous with remedial or restitutive equality, it will in fact not add anything additional to the previous two rationality requirements and cumulatively the s 9(2) conditions for the constitutional validity of affirmative action will stay within the confines of a rationality inquiry.\textsuperscript{269}
\end{quote}

On the other hand, he explains the broad understanding as follows:

\begin{quote}
If...the phrase 'to promote the achievement of equality' in s 9(2) is understood more broadly and inclusively, i.e. recognising and balancing the equality aspirations of all, then considerations regarding the fairness and proportionality of the impact of the affirmative action measures will inevitably surface.\textsuperscript{270}
\end{quote}

Having considered the possible interpretations of section 9(2), Pretorius comes to the conclusion that the third yardstick was applied by the majority (to the facts in \textit{Van

\begin{itemize}
\item\textsuperscript{263} Pretorius 2010 \textit{SAJHR} 558.
\item\textsuperscript{264} Pretorius 2010 \textit{SAJHR} 537.
\item\textsuperscript{265} De Vos 2012 \textit{SALJ} 92.
\item\textsuperscript{266} Pretorius 2010 \textit{SAJHR} 562.
\item\textsuperscript{267} Fergus 2015 \textit{ILJ} 56, 57.
\item\textsuperscript{268} Pretorius 2010 \textit{SAJHR} 536
\item\textsuperscript{269} Pretorius 2010 \textit{SAJHR} 562.
\item\textsuperscript{270} Pretorius 2010 \textit{SAJHR} 563
\end{itemize}
Heerden) in a way which presupposes the importing into section 9(2) of "an internal fairness requirement". However, this he sees as being in direct contradiction with the "emphatic insistence" of the majority that section 9(2) compliant measures do not attract the burden of any fairness requirement. In short, he comes to the conclusion that the Van Heerden decision is self-contradictory and may create much confusion in lower courts. Like Pretorius, other commentators have also come to the same conclusion that the judgment goes beyond mere rationality testing and "leaves the door open" to include fairness and proportionality in future affirmative action cases.

Also, the rationality test has been criticised for its restrictive and differential nature. According to this criticism, the differential nature of the rationality test "calls for a lesser degree of accountability when limiting the equality right". Accordingly, it is argued that even if disproportional or unfair, a mere rationality standard of justification demands no explanation for the disproportional or unfair invasion of rights. According to Pretorius, the impact of adopting a differential standard is that:

...courts protect the state from having to explain a decision in the first place, thereby circumventing the need to develop a judicial standard of scrutiny commensurate with the demands of the principle of openness and accountability, implicit in s 36 norm of an open and democratic society... Compared to a fairness or proportionality inquiry, a differential rationality standard registers a clear deficit in the degree of accountability expected of rights-limiting measures. (References omitted)

Given the fact that rationality focuses on only the objects and reasons of the employer and thus fails to proper account of the interests of those affected, the frustration with rationality is (to some extent) understandable. It clearly favours the employer and not

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271 Pretorius 2010 *SAJHR* 564.
272 Pretorius 2010 *SAJHR* 564.
273 Pretorius 2010 *SAJHR* 564.
274 McGregor 2013 *TSAR* 656 (note 41); De Vos 2012 *SALJ* 93; Van der Westhuizen J’s judgment in *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC).
275 McGregor 2013 *TSAR* 655; Pretorius 2013 *SALJ* 40.
276 McGregor 2013 *TSAR* 656.
277 Pretorius *SALJ* 2013 40.
278 Pretorius *SALJ* 2013 39, 40.
279 Fergus 2015 *ILJ* 59.
the employee. For the critics, rationality seems to be a standard which is not exacting
enough for testing the constitutionality of rights-limiting measures such as affirmative
action. For them, the appropriate standard which ought to be applied is fairness and
or proportionality. The fairness test is considered next, and as will be shown, the critics
of the fairness standard argue in favour of the rationality standard.

4.3 Fairness

4.3.1 The nature of the fairness standard

The fairness test is said to require a "flexible but situation-sensitive approach". The
test has been described as follows:

The essence of fairness is that the effects of the decision on the parties to a dispute are
evenly adjudged. In determining the impact on the employer, the legitimacy of its
objects, as well as the rationality and proportionality of the measures taken to achieve
them are germane. Equally if not more important though is the impact of the
discrimination on those alleging to have suffered from it...in the context of AA
[affirmative action], the interests of those who were intended to benefit from the
restitutive measure must be considered. As such, the standard of fairness is an
exact ing one, requiring judicial assessment of various factors in pursuing an equitable
and balanced result. (Own emphasis added)

From the above quotation, a number of differences between rationality and fairness are
apparent: firstly, unlike rationality which focuses on the employer, the focus of the
fairness test is on the impact of the discrimination on the complainant. Secondly, unlike
rationality, the fairness standard takes into account proportionality as well as rationality
itself. Thirdly, unlike the differential rationality test, the fairness test is more exacting –
the important constitutional values that can be in tension when affirmative action is
applied has been put forward as justification for a more exacting standard.

280 See for example the comments of Cameron J in Solidarity obo Barnard v SA Police Service 2014 35
ILJ 2981 (CC) paras 95-98.
281 Fergus and Collier 2014 SAJHR 652.
282 Fergus 2015 ILJ 57. See also Fergus and Collier 2014 SAJHR 652; South African Airways v Van
Vuuren 2014 35 ILJ 2774 (LAC) para 46; Department of Correctional Services v POPCRU 2012 2 BLLR
110 (LAC) para 24.
283 By Cameron J in Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 95.
Fairness and rationality perceive the issue of presumption of unfairness in discrimination claims involving affirmative action differently.\textsuperscript{284} A fairness enquiry would attract a burden of proof as to the fairness of affirmative action measures compliant with section 9(2)\textsuperscript{285} whilst a rationality enquiry attracts no such onus.\textsuperscript{286} If the rationality test is applied and it is established that the impugned affirmative action measures comply with the requirements of section 9(2) as set out in \textit{Van Heerden}, that would be the end of the matter meaning that a section 9(3) inquiry as set out in \textit{Harksen v Lane} is not applicable.\textsuperscript{287}

\textbf{4.3.2 The Barnard cases}

\textbf{4.3.2.1 Labour Court}

Whilst the judgment of the Labour Court in \textit{Barnard LC} has been hailed by some as a good example of how the fairness test served justice,\textsuperscript{288} it has been criticised by others.\textsuperscript{289} Since the complainant (Mrs. Barnard) was claiming relief for unfair discrimination as she was denied promotion on two occasions because of her race, the court determined that the applicable law was the EEA.\textsuperscript{290} Surprisingly, it has been pointed out that given \textit{Van Heerden's} relevance for interpreting the EEA; it was mentioned in only two footnotes in this matter.\textsuperscript{291}

After stating the relevant facts of the case before it (summarised above), the court identified the "general principles" which were applicable to the facts. These included the following: the provisions of the EEA must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to

\begin{itemize}
\item \textsuperscript{284} Fergus 2015 \textit{ILJ} 56.
\item \textsuperscript{285} Pretorius 2010 \textit{SAJHR} 564.
\item \textsuperscript{286} \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) paras 33, 34, 36.
\item \textsuperscript{287} De Vos 2012 \textit{SALJ} 88. See also \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) paras 33, 34, 36; \textit{Solidarity obo Barnard v SA Police Service} 2014 35 \textit{ILJ} 2981 (CC) paras 37, 48, 51.
\item \textsuperscript{288} McGregor 2013 \textit{TSAR} 651; Pretorius 2013 \textit{SALJ} 31.
\item \textsuperscript{289} Fergus and Collier 2014 \textit{SAJHR} 488 note 29.
\item \textsuperscript{290} \textit{Solidarity obo Barnard v SA Police Service} 2010 31 \textit{ILJ} 742 (LC) paras 1, 2.
\item \textsuperscript{291} Pretorius 2013 \textit{SALJ} 36.
\end{itemize}
equality;\textsuperscript{292} given the potential adverse effects of implementing employment equity plans on either non-designated groups or designated groups, due consideration must be given to the particular circumstances of individuals potentially adversely affected;\textsuperscript{293} the provisions of the EEA must be applied in a manner that is both rational and fair;\textsuperscript{294} in the implementation of an employment equity plan, due recognition must be given to the right of the affected person's dignity;\textsuperscript{295} there must be a rational connection between the provisions of the employment equity plan and the measures adopted to implement the provisions of that plan;\textsuperscript{296} and the employer bears the onus to show that the unfair discrimination alleged by the applicant is fair.\textsuperscript{297} Given the facts before it and the applicable principles it had identified, the court held that the failure to promote Mrs. Barnard because of her race constituted unfair discrimination and, that the employer had failed to discharge the onus of showing that such discrimination was not unfair.\textsuperscript{298}

Given the fact that the constitutionality of the affirmative action measures themselves was not in issue, it is clear that the Labour Court in \textit{Barnard LC} did not apply or take into account the principles plaid down in \textit{Van Heerden}, namely that measures compliant with section 9(2) of the Constitution are not unfair discrimination and do not attract any burden of proof as to their fairness.\textsuperscript{299} Despite this obvious misdirection, the fairness approach adopted in this matter has been welcomed by some for pointing out that the extent to which an employment equity plan might adversely affect individuals is limited by law.\textsuperscript{300} Also, unlike \textit{Van Heerden} with its differential rationality test, \textit{Barnard LC} is

\textsuperscript{292} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 25.1.
\textsuperscript{293} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 25.2.
\textsuperscript{294} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 25.3.
\textsuperscript{295} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 25.3.
\textsuperscript{296} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 25.6.
\textsuperscript{297} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) para 26.
\textsuperscript{298} Solidarity obo Barnard v SA Police Service 2010 31 ILJ 742 (LC) paras 43.2, 43.6.
\textsuperscript{299} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 48-51.
\textsuperscript{300} McGregor 2013 TSAR 671.
seen by some as standing for the proposition that a more exacting fairness-based inquiry is needed.\textsuperscript{301}

4.3.2.2 Labour Appeal Court

Unsurprisingly, the matter went on appeal to the Labour Appeal Court (\textit{Barnard LAC}). For the court, the "overreaching issue" raised in the appeal was the relationship between sections 9(1) and 9(2) of the Constitution.\textsuperscript{302} Invariably, the court had to determine the correctness of the court \textit{a quo}'s judgment, and in particular whether restitutionary measures envisaged in section 9(2) must be applied in accordance with the principle of fairness and due regard to the affected individual's constitutional right to equality.\textsuperscript{303}

Relying on \textit{Van Heerden}, the court held that the court \textit{a quo} had erred in treating the implementation of restitutionary measures as subject to the individual conception of equality. The court saw the approach of the Labour Court in \textit{Barnard LC} as promoting the "interests of persons from non-designated categories to continue to enjoy an unfair advantage which they had enjoyed under apartheid".\textsuperscript{304} Regarding whether or not the complainant had been discriminated against, the court held that since there had not been any differentiation – no person was appointed to the post in question including the complainant – no discrimination had taken place.\textsuperscript{305} However, contradictorily, further in its judgment the court held that "discriminating against Barnard in the circumstances of this case was clearly justifiable".\textsuperscript{306} Furthermore, the court pointed out that in the court \textit{a quo} the issue of whether there was a rational connection between the employer's employment equity plan and its objectives was not raised an issue requiring determination. However, on the facts of the case, the court held that the employer's employment equity plan "demonstrates that the plan was drafted with due consideration

\textsuperscript{301} Pretorius 2013 \textit{SALJ} 37.
\textsuperscript{302} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) para 1.
\textsuperscript{303} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) para 2.
\textsuperscript{304} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) para 30.
\textsuperscript{305} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) para 22.
\textsuperscript{306} \textit{SA Police Service v Solidarity obo Barnard} 2013 34 ILJ 590 (LAC) para 42.
of rationality and reasonableness". Given these findings, the appeal was upheld and the order of the Labour Court set aside.

From its judgment it is clear that the court in *Barnard LAC* did not apply the fairness test as the court *a quo* had done. Unsurprisingly, critics of the rationality test have criticised this judgment for not focusing on the impact of the affirmative action measures on Mrs. Barnard, and for not applying the fairness test but instead applying the differential rationality test.

4.3.2.3 Supreme Court of Appeal

Did the Labour Appeal Court get it right? As the case went on appeal for a second time, perhaps the answer can be found in the Supreme Court of Appeal's judgment. The main task before the court was to determine the correctness of the Labour Appeal Court's judgment. In the very first paragraph of its judgment, the court stated that in redressing the "skewed" situation created South Africa's racist past, "there has to be an accommodation and a scrupulous adherence to fairness". The court identified the relevant provisions of the EEA, and in particular the court noted the fact section 11 of the EEA (which deals with the burden of proof) was going to be important in determining the appeal.

Relying on *Harksen v Lane*, the court held that the starting point in discrimination claims is to determine whether the conduct complained of constitutes discrimination and, if so, to determine whether it is unfair. The court held that the court *a quo* had erred in holding that the fact that no appointment had been made meant that there had been no

307 *SA Police Service v Solidarity obo Barnard* 2013 34 ILJ 590 (LAC) para 44.
308 McGregor 2013 TSAR 671.
309 *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 50.
310 *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 1.
311 *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 11. See also *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (LC) para 26 whereby the Labour Court adopted a similar approach.
312 *Solidarity obo Barnard v SA Police Service* 2014 2 SA 1 (SCA) para 50.
discrimination. On the facts of the case, the court held that there had in fact been discrimination based on Mrs. Barnard's race. Having determined this, the court then turned to determine whether such discrimination was unfair. As the Labour Court had done, the court also held that the employer bore the onus of proof in this regard.

Relying on *Harksen v Lane* once more, the court quoted with approval a passage therein which said "the test for unfairness focuses primarily on the impact of the discrimination on the complainant and others in her situation". At this juncture, it should be recalled that the more exacting fairness test, unlike the differential rationality test (as laid down in *Van Heerden*), focuses on the impact of the discrimination on the complainant. The court saw the facts of the case as requiring "closer and scrupulous scrutiny". On the facts of the case, and in particular the fact that the failure to appoint the Mrs. Barnard must have affected service delivery negatively, the court held that the discrimination against her was unfair. Consequently, the appeal was upheld and the order of the court *a quo* set aside. In effect, the judgment of the Labour Court was reinstated (with minor changes to the order).

To its credit, the court did in fact refer to *Van Heerden*, even though it did so selectively. For example, it did not refer to *Van Heerden* regarding the onus of proof. Once again, like in *Barnard LC*, the court opted to apply a fairness test in direct contradiction with *Van Heerden's* differential rationality test.

4.3.2.4 Constitutional Court

Given the judgment in *Barnard SCA*, the matter went on appeal for a third time, now to the Constitutional Court, the highest court in the country. It should be noted that the

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317 Fergus 2015 ILJ 57. See also Fergus and Collier 2014 SAJHR 652.
majority judgments in both *Van Heerden* and *Barnard CC* were written by the same judge, namely Moseneke J. It should also be noted that this matter was probably the second case (after *Van Heerden*) where the affirmative action clause in the constitution was directly considered by the court.

Before considering the correctness of the judgment in *Barnard SCA*, the court began by identifying the applicable legal framework. The court noted the fact that South Africa's Constitution has a transformative mission which requires active steps to be taken in order to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. However, as the court further noted, remedial measures must be formulated with due care not to invade unduly the dignity of all affected persons. Relying on *Van Heerden*, the court once again re-affirmed the three pronged rationality test as laid down in that landmark case. Consequently, measures which pass this test are neither unfair nor presumed unfair. Importantly, the court held that compliance with section 9(2) does not preclude courts from deciding whether a valid employment equity plan was put into place lawfully. In order to survive judicial scrutiny and as a bare minimum, legitimate restitution measures must be rationally related to their terms and objects.

Turning to the judgment of the court *a quo*, the court held that it (the court *a quo*) had misconceived the issues before it and the applicable law. As the employer's employment equity plan was never challenged as unlawful and invalid, it ought to have approached the inquiry through the "prism of section 9(2)". Consequently, it was wrong for the court *a quo* to have applied the *Harksen v Lane* fairness inquiry which presumed the

320 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) paras 29, 35.
321 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) paras 30, 31, 32.
322 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 36.
323 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 37.
324 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 38.
325 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 39.
326 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 51 (see also para 83).
application of the employment equity plan to be suspect and unfair.\textsuperscript{327} On this reason alone, the court held that the appeal should succeed.\textsuperscript{328}

Although Cameron J (with Froneman J and Majiedt J concurring) came to the same conclusion as Moseneke J that the appeal should succeed, they proposed a different and more exacting test for determining whether affirmative action measures are compliant with section 9(2) of the Constitution, namely a fairness test.\textsuperscript{329} They began by identifying the "transformative tension" created by the constitutional imperatives of redressing the effects of past discrimination on the one hand and, establishing a non-racial, non-sexist society and inclusive society on the other hand.\textsuperscript{330} For them, this case presented an opportunity to "address these tensions and provide for a framework that permits these constitutional goals to be read harmoniously".\textsuperscript{331} Significantly, before turning to consider their proposed fairness test, like the majority judgment, they agreed that the lawfulness of the employer's employment equity plan was not at issue.\textsuperscript{332}

Turning to consider the applicable standard, they began by agreeing that rationality is "the bare minimum requirement".\textsuperscript{333} However, they saw Mrs. Barnard's challenge as requiring them to apply a less deferential standard than "mere rationality".\textsuperscript{334} They reasoned that given the constitutional values which may be in tension when remedial measures are implemented, a court is required to examine such implementation with a more exacting level of scrutiny.\textsuperscript{335} Taking a swipe at the differential rationality test, they criticised it for not allowing a court to properly interrogate a decision-maker's balancing of the interests of designated and non-designated groups or persons adversely affected
by remedial measures.\textsuperscript{336} Therefore, they held that a standard which is specific to the EEA must be formulated; one that is rigorous enough to ensure that:

... the implementation of a remedial measure is "consistent with the purpose of the Act" – namely, to avoid over-rigid implementation, to balance the interests of the various designated groups, and to respect the dignity of rejected applicants.\textsuperscript{337}

They proposed a fairness test for testing the compliance of affirmative action measures with section 9(2) of the Constitution.\textsuperscript{338} In applying the fairness test to the facts of the case before them, they considered the explanation given by the employer (SAPS) as to why Mrs. Barnard was rejected for the promotion she had sought, and the question of service delivery versus representivity.\textsuperscript{339} On the facts before them, they held that the decision not to promote Mrs. Barnard did in fact pass the fairness test and was therefore fair.\textsuperscript{340} Their conclusion was based on the following facts: firstly, the overrepresentation of white women at the salary level to which Mrs. Barnard was applying (which meant that there was justification for preferring representivity over service delivery);\textsuperscript{341} secondly, the eventual promotion of the complainant to the position of Lieutenant-Colonel (which meant that the affirmative action policy of the SAPS did not constitute an absolute bar for her).\textsuperscript{342}

Mindful of the criticisms against fairness as a standard for testing whether affirmative action measures are compliant with section 9 of the Constitution, Cameron J did in fact attempt to rebut some of the potential criticisms of the fairness standard. The criticisms of the fairness test and Cameron J’s response to some of them are considered next.

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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 96.
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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 98.
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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 106-122.
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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 123.
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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 123.
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Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 123.
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4.3.3 Criticisms against the fairness standard

In his separate judgment, Van der Westhuizen J disagreed with Cameron J that a fairness standard should be applied to test the constitutional validity of the affirmative action measures. For him, if fairness relates to the unfair discrimination prohibition in section 9(3), there may be a risk of an internal inconsistency in section 9. He reasoned that:

Section 9(3) deals with differentiation which amounts to unfair discrimination. By definition, measures under section 9(2) do not amount to unfair discrimination...Once a measure has withstood the section 9(2) Van Heerden enquiry and is found not to be unfair, another investigation into its fairness, informed by section 9(3) considerations, may not always make practical sense.

Even if the term "fairness" is used in a more general sense, the learned judge still criticised it for being vague. Also, given the high level of scrutiny involved in the fairness test, he warned against subjecting affirmative measures to an "unrealistically high standard of review which would thwart a constitutional objective".

In addressing the criticism that fairness is vague, Cameron J (with Froneman J and Majiedt J concurring) accepted that fairness is indeed an open-ended norm. However, they pointed out that it is no different from norms such as reasonableness, proportionality, wrongfulness, negligence et cetera – norms which became more certain as they were applied over time and precedent built up. Also, they argued that assessing the fairness of the individual implementation of affirmative action measures is different from deciding whether those measures amount to unfair discrimination. They explained the former enquiry as involving an examination of whether a specific

344 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 158.
345 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 158. See also Jafta J’s judgment at paras 223, 228; and Mokgoro J’s comments in Minister of Finance v Van Heerden 2006 4 SA 121 (CC) paras 79-82 where these judges seem to agree with Van der Westhuizen J.
346 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 159.
347 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 159.
348 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 100.
implementation of a measure that is constitutionally compliant in its general form is nevertheless in conflict with the provisions of the EEA.350 This reasoning has been criticised for being ambiguous and raising more questions.351

Also, the fairness test was criticised in Van Heerden by Mokgoro J for being a test that would place too much emphasis on the complainant.352 For her, applying the fairness test would frustrate the goal of section 9(2) if undue attention is paid to those disadvantaged by a restitutionary measure.353 In response to this criticism, Pretorius argues that "the fairness of a measure is not decided by considering its impact on the complainant in isolation".354 Therefore, for him, this criticism is unconvincing. The four Barnard cases provide a good illustration of the consequences of applying the fairness test: where the test was applied (in Barnard I and Barnard III) the court ruled in favour of the complainant but where the rationality test was applied (in Barnard I and Barnard IV) the court ruled in favour of the employer.

Lastly, Fergus points out that whereas fairness appears more objective than rationality, it requires judges to pass value judgments (for example, the degree to which a person's dignity has been infringed) and is thus more exposed to the discretion of individual judges than is rationality.355 For Fergus, rationality is better suited for testing the constitutionality of affirmative action measures than is fairness.356 Although she concedes that both standards may be criticised, she argues that:

...given the need for redress and the intrinsic difficulties with fairness, the detriment caused by rationality is both more easily tempered and more easily justified than that caused by fairness.357

351 Fergus 2015 ILJ 47, 48.
352 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 79-80.
353 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 80.
354 Pretorius 2010 SAJHR 553.
355 Fergus 2015 ILJ 58.
356 Fergus 2015 ILJ 56. See also Baqwa 2006 ILJ 78.
357 Fergus 2015 ILJ 59.
### 4.4 Proportionality

#### 4.4.1 The principle of proportionality in general and the section 36 analysis

The birthplace of the principle of proportionality is said to be Germany. From there, it is said to have spread to other countries around the world including South Africa.\(^{358}\) According to Petersen, the principle of proportionality is "one of the central doctrines of judicial review in South Africa".\(^{359}\) For George, in practice, proportionality involves:

... a balancing act between the competing interests and objectives of the state and the interests of the individual and embodies a sense of an appropriate relationship between the ends and the means of state action. Proportionality demands that when an individual's rights are affected or threatened by state action, only such shall be countenanced which is suitable, necessary and not out of proportion to the gains of the community. Proportionality can thus be a synonym for reasonableness.\(^{360}\)

Later on he adds:

Proportionality represents the idea that the individual lives in a society and is part of that society (with its own needs and traditions) and that the individual's human rights may be justifiably limited provided the limiting laws are proportional. In a nutshell, proportionality demands an inquiry weighing up the harm done by a law infringing a human right against the benefit that the law seeks to achieve (the reasons for the law or its purpose).\(^{361}\)

The sections that deal with limitation of rights in the Constitution are sections 7(2) and 36. \(S v Makwanyane\)\(^{362}\) is probably the most well-known Constitutional Court judgment on section 36 of the Constitution, and it is said to influence all South African courts when applying proportionality.\(^{363}\) Woolman points out the fact that the drafters of the limitation clause in the Constitution (section 36) "copied its relevant factors almost

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358 George 2013 *SAPL* 40.
359 Petersen 2014 *SAJHR* 405.
360 George 2013 *SAPL* 40.
361 George 2013 *SAPL* 53.
362 \(S v Makwanyane\) 1995 3 SA 391 (CC). Although the Constitutional Court in this matter was concerned with the limitation clause in the interim Constitution, the principles laid down therein are still applicable to the limitation clause (section 36) of the final Constitution. See George 2013 *SAPL* 52.
363 George 2013 *SAPL* 53.
verbatim" from a discussion of proportionality in *S v Makwanyane*. In this case, the court had held that:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves weighing up competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1) [now section 36 of the final Constitution].

In the same paragraph, the court went on to hold that the relevant factors in the balancing process include:

...the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficiency, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.

In light of the above, the obvious question is who bears the burden of proof or burden of justification? It is for the legislature, or the party relying on the legislation, to prove that the impugned law is saved by section 36 – that is to say, to show that the law is reasonable and necessary, and consistent with the requirements of section 36. Put differently, it is not for the party challenging the legislation to show that it is not justified. By allocating the burden of justification this way, the legislature is held accountable. It should be noted, however, that the Constitutional Court in *S v Makwanyane* did in fact acknowledge that it is not for the courts to "second-guess the wisdom and policy choices of the legislature". However, as Petersen points out, in several cases the Constitutional Court has itself struck down several laws because the

364 Woolman 1997 *SAJHR* 107. See also George 2013 *SAPL* 53; Petersen 2014 *SAJHR* 420.
365 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
366 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
367 *S v Makwanyane* 1995 3 SA 391 (CC) paras 102, 283, 183. See also George 2013 *SAPL* 53.
368 George 2013 *SAPL* 53.
369 Petersen 2014 *SAJHR* 420.
370 *S v Makwanyane* 1995 3 SA 391 (CC) para 104.
state had failed to discharge the burden of justification resting on it. Some of the most famous examples that come to mind include *S v Makwanyane* and *Khosa v Minister of Social Development*.

Having briefly outlined what the doctrine of proportionality entails, in particular the proportionality analysis in terms of section 36, Van der Westhuizen J’s proposal in *Barnard CC* that proportionality should be the standard for judicial review of affirmative action measures in the context of the Constitution is considered next.

4.4.2 Proportionality as a standard for review?

In *Barnard CC*, Van der Westhuizen J began his judgment by recalling some of the controversies surrounding affirmative action, in particular the United States experience. Turning to South Africa, he noted the fact that the Constitution is founded on the values of human dignity and non-sexism, and that it recognises fundamental human rights in the Bill of Rights which include equality and human dignity. Although he agreed with the outcome of the other judgments (including that of the majority), he felt that he had to write separately in order to give his somewhat different reasoning on a few aspects.

Having held that affirmative action measures and their implementation are not immune to scrutiny, he then turned to consider the three pronged *Van Heerden* test. For him, whilst the first two prongs test the rationality of restitutionary measures, the focus of the third – whether the measure promotes the achievement of equality – is somewhat

371 Petersen 2014 SAJHR 421. He identifies the following cases: *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders* 2005 3 SA 280 (CC); *S v Steyn* 2001 1 SA 1146 (CC); and *Centre for Child Law v Minister for Justice* 2009 6 632 (CC).

372 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC). In this matter the Constitutional Court struck down certain sections of a law which contravened the right to access social security as enshrined in section 27(1)(c) of the Constitution.

373 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) paras 125-127.

374 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 129.

375 *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) par 140.
different: it is on the measure but also on its implementation.\textsuperscript{376} Thus, he concluded that \textit{Van Heerden} recognises the distinction between a measure and its implementation.\textsuperscript{377} Consequently, he held that "something more" is required when a measure and its implementation are evaluated.\textsuperscript{378} According to him, because the third prong of \textit{Van Heerden} "requires an appreciation of the effect and impact of the measure, more than mere abstract rationality testing is required".\textsuperscript{379}

On the facts of the case before him, he held that the SAPS's employment equity plan passed the first two prongs of the \textit{Van Heerden} test.\textsuperscript{380} Later on, in light of the fact that Mrs. Barnard's promotion would have aggravated the over-representation of white females, he also came to the same conclusion regarding the third prong of the \textit{Van Heerden} test.\textsuperscript{381} However, for Van der Westhuizen J, that was not the end of the matter. According to the judge:

\dots the question whether the implementation passes constitutional muster also has to take into account how it may affect other constitutional rights and values. A separate enquiry – one which does not only use equality as a barometer – needs to be undertaken. What barometer would be appropriate to test the impact of the implementation?\textsuperscript{382}

In effect what the judge was saying is that a test (such as rationality) which fails to take into account the effect of the implementation of affirmative action on persons negatively affected thereby is inadequate. It should be recalled, as noted above, that the essence of rationality is said to be justification – the emphasis being on the decision-maker's justification rather than on the interests of those affected by the decision.\textsuperscript{383}

In determining which "barometer" would be appropriate, he considered the idea advanced by Cameron J that the fairness test was the most appropriate standard. As

\begin{flushleft}
\textsuperscript{376} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 143.
\textsuperscript{377} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 143.
\textsuperscript{378} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 145.
\textsuperscript{379} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 146.
\textsuperscript{380} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 144.
\textsuperscript{381} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 150-156.
\textsuperscript{382} Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 156.
\textsuperscript{383} Fergus 2015 ILJ 56, 57.
\end{flushleft}
noted earlier, Van der Westhuizen J was unimpressed by the fairness standard due to its vagueness and the fact that it could create an internal inconsistency within section 9 of the Constitution. Having rejected fairness given its potential to create an internal inconsistency, he emphasised the fact that although courts try to construe the provisions of the Constitution harmoniously this does not mean that they should "overlook the impact of one right on other rights in specific situations". Also, he emphasised the fact that no provision of the Constitution may be interpreted in isolation; no right protected or enforced without regard to other rights; and that the courts often have to balance one constitutional right against another. Although he conceded that section 36 of the Constitution was not directly applicable to the case before him – because the EEA is a law of general application but the implementation of an affirmative action measure is not – he nevertheless saw the proportionality formula as being helpful with the task of measuring the impact of one right on another. He reasoned that:

Instead of interpreting the ambit and nature of a right restrictively so as to mask the fact the reality that courts are compelled to make difficult choices, the appropriate route is often to interpret rights holistically and robustly and then consider whether intrusions into those rights are reasonable and justifiable in a democracy. Amongst the factors to be considered is whether the impact of the implementation of a section 9(2) measure on other rights is more necessary to achieve their purpose.

Having concluded that a proportionality analysis ought to be undertaken, Van der Westhuizen J then went on to conduct a proportionality analysis by considering (1) the impact of the implementation of the SAPS's employment affirmative action measure policy on the human dignity of Mrs. Barnard, and (2) the impact of not promoting her on service delivery. It suffices to merely note that regarding human dignity, the judge concluded that the impact on Mrs. Barnard's dignity was not excessively restricted and was in fact "reasonably and justifiably outweighed by the goal of the affirmative

385 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 161. See also Pretorius 2010 SAJHR 558.
386 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 162-164.
387 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 164.
action".\textsuperscript{388} Regarding service delivery, he concluded that, on the facts of the case, it was not disproportionate for the SAPS to prioritise representivity over the possible impact on service delivery.\textsuperscript{389} It should be noted that, according to Moseneke J, Mrs. Barnard had in fact conceded that the decision not to promote her did not affect service delivery negatively.\textsuperscript{390} Ultimately, Van der Westhuizen J came to the conclusion that the appeal should be allowed.\textsuperscript{391}

To sum up, according to Van der Westhuizen J not only should the \textit{Van Heerden} test be applied but as "something more is required" a proportionality analysis inspired by section 36 should also be applied to determine whether affirmative action measures are constitutionally compliant. If applied, a proportionality analysis would certainly address some of the criticisms of the rationality test developed in \textit{Van Heerden}. For example, unlike the rationality test which has been criticised for failing to properly take into account the interests of those negatively affected by affirmative action, a proportionality analysis would recognise and integrate competing interests in a specific case.\textsuperscript{392}

Presumably, in line with \textit{S v Makwanyane}, the burden of proof or justification would be on the employer to show that the impugned affirmative action measures are justified. Consequently, a proportionality analysis would be friendlier to complainants. However, as Van der Westhuizen J’s conclusion in \textit{Barnard IV} shows, a proportionality analysis will not always result in the court finding in favour of the complainant.

\textbf{4.4.3 The criticisms against proportionality}

The comments by Sachs J in \textit{Van Heerden} on affirmative action measures are apposite to this discussion, the learned judge observed that:

\begin{quote}
\textit{Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbitrators as to whether the measure could}
\end{quote}

\textsuperscript{388} \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 183.
\textsuperscript{389} \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 189.
\textsuperscript{390} \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 64.
\textsuperscript{391} \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 183.
\textsuperscript{392} Pretorius 2010 \textit{SAJHR} 554.
have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged members section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere.393 (Emphasis added)

The fact that none of the other judges concurred in Van der Westhuizen J's judgment is telling in itself. Cameron J (with Froneman J and Majiedt J concurring) addressed Van der Westhuizen J's judgment by saying:

As far as his suggestion of proportionality as the exclusive standard is concerned, we think that proportionality can be accommodated within the broader standard of fairness. The added advantage of fairness is it may also cater for situations where proportionality is not necessarily at the heart of alleged unfair implementation.394

Also, Fergus argues that:

While the value of proportionality in balancing competing constitutional rights and values is clear, the suitability of a full-scale proportionality assessment in the restitutive sphere is uncertain. The danger is that if judges are encouraged to weigh the equality imperative against all manner and form of constitutional rights and values raised by litigants, restitutive measures may be subject to unduly broad review. Considering whether a measure is 'the least restrictive means' of achieving transformation would conceivably exacerbate this.395 (Emphasis added)

4.5 Conclusion

The Constitutional Court has rejected the "PSA template". Accordingly, restitutionary measures that properly fall within the requirements of section 9(2) are not presumptively unfair.396 If a measure does not fall within the section, and it constitutes discrimination on a prohibited ground, only then would it be necessary to apply the test laid down in Harksen v Lane in order to determine whether the measure offends the anti-discrimination prohibition in section 9(3).397 As noted before, the Supreme Court of

393 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 152.
394 Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 98 (note 107).
395 Fergus 2015 ILJ 52.
396 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 32. See also Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 37.
397 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 36.
Appeal in *Barnard SCA* and the Labour Court in *Barnard LC* clearly failed to apply the above mentioned principle.

Laid down in *Van Heerden* and later re-affirmed in *Barnard CC*, the test to be applied in determining whether affirmative action measures pass muster in terms of section 9(2) of the *Constitution* is a three-fold rationality test. In light of these two judgments of the Constitutional Court, an employer who chooses to rely on affirmative action as a defence in an unfair discrimination case is only required to show that the affirmative action measures in question (1) target a disadvantaged group, (2) that they are designed to achieve their purpose and (3) that they promote equality.

It was shown that the rationality test has been severely criticised by some academics for a number of reasons which seemingly emphasis and or focus on the failure of the *Van Heerden* test to take proper account of the interests of those who are negatively affected by affirmative action. However, it has also been shown that the proposed alternatives (fairness and proportionality) by Cameron J and Van der Westhuizen J in *Barnard CC* are open to criticism. Therefore, it is clear that rationality, fairness and proportionality can all be criticised in one way or the other.

As the next chapter considers the position taken by the Supreme Court of Canada regarding affirmative action measures, perhaps the Canadian experience can provided some invaluable lessons for the way forward in South Africa given the uncertainty created by *Barnard CC*. The Canadian experience is considered next.
Chapter 5 – A comparative perspective: Canada

5.1 Introduction

Being a comparative chapter, this chapter considers the Supreme Court of Canada's approach to affirmative action. Although the main focus in this chapter will be on subsection (2) of section 15 of the Canadian Charter of Rights and Freedoms (hereafter the Charter), it is also important to consider the discrimination analysis in terms of subsection (1) thereof. As will be shown below, how the Supreme Court of Canada interprets the relationship between these two subsections is vital to its approach to affirmative action measures (also known as "ameliorative measures" in Canada). Firstly, the chapter begins by briefly outlining the legal framework; secondly, the court's approach to section 15(1) of the Charter is considered, and in particular the three most important cases in this regard; thirdly, the court's approach to section 15(2) and; lastly, conclusions are drawn. Throughout this chapter, reference will also be made to decisions of South Africa's Constitutional Court to determine how it compares to the Supreme Court of Canada on certain issues.

5.2 Legal framework: an overview

There was a struggle for equality in Canada during the 1970s and 1980s by women, persons with disabilities, and Aboriginal peoples who were demanding that inequality against them be addressed. Said to have been partly influenced by a grass roots campaign by women across Canada to ensure that gender rights would be protected, the Charter was adopted in 1982. The limitation clause is contained in section 1 of the Charter and provides that:

399 Ágocs Employment Equity in Canada: The Legacy of the Abella Report 3.
400 Ágocs Employment Equity in Canada: The Legacy of the Abella Report 3.
The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Although the Charter came into force in 1982, section 15 only came into effect three years later in 1985 to enable federal governments' time to amend their laws accordingly. The right to equality and non-discrimination are enshrined in section 15 of the Charter which is divided into two subsections and reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, or mental or physical disability.

According to Marcus, rarely does the Supreme Court of Canada miss an opportunity to reiterate section 15’s commitment to substantive equality. Both the Constitutional Court and the Supreme Court of Canada have held that the list of prohibited grounds of discrimination is not exhaustive and that there may be other analogous grounds of discrimination. In *Andrews v Law Society*, McIntyre J observed that:

Section 15(1) of the Charter is not so limited. The enumerated grounds in s. 15(1) are not exclusive and the limits, if any, on grounds for discrimination may be established in future cases await definition. The enumerated grounds do, however, reflect the most common and probably the most socially destructive and historically practised basis of discrimination and must, in the words of s. 15(1), receive particular attention.

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402 Marcus 2013 *Appeal: Review of Current Law and Reform* 122. See also *R v Kapp* 2008 2 R.C.S. 483. para 14 where the court said that "Andrews set the template for this court's commitment to substantive equality – a template which subsequent decisions have enriched but never abandoned".
403 *Harksen v Lane* 1998 1 SA 300 (CC) paras 46-48; *Prinsloo v Van Der Linde* 1997 3 SA 1012 (CC) paras 28-30.

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5.3 Determining discrimination: the section 15(1) analysis

5.3.1 Andrews v Law Society of British Columbia

Andrews v Law Society of British Columbia\(^{407}\) (hereafter Andrews) is regarded as one of the Supreme Court of Canada's first major section 15(1) decisions.\(^{408}\) In this matter, the court had to determine whether several sections of an impugned law violated section 15(1) of the Charter. Having already held that it is not every distinction or differentiation in treatment that will offend against the equality guarantee in section 15(1),\(^ {409}\) and having rejected the formal notion of equality (thereby embracing substantive equality),\(^ {410}\) the court found discrimination to mean:

...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholding or limit access to opportunities, benefits, and advantages available to other members of society.\(^ {411}\)

As for the burden of proof, the court held that "it is for the citizen to establish that his or her Charter right has been infringed and for the state to justify the infringement".\(^ {412}\) For a complainant to succeed, the court held that he or she must not only show that he or she is not receiving equal treatment before the law but, in addition, must show that the legislative impact of the law is discriminatory.\(^ {413}\) In its subsequent decisions, the test for discrimination under section 15(1), as laid down in Andrews, was understood by the Supreme Court to involve three elements: differential treatment; an enumerated or

analogous ground; and discrimination in a substantive sense involving features such as prejudice, stereotyping and disadvantage.\footnote{Miron v Trudel 1995 2 S.C.R 418 para 13, 14; Law v Canada 1999 1 S.C.R. 497 para 30, 39; R v Kapp 2 R.C.S. 483 para 17.}

\textit{Andrews} was lauded for addressing many of the issues which were dividing lower courts and commentators concerning the appropriate framework for analysis equality cases.\footnote{Gold 1989 McGill Law Journal 1064.} However, even after Andrews, it has been said that the Supreme Court continued to be plagued by the question of what kind of legislative distinction was to count as discrimination.\footnote{Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 45.}

5.3.2 \textit{Law v Canada}

\textit{Law v Canada}\footnote{\textit{Law v Canada} 1999 1 S.C.R. 497.} (hereafter \textit{Law}) involved a claim of discrimination on the ground of age. Like in \textit{Andrews}, the court had to determine whether several sections of an impugned law violated section 15(1) of the Charter. The complaint was that the sections in issue discriminated against widows and widowers below a certain age.

\textit{Law} revisited the test for discrimination laid down in \textit{Andrews}. In its analysis of section 15(1), the court in \textit{Law} noted that on its face, the section guarantees equal treatment by the state without discrimination.\footnote{\textit{Law v Canada} 1999 1 S.C.R. 497 para 22.} In order to determine what the terms "equality" and "discrimination" meant, the court saw \textit{Andrews} as a good starting point.\footnote{\textit{Law v Canada} 1999 1 S.C.R. 497 para 22.} In light of \textit{Andrews}, the court noted that a court that is called upon to determine a discrimination claim under section 15(1) should make the following three inquiries:

First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristic? If so, there is differential treatment for the purposes of section 15(1). Second, was the claimant subject to differential treatment
on the basis of one or more enumerated or analogous grounds? And third, does the
differential treatment differentiate treatment discriminate in a substantive sense,
bringing into play the purpose of section 15(1) of the Charter in remedying such ills as
prejudice, stereotyping, and historical disadvantage? The second and third inquiries are
concerned with whether the differential treatment constitutes discrimination in the
substantive sense intended in section 15(1).  

What did the court mean by "the purpose of section 15(1) of the Charter"? The court
held that the purpose of this section is to prevent the violation of human dignity.
Consequently, the court held that differential treatment will not constitute discrimination
within the purpose of section 15(1) where it does not violate human dignity.

Therefore, according to the court, whether differential treatment was discriminatory
would depend on an evaluation of whether the complainant's human dignity was
violated. In so doing, the court had adopted an approach to equality that focused on
human dignity. For about a decade, Law had become the authoritative approach to
the interpretation of section 15(1).

It is said that the Law test quickly attracted a lot of criticism on a number of grounds,
and these included (amongst others) the criticism that the concept of human dignity is
"an imprecise and unworkable standard which would increase the subjectivity of judicial
decision-making". Interestingly, South Africa's Constitutional Court in Harksen v Lane
quoted (seemingly with approval) an observation made by L'Heureux-Dubé J in Egan v Canada
where she said that dignity is a notoriously elusive concept. The criticisms against Law are neatly summarised by Fudge as follows:

423 Veel Journal of Law and Equality 35.
424 Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 46.
425 Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 46.
426 Veel Journal of Law and Equality 35.
428 Harksen v Lane 1998 1 SA 300 (CC) para 49.
431 She refers to Law as Nancy Law.
The initial relief that Nancy Law resolved the impasse in equality jurisprudence soon evaporated as Nancy Law attracted a barrage of academic criticism...human dignity was regarded as both too abstract and too subjective. It also proved to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be. Moreover, Nancy Law allowed a formalistic conception of equality to resurface in the form of an artificial comparator analysis focused on treating like alike. Critics complained that the court had abandoned the robust and substantive conception of equality promised in Andrews, for a thin and formal conception in Nancy Law. (References omitted)

5.3.3 R v Kapp

When the court delivered its judgment in R v Kapp (hereafter Kapp) it reaffirmed Andrews, and this is said to have been a response to the "academic onslaught". Kapp has been described as perhaps the most significant equality rights decision since Law. In Kapp, The court acknowledged that Law had unified the division within the court regarding the proper approach to section 15(1). However, the court also acknowledged the fact that difficulties had arisen from the attempt in law to employ human dignity as a legal test. In effect, the court accepted the criticisms (outlined above) levelled against Law by academics. Therefore, the court endorsed a version of the Andrews test which involves two enquiries: (1) does the law create a distinction based on an enumerated or analogous ground, and (2) does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

Kapp was not only significant in bringing clarity to the proper approach to section 15(1) but it also laid down the proper approach to section 15(2) (the section in the Charter which deals with ameliorative measures). Section 15(2) is considered next. And, as will

432 Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 47.
433 R v Kapp 2008 2 R.C.S. 483.
435 Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 47.
436 This case is discussed in more detail below under the analysis of section 15(2).
be shown below, like the Constitutional Court's approach to section 9(2) of South Africa's Constitution, the Supreme Court of Canada's approach to section 15(2) of the Charter has also been criticised (in some instances severely) by some.

5.4 Ameliorative measures: the section 15(2) analysis

Described as one of the most contentious aspects of the Charter, section 15(2) has only been considered directly by the Supreme Court of Canada in a relatively few number of cases. It was first considered in *Lovelace v Ontario* (hereafter *Lovelace*), and secondly in *Kapp*. Then, it was considered in *Alberta v Cunningham* (hereafter *Cunningham*) wherein the court, for the most part, simply reaffirms *Kapp*. Therefore, although *Cunningham* will also be referred to, the focus is on *Lovelace* and *Kapp* hereunder. At this juncture, it should be noted that *Lovelace* and *Kapp* took different approaches regarding how section 15(2) ought to be interpreted.

5.4.1 *Lovelace v Ontario*

Briefly, the facts were that the province of Ontario and representatives from Ontario's First Nations (indigenous Indian, Inuit and Métis communities) entered into a process of negotiations with the goal of partnering in the development of the province's first reserve based commercial casino. Profits from the casino were to be shared among the province's First Nations. The casino was subsequently opened in 1996. Meanwhile, the province and representatives of Chiefs of Ontario had begun a process of negotiating the terms for distributing the casino's proceeds (First Nations Fund) to the First Nations communities. Sometime in 1996, the province informed the appellant aboriginal communities that the First Nations Fund was to be distributed only to Ontario First Nations communities registered as bands under the *Indian Act* of 1985.

441 Howard 2002 *Windsor Yearbook of Access to Justice* 255.
442 *Lovelace v Ontario* 2000 1 S.C.R. 950.
444 Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 48.
445 For a summary of the facts in this matter, see *Lovelace v Ontario* 2000 1 S.C.R. 950 para 1.
The issue to be determined was whether the exclusion of the appellant aboriginal groups from the First Nations Fund, and from the negotiations on the establishment and operation of the fund, on the ground that they were non-registered bands, was discriminatory in violation of the section 15(1) right to equality. It suffices to merely note that in applying the section 15(1) discrimination test, and relying on Law, the court concluded the appellants had failed to establish that their exclusion from the fund had the effect of diminishing their human dignity. Consequently, there was no violation of section 15 of the Charter (discrimination).

Since the court a quo (Ontario Court of Appeal) had decided the matter on the basis of section 15(2), the court felt that it was important for it to "comment" on the relationship between section 15(1) and 15(2). The court noted the fact that although it had not yet defined the scope or content of section 15(2), it (section 15(2)) had played an important role in the development of section 15 jurisprudence. In particular, that the right to equality should be understood in substantive not formal terms. In setting the tone of what was to come later in its judgment, the court had earlier stated that the appeal "represents an opportunity to confirm that the section 15(1) scrutiny applies just as powerfully to targeted ameliorative programs".

Interestingly, the appellants argued that section 15(2) could not be invoked as a defence while the respondents argued that it was a defence to any section 15(1) claim of discrimination. In effect, as the court noted, the respondents were arguing that section 15(2) can act to pre-empt or limit the section 15(1) (discrimination) scrutiny. The court saw itself as being confronted with two approaches to section 15(2): one where section 15(2) is an interpretive aid to section 15(1) – providing conceptual depth.

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446 Lovelace v Ontario 2000 1 S.C.R. 950 para 90.  
448 Lovelace v Ontario 2000 1 S.C.R. 950 para 93.  
449 Lovelace v Ontario 2000 1 S.C.R. 950 para 93.  
450 Lovelace v Ontario 2000 1 S.C.R. 950 para 61.  
451 Lovelace v Ontario 2000 1 S.C.R. 950 para 91.  
452 Lovelace v Ontario 2000 1 S.C.R. 950 para 96.
and clarity on the substantive nature of equality – and the other where section 15(2) is an exception or defence to the applicability of the section 15(1) analysis.\textsuperscript{453} Whilst accepting that section 15(2) may be independently applicable in a case in the future, the court concluded that the section 15(2) was an interpretive aid to section 15(1).\textsuperscript{454} In conclusion, the court held that:

...claimants arguing equality claims \textit{should first be directed to s 15(1)} since that can embrace ameliorative programs of the kind that are contemplated by s 15(2). \textit{By doing that one can ensure that the program is subjected to the full scrutiny of the discrimination analysis as well as the possibility of a s 1 review. However, as noted earlier, we may well wish to reconsider this matter at a future time in the context of another case.}\textsuperscript{455} (Own emphasis added)

The above approach is clearly not the differential rationality based approach adopted by South Africa's Constitutional Court in \textit{Van Heerden}. The \textit{Lovelace} approach would not only mean that a court would have to consider the interests of those negatively affected by the programme or measure, but it would also require the state to provide a thorough explanation of its conduct. However, on the face of it, the consequence of the approach in \textit{Lovelace} would seem to be that a court would find an ameliorative program to be discriminatory before saving it under section 15(2) or even section 1. It has been pointed out that the Supreme Court of Canada has a habit of saying "the door remains open";\textsuperscript{456} the above quote from \textit{Lovelace} is but one such example where the court said that it may well reconsider the approach to section 15(2) at a future time. As will be shown below, the court in \textit{Kapp} seized the opportunity to reconsider the proper approach to section 15(2).

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\textsuperscript{453} \textit{Lovelace v Ontario} 2000 1 S.C.R. 950 para 97.
\textsuperscript{454} \textit{Lovelace v Ontario} 2000 1 S.C.R. 950 para 100, 105, 106. Contrast with \textit{Minister of Finance v Van Heerden} 2006 4 SA 121 (CC) para 33 where the court rejected the notion that 9(2) is an interpretive aid.
\textsuperscript{455} \textit{Lovelace v Ontario} 2000 1 S.C.R. 950 para 108.
\textsuperscript{456} Marcus 2013 \textit{Appeal: Review of Current Law and Reform} 138.
5.4.2 *R v Kapp* (and *Cunningham*)

Four years after *Van Heerden*, in *Kapp*, the second case where the Supreme Court of Canada directly considered section 15(2) of the Charter, it unanimously pronounced its preferred approach of a section 15(2) analysis. In so doing, "it developed an interpretation of section 15(2) which is incompatible with the one developed in *Lovelace*."457

*Kapp* was a criminal matter where the appellants claimed a violation of their right to equality in terms of section 15 of the Charter. As part of its strategy of enhancing aboriginal involvement in commercial fishing, the federal government introduced the Aboriginal Fisheries Strategy. As part of the said programme, commercial fishing licences were issued to aboriginal communities so as to permit them to fish for salmon for a period of 24 hours at the mouth of the Fraser River. The appellants, who were mainly non-aboriginal, excluded from fishing during the 24 hour period, participated in a protest fishery and were subsequently charged with fishing at a prohibited time. At their trial, the appellants argued that the Aboriginal Fisheries Strategy discriminated against them on the basis of their race. In response, the government argued that the programme under which the license was issued, *inter alia*, ameliorated the conditions of a disadvantaged group.458 Given these arguments, the court felt that it had to consider whether section 15(2) is capable of operating independently of section 15(1) to protect ameliorative programs from claims of discrimination – a possibility left open in *Lovelace*.459

According to the court, section 15(1) and 15(2) work together to promote the version of substantive equality that underlies section 15 as a whole, and section 15(2) preserves the right of governments to implement programmes aimed at helping disadvantaged

457 Pretorius 2009 *SALJ* 409.
groups.\textsuperscript{460} Relying on \textit{Kapp} as to the purpose of section 15(2) of the Charter, the court in \textit{Cunningham} later held that:

\begin{quote}
\textit{The purpose of section 15(2) is to save ameliorative programs from the charge of “reverse discrimination”.} Ameliorative programs function by targeting specific disadvantaged groups for benefits, while excluding others. At the time the Charter was being drafted, affirmative action programs were being challenged in the United States as discriminatory – a phenomenon sometimes called reverse discrimination.\textsuperscript{461} (Emphasis added)
\end{quote}

It should be recalled that the court in \textit{Lovelace} saw two possible approaches to section 15(2): one where section 15(2) is an interpretive aid to section 15(1) and the other where section 15(2) is an exception or defence to the applicability of the section 15(1) analysis. However, in \textit{Kapp}, the court held that there was in fact a third option:"If government could can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a section 15(1) analysis at all".\textsuperscript{462} The court reasoned that although section 15(1) and 15(2) are confirmatory of each other, this does not preclude an independent role for section 15(2).\textsuperscript{463} It went further to explain that:

\begin{quote}
Section 15(2) is more than a hortatory admonition. It tells us in simple, clear language, that s. 15(2) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of s. 15.\textsuperscript{464} (Emphasis added)
\end{quote}

Therefore, according to the court, once a claimant proves a distinction made on an enumerated or analogous ground under the first step of the section 15(1) test, the government has an opportunity to prove that the impugned law, programme or activity is ameliorative; if so, it is neither unconstitutional nor discriminatory.\textsuperscript{465} However, if the government fails to demonstrate that its programme falls under section 15(2), the programme must then receive a full section 15(1) scrutiny to determine if its effect is

\begin{flushright}
\textsuperscript{460} \textit{R v Kapp} 2008 2 R.C.S. 483 para 16.  \\
\textsuperscript{461} \textit{Alberta v Cunningham} 2011 2 S.C.R. 670 para 41.  \\
\textsuperscript{462} \textit{R v Kapp} 2008 2 R.C.S. 483 para 37.  \\
\textsuperscript{463} \textit{R v Kapp} 2008 2 R.C.S. 483 para 38.  \\
\textsuperscript{464} \textit{R v Kapp} 2008 2 R.C.S. 483 para 38.  \\
\textsuperscript{465} \textit{R v Kapp} 2008 2 R.C.S. 483 para 40.
\end{flushright}
discriminatory.\textsuperscript{466} Thus, the test for section 15(2) was formulated as follows: a programme does not violate the section 15 equality guarantee if the government can demonstrate that (1) the programme has an ameliorative or remedial purpose; and (2) the programme targets a disadvantaged group identified by the enumerated or analogous grounds.\textsuperscript{467} It should be noted that these two conditions are not onerous nor are they the least impact sensitive,\textsuperscript{468} and there is no proportionality requirement.\textsuperscript{469} Put simply, the test is not concerned with the interests of the complainant or disfavoured group. As it had done in \textit{Lovelace}, the court in \textit{Kapp} once again "left the door open" by saying that the test may be refined in the future.\textsuperscript{470}

Given the choice between an effect-based or purpose-based approach in determining whether a programme qualifies for section 15(2) protection, the court opted for the latter.\textsuperscript{471} To avoid an effect-based analysis, the court suggested that courts should frame the analysis as follows:

\begin{quote}
Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.\textsuperscript{472}
\end{quote}

Also, the court made it quite clear that the new test requires only that a programme an ameliorative purpose as one of its purposes, not that this be the sole or most important purpose of the programme.\textsuperscript{473} Significantly, the court added that section 15(2) precludes from section 15(1) review distinctions made on enumerated or analogous grounds that serve and are "necessary" to the ameliorative purpose.\textsuperscript{474} However, three years later in

\textsuperscript{466} \textit{R v Kapp} 2008 2 R.C.S. 483 para 40.
\textsuperscript{467} \textit{R v Kapp} 2008 2 R.C.S. 483 para 41.
\textsuperscript{468} Marcus 2013 \textit{Appeal: Review of Current Law and Reform} 128.
\textsuperscript{469} Eisen 2009 \textit{Journal of Law and Equality} 11.
\textsuperscript{470} \textit{R v Kapp} 2008 2 R.C.S. 483 para 41.
\textsuperscript{471} \textit{R v Kapp} 2008 2 R.C.S. 483 paras 43-48.
\textsuperscript{472} \textit{R v Kapp} 2008 2 R.C.S. 483 para 49.
\textsuperscript{473} \textit{R v Kapp} 2008 2 R.C.S. 483 paras 50-52.
\textsuperscript{474} \textit{R v Kapp} 2008 2 R.C.S. 483 para 52.
Cunningham, the court made it clear that "necessary" should not be understood as requiring proof that the exclusion is essential to realising the object of the ameliorative programme. Instead, according to Cunningham, what is required is that the impugned distinction in a general sense serves or "advances" the object of the programme. To its credit, the court in Kapp had added that laws designed to "restrict or punish behaviour" would not qualify for section 15(2) protection. Unsurprisingly, given the above mentioned approach to ameliorative measures, the court ultimately held that the impugned measures passed the section 15(2) test which meant there had been no violation of section 15. The appeal was dismissed.

It has been said that since Law, the court's decisions under section 15 of the Charter "have been marked by extreme deference to the legislature". Probably the most striking aspect of the approach adopted by the court in Kapp is the level of deference towards ameliorative measures; an approach that allows for a large number of programmes to qualify for section 15(2) protection. Some commentators are of the opinion that the court in Cunningham actually took the level of deference even further. It should be noted that in Cunningham – like in Kapp – the court held that the impugned measures passed the section 15(2) test which meant there had been no violation of section 15.

Also, as noted above, the section 15(2) test laid down in Kapp is not impact sensitive. Moreau argues that this purpose-based approach (as opposed to an effect-based approach) makes it more difficult for courts to interfere with any programme that

476 R v Kapp 2008 2 R.C.S. 483 para 54.
477 R v Kapp 2008 2 R.C.S. 483 paras 61, 66.
478 McIntyre 2006 Queen's Law Journal 742.
482 See Marcus 2013 Appeal: Review of Current Law and Reform 128.
claims to have the amelioration of a disadvantaged group as one of its goals. In a similar vein, Eisen opines that the purpose-based approach is a departure from the claimant-focused analysis that otherwise characterises Canada’s equality jurisprudence. For her, a proportionality analysis would allow for amore genuine inquiry into who benefits, the extent of that benefit, and the gravity of the harm imposed by the impugned programme. On the flip side, Kapp has been praised for being more claimant friendly than the legal test formulated down in Lovelace. For example, the burden of proof is now on the government to demonstrate that its affirmative action programmes truly are aimed at combating disadvantage.

A decade before the Kapp decision, Drumbl and Craig had argued that the strict scrutiny standard should be applied to section 15(2) of the Charter. It is evident that Kapp (like Van Heerden) clearly rejected this idea. Although it has been pointed out that the approach in Kapp is similar to that taken in Van Heerden, it has also been pointed out that there is one significant difference: by reading an internal validity requirement into section 9(2), the court in Van Heerden left the backdoor open for a fairness analysis regarding the effects of an affirmative action measure on excluded groups. However, it should be recalled that the court in Kapp left the door open by saying that the test for section 15(2) of the Charter may be refined in the future.

5.5 Conclusion

The Supreme Court of Canada is committed to substantive equality. It has been shown that the court’s understanding of the relationship between sections 15(1) and 15(2) of

485 Eisen 2009 Journal of Law and Equality 21. See also Van der Westhuizen J’s reasons in Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) as to why proportionality is most appropriate barometer for testing the constitutionality of affirmative action measures in South Africa.
486 Goela 2009 The Dalhousie Law Journal 143.
488 Pretorius 2009 SALJ 418.
489 Pretorius 2009 SALJ 418. See also McGregor 2013 TSAR 656 (note 41); De Vos 2012 SALJ 93.
490 R v Kapp 2008 2 R.C.S. 483 para 41.
the Charter is vital in determining its approach to ameliorative measures. As it currently stands, section 15(2) is not an interpretive aid to section 15(1). According to Cunningham, the purpose of section 15(2) is "to save ameliorative programmes from the charge of "reverse discrimination".491

The cases whereby the Supreme Court of Canada has directly considered sections 15(1) and 15(2) of the Charter demonstrate that the court is willing to reformulate the tests for these two sections, sometimes as a response to criticisms by academics.

Like the Constitutional Court in South Africa, the Supreme Court of Canada applies a deferential rationality based standard for determining whether ameliorative measures are compliant with section 15(2) of the Charter – a standard lacking in proportionality or fairness. A programme does not violate the section 15 equality guarantee if the government can demonstrate that (1) the programme has an ameliorative or remedial purpose; and (2) the programme targets a disadvantaged group identified by the enumerated or analogous grounds.492 The test developed by the court in Kapp in relation to ameliorative measures avoids a situation whereby impugned measures will be found to be discriminatory before being saved as ameliorative in terms of section 15(2) of the Charter. The Kapp test is clearly similar to the Van Heerden test. However, as noted above, there is one significant difference between the approaches adopted by the Constitutional Court in South Africa and the Supreme Court of Canada: Van Heerden left the backdoor open for a fairness analysis regarding the effects of an affirmative action measure on excluded groups.

492 R v Kapp 2008 2 R.C.S. 483 para 41.
Chapter 6 – Conclusions and recommendations

A discussion of affirmative action in South Africa would be incomplete without referring to the pre-1994 apartheid era. Therefore, this study began by providing an overview of some of the legislation and policies that were used to not only encourage but to perpetuate racial discrimination in the workplace. It has been shown that state-sponsored racial discrimination in the workplace was in place even before the apartheid regime officially came into power in 1948. For example, by 1924 the "civilised labour policy" was already in place. It will be recalled that this policy distinguished between "civilised" white and "uncivilised" black labour, and protected poor white labour by inter alia rewarding firms for hiring white workers.493

Post-1994, the EEA was enacted to redress the disparities caused by the pre-1994 racist apartheid policies and laws. The purpose of the Act is twofold: (1) to eliminate unfair discrimination and (2) to implement 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.494 Although affirmative action is controversial in South Africa and has been subjected to criticism, it should continue to be applied until its goals have been met.495 It should be recalled that an employer may not discriminate in the name of affirmative action once it has reached its numeric goals or representivity as set out in its employment equity plan.496

In unfair discrimination cases, the EEA places the burden of proof on the employer to prove that the alleged unfair discrimination is fair and rational. Affirmative action

493 Lowenberg and Kaempfer The origins and demise of South African apartheid 2; McGregor 2006 Fundamina 90.
494 Section 2 of the EEA.
495 See para 2.4 above for criticisms against affirmative action in South Africa and the responses to these criticisms.
496 See Willemse v Patelia 2007 28 ILJ 428 (LC); Reynhardt v University of South Africa 2008 29 ILJ 725 (LC).
measures which comply with section 6(2)(a) of the EEA are not presumptively unfair.497 Sadly, the courts have often failed to apply this principle in unfair discrimination cases where affirmative action is raised as a defence. The Labour Court in Barnard LC and even the Supreme Court of Appeal in Barnard SCA are two such examples. It is therefore evident that even judges still require training regarding the applicable principles in unfair discrimination cases where affirmative action is raised as a defence. For the proper principles which are applicable, the Constitutional Court's judgment in Barnard CC is probably the most authoritative in this regard.

The EEA requires designated employers to prepare and implement an employment equity plan. This plan represents which a "critical link" between a workforce profile and the implementation of affirmative action measures.498 It has been shown that in the drawing up and implementation phase of an affirmative action policy there are several issues that may arise including numerical targets versus quotas, representivity versus efficiency, and national demographics versus regional demographics. Regarding numerical targets and quotas, this study has shown that the EEA allows a designated employer to set numerical goals in its employment equity plan but not quotas.499 Although the courts seem reluctant to define the term "quota", the Supreme Court of Appeal in Barnard SCA500 observed that "the mechanical application of numerical targets would effectively amount to a quota". The court further observed that representivity and numerical targets cannot be "absolute barriers for appointment" because to adopt such an approach "would turn numerical targets into quotas".501

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497 Fergus 2015 ILJ 66. See also Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) paras 51-53; Naidoo v Minister of Safety and Security 2013 34 ILJ 2279 (LC) para 113 where the court held that affirmative action measures which comply with section 6(2)(a) of the EEA are not presumptively unfair.

498 In terms of item 4.2 of the Code of good practice: Preparation, implementation and monitoring of employment equity plans.

499 Section 15(3) of the EEA.


Regarding national demographics versus regional demographics, the Labour Court in *Solidarity v Department of Correctional Services*\(^{502}\) and the Labour Appeal Court\(^{503}\) in the subsequent appeal, have settled the debate regarding which demographics a designated employer ought to take into account when setting numerical targets. According to these courts, a designated employer is obligated to take into account both national and regional demographics when setting numerical targets (notwithstanding the amendment to section 42(1)(a) of the EEA by the EEAA).\(^{504}\) By requiring employers to take into account both national and regional demographics, the EEA "allows for proportionality, balance and fairness".\(^{505}\) These judgments are indeed welcomed for bringing clarity to the debate. It is now evident that should an employer (whether in the public sector or private sector) fail to take into account both regional and national demographics when setting employment equity targets, such an employer would be vulnerable to being sued for unfair discrimination by employees who have been denied job opportunities as a result of the implementation of a defective employment equity plan.

Going forward, it is therefore of utmost importance that designated employers should receive proper up-to-date training regarding the construction and implementation of EEA compliant employment equity plans. The Department of Labour should lead from the front in this regard. Also, it should be recalled that the EEAA has amended section 42(1)(a) of the EEA by replacing the word "must" with "may". In light of the above mentioned judgments of the Labour Court and Labour Appeal Court, this amendment to the EEA should be revisited by Parliament. If left unchanged, section 42(1)(a) of the EEA can create unnecessary confusion as to whether regional demographics should also be taken into account when setting numerical targets.

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502 *Solidarity v Department of Correctional Services* 2014 35 ILJ 504 (LC).
503 In *Solidarity v Department of Correctional Services* 2015 4 SA 277 (LAC).
504 See *Solidarity v Department of Correctional Services* 2014 35 ILJ 504 (LC) paras 45, 53; *Solidarity v Department of Correctional Services* 2015 4 SA 277 (LAC) para 58.
505 *Solidarity v Department of Correctional Services* 2014 35 ILJ 504 (LC) para 53.
Regarding representivity and efficiency (at least in the context of the public service), *Coetzer v Minister of Safety and Security*⁵⁰⁶ tells us that although the Constitution does not prescribe how the two imperatives of efficiency and representivity should be balanced, it should be a rational one.⁵⁰⁷ The overall picture which emerges from chapter two is that affirmative action measures must be implemented in a fair and rational manner as opposed to an arbitrary, irrational and unfair manner.⁵⁰⁸ In determining fairness, proportionality also comes into play.

Chapter three was dedicated to formal and substantive equality. The chapter began with a discussion on the concept of differentiation and (unfair) discrimination. There is broad consensus that there are instances which require people to be treated differently. In the context of the workplace, the need to draw distinctions (to differentiate) among employees is said to be a fact of working life and or is the rule.⁵⁰⁹ It was shown that mere differentiation only becomes discrimination when it is based or linked to an unacceptable ground such as race.⁵¹⁰

The main focus of chapter three was on formal and substantive equality. As such, it was shown that equality can be understood in a formal sense or in a substantive sense. Formal equality (equality as consistency) is based on the premise that individuals should be treated as individuals, on their own merit without taking into account irrelevant characteristics such as race and sex.⁵¹¹ Formal equality sees differentiation of any nature as discrimination regardless of whether the differentiation in question is aimed at

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⁵⁰⁶ *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC).
⁵⁰⁷ *Coetzer v Minister of Safety and Security* 2003 24 ILJ 163 (LC) para 32.
⁵⁰⁸ See Van Niekerk and Smit *Law @ Work* 136; Van der Walt *et al* *Labour Law in Context* 65; *Solidarity obo Barnard v SA Police Service* 2010 31 ILJ 742 (LC) para 25.3; *SA Police Service v Solidarity obo Barnard* 2013 34 ILJ 590 (LAC) para 44; *Willems v Patella* 2007 28 ILJ 428 (LC) para 34; *Naidoo v Minister of Safety and Security* 2013 34 ILJ 2279 (LC); *Gordon v Department of Health* 2008 BLLR 1023 (SCA) para 22; *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council* 2000 21 ILJ 1119 (LC) paras 18-19.
⁵⁰⁹ Du Toit and Potgieter *Unfair Discrimination in the Workplace* 18, 80.
⁵¹⁰ *Ntai v SA Breweries* 2001 22 ILJ 214 (LC) para 17.
⁵¹¹ Fredman "Facing the future: substantive equality under the spotlight" 17.
redressing past disadvantages, and is therefore fundamentally opposed to affirmative action. On the other hand, substantive equality recognises that those who suffered from disadvantage in the past as a result of discrimination are entitled to positive unequal treatment in the present. As such, it embraces affirmative action. The Constitutional Court in several cases has held that section 9 of South Africa's Constitution embraces a substantive conception of equality, and that affirmative action measures are neither "reverse discrimination" nor a deviation from the right to equality.

Having shown that South Africa’s constitution embraces a substantive conception of equality which embraces affirmative action, chapter four dealt with standards which are or may be used by the courts to determine whether affirmative action measures are compliant with the Constitution. A unanimous court in Van Heerden laid down a three pronged rationality test which asks: (1) whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; (b) whether the measure is designed to protect or advance such persons or categories of persons; and (c) whether the measure promotes the achievement of equality. The rationality test was re-affirmed by the majority of the members of the Constitutional Court in Barnard CC.

It was shown that it would be difficult to convince a court that a programme which relies on racial categories and is aimed at redressing past unfair discrimination does not comply with the requirements laid down in Van Heerden. Therefore, the test clearly

512 Parington and Van der Walt 2005 Obiter 596.
513 For example, see the views expressed by the United States Supreme Court in Adarand Constructors v Pena 515 U.S. 200 1995, 240; the dissenting judgment of Justice Stewart in Fullilove v Klutznick 448 U.S. 448 1980.
514 Cooper 2004 ILJ 817.
515 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 27; President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC) para 41; National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 1 SA 6 (CC); City Council of Pretoria v Walker 1998 2 SA 363 (CC); more recently in SA Police Service v Solidarity obo Barnard 2014 35 ILJ 2981 (CC) para 29.
516 Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 37.
517 De Vos 2012 SALJ 89.
favours the party who relies on affirmative action as a defence. For example, in the employment context, the test would favour the employer as opposed to the employee who is claiming to be a victim of unfair discrimination. The rationality test is not without its critics. This study has shown that the criticisms levelled against rationality revolve around its failure to take proper account of the interests of those who are adversely affected by the implementation of affirmative action measures. In a nutshell, rationality has been criticised for not containing any elements of fairness and proportionality.

In *Barnard CC*, two alternatives to the rationality test were proposed by Cameron J (with Froneman J and Majiedt J concurring) and Van der Westhuizen J, namely fairness and proportionality. Whilst this study acknowledges the fact that these proposed alternatives would address some of the criticisms levelled against the rationality test, as will be shown below, both of these proposed alternatives are unsuitable for several reasons.

Regarding fairness, the reasons why it is undesirable include the following: firstly, given its high level of scrutiny, it would subject affirmative measures to an "unrealistically high standard of review which would thwart a constitutional objective".\(^{518}\) Secondly, although its proponents do not wish to admit it, a fairness test focuses on the complainant\(^{519}\) and as such would unduly favour the complainant.\(^{520}\) It should be recalled that Mokgoro J in *Van Heerden* observed that applying the fairness test to affirmative action measures would frustrate the goal of section 9(2) if undue attention is paid to those disadvantaged by a restitutionary measure.\(^{521}\) Thirdly, fairness is vague.\(^{522}\) Fourthly, 

\(^{518}\) According to Van der Westhuizen J in *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 159. See also Fergus 2015 *ILJ* 58 where she confirms that "the fairness standard is an exacting one".

\(^{519}\) Fergus 2015 *ILJ* 58.

\(^{520}\) Per Mokgoro J in *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) paras 79-80. However, see Pretorius 2010 *SAJHR* 553 where he disagrees with this assertion.

\(^{521}\) *Minister of Finance v Van Heerden* 2006 4 SA 121 (CC) para 80. See also *SA Police Service v Solidarity obo Barnard* 2013 34 ILJ 590 (LAC) para 30 where the court observed that the fairness approach adopted by the Labour Court in *Barnard I* promoted "the interests of persons from non-designated categories to continue to enjoy an unfair advantage which they had enjoyed under apartheid".\(^{521}\)
fairness requires judges to pass value judgments (for example, the degree to which a person's dignity has been infringed) and is thus more exposed to the discretion of individual judges than is rationality.\textsuperscript{523} Lastly and most importantly, a fairness test would create an internal inconsistency within section 9 of the Constitution.\textsuperscript{524} The rationality test developed in \textit{Van Heerden} does not create an internal inconsistency within section 9. Similarly, the rationality based test developed by Supreme Court of Canada in \textit{Kapp} was specifically designed to avoid an internal inconsistency within section 15 of the Charter.\textsuperscript{525}

Regarding proportionality, Van der Westhuizen J in \textit{Barnard CC} was alone in proposing proportionality as an alternative to rationality. The fact that none of the judges concurred in his judgment is telling in itself. It should be recalled that Van der Westhuizen J conducted a proportionality analysis by \textit{inter alia} considering the impact of the implementation of the SAPS's employment affirmative action measure policy on the human dignity of Mrs. Barnard. The comparative analysis of the Canadian perspective conducted in chapter five of this study revealed some of the problems associated with the concept of dignity. For example, that the concept of human dignity is too abstract and too subjective.\textsuperscript{526} The unsuitability of proportionality is best summed up by Fergus where she argues that:

> While the value of proportionality in balancing competing constitutional rights and values is clear, the suitability of a full-scale proportionality assessment in the restitutive sphere is uncertain. The danger is that if judges are encouraged to weigh the equality imperative against all manner and form of constitutional rights and values raised by litigants, restitutive measures may be subject to unduly broad review. Considering

\textsuperscript{522} According to Van der Westhuizen J in \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 159.  
\textsuperscript{523} Fergus 2015 \textit{ILJ} 58.  
\textsuperscript{524} According to Van der Westhuizen J in \textit{Solidarity obo Barnard v SA Police Service} 2014 35 ILJ 2981 (CC) para 158.  
\textsuperscript{525} See \textit{R v Kapp} 2008 2 R.C.S. 483 para 38-41.  
\textsuperscript{526} \textit{R v Kapp} 2008 2 R.C.S. 483 para 21; Fudge "The Supreme Court of Canada, substantive equality, and inequality at work" 47; Veel \textit{Journal of Law and Equality} 35. See also \textit{Harksen v Lane} 1998 1 SA 300 (CC) para 49.
whether a measure is 'the least restrictive means' of achieving transformation would conceivably exacerbate this.527

The comparative chapter shows that when the Supreme Court of Canada lays down a test for either section 15(1) or section 15(2) of the Charter, it has a habit of leaving the door open for revisiting such test at in a future case. Regarding the test for whether impugned ameliorative measures are compliant with the Charter, the Court had earlier preferred a more exacting test in Lovelace; a test that would ensure that an impugned programme "is subjected to the full scrutiny of the discrimination analysis as well as the possibility of a section 1 review".528

However, in Kapp the court laid down a new and highly deferential rationality based test. The court made it abundantly clear that section 15(2) of the Charter is not an interpretive aid to section 15(1).529 Therefore, according to Kapp, once a claimant proves a distinction made on an enumerated or analogous ground under the first step of the section 15(1) test, the government has an opportunity to prove that the impugned law, programme or activity is ameliorative; if so, it is neither unconstitutional nor discriminatory.530 Thus, the test for section 15(2) was formulated as follows: a programme does not violate the section 15 equality guarantee if the government can demonstrate that (1) the programme has an ameliorative or remedial purpose; and (2) the programme targets a disadvantaged group identified by the enumerated or analogous grounds.531 Despite criticisms by academics for its failure to take into account the impact of ameliorative measures on the claimant, the Kapp test has been followed by the court in its subsequent judgment532 on section 15(2) of the Charter.

527 Fergus 2015 ILJ 52. See also the comments of Sachs J in Minister of Finance v Van Heerden 2006 4 SA 121 (CC) para 152; Cameron J in Solidarity obo Barnard v SA Police Service 2014 35 ILJ 2981 (CC) para 98 (note 107).
528 Lovelace v Ontario 2000 1 S.C.R. 950 para 108.
529 R v Kapp 2008 2 R.C.S. 483 para 38.
530 R v Kapp 2008 2 R.C.S. 483 para 40.
531 R v Kapp 2008 2 R.C.S. 483 para 41.
532 See Alberta v Cunningham 2011 2 S.C.R. 670 para 42.
In light of the reasons for the unsuitability of a fairness or proportionality test, the uncertainty created by the different views expressed in *Barnard CC*, and the persuasive authorities from the Supreme Court of Canada in favour of a rationality test, this study concludes that the rationality test, although not perfect, is better suited for testing whether affirmative action measures are compliant with South Africa's Constitution.\(^{533}\) However, this is not the end of the matter. The questions raised by the judgments of Cameron J (with Froneman J and Majiedt J concurring) and Van der Westhuizen J in *Barnard CC*, and the multiple criticisms levelled against *Van Heerden's* rationality test by academics need to be properly addressed by the Constitutional Court. It should be recalled that when *Law* was criticised by academics for its emphasis on human dignity in relation to section 15(1) of the Charter, the Supreme Court of Canada took heed of these criticisms in *Kapp*.\(^{534}\)

It should be noted that Jafta J in *Barnard CC* was seemingly open to the idea of revisiting the question of which standard should be applied in a future case.\(^{535}\) Should the Constitutional Court revisit this question in a future case, while this study acknowledges that the interests of those who are negatively affected cannot and should not be ignored, the court should reformulate the *Van Heerden* test in a manner that properly takes into account the interests of such persons whilst at the same time guarding against placing too much emphasis on such interests. To do otherwise would once again turn the courts into a "blunt weapon for transformation"\(^{536}\) and thereby impede the Constitution's goal of transformation. In light of the similarities between South Africa and Canada in relation to affirmative action, the Supreme Court of Canada's approach to affirmative action may provide much needed guidance.

\(^{533}\) See also Fergus 2015 *ILJ* 40 where the learned author also concludes that rationality is more suitable. However, contrast this with the views expressed by Pretorius 2010 *SAJHR* 537-570 and McGregor 2013 *TSAR* 650-67 where these authors argue in favour of fairness and or proportionality.
\(^{534}\) *R v Kapp* 2008 2 R.C.S. 483 para 21.
\(^{535}\) See *Solidarity obo Barnard v SA Police Service* 2014 35 ILJ 2981 (CC) para 233.
\(^{536}\) See Rycroft 1999 *ILJ* 1412 where the learned author discusses how the courts were "blunt weapons for transformation". See also Rycroft "Transformative failure: the adjudication of affirmative action disputes" 314.
Given the complex issues and emotions often involved in cases involving affirmative action, the courts undoubtedly find themselves in an unenviable position. However, the next Constitutional Court case which will not only revisit *Van Heerden* but also revisit the different views expressed in *Barnard CC*, thereby bringing clarity to the debate, is eagerly awaited.
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To whom it may concern

Confirmation of editing the dissertation of Mr Motsoane Lephoto

I hereby wish to confirm that I proofread and edited the dissertation of Mr Lephoto, 
*The re-evaluation of principles of fairness, rationality and proportionality in affirmative action cases in South Africa.*

Yours sincerely,

Maretha Botes
Freelance journalist and language practitioner
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