A CRITIQUE ON *SOUTH AFRICAN POLICE SERVICES V SOLIDARITY obo BARNARD* IN RELATION TO INEQUALITY

By

SEUN RABBEY JORDAN
Student No: 21755648

MINI DISSERTATION

Submitted in partial fulfilment of the requirement for the completion of the:

Degree:

***Magister Legum* (LLM):**

In

Constitutional and Administrative Law (Coursework)

In the Faculty of Law

At

University of Pretoria

SUPERVISOR: PROF STEFAN VAN ECK

Submission date: 06 MARCH 2023

Declaration by Student

I, **Seun Rabbey Jordan** of Student No: **21755648** at the University of Pretoria I declare that this mini – dissertation which I hereby submit for assessment in partial fulfilment of the requirements of the Degree of Master of Laws in Constitutional and Administrative Law at the University of Pretoria, is my own original work. Where I have utilised any person's original work, I have acknowledged that person as the source in terms of the rules of the university. I have not copied any person's work and represented as if it is my own. I have not allowed any person to copy my work and submit it anywhere as if it is their original work.

_____ _____

Rabbey Seun Jordan Date

Declaration by Supervisor

I, the undersigned, Prof Stefan van Eck do hereby declare that this Mini – Dissertation by Seun Rabbey Jordan in partial fulfilment of the degree of Master of Laws (LLM) in Constitutional and Administrative Law be accepted and declared for examination.

_____ _____

Prof Stefan van Eck Date

Acknowledgements

God Almighty, Alfa and Omega, the Giver of Life and the Redeemer of the lost, I am not worthy of Your Grace, but because You are God of all including the last of sinners like me, Your Grace was bestowed on me, and for that I bow down before You ooh Lord God, o Mothusi mo tshikatshikeng, Modimo wa Boikanyo ke a go leboga Jehova gonne ke hano ka wena Seokamaditshaba.

I hereby extend the strongest gratitude to my daughter, Audrey Siphesihle Jordan. You have been my utmost supporter, pillar of strength and your believe in me is unmeasurable. You endured the worst and instead of feeling neglected, you became my tiny mentor, this is dedicated to you my angel.

When Adam was not coping, God created from Adam's ribs Eve in order that Eve balance Adam. I was blessed for God from my ribs extracted for me my own balance, Thobekile Precious Jordan. It is difficult to express what the journey is because it has just begun, but I know that because you are a blessing from God, I can safely say I am forever going to be sustained by your love and support.

This mini-dissertation is only addressed as my work because it is examined against my name, it is indeed made possible by the vast experience, patience, guidance and mostly the numerous phone calls and texts that flowed to Professor Stefan van Eck. I am not convinced that had I been granted another supervisor I would have managed, this was made possible by your ability to can make an ant squash and swallow an elephant in whole, I humbly submit before you Prof.

My siblings, Daphney, Serefete and Ofentse Garenamotse, you have always been on the side-lines and cheered me to push through, even when the feet were heavy, your cheers were always heard whispered at low pitches. Lastly, the woman who gave birth to me, you are watching from above, I so wished that you would be here to witness what was always your wishes and prayers, but because God's Will was that you witness from Heaven, we say; "May His Will be done on Earth as it is in Heaven", this is a cheers to your resting spirit olady!!!

Research Summary

All forms of discrimination are prohibited in terms of the South African Constitution. This prohibition also extends to the labour arena. Any forms of discrimination in the workplace are prohibited. There is a general view that all people in the employment sphere should be treated with fairness and equally at all times.

South Africa is not an island. The country is a member of the international community and a signatory to international conventions which are structured to ensure that the rights of citizens of the world are upheld.

South Africa as an international companion is bound by international laws as a signatory to the sources of these laws and as prescribed by the Constitution. The South African judges must consult international law sources whenever they are dealing with the interpretation of human rights clauses.

In so far as discrimination is prohibited, there is a form of discrimination that is not prohibited, namely, the implementation of affirmative action policies. Affirmative action policies are policies that are accepted to advance those persons who were previously disadvantaged. This policy empowers them to compete with those persons that previously were advantaged. It seeks to achieve substantive equality and is therefore not accepted as unfair discrimination.

In this mini-dissertation, the researcher evaluates the Constitutional Court's decision in the matter of *South African Police Services v Solidarity obo Barnard*. The study assesses and critically analysis how the court decided the matter and it evaluates the reasons advanced by the Honourable Court.

Keywords

Affirmative action; Broad Based Black Economic Empowerment; critical assessment; *South African Police Services v Solidarity obo Barnard;* and unfair discrimination

List of abbreviations and acronyms

ACJ	Acting Chief Justice
ANC	African National Congress
BBBEE	Broad-Based Black Economic Empowerment
BoR	Bill of Rights
Cap	Captain
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation & Arbitration
EEA	Employment Equity Act
EEP	Employment Equity Plan
HC	High Court
J	Judge
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SA	South Africa
SAPS	South African Police Services
SCA	Supreme Court of Appeal
UN	United Nations

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 Introduction

South Africa is a democratic state founded under a supreme Constitution (the "Constitution") and the rule of law.[1] The preamble of the Constitution[2] is a recognition and acknowledgement of the past injustices and it states:

> "We, the people of South Africa,
> Recognise the injustices of our past".[3]

The Preamble of the Constitution is also a pledge by the South Africans towards healing the nation from past divisions and the establishment of a civilised society founded on social justice and built upon the recognition of fundamental human rights.[4]

In terms of the founding provisions of the Constitution, the Republic of South Africa (the "RSA") is one, sovereign, democratic state founded on the following values; human dignity, the achievement of equality and the advancement of human rights and freedoms,[5] non- racialism and non-sexism,[6] supremacy of the Constitution and the rule of law.[7]

The Constitution is the supreme law of RSA, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[8] This implies that all actions, whether they are performed by an individual or the state, they must conform to the Constitution, otherwise such action is invalid.[9] Enshrined in the supreme Constitution is the Bill of Rights[10] (the "BoR"). The BoR enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.[11]

---

1 S 2 of the Constitution of the Republic of South Africa, 1996.
2 Preamble of the Constitution.
3 Preamble of the Constitution.
4 Preamble of the Constitution.
5 S 1(a) of the Constitution.
6 S 1(b) of the Constitution.
7 S 1(c) of the Constitution.
8 S 2 of the Constitution.
9 S 2 of the Constitution.
10 Chapter 2 of the Constitution.
11 S 7(1) of the Constitution

The BoR applies to all law and binds the legislature, the executive, the judiciary and all organs of the state.[12] Section 9 of the Constitution declares that all people are equal before the law and further that all people are to have an equal protection that is accorded by the law.[13] The Constitution employs or uses the words "all people", this means that the Constitution intends that each and every person within the boundaries of the Republic has the protection conferred by section 9 and has no disqualification of persons.

The Constitution further states that in order to promote the achievement of equality, there must be the enactment of legislation and the design of other measures in order to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.[14] This section was designed as a recognition of the past disadvantages on other segments of the South African population and seeks to address the past disadvantages that accrued from those past injustices.

In response to the section 9(2) of the Constitution, the South African government has sought to redress the historical legacy of workplace discrimination through the introduction of the Employment Equity Act[15] (the "EEA") and other legislative and institutional interventions.[16] The EEA requires all designated employers to implement affirmative action measures in order to achieve employment equity for people from designated groups.

1.2. Research Problem

This research seeks to critically analyse the Constitutional Court's (the "CC") decision on the case of *South African Police Services v Solidarity obo Barnard*[17] (*"Solidarity"*).

In *Solidarity,* the CC had to decide if the decision of the National Commissioner ("NC") of SAPS to deny a white female person promotion to a senior position that she qualified

12 S 8(1) of the Constitution.
13 S 9(1) of the Constitution.
14 S 9(2) of the Constitution.
15 55 of 1998.
16 Horwitz and Jain (2011) Equality, Diversity and Inclusion: 299.
17 [2014] ZACC 23.

for and was the best candidate to fill, was lawful and constitutional and further that the decision was not violating the equality rights of the applicant (Barnard).
The decision of the NC of the SAPS was justified by the reliance on section 9(2) of the Constitution and the fact that there was a high concentration of white females at the bracket which the promotion sought to be made to.

The study also considers the *ratio decidendi* of *Solidarity* and further the arguments advanced on behalf of all the parties and also considers the Constitution and other sources of the South African law to critically assess the judgment.

1.3. Research Questions

This study grapples with the following questions:

1. What is equality?
2. What is affirmative action?
3. What does section 9(2) of the Constitution say?
4. What does the Constitutional Court say in its decision in the *Solidarity* case; and whether it delivered an appropriate decision?

1.4. Motivation

Like all the constitutional rights, the constitutional guarantee of equality must be interpreted contextually,[18] taking into cognisance the history of equality in South Africa, from the apartheid regime to the dawn of democracy and beyond.

The Constitution wishes to create a type of society that is based on equality, dignity and freedom.[19] This, the Constitution seeks to achieve by the enshrining of the equality right. According to Currie & De Waal, equality "includes the full and equal enjoyment of rights and freedoms".[20] The implementations of affirmative action come with a different treatment of black and white persons, males and females and people with and without disabilities, even when they are in the same position.

---

18 Currie and De Waal 2013: 211.
19 Currie and De Waal 2013: 211.
20 Currie and de Waal 2013: 211.

The implementation of affirmative action may, at certain times be implemented in a way that have adverse effects upon the victims of the policies; those who were previously advantaged. These adverse effects are in essence sometimes so adverse that they transgress the rights of the victim adversely. This study seeks to evaluate the positioning of the right to equality as enshrined in the Constitution, of the victims, the Constitutional provisions of affirmative action in the case of *Solidarity.*

This study will also seek to research whether the affirmative action policies have achieved their desired goals without having caused a reverse inequality.

1.5. Overview of Literature

The following sources will be consulted in this research:

1.5.1. The Constitution

A constitution is a law that contains the most important rules of law in connection with the constitutional system of a country. It confers government authority on particular institutions, and regulates and limits its exercise. A constitution guarantees and regulates the rights and freedoms of the individual in a bill of rights. A constitution is thus a key component of the legal system of a state. In addition, a constitution is regarded in democratic societies as an expression of the will of the people and a reflection of prevailing values, or values to which the state aspires.[21]

With the dawn of democracy in 1994 and the birth of a new constitutional order in 1996, equality rights were built into Chapter 2 of the Constitution. Equality rights are meant to ensure that no person in the Republic shall ever again be subjected to any discrimination. The Constitution has in it embodied those grounds of discrimination that are prohibited.[22]

Because the Constitution is the supreme law, the interpretation and application of legislation and common law must be consistent with constitutional principles.[23] Law is dual dimensional. The insight that law is essentially dual-dimensional has a long

---

21 Rautenbach and Venter 2018: 20.
22 S 9(3) of the Constitution.
23 Du Toit *et al,* 2015*:* 73.

history. The basic contours of such dual-dimensional understanding of law might be as ancient as legal reflection itself.[24]

The BoR entrenches a wide range of fundamental rights, which by virtue of the supremacy of the Constitution, are protected from infringement by either legislative, or executive organs of state. These rights include equality rights. Because the right to equality protects the equal worth of people, it is strictly speaking not a right to equal treatment, but a right to have one's equal worth with others respected, protected, promoted and fulfilled.[25]

The right to equality is contained in section 9 of the Constitution and establishes categories of duties, namely (a) in section 9(1), duties in respect of differentiation that does not amount to unfair discrimination, (b) in section 9(3), (4) and (5), duties in respect of unfair discrimination, and (c) in section 9(2), duties in respect of affirmative action.[26]

Section 9 of the Constitution guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law.[27] Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.[28] The section also states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[29] The section continues in as far as it provides that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or

24 Malan 2019: 67.
25 Rautenbach and Venter 2018: 330.
26 Rautenbach and Venter 2018: 331.
27 S 9(1) of the Constitution.
28 S 9(2) of the Constitution.
29 S 9(3) of the Constitution.

prohibit unfair discrimination;[30] discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[31]

Section 9(1) states that everyone is equal before the law and has the right to equal protection and benefit of the law. The core purpose of this section is to promote and proclaim boldly the principle equal treatment between people or persons. In order to provide a meaningful and an insightful understanding of this constitutional right, legislation must be enacted specifically to protect and promote the right to equality. But, because of the fact that the Constitution was not only enacted to establish a society based on democratic values, social justice and fundamental human rights, also not only to lay foundations for a democratic and open society, not only to recognise the will of the people, not only to improve the quality of life of all citizens and not only to build a united and democratic RSA but also to heal past divisions, reference must also be made to the general history of equality.

The BoR applies to all law and binds the legislature, the executive, the judiciary and all organs of state.[32] The Constitution with the entrenched BoR has led to a profound effect on all branches of law in the RSA, because it provides a mechanism for citizens to challenge legislation and actions by the state which infringe these rights.[33] When interpreting any legislation or developing the common law, the courts must promote the spirit, purport and objects of the BoR.[34]

1.5.2. Employment Equity Act[35] ("EEA")

The EEA was promulgated in order to give effect to the constitutional provision in section 9(2) of the Constitution. The EEA is specifically enacted to provide for employment equity and to provide for matters incidental thereto,[36] achieve a diverse workforce broadly representative of our people,[37] to achieve equity in the workplace by implementing affirmative action measures to redress the disadvantages in

30 S 9(4) of the Constitution.
31 S 9(5) of the Constitution.
32 S 8(1) of the Constitution.
33 Grogan 2017: 4.
34 S 5 of the Constitution.
35 No: 55 of 1998.
36 Title of the EEA.
37 Preamble of the EEA.

employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.[38] According to the EEA, it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA,[39] or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.[40]

The EEA aims, inter alia, to eliminate employment barriers and to create equal employment opportunities by appointing suitable people from the designated groups. It is common knowledge that the designated groups are regarded as specifically vulnerable groups that suffered from unfair discrimination in the past. One of the forms of discrimination suffered from the past was a lack of access to education and skills.

1.5.3. United Nations Convention on the Elimination of All Forms of Discrimination ("the UN Convention")

According to section 233 of the Constitution, the courts are directed to when interpreting the legislation, prefer to take a decision that is reasonably consistent with international law over any that may be inconsistent with international law."[41]

This is a peremptory provision and therefore is directing the judicial officers to ensuring that whenever they are interpreting legislation, the interpretation is in line with international law, the interpreter is therefore compelled to revert to external aids and, in effect, follow the contextual approach as the interpreter is, from the outset, required to promote the spirit, purport and objects of the BoR and to interpret statutory provisions in a manner that is consistent with international law.

According to Olivier,[42] Chaskalson JP resorted to international law in interpreting the Constitution. It was argued that documents used during the negotiating process (specifically those relating to the position of the death penalty), formed part of the context which the Constitution should be interpreted. He considered circumstances existing at the time the Constitution was adopted in interpreting the relevant provisions

38 S 2(b) of the EEA.
39 S 6(2)(a) of the EEA.
40 S 6(2)(b) of the EEA.
41 S 233 of the Constitution.
42 Olivier (2003) 6 PELJ: 2.

of the Constitution. Chaskalson JP found authority permitting the use of such evidence in international law. International law is a binding source of our law and therefore when the judicial officers make decisions, the principles of international law are binding on them.[43] For the international law sources to be binding, the source must have been ratified by the National Assembly and the National Council of Provinces[44] unless it is an international law instrument of a technical, administrative or executive nature which otherwise do not require to be ratified by Parliament.[45] The signature by the President, Minister of International Relations and Cooperation or the Minister whom the international agreement falls within their responsibility binds the Republic without the Parliamentary ratification if the said agreement falls within the ambits of section 231(3) of the Constitution. South Africa is a member of the United Nations and a signatory to the UN Convention, therefore bound by the prescripts of the UN Convention.

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all member states have pledged themselves to take joint and separate action, in co-operation with the organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights, and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin.[46]

The UN Convention in its entirety is prescribing to the member states to promote the prohibition of all kinds of discrimination and also to eliminate racial discrimination in all its forms and to guarantee the rights of everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law.[47]

---

43 S 39(1)(b) of the Constitution.
44 S 231(2) of the Constitution.
45 S 231(3) of the Constitution.
46 UN Convention: 1.
47 Article 5 of the UN Convention.

The UN Convention is binding on the member states of the United Nations. It is peremptory in that the member state must ensure that all forms of racial discrimination and any forms of discrimination are eradicated and that all persons or people are seen as the same before the law and further purports that the state must take all necessary and possible available measures to protect all persons' rights to sameness of treatment.

1.5.4. **International Labour Organisation, Convention No. 111 ("ILO Convention")**

Section 231(5) of the Constitution states that "The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect".[48] This means that, despite the signing of the international agreement prior the coming into effect of the Constitution, the international agreement continues to be binding on the Republic post the coming into effect of the Constitution as it was already binding the Republic prior the taking force of the Constitution. The Constitution did not alter the position of international agreements already signed or ratified before it came into effect, instead the Constitution affirmed their position as binding on the Republic.[49]

The ILO Convention is a binding source of international law in South Africa. When a court is making any interpretation of any legislation, the court must prefer an interpretation of that legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[50]

The ILO Convention seeks to direct member states to eradicate any forms of discrimination in the workplace. The convention describes "discrimination" as inclusive of:

> "*(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation*".[51]

---

48 S 231(5) of the Constitution.
49 S 231(5) of the Constitution.
50 S 233 of the Constitution.
51 Article 1(1)(a) of the ILO Convention.

Each member of the ILO Convention by virtue of having ratified the ILO Convention has undertaken to shall seek the buy-in of employers and workers' organisations and any other stakeholders to promote that the ILO Convention as a policy is accepted and observed,[52] and RSA as a member state is obliged to likewise pursue employers within RSA boundaries to ensure that there is a compliance with the prescripts of the ILO Convention, to ensure that there is no discrimination of any kind in the workplace.

1.6. Research Methodology

The research will be undertaken using mixed methodologies. It is firstly going to be undertaken using a desktop study as well as the historical methodology. These methodologies of research will be deployed in tracking the history of the South African political landscape prior the democratic era in relation to the right to equality, the legacy left by the pre-democratic era or regime in terms of racial interactions and socio-economically, and thereafter, transposase into the current situation, the current position in terms to, or in relation to equality taking into account the policy of affirmative action.

The research will also take a closer analysis of the decision in *Solidarity*. The matter will be looked at from the CCMA decision until the decision of the Constitutional Court ("CC") concentrating on how the different courts dealt with the legal questions and interpreted the legislation and constitutional provisions that were raised by the parties.

1.7. Chapter outline

This mini-dissertation research will comprise of 8 chapters and are as follows:

Chapter 1

This is an introductory chapter which shall provide a brief background on the history of the right to equality in South Africa. This chapter will also be an introduction of what the mini dissertation will be focus on.

In this chapter will look at the introduction of the case of *Solidarity*, this is the case that the research will critically look at assessing the various decisions of the different courts

[52] Article 3(a) of the ILO Convention.

that were adjudicating this matter at different levels with more focus on assessing the judgments of the CC on this matter.

Chapter 2

This chapter will focus mainly on the right to equality. This chapter will look at the historical background of the right to equality in South Africa and thereafter will turn to look at the EEA, what is the EEA enacted for, the purpose of the EEA and the rationale of the EEA.

This chapter will also research on affirmative action as a policy born of the EEA. The research will seek to look how the policy is intended to be implemented and how it is built within the context of the EEA, how the EEA is designed to eliminate the past injustices, how it empowers the victims of the past unjust laws and how the EEA seeks to promote equal access to employment opportunities.

Chapter 3

This chapter will be focused on the comparative study using the Botswana jurisdiction. The chapter will be a study of how affirmative action is implemented in the Botswana jurisdiction and further focus on the study of how the equality laws are practised in the Botswana jurisdiction. The last part of this chapter would be mainly the lessons that can be learnt by South African jurists and legal scholars from the Botswana jurisdiction in relation to affirmative action and equality law.

Chapter 4

This chapter will be focused mainly on the decision of the Labour Court in the case of *Solidarity obo Barnard v South African Police Services.*[53] This chapter will look at the facts of the case from the CCMA until the matter reaches the LC. The question of law and any other question that the LC was invited to deal with, how the LC decided the said questions and then the decision of the LC.

53 (JS455/07) [2010] ZALC 10.

Chapter 5

This chapter will focus mainly on the case of *South African Police Services v Solidarity obo Barnard*[54] in the Labour Court ("LC"), Labour Appeal Court ("LAC") and the Supreme Court Appeal "(SCA"). This chapter will be focusing on the legal questions before the LC, LAC and the SCA, how the LC, LAC and SCA dealt with the legal questions and then lastly the decisions of the LC, LAC and the SCA.

Chapter 6

This chapter will focus mainly on the case of *South African Police Services v Solidarity obo Barnard (Solidarity")*.[55] This chapter will be focusing on the various judgments delivered on the matter of *Solidarity* by the CC, how the CC dealt with the legal questions in each judgment.

Chapter 7

This chapter will be focused in the critical assessment of the decision of the CC in case of *Solidarity*. The chapter will be a lengthy chapter which will look in depth, at the decision of the CC looking at both the minority and majority judgments, the comparison with other previously decided cases that had similar facts or which were in essence of the same genius. The chapter will conclude with studying the decision of the CC and assessing whether this decision does not support any reverse discrimination.

Chapter 8

This chapter will be the concluding chapter. It will have its primary focus on the final assessment of the CC's decision on *Solidarity* and thereafter focus on the recommendations and the conclusions made during and from the research.

54 (JA24/2010) [20 3112] ZALAC.
55 [2014] ZACC 23.

CHAPTER TWO

THE RIGHT TO EQUALITY

2.1. Introduction

Equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should be treated dissimilarly.[56]

Prior to the new democratic order in South Africa, there was a regime of apartheid which was a regime of racial discrimination by the minority white race discriminating against the black majority.

The apartheid political and legal system were squarely based on inequality and discrimination. Apartheid dealt with the problem of scares resources by systemically promoting the socio-economic development of the white population at the expense of the rest of the society.[57]

O' Regan J in the matter of *Brink v Kitshoff NO*[58] recognised that during the apartheid regime, blacks were barred from owning property nor residing in areas designated solely for whites and were not allowed to occupy senior jobs nor attend educational activities in designated institutions.[59]

Under apartheid, discrimination against workers on grounds such as race and sex was not only permitted; it was legally enforced. In addition, employers had a relatively free hand to discriminate on grounds such as religion, disability or political opinion.[60]

---

56 Currie and de Waal 2013: 211.
57 Currie and de Waal 2013: 211.
58 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (*"Brink v Kitshoff NO"*).
59 *Brink v Kitshoff NO* at para 40.
60 Du Toit (2020) ILJ 1.

Everyone has the right to enjoy all other rights on an equal basis with everyone else.[61] People have equal worth because each of them has attributes of a human being – for example, human dignity, life, physical and psychological integrity, privacy, ability to form religious and other convictions, to communicate, assemble, associate, pursue political causes, earn a living, and acquire property. These features of human beings are protected by other rights in the BoR.[62]

2.2. Background on the history of the right to equality in South Africa

The end of the apartheid regime marked the beginning of the democratic South Africa. When, in 1994, a democratically elected government came to power, it inherited a contradictory legacy; the most developed economy in Africa on the one hand, and major socio-economic problems on the other. The most serious of these are high rates of unemployment; abject poverty among more than fifty (50%) percent of the population; sharp inequalities in the distribution of income, property and opportunities; and high levels of crime and violence. What makes these problems so pressing is the fact that it is mostly blacks – and especially Africans – who are at their receiving end.[63]

In sharp contrast to the ANC government's inability to eradicate the legacy of colonialism, segregation and apartheid, it has introduced several laws aimed at laying the foundations for a non-racial society.[64] The interim Constitution[65] which took effect in April 1994, contained the first blanket prohibition of "unfair discrimination" on all walks of life. Section 8 of the interim Constitution stated that "[n]o person shall be unfairly discriminated against" on any ground, including a number of listed grounds such as race, sex and origin. Importantly, it also stipulated that affirmative action measures were not prohibited. For the next two years, while the Industrial Court continued to exercise its unfair labour practice jurisdiction, the effect was that discrimination in the workplace on any of the grounds listed in section 8 had to be treated as an unfair labour practice."[66]

---

61 Rautenbach and Venter 2018: 329.
62 Rautenbach and Venter 2018: 329.
63 Terreblanche 2002: 25.
64 Terreblanche 2002: 45.
65 Constitution of the RSA Act 200 of 1993.
66 Du Toit (2020) ILJ: 4.

The CC commented on the Interim Constitution that: The interim Constitution seeks not only to avoid discrimination against previously disadvantaged people but rather that the purpose of the new constitutional and democratic order seeks the to establish a society in which all persons are accorded equal dignity and respect irrespective of their class, creed or segregate grouping.[67]

In 1997, the Final Constitution took effect. In it, there is a clause prohibiting "unfair discrimination" very similarly to that contained in the Interim Constitution.[68] The right to equality is enshrined in the BoR. Section 9(1) states that; "Everyone is equal before the law and has the right to equal protection and benefit of the law".

According to the Constitution, "equality includes the full and equal enjoyment of all rights and freedoms."[69] The Constitution accepts that in order to achieve equality, there needs to be enacted legislation and taking out of other measures specifically crafted to protect or advance persons, or categories of persons who are victims of previous discrimination.[70]

Section 9 does not describe the interests protected by the right. It only describes the duties of those who are bound by the right.[71] Section 9(3) of the Constitution prohibits any form of unfair discrimination by the state, and section 9(4) of the Constitution prohibits any form of unfair discrimination by any person. Any form of discrimination on any or more of the grounds listed in section 9(3) of the Constitution is presumed to be unfair discrimination until proven that to be a fair discrimination.[72]

2.3. The Employment Equity Act[73] ("the EEA")

Discrimination is deeply rooted in South African history. In a society where racial in-equality was the norm, discriminatory practices became a pervasive feature of employment relations also. The 1980s saw the first steps towards reversing such practices in a limited, *ad hoc* manner. Discrimination on the basis of sex, race and

67 Terreblanche 2002: 45.
68 Du Toit (2020) ILJ 5.
69 S 9(1) of the Constitution.
70 S 9(2) of the Constitution.
71 Rautenbach and Venter 2018: 329.
72 S 9(5) of the Constitution.
73 No. 55 of 1998.

colour in industrial council agreements was outlawed in 1981 by effecting amendments to section 24(2) of the LRA 28 of 1956 and section 19(6) of the Wage Act 5 of 1957.[74] The new government has pursued wide – ranging legislative programmes aimed at addressing the legacy of apartheid through affirmative action and special protection for the historically disadvantaged. Unfair Discrimination Act[75], which requires every minister and level of government to implement measures aimed at achieving equality. These measures include the repeal of any law, policy, or practice that perpetuates inequality.[76]

In 1996 the equality clause of the Final Constitution enjoined the enactment of national legislation 'to prevent or prohibit unfair discrimination'.[77] This resulted in the enactment of the EEA in which unfair discrimination in the workplace is dealt with in its own right rather than as a species of unfair labour practice, followed by PEPUDA[78] which is applicable outside the employment context.[79] The EEA is a critical craft designed as an instrument for addressing the legacy of the apartheid colour bar, which precluded black people from occupying jobs recognised to be above a basic level.[80]

The principal statutory protection against discrimination in the workplace is established by the EEA which seeks to give effect to both Articles 2 and 3 of the ILO Convention and section 9 of the Constitution.[81] The EEA was introduced in 1998 and repealed the unfair labour practice as the primary protector of the right to equality in the work place.[82]

2.3.1. The rationale of the EEA

The Constitution prohibits any form of discrimination[83] and further makes provision for the enactment of legislation to promote the achievement of equality, to protect and

74 Du Toit *et al:* 2015: 653.
75 No. 4 of 2000.
76 Terreblanche 2002: 47.
77 S 9(4) of the Constitution.
78 *Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000* ("PEPUDA").
79 Du Toit *et al* 2015: 654.
80 Terreblanche 2002: 47.
81 Van Niekerk *et al* 2019:123.
82 Van Niekerk *et al* 2019:123.
83 S 9 of the Constitution.

advance persons or categories of persons who have been disadvantaged by unfair discrimination.[84]

Both the Constitution and the ILO Convention direct the Republic to enact legislation that will give effect to the recognition of the right to equality of all persons and both direct that all persons be protected against discrimination thus they both direct the RSA to promote equality between all persons or upon all persons without first considering their racial being. This means that both whites and blacks must be treated equally despite their melanin content or the colour of their skins.

The EEA was introduced in 1998 and it repealed the previous unfair labour practice which regulated residual unfair labour practices and prohibited unfair discrimination through item 2(1)(a) of schedule 7 of the then LRA taking over as the primary source of the law in so far as workplace equality laws are related.[85]

2.3.2. Purpose of the EEA

The purpose of the EEA is set out in section 2 of the EEA as being the achievement of substantive equality by the promotion of equal opportunity and fair treatment in the work place through the elimination of unfair discrimination and the implementation of affirmative action in order for the attainment of a balanced and dynamic spread of the workforce.[86]

The EEA prohibits unfair discrimination as part of its broader purpose of promoting employment equity. The prohibition is one of the 'public policy norms governing an employment relationship, which cannot be excluded by contract'. The EEA identifies 'unfair discrimination' in terms very similar to those of item 2(1)(a), although with some noteworthy differences'.[87]

Chapter II of the EEA prohibits unfair discrimination in employment. It applies to all employers, irrespective of the size of the business. The term 'employee' is defined for

84 S 9(2) of the Constitution.
85 Van Niekerk *et al* 2019:123.
86 Van Niekerk *et al* 2019:123.
87 Du Toit *et al* 2015: 654.

the purposes of the chapter as including applicants for employment, thus extending equality rights to those seeking access to employment.[88]

The EEA also has the purpose of eliminating unfair discrimination. Section 5 of the EEA mandates every employer to engage steps designed specifically for the promotion of equal opportunity in the workplace by eliminating any acts of unfair discrimination in their employment policies and practices.[89]

Section 5 of the EEA does not make any differentiation in relation to employers, rather section 5 employs the words; *"every employer"*, this means that there is no exception in terms of who as an employer is mandated by the EEA to alter the provisions in their policies in order that the policies promote equality and access to equal opportunities by eradicating unfair discrimination in the workplace policies.

In terms of section 6 of the EEA, the EEA has as a purpose, the prohibition of unfair discrimination. The EEA prohibits any person from unfairly discriminating against another. The discrimination prohibited can be direct or indirect and may be based on any listed or unlisted grounds.[90]

The EEA does not accept as unfair discrimination when the differentiation is made in order to effect affirmative action consistent with the purpose of the EEA[91] and further when the differentiation is made in preference of one person above the other based on the inherent requirements of the job.[92]

2.3.3. Affirmative Action in the EEA

Affirmative Action is a temporary intervention to facilitate change from an unfair situation to a situation where inequalities are redressed in order that all people are placed in a position where they can compete on an equal footing and equilibrium for the available job opportunities.[93]

88 Van Niekerk *et al* 2019:124.
89 S 5 of the EEA.
90 S 6(1) of the EEA.
91 S 6(2)(a) of the EEA.
92 S 6(2)(b) of the EEA.
93 Rossouw (1994): 74 – 75.

Affirmative Action is a strategy designed by the legislature or the government to overcome the legacy of the inequality where the discrimination and inequality has caused an unfair disadvantage to a certain group of the populace. Affirmative Action may further be explained as an intervention crafted by the legislature or the government to redress and develop a country like South Africa, which country is characterised by past injustices and unfair discrimination of parts of the populace.

Affirmative Action differs with those policies that are designed for the promotion of equal opportunities in employment in the workplace in that Affirmative Action seeks to bridge the gap existing between inequality caused by discrimination and the merit principle, and Affirmative Action focuses mainly on the groups that were or are victims of past discrimination.

Section 9 of the Constitution makes for the promotion and advancement of persons or categories of persons who were previously disadvantaged by unfair discrimination.[94] The ILO Convention which is binding on South Africa as an international sources of the law, provide for the crafting and thereafter the application of affirmative action in the workplace.[95]

Section 1 of the Constitution states that the RSA is founded on, *inter alia*, the value of the "achievement of equality and the advancement of human rights and freedoms".[96] The EEA was enacted from the direction of section 9(2) of the Constitution.

2.3.3.1. How Affirmative Action is built within the context of the EEA

The Constitution states that; "everyone is equal before the law and has the right to equal protection and benefit of the law",[97] and further prohibits the state from unfairly discriminating against any person be it directly or indirectly and the prohibition is against both listed and unlisted grounds.[98]

94 S 9(2) of the Constitution.
95 Van Niekerk *et al* 2019:163.
96 S 1(a) of the Constitution.
97 S 9(1) of the Constitution.
98 S 9(3) of the Constitution.

The EEA states similarly with a further addition of *"family responsibility, HIV Status and political opinion"*[99] as listed grounds. Section 6 of the EEA prohibits unfair discrimination whilst section 9 of the Constitution promotes equality.

Affirmative action in the EEA is incorporated as a peremptory and instructive inception. The EEA identifies and fully outlines those measures that a designated employer is compelled to include and implement in terms of their affirmative action measures. The EEA directs the organisations on what must be contained in the measures taken in implementation of affirmative action.[100]

2.3.3.2. How Affirmative Action is intended to be implemented

Affirmative action measures are defined in the EEA as measures designed for the ensuring that suitably qualified persons from previously disadvantaged backgrounds are afforded fair chances and representations at all employment spheres of a designated employer.[101]

The EEA allows for preferential treatment and the utilisation of numerical targets whilst on the other hand the EEA seeks not to avoid the application of the system of quotas.[102] The EEA allows the designated employer to set numerical goals to be achieved by the affirmative action policy[103] but also seeks to direct the designated employer to not completely put barriers that would serve to absolutely deny those people who are not from the designated groups the opportunity to continue their employment or get new opportunities in the employ of the designated employer.[104]

One can say that the EEA or the crafters of the EEA did not intend for affirmative action to be used as a reverse apartheid by designated groups upon those who are not members of the designated groups. Instead, the EEA seeks that affirmative action policies be designed by the designated employer in order that the competition ground for the scares opportunities is level, in order that those from designated groups and

99 S 6(1) of the EEA.
100 S 15(2) of the EEA.
101 S 15(1) of the EEA.
102 S 15(3) of the EEA.
103 S 15(3) of the EEA.
104 S 15(3) of the EEA.
104 S 15(4) of the EEA.

those who previously were advantaged are brought to par in terms of competitiveness and security in the workplace.[105]

The EEA[106] seeks to insulate affirmative action appointments against attack on the basis of unfair discrimination by 'non-designated' employees with set limitations set for the 'defence' of affirmative action. To be accepted as fair and be excluded or be protected against a label of 'unfairness,' the appointment based on affirmative action must be consistent and conform with the purposes of the EEA.[107]

2.3.4. How the EEA is designed to eliminate the past injustices?

In order that competition is healthy, fair and enhanced, those who are competing must have the same or equivalent means of competing. The competitors must be allowed to have a fair competition by ensuring that both parties have an opportunity to prepare for the competition, the competition ground must also be levelled, they must both have an equal footing to the competition. The apartheid regime equipped the white populace at the disadvantage and exclusion of the blacks[108]. Also, women have been disadvantaged by the previous patriarchal systems which favoured men just as people with disabilities were also put at a disadvantaged position whilst those without disabilities were placed in a better position, these differences placed a heavy disadvantage on the part of the disadvantaged, which led to the advantaged having better chances and a stronger competitive edge over the disadvantaged.

The previously disadvantaged groups are collectively identified as designated groups by the EEA.[109] The EEA directs designated employers to retain and develop people from designated groups and to further implement training measures and measures designed specifically to equip members of the designated groups with skills.[110] By so doing, the EEA seeks to compel the designated employers to ensure that the members of the designated groups as they were previously not given a fair opportunity to develop skills wise, the designated employer gives them the opportunity to develop in

105 S 15(2) of the EEA.
106 S 6(a) of the EEA.
107 Grogan 2017: 97.
108 Terreblanche 2002: 4.
109 S 1 of the EEA.
110 S 15(2)(d)(ii) of the EEA.

terms of skills and training and thus making them to be equally competitive thus eliminating the “lack-of-skills” barrier against them and allowing them a fair chance as opposed to previous times when they lacked the skills.

2.3.5. How the EEA empowers the victims of the past unjust laws.

The people who were previously disadvantaged are predominantly the black race in South Africa. The definition of a black person in the EEA has been extended to include Africans, Coloureds and Indians.[111] The black persons have thereafter been included in the category of designated groups in the EEA.[112]

According to Du Toit, “affirmative action is confined to preferential treatment of suitably qualified’ persons from designated groups.”[113]Du Toit further submits that the EEA allows for the preferential of designated group members when there is an appointment to be made in relation to a job, the preferential treatment being that the appointing officer is empowered to prefer the designated groups member over any person, this preferential treatment is protected in terms of the EEA[114] and the Constitution.[115]

The EEA seeks the empowerment of persons from designated groups by amongst others, altering the definition of a suitably qualified person, by allowing for the accepting of a person who is at the time of appointment, not suitably qualified by virtue of their lack of possession of the abilities of the job, but who has the potential of acquiring the required abilities within a reasonable time,[116] this person is therefore accepted as if they have the ability at the appointment time.

2.3.6. How the EEA seeks to promote equal access to employment opportunities.

According to Grogan,[117] the EEA seeks to promote equal access to employment by firstly placing a positive obligation on all employers to ‘promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or

111 S 1 of the EEA.
112 S 1 of the EEA.
113 Du Toit *et al* 2015: 733.
114 Du Toit *et al* 2015: 733.
115 S 9(2) of the Constitution. (my emphasis).
116 S 20(3)(d) of the EEA.
117 Grogan 2017: 86.

practice.'[118]This obligation is further qualified by both section 6(1) of the EEA and section 9 of the Constitution. Both sections prohibit any form of discrimination and have listed prohibited grounds of discrimination that are prohibited.

The EEA has further made it mandatory to the employers to ensure that there is a reasonable accommodation for the people from designated groups at all levels in the workplace and that they enjoy equal opportunities in the workplace,[119] that there are policies designed for skills development of those members of the designated groups in order that they are placed in a better skills position and therefore are enabled to be competitive and are retained in the workplace.[120]

The EEA aims, *inter alia*, to eliminate employment barriers and to create equal employment opportunities by appointing suitable people from the designated groups. It is common knowledge that the designated groups are regarded as specifically vulnerable groups that suffered from unfair discrimination in the past. One of the forms of discrimination suffered from the past was a lack of access to education and skills. In order to address this form of past unfair discrimination on the one hand, and to attain the aim of promoting suitably qualified people from the designated groups, the EEA plays a role in ensuring fair labour practices.[121]

2.4. Background on the Broad – Based Black Economic Empowerment Act[122]

The BBBEE Act is enacted as a response to the fact that under the apartheid regime, race was used to control access to South Africa's productive resources and to accessing skills.[123] The BBBEE Act was therefore enacted to amongst others promote the achievement of the Constitutional right to equality, increase broad-based economic empowerment and the effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution and to establish a national policy on broad-based economic empowerment

118 S 5 of the EEA.
119 S 15(2)(c) of the EEA.
120 S 15(2)(d)(ii) of the EEA.
121 Grogan 2017: 7.
122 Broad – Based Black Economic Empowerment Act, No: 53 of 2003 ("the BBBEE Act").
123 BBBEE Preamble.

so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and access to government services.[124]

2.5. The Affirmative Action Plans

Terreblanche states that; there have been a failure completely eradicate the legacy left by colonialism and apartheid by the African National Congress ("ANC") led government which has been governing the RSA from the birth of democracy despite that the ANC led government has endeavoured to promulgate laws to achieve the ideal society made up of lawfulness and equality of all people.[125] Terreblanche further writes that the ANC led government in its quest to address the apartheid legacy have enacted legislative programmes aimed at implementing affirmative action measures and seeking a special protection for the previously marginalised.[126]

The Constitution provides for the full and equal enjoyment of all rights and freedoms and further for that there may be the promulgation of legislative and other measures designed for the protection and advancement of those previously disadvantaged.[127]

Affirmative action is a policy designed for the allowing of taking of a discriminatory measure in order for the favouring of those from previously disadvantaged categories.[128] For the affirmative action to be acceptable and also to continue being lawful and fair, the affirmative action plan must have its aim as being the achievement of "reasonable progress" towards employment equity or fair representation of those from designated groups.[129]

The affirmative action plans cannot be designed irresponsibly, they are rather are to be crafted following rigorous consultation processes with the aim of reaching an agreement with any representative trade union, workplace forum or employees' nominees in order to make analysis to realise employment barriers, thereafter prepare the affirmative action plan and craft implementation mechanisms.[130] Affirmative action

124 BBBEE Preamble.
125 Terreblanche 2002: 45.
126 Terreblanche 2002: 47.
127 S 9(2) of the Constitution.
128 Grogan 2017: 117.
129 Grogan 2017: 118.
130 Grogan 2017: 119.

plans may be used as defences against unfair discrimination claims, but the affirmative action plan in order to succeed as a defence in claims of unfair discrimination must be consistent with the purpose of the EEA.[131]

The affirmative action plan does not serve as a ground of defence to appoint unqualified persons. The court in *Coetzer & others v Minister of Safety & Security & another*[132] found the justification based on affirmative action, of the failure to appoint competent white applicants to have constituted as an unfair discrimination.

2.6. Conclusion

South Africa is a country that was previously affected by the apartheid regime which had the country divided on race or skill colour and was a subject of injustice.[133] The racial divisions have left the vast majority of the South Africans outside the net of ownership of means of production and the possession of skills and the know-how in order that they are able to participate meaningfully in the economic activities in the country.[134]

It is behind this historical background that the labour and workforce and the workplace was left with many inequalities. The Constitution of the Republic seeks to bring equality for all the people in the Republic.[135] The Constitution sought to achieve this by its mandate to parliament to promulgate laws that will be able to realise the right to equality and further the legislation that will bring about the achievement of equality by also promoting those people who are from previously disadvantaged groups.[136] The promulgation of the EEA and BBBEE Act are amongst the milestones that the Constitution achieved as responses from the legislature to ensure that equality is not a theory, it is not heard to be achieved but rather it is seen to be achieved.

131 Van Niekerk *et al* 2019:141.
132 *Coetzer & Another v Minister of Safety & Security & another* [2003] 24 ILJ 163 (LC).
133 Preamble of the Constitution.
134 Preamble of the BBBEE.
135 S 9(1) of the Constitution.
136 S 9(2) of the Constitution.

CHAPTER THREE
A COMPARATIVE STUDY OF AFFIRMATIVE ACTION LAW; BOTSWANA'S JURISPRUDENCE AND LESSONS TO BE LEARNT

3.1 Introduction

It is deemed appropriate to do a comparative study with one of South Africa's neighbouring countries. The research will do a comparative study between South Africa and Botswana. Both countries are members of the ILO and both have supreme constitutions. Botswana's population is predominantly black and the primary language spoken there is Setswana and English.

3.2. The Right to Equality in Botswana Generally

According to *Mathe and Others v The Attorney General of Botswana*[137] ("*Mathe*") the Constitution of Botswana[138] ("Botswana Constitution") is the supreme law of the land.[139] Like the Constitution of South Africa, the Botswana Constitution has in it enshrined the "Protection of Fundamental Rights and Freedoms of the Individual"[140] which is the same as the BoR enshrined in the Constitution.

Section 3 of the Botswana Constitution bestows upon every person within Botswana's boundaries with the entitlement to fundamental rights. The section clearly indicates that the fundamental rights accrue to all person "whatever his or her race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest"…[141] According to Ian Kirby JP in the case of, *Attorney General of Botswana v Rannoge and Others*[142] ("*Rannoge*") whenever there is a breach of any right enshrined in Chapter II of the Botswana Constitution, there is a reciprocal violation and breach of section 3 of the BW Constitution as section 3 of the Botswana Constitution encompasses all of the fundamental rights.

---

137 *Mathe and Others v Attorney General* (HC Case No. 000321-20) [2022] MAHBH.
138 Constitution of Botswana Chapter 1.
139 *Mathe* at para 12.
140 Chapter II of the Botswana Constitution.
141 S 3 of the Botswana Constitution.
142 [2017] 1 BLR 494 (CA).

According to *Mathe*, Botswana is bound by the "decisions made by the international community"[143] whenever it is possible. *Mathe* further alluded that the international community crafts law through the creation of treaties and conventions that in turn become binding upon the member states as international law sources.[144] For the international law sources to become binding sources of law in Botswana the said treaty laws must first be "domesticated" into the laws of Botswana and shall therefore be accepted as a domestic law of the land.[145] The position changes in the event when the international law source or treaty has not been domesticated, the said treaty shall be dealt with in terms of section 24 of the Interpretation Act of Botswana and therefore shall only be used as an "aid in interpreting provisions in domestic law."[146]

The right to equality in Botswana is governed specifically by section 15 of the Botswana Constitution. The Botswana Constitution states that: "no law shall make any provision that is discriminatory either of itself or in its effect."[147] This section is similar to section 9 of the Constitution. Both sections clearly and in explicit terms prohibit the designing or crafting of any laws that may contain in them elements of a discriminatory nature.

The side note of section 15 of the Botswana Constitution states "Protection from discrimination on the grounds of race, etc". This side note despite the fact that it does not form part of the section of the Botswana Constitution,[148] it shows exactly what the intention of the legislature was, the side note shows that the crafter of the Botswana Constitution intended to prohibit not only racial discrimination but rather to prohibit any forms of discrimination, taking notice of the use of the word "etc".

The primary purpose of section 15 of the Botswana Constitution "is to invalidate any law that is discriminatory either of itself or in its effect"[149] Discrimination is defined as:

> *"affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such*

143 *Mathe* at para 16.
144 *Mathe* at para 17.
145 *Attorney General of Botswana v Dow* [1992] BLR 119 (CA) ("*Dow*") at page 171.
146 *Mathe at para 20.*
147 S 15 of the Botswana Constitution.
148 S 9 of the Interpretation Act, Chapter 01:04; see also *Mathe* at para 74.
149 *Mathe* at para 72.

> *description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."*[150]

The right contained in section 3 of the Botswana Constitution therefore leads one to the ideal that prescribes that the law must treat people of the same genus and who are standing in a similar setting, equally except where the constitution may exempt the equal treatment under exceptional circumstances.[151] The Botswana Constitution therefore does not permit nor make any provisions for the deviations from the prescriptions of the Botswana Constitution to treat people equally. The deviation is only permissible when taken under the auspices of the Botswana Constitution and for a legitimate constitutional reason, otherwise the deviation will be equivalent to a transgression of the Botswana Constitution and therefore invalid.

3.3. Affirmative Action in Botswana

According to Jeremiah[152] affirmative action is generally defined as a "policy that exists'…whenever an organisation goes out of its way (i.e. exerts an effort) to help realize the goal of true equality among people."[153] The Economic Inclusion Act[154] ("EI Act") was enacted as the piece of legislation:

> *"to promote the effective participation of targeted citizens in the economic growth and development of the economy, to facilitate enforcement of the economic empowerment initiatives and for matters connected therewith and incidental thereto."*[155]

The EI Act serves the same purpose as the South African BBBEE Act. Both the Acts are crafted in order to advance the previously disadvantaged groupings. The EI Act unlike the BBBEE Act was not enacted after the racial discrimination which led to the disempowerment of one race by the other. The EI Act was crafted in order that the part of the citizenry of Botswana who were previously disadvantaged by whatever

---

150 S 15(3) of the Botswana Constitution.

151 *Kamanakao and Others v Attorney General and Another* [2001] 2 BLR 654 ("*Kamanakao*") at para 20.

152 Jeremiah (2017) 11 EJES.

153 Jeremiah (2017) 11 EJES: 240; definition taken and referenced as from Tomasson, Crosby and Herzberg, 2001 at page 11.

154 2021.

155 Preamble of the EI Act.

ways or means referred to as the "targeted citizen"[156] in the EI Act, are empowered to access economic opportunities and benefit from the opportunities thereof.[157]

Unlike the BBBEE Act, the EI Act does not identify the intended beneficiaries in terms of race or the colour of their skin. The intended beneficiary as citizens are recognised in terms of any of the possible means that may have created the disadvantage against them.[158] The various factors that may have created the disadvantage can be race, gender, political affiliation or opinion, sexual orientation or any other factor, as long as the disadvantaged victim was or is a citizen of Botswana, they are thereof entitled.

Botswana has different racial denominations, whites, blacks and Indians. For as long as any of the above persons was disadvantaged against gaining economic advantages they will thereof be entitled protection and are to be empowered to counter the disadvantage. In the context of South Africa in the application of the BBBEE, the white males who are South African citizens seem not entitled to any form of protection or entitlement for protection, the female white citizens at least have the advantage when it comes to the women empowerment part. This disadvantage is a differentiation and a *prima facie* evidence of discrimination. Botswana on the other hand seeks to empower the whole citizenship, as long as the citizen can prove that they suffered a disadvantage against acquiring economic benefits or economic participation.

In terms of the employment of any persons, the South African jurisprudence relies on the EEA. The EEA seeks to eradicate the inequalities that may be found in the employment sphere[159] and further makes a way for the affirmative action policies to advance the interests of the previously disadvantaged.[160] Affirmative action is further provided for in the Constitution[161] and BBBEE Act. The Botswana jurisprudence in relation to the Employment law is centred on the Employment Act.[162] There is no act that deals directly with affirmative action except that Botswana's jurisprudence makes for the empowerment of the previously disadvantaged persons through the EI Act.

156 S 2 of the EI Act.
157 S 2 of the EI Act.
158 S 2 of the EI Act.
159 Title of the EEA.
160 S 2(b) of the EEA.
161 S 9(3) of the Constitution.
162 Chapter 47:01.

3.4. Lessons to be Learnt

Because of the fact that Botswana did not suffer racial segregation like South Africa, Botswana's jurisprudence does not affirm race as a master ground for the economic disadvantage of one group of the population whilst the other group enjoyed an advantage. Botswana recognise that any citizen who is a member of any grouping, be it gender, political or racial may have suffered at some time of their life a disadvantage against economic beneficiation. This, the Botswana government seeks to address by allowing any such person[163] the opportunity through the protection and entitlement afforded by the EI Act, for as long as the person is a citizen of Botswana. South Africa on the other hand seeks to capacitate the persons who were previously disadvantaged through the affirmative policies. These policies have been designed in such a way that they sow further divisions between the different races in South Africa.

South Africa could learn a lot from their immediate northern neighbour Botswana in terms of dealing with previous disadvantage upon some citizens. RSA may design their affirmative policies to not be racially biased taking note that it is not all whites who benefitted from apartheid, some like Advocate Bram Fischer and others have suffered economic exclusion as anti-apartheid activists, whilst some blacks did benefit. Some of whites and blacks are born at the time when there is no racial discrimination and are both exposed to opportunities equally, the preference of one over the other creates racial segregation similar to the apartheid one just in reverse.

The Botswana EI Act makes provision for the "targeted citizen" whilst the South African BBBEE and EEA use the word "black" for the intended beneficiaries. This makes the South African Acts look like it seeks to empower blacks at the expense of whites and this can be seen as intending to benefit black even non-South Africans over white citizens, this would be a bad economic intention. The South African legislation can be crafted like the Botswana legislation to clearly show that the intended beneficiary of the affirmative policies is not any black person but rather a South African citizen, and further be narrowed to ensure there is no repeat of the past discriminatory laws.

[163] Referred to as a "targeted citizen" in terms of S of the EI Act.

CHAPTER FOUR

THE BARNARD CASE IN THE CCMA AND LC

4.1. Introduction

The apex court in RSA came to be faced with the situation of a conflict between the right to equality and the implementation of the affirmative policies designed to advance members of designated groups in amongst other cases, the case of *Solidarity,* where the court found in favour of the affirmative policies and further found that the differentiation that emanates from the implementation of affirmative policies does not constitute an unfair discrimination.

4.2. Facts of the case from the CCMA until the LC

On the 6th day of January 1989, Captain Barnard, a white female person was employed by the South African Police Services ("SAPS") as a constable and in the year 1997 she was promoted to the rank of Captain.[164]

Captain Barnard served several years as a Branch Commander of the detective Services stationed at the Haartebeestpoort Police Station. She was later transferred to the National Inspectorate which was previously known as the National Evaluation Services and she retained her rank of Captain.[165]

In 2005, there was a new position of Superintendent that was created, approved and advertised where Captain Barnard was currently stationed, at the National Evaluation Services.[166]

Captain Barnard and six other candidates, four blacks and two whites applied for the position and they were interviewed on or about the 3rd day of November 2005.[167] Four candidates were recommended by the selection panel for consideration for appointment in the following order based on their scoring from the interview; Captain

---

164 *Solidarity obo Barnard v SAPS* (JS455/07) [2010] ZALC 10 ("*Barnard v SAPS*") at para 24.1.
165 *Barnard v SAPS* at para 24.1.
166 Malan (2014) De Jure 120.
167 *Barnard v SAPS* at para 24.6.

Barnard, a white female; Captain Oschmann, a white female; Captain Achendorf, a coloured female and Captain Shibambu, a black male.[168]

The selection panel made recommendations. The selection panel's recommendations were discussed with the Divisional Commissioner ("DC") who then recommended that the advertised position be not filled citing that the appointment of any of the top three recommended persons will aggravate the representivity status of the already under represented sub-section: Complaints Investigations.[169] The DC further stated that the appointment of either of the top three candidates will not enhance service delivery to a diverse community.[170] The post was not filled and subsequently was withdrawn.[171]

Captain Barnard was not appointed and the primary reason why she was not appointed was primarily because she was white.[172] After the lapse of three months from the withdrawal of the advertised position, a white male Superintendent was transferred to the Complaints sub-section.[173]

During May of 2006, the same position was re-advertised and Captain Barnard re-applied for the post.[174] Captain Barnard and seven other candidates; four African males, one African female, one coloured male and one white male were short-listed and interviewed for the re-advertised post and were interviewed on or about the 26th day of June 2006.[175]

The selection panel recommended three names for appointment in the following order; Captain Barnard, Captain Mogadima and Captain Ledwaba.[176] The selection panel's recommendations were discussed in a divisional level meeting and the Divisional Commissioner supported Captain Barnard.[177]

---

168 Malan (2014) De Jure 120.
169 *Barnard v SAPS* at para 24.9.
170 *Barnard v SAPS* at para 24.9.
171 *Barnard v SAPS* at para 24.10.
172 *Barnard v SAPS* at para 24.11.
173 *Barnard v SAPS* at para 24.12.
174 *Barnard v SAPS* at para 24.13.
175 *Barnard v SAPS* at para 24.14.
176 *Barnard v SAPS* at para 24.15.
177 *Barnard v SAPS* at para 24.17.

On the 7th of June 2007, the office of the National Commissioner ("NC") of the SAPS issued instructions to remind the interview panels that they should focus on service delivery when they make recommendations for appointments.[178]

On the 10th of July 2007, the DC recommended Captain Barnard to the NC for appointment to the advertised post.[179] The NC rejected the recommendation to appoint Captain Barnard and subsequently caused the re-advertised position to be withdrawn reasons being that the recommendations of the DC do not address representivity and the post is not critical and does not affect service delivery.[180] The NC further directed that the position be re-advertised.[181]

Captain Barnard thereafter filed a complaint in terms of the SAPS grievance procedures in contention of a failure of the SAPS to appoint her for the advertised position. Captain Barnard in her grievance sought a promotion dating back to 1st of December of 2005.[182]

The SAPS responded to Captain Barnard's grievance and in the response cited that her recommendation by the DC did not address representivity and that the position she was recommended for appointment to was not a critical position and that by not filing the position, service delivery would not be affected.[183]

Captain Barnard then approached the CCMA for conciliation.[184] The SAPS did not attend the conciliation meeting; the matter could not be resolved.[185] The CCMA issued a certificate of unresolved and Captain Barnard with the assistance of the trade union Solidarity, referred the dispute to the Labour Court ("LC").[186]

178 *Barnard v SAPS* at para 24.18.
179 *Barnard v SAPS* at para 24.19.
180 Malan (2014) De Jure 121.
181 Malan (2014) De Jure 121.
182 *Barnard v SAPS* at para 24.21.
183 *Barnard v SAPS* at para 24.22.
184 Malan (2014) De Jure 121.
185 *Barnard v SAPS* at para 24.23.
186 Malan (2014) De Jure 121.

4.3. Questions to be considered by the LC

The LC was tasked with determining firstly whether the failure to appoint Cap Barnard by the SAPS to the advertised post a discrimination was based on her race. The second question the LC was to determine was whether the discrimination against Captain Barnard amounted to a fair discrimination. The third question the LC was to determine was whether the failure by the SAPS to appoint Captain Barnard was unfair and inconsistent with the provisions of the EEA. The fourth question the LC determined was whether the failure to appoint the other recommended candidates served as a mitigating factor against the allegation that there was an unfair discrimination based on race against Captain Barnard by the SAPS?

4.4. Judgment of the LC

The LC found that the SAPS unfairly discriminated against Captain Barnard; further that the failure to appoint Captain Barnard was inconsistent with the provisions of the EEA and the failure to make appointments of the other recommended candidates did not serve as a mitigating factor.

The Honourable Court ordered that the SAPS to promote Captain Barnard to the position of Superintendent retrospectively from the 27th day of July 2006 and further ordered that the Respondent pay the costs of the suit.

4.5. How the LC decided the questions before it?

The LC decided the matter by considering whether the decision of the NC not to appoint any of the candidates recommended for the post was a fair and appropriate method of implementing the Employment Equity Plan ("EEP") which was fair to Cap Barnard.[187] The LC further considered the letter and spirit of the Constitution in relation to the application of affirmative action policies and accepted as unacceptable the failure of the SAPS to engage effectively in the mediation and conciliation procedures which are provided for in the SAPS' procedures.[188] The LC further decided the questions by considering whether there was a rational connexion between the decision reached by the NC and the overall objects of the EEP of the SAPS.[189] The LC further

187 *Barnard v SAPS* at para 33.
188 *Barnard v SAPS* at para 38.
189 *Barnard v SAPS* at para 42.

decided the question by making a determination as to whether the NC considered the constitutional rights of Cap Barnard; the rights to equality and to dignity; her personal work history and circumstances when making the decision not to appoint her.[190]

4.6. Conclusion

The LC accepted the argument of Solidarity and decided that the decision of the NC to fail to appoint Cap Barnard was based on the fact that she was white and therefore she was unfairly discriminated. The LC did not agree with the submission of the SAPS' that the differentiation against Captain Barnard was a differentiation made in line with the SAPS' EEP. The LC decided that whenever there is an application of the EEP, the EEP must be applied in a fair manner taking due cognisance of the constitutional right to equality of the affected individual.[191] The LC ordered the SAPS to promote Captain Barnard retrospectively from 27 July 2006. The SAPS being aggrieved by the LC's decision appealed to the Labour Appeal Court ("LAC").

190 *Barnard v SAPS* at para 43.5.
191 Gaibie (2015) ILJ 87.

CHAPTER FIVE

THE BARNARD CASE IN THE LAC AND THE SCA

5.1. The Barnard case in the LAC

5.1.1 Introduction

According to the Labour Relations Act[192] ("LRA"), the LAC is the final court of appeal in respect of all judgments and orders made by the LC in respect of the matters within its exclusive jurisdiction.[193] The LAC has the status equivalent to the status of the SCA in relation to matters that fall under the LAC's jurisdiction.[194] The LAC is the court of final arbiter in all matters before it in terms of section 173(1)(a);[195] its decision on any question of law in terms of section 173(1)(b);[196] and any judgment or order made in terms of section 175 subject only to the Constitution and despite any other law[197].

5.1.2. Barnard Case in the LAC

Aggrieved by the decision of the LC, the SAPS approached the LAC on appeal seeking an order to set aside the decision of the LC and make a pronunciation that the decision of the NC of the SAPS to decide against appointing Cap Barnard to the advertised position of Superintendent did not constitute an unfair discrimination against her but rather it was a decision taken in light of the SAPS' implementation of its EEP.

5.1.2.1. The questions to be considered by the LAC

The LAC was approached to consider amongst others; whether the LC was justified in concluding that the restitutionary measures envisaged in section 9(2) 'must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality' found in section 9(1).[198] The other question the LAC was tasked with considering was whether the SAPS unfairly discriminated

---

192 No. 66 of 1995.
193 S 167 (2) of the LRA.
194 S 167(3) of the LRA.
195 S 183(a) of the LRA.
196 S 183(b) of the LRA.
197 S 183(c) of the LRA.
198 *SAPS v Solidarity obo Barnard* (JA24/2010) [2012] ZALAC ("*SAPS v Barnard*") at para 2.

against Barnard on the basis of race, namely, 'I did not appoint a white female to the post even though she was rated as the best candidate in the interviews'.[199] The LAC was further tasked with considering whether the NC of the SAPS was having the sole prerogative to decide not to fill the advertised post;[200] and whether the implementation of equity orientated measures should be stifled if such implementation will adversely affect persons from non-designated groups.[201]

5.1.2.2. The decision of the LAC

The LAC decided that the LC was misconstrued in rendering the implementation of restitutionary measures subject to the individual's right to equality;[202] that there was discrimination against Captain Barnard in terms of race. The LAC decided that discriminating against Barnard in the circumstances of this case was clearly justifiable.[203] The LAC further decided that the application of section 5(7) read together with section 13(7) of the South African Police Act places the sole discretion to appoint on the shoulders of the NC. The LAC therefore decided that the NC has a discretion regarding what to do with the recommendation that came to him.[204] In their decision, the LAC rejected the view that the implementation of equity orientated plans could be achieved without the adverse effects upon the rights of those from non-designated groups. The LAC found that the basis relating to restitutionary measures as advanced by the LC cannot be countenanced.[205]

5.1.2.3 How the LAC decided the questions before the Court.

The LAC applied a few mechanism and principles to decide the different questions before them. The following principles and mechanisms were applied. Firstly, the LAC engaged the contextual interpretation of the Constitution, the SAPS' EEPs and the interview and divisional panels' recommendations. In so doing, the LAC arrived at a decision that "it is misconstrued to render the implementation of restitutionary measures subject to the right of an individual's right to equality."[206]

---

199 *SAPS v Barnard* at para 4.
200 *SAPS v Barnard* at para 4.
201 *SAPS v Barnard* at para 20.
202 *SAPS v Barnard* at para26.
203 *SAPS v Barnard* at para 42.
204 *SAPS v Barnard* at para 43.
205 *SAPS v Barnard* at para 26.
206 *SAPS v Barnard* at para 26.

The application of the contextual approach then led to the court's findings that the

> "*essence of restitutionary measures is to guarantee the right to equality for the reason that, without such measures, the achievement of equitable treatment will continue to elude us as a society*".[207]

This led the court to deciding that the LC had erred in "treating the implementation of restitutionary measures as subject to the individual conception of a right to equality."[208]

Secondly, the LAC in making their decision applied the principle in *Harsken v Lane NO and Others*[209] by the LAC to determine whether there was a differentiation which amounted to discrimination; whether the discrimination was an unfair discrimination. In applying this principle, the LAC found no evidence of any such differentiation.[210] The LAC found that there was no discrimination against Cap Barnard.

Thirdly, the LAC in deciding the question before it, adopted the reasoning of the LC in the case of *South African Police Services v Zandberg and Others*[211] and the LAC case thereafter in the same case wherein the LAC had found that the power to appoint lied with the DC who was entitled to deviate from the panel's recommendation. The deviation which was found to be rational and justified by the LC and confirmed by the LAC when the decision of the LC was appealed against in an unreported judgment DA 18/2010.[212]

The LAC in the case of *SAPS v Barnard* therefore decided that the NC of the SAPS was having the prerogative to appoint and further that the recommendations of the interview panel were not binding on the NC.[213]

---

207 *SAPS v Barnard* at para 27.
208 *SAPS v Barnard* at para 30.
209 *Harsken v Lane NO and Others* 1998 (1) SA 300 ("*Harsken v Lane*") at para 45.
210 *SAPS v Barnard* at para 22.
211 *SAPS v Zandberg and Others* (2010) 31 ILJ 1230 (LC) at para 1237 A-C.
212 *SAPS v Barnard* at para 43.
213 *SAPS v Barnard* at para 43.

5.2. The Barnard case in the Supreme Court of Appeal ("SCA")

5.2.1 Introduction

The SCA is the highest court of appeal in all matters except only in Constitutional matters.[214] The SCA has the powers to decide only appeals;[215] issues concerned with appeals;[216] and any matter that may be referred to it in circumstances defined by an Act of Parliament.[217] The SCA only hear appeals and may therefore not be approached as a court of first instance.

5.2.2. The Barnard case in the SCA

Solidarity acting on behalf of Barnard, having been aggrieved by the decision of the LAC, of upholding the appeal lodged by the SAPS against the decision of the LC whom had granted an order against the SAPS in favour of Cap Barnard that she was unfairly discriminated against.

This matter came before the SCA as an appeal from the decision of the LAC which court had set aside the decision of the LC and found that the SAPS had not unfairly discriminated against Barnard but rather the SAPS have acted in a justifiable way in differentiating against Barnard as the LC reasoned amongst others that the SAPS was acting to achieve its EEP.

5.2.2.1. The questions to be considered by the SCA

The SCA was approached to make determinations on the following questions. On whether the conduct of the SAPS in failing to appoint Captain Barnard constituted a discrimination in terms of race, being that she was discriminated against because she is a white person.[218] The other questions the SCA was tasked with considering was whether the SAPS managed to demonstrate to the court or managed to prove that the discrimination against Cap Barnard was a fair discrimination and therefore a justified discrimination in terms of the law;[219] whether the NC of the SAPS has the sole

214 S 168(3) of the Constitution.
215 S 168(3)(a) of the Constitution.
216 S 168(3)(b) of the Constitution.
217 S 168(3)(c) of the Constitution.
218 *Solidarity obo Barnard v SAPS* (165/2013) [2013] ZASCA 177 (28 November 2013) ("*Barnard v SAPS*") at para 50.
219 *Barnard v SAPS* at para 55.

discretion in relation to making appointments in the national office of the SAPS and whether the NC is bound by the recommendations of the interviewing and selection panels; and whether the post advertised was not critical.

5.2.2.2. The decision of the SCA

In responding to the legal question before the SCA, the SCA decided that: Captain Barnard was discriminated against and the discrimination was based on a specified ground, being that of her race.[220] The SCA further decided that the SAPS failed to demonstrate that the discrimination against Captain Barnard on the grounds of her race was a fair discrimination, the SCA found rather that the discrimination against Captain Barnard was an unfair discrimination.[221]

In its decision, the SCA accepted that the NC of the SAPS is having the discretion in terms of whether to make an appointment at the national office or whether to fill a vacancy.[222] The SCA went further and decided that the NC is not obliged to fill a vacancy.[223] The SCA went further to stated that; despite that the NC is not bound by the recommendations of the interviewing panels, the interviewing panels are constituted to serve a purpose,[224] this implying that their recommendations cannot just be ignored by the NC, the court went further to assert that the NC "must at the very least give consideration to and engage with what is put before him by them".[225] The SCA in its decision decided that the advertised post cannot be classified to have been not critical.[226]

5.2.2.3. How the SCA decided the questions before it.

The SCA decided the questions before it with the application of different legal mechanism and principles. The SCA followed a number of different mechanism and principles when dealing with the legal questions.

---

220 *Barnard v SAPS* at para 55.
221 *Barnard v SAPS* at para 79.
222 *Barnard v SAPS* at para 60.
223 *Barnard v SAPS* at para 78.
224 *Barnard v SAPS* at para 60.
225 *Barnard v SAPS* at para 60.
226 *Barnard v SAPS* at para 74.

Firstly, the SCA applied the principle applied by the SCA in the case of *Gordon v Department of Health: KwaZulu-Natal*[227] by which principle the SCA then decided that Captain Barnard like the appellant in the *Gordon* case was not appointed whilst they should have been appointed. This then led the SCA deciding that the LAC had made an error in holding that the was no discrimination against Captain Barnard because there was no appointment made.[228]

In determining whether the discrimination against Captain Barnard was unfair, the court applied the principles in *Harsken v Lane NO and Others;*[229] in which case the CC had stated that "the test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation." The SCA also applied the principle in *Minister of Finance and Another v Van Heerden*[230] and in applying this principle the court was considering the personal circumstances of Captain Barnard and other persons in her similar situation, this led to court to decide that the discrimination against Captain Barnard was unfair.

The SCA further applied the South African Police Services Act[231] which advocates for the coherent and cooperative structuring of the SAPS with the division of the SAPS into various components and the recognition of various Commissioners and the Board of Commissioners, and the Constitution.[232] This led to the SCA finding that the recommendations of the interviewing panels and the DC's recommendations were vital in the decision of the NC in relation to whether to appoint Captain Barnard to the advertised post. The SCA in making the decision against the questions before it, examined and considered the fact that the position was advertised more than thrice, that there was a temporary appointment of Senior Superintendent to fill the post and concluded that the assertion that the post was not critical was a lie.[233]

---

227 *Gordon v Department of Health: KwaZulu-Natal* [2008] 11 BLLR 1023 (SCA) ("*Gordon*").

228 *Barnard v SAPS* at para 52.

229 *Harsken v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; (1) SA 300 (7 October 1997) ("*Harsken v Lane NO*").

230 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) ("*Van Heerden*").

231 S 11 of the South African Services Act: No. 68 of 1995 (the "SAPS Act"); most importantly S 11(2)(a) to (c).

232 S 205 and 207 of the Constitution.

233 *Barnard v SAPS* at para 73.

5.3. Conclusion

The LAC rejected the LC's placing as paramount the individual person's right to equality at the exclusion of the premise upon affirmative action measures.[234] The LAC took the direction that because there was no matter brought against the EEP themselves, then such a measure as was taken by the SAPS as the employer was binding against all of its employees in such a way the measures would have had they been taken in a collective bargain process.[235] The LAC applied the three stage approach established in *Van Heerden* in deciding the matter and found that affirmative action measures if applied in terms of section 6(2) of the EEA, they are defendable and justifiable under the auspices of the Constitution.[236]

The SCA decided to uphold the appeal lodged by Solidarity acting on behalf of Captain Barnard. The decision reversed or set aside the decision of the LAC which had found that there was no discrimination against Captain Barnard in terms of her race. The SCA decided that the decision to not appoint Captain Barnard was discriminatory and the argument that the filing of the position advertised about three times was not crucial as argued by the SAPS was a lie.

The SAPS were aggrieved by the decision of the SCA and therefore appealed the decision to the apex court.

234 *SAPS v Barnard* at para 30.
235 Gaibie (2015) ILJ 88.
236 *SAPS v Barnard* at para 24.

CHAPTER SIX

THE VARIOUS JUDGMENTS DELIVERED BY THE CC

6.1. Introduction

The CC is the highest court in all constitutional matters in the Republic.[237] The CC does not decide on all matters like the HC and the SCA, it is a specialist court that may decide only constitutional matters and matters that within them have any issues connected with the decision upon a constitutional matter.[238] A matter is said or accepted to be a constitutional matter if the matter deals with, or has in it any issue that deals with the interpretation, protection or the enforcement of the Constitution.[239] The CC has a sole discretion to determine and decide if the matter being brought before the CC is a constitutional matter or if the matter has any issue connected with it that is a constitutional matter.[240]

The matter of Captain Barnard was brought as an appeal from the SCA to the CC. The CC did not decide against hearing the matter for lack of jurisdiction or that the matter was not a matter envisaged by section 167(3)(b) of the Constitution. The matter dealt with the application and interpretation of section 9(2) of the Constitution and in one way of the other also the interpretation of section 9(1) of the Constitution and therefore the matter was indeed a Constitutional matter. The CC constituted a quorum of eleven Judges in this matter.

6.2. The Main Judgment

The main judgment was penned down by Acting Chief Justice Dikgang Moseneke (as he was) (“Moseneke ACJ”) and was concurred to by other six judges thus making the decision the majority decision at a count of seven out of eleven judges.

237 S 167(3)(a) of the Constitution.
238 S 167(3)(b) of the Constitution.
239 S 167(7) of the Constitution.
240 S 167(3)(c) of the Constitution.

Penning for the majority, Moseneke ACJ accepted that "the quest to achieve equality must occur within the discipline of our Constitution*".*[241]

The CC in the main judgment looked at whether restitutionary measures taken in the decision not to appoint Captain Barnard fell within the ambit of section 9(2) of the Constitution. The CC applied the measure in *Van Heerden* to determine whether the restitutionary measure targeted a particular class of people whom may have previously been subjected to unfair discrimination;[242] whether the restitutionary measures were crafted to protect or for the advancement of those persons;[243] and lastly whether the restitutionary measures were crafted for the promotion of the achievement of equality.[244] The CC held that once the restitutionary measures conformed to the test in *Van Heerden,* then they are neither unfair nor may they be presumed to be unfair.[245]

The CC thereafter stated that the second question to be determined would be whether the properly adopted restitutionary measures were applied in a manner that may be challenged.[246]

The CC found that the SCA;

> *"adjudged Cap Barnard's equality claim as one of unfair discrimination on the ground of race and that it fell within the prescripts of section 9(3) of the Constitution and section 6(1) of the EEA*".[247]

The CC found that the SCA had misconceived the issue before it as well as the controlling law. The CC found and stressed that the SCA was obliged to decide the matter in application of section 9(2) of the Constitution and also section 6(2) of the EEA and further that the SCA was not having it open for them to apply the analysis in *Harsken* for analysing whether the discrimination was unfair. The CC also decided that the SCA was not tasked with determining whether the EEP was assailable but rather

241 *SAPS v Solidarity obo Barnard* [2014] ZACC 23 ("*Solidarity*") at para 30.
242 *Solidarity* at para 36(a).
243 *Solidarity* at para 36(b).
244 *Solidarity* at para 36(c).
245 *Solidarity* at para 37.
246 *Solidarity* at para 38.
247 *Solidarity* at para 48.

that the SCA was tasked with determining whether the decision of the NC of the SAPS was open to being challenged.[248]

The CC further found that the task they are being given was to review and set aside the NC's decision not to appoint Captain Barnard.[249] The CC found that this is a new matter that was not put forward in the LC and therefore it is a new averment and not an appeal and therefore cannot be permitted to be adjudicated upon by the CC sitting as an appeal court.[250]

The CC accepted that the NC of the SAPS has the sole discretion in relation to the appointment and further due to his discretion, his failure to appoint the two black males who were recommended below Captain Barnard is one way the NC was exercising this discretion and therefore it cannot be construed as being unlawful despite that the appointment of either of the two black males would have improved representivity.[251]

The CC further considered whether the decision of the NC's decision not to appoint Captain Barnard was injudicious and invalid because he over-emphasised representivity at the expense of Captain Barnard.[252] The CC found that the EEP compelled the NC to take rational steps in conjunction with the criteria set in the Instruction to achieve the targets set by the EEP and further the NC acted within the bounds of rationality and in conformity with the right and duty vested upon him.[253]

In relation to whether the decision not to appoint Captain Barnard acted as a bar against her for future appointments, the CC found that the decision did not in any way act as a bar against Captain Barnard being appointed in the future recognising further that at the time of the delivery of the judgment, Captain Barnard was already appointed by the SAPS as a Lieutenant-Colonel.[254]

---

248 *Solidarity* at para 51.
249 *Solidarity* at para 59.
250 *Solidarity* at para 59.
251 *Solidarity* at para 62.
252 *Solidarity* at para 65.
253 *Solidarity* at para 66.
254 *Solidarity* at para 67.

Moseneke ACJ found that the NC acted rationally and lawfully in his decision not to appoint Captain Barnard whilst he was pursuing the prescripts of the Instruction and the implementation of the EEP in conjunction with the spirit of section 6(2) of the EEA thus deciding that the CC would not review nor set aside the decision of the NC and therefore decided that the application to do so be dismissed.[255]

The CC decided that the appeal against the SCA decision be upheld and made no order as to costs.[256]

6.3. The First Concurring Judgment

The first concurring judgment was penned down by three justices of the CC, Cameroon J, Froneman J and Majiedt AJ. The three justices of the CC concurred with the reasoning and decision of the majority judgment[257] but penned down their own judgment, in which judgment they were to deal with other matters that may have been left unaddressed in their view, by the main judgment like the tension accompanying the way the restitutionary measures giving satisfaction to the Constitution's demand for transformation are to be formulated and be implemented.[258]

The first concurring judgment also sort to analyse the appropriate standard applicable when there is a challenge against the implementation of a constitutionally compliant restitutionary measure in a certain matter. The analysis that the first concurring judgment view was left unattended by the main judgment and they differ with that as they believe Cap Barnard approached the court basing her case mainly on the auspices of the EEA.[259]

The first concurring judgment looked at the tension that can erupt from the balancing of important constitutional imperatives which are; the Constitution*'s* commitment to the creation of a non-racial, non-sexist and socially inclusive society and the Constitution*'s* committal to recognising and redressing the past realities.[260] The judgment accedes

255 *Solidarity* at para 70.
256 *Solidarity* at para 73.
257 *Solidarity* at para 74.
258 *Solidarity* at para 74.
259 *Solidarity* at para 75.
260 *Solidarity* at para 77.

that the Constitution permits for the achievement of substantive equality by allowing for the protection and advancement of the designated person,[261] but taking strict caution against allowing race to be the only decisive factor in employment decisions.[262]

The judgment states that it was impossible for the court to decide whether Cap Barnard was unfairly discriminated or decide the NC of the SAPS's appeal against the judgment of the SAPS, the CC ought to firstly evaluate the decision of the NC of the SAPS against the EEA.[263]

The judgment in dealing with the above tension applied the LRA. The Justices of the CC accepted that was the applicable Act to the matter and further stated that the Act prohibited unfair discrimination.[264] The judgment further noted that Captain Barnard's complainant was that the NC's decision discriminated against her because she was white and the judgment found that this fell short of the prohibition as stated in the EEA stating that the Act does not accept as unfair discrimination the taking of affirmative action measures which are consistent with the EEA which was the basis of the SAPS' defence on the decision of the NC.[265]

The first concurring judgment realised that the CC was in fact tasked with the understanding of what was the purpose of the EEA and further determine whether the decision of the NC was consistent with that propose thereof.[266]

The judgment found that the purpose of the EEA is:

> "*to achieve workplace equity including by 'implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels*.'"[267]

261 *Solidarity* at para 79.
262 *Solidarity* at para 80.
263 *Solidarity* at para 84.
264 *Solidarity* at para 86.
265 *Solidarity* at para 86.
266 *Solidarity* at para 86.
267 *Solidarity* at para 87.

And further that: “section 15(3) of the EEA states that remedial measures may include preferential treatment and numerical goals, but exclude quotas.’”[268]

The judgment states that, the main judgment held that the above was not an appropriate case to determine the difference between numerical goals and quotas whilst the first concurring judgment holds that Captain Barnard managed to place before the CC this question, and therefore the CC must determine whether the NC’s implementation of the Plan was indeed so rigid as to constitute the use of quotas instead of numerical goals.[269]

In determining and deciding this question, the Justices of the CC applied the standard of fairness, and found that the NC’s decision passed the standard of fairness.[270] The judgment also states that the NC’s decision did not bar Captain Barnard from future appointment and acceded to recognise that at the time of judgment, she was already serving in a more senior position and therefore they decided that the NC applied the Plan in a fair manner.[271]

The first concurring judgment agreed with the principled approach in the main judgment and also with the decision taken by the main judgment.[272]

6.4. The Second Concurring Judgment

The second concurring judgment was penned down by Justice Van der Westhuizen who concurred with the main judgment and the other concurring judgments.[273] Van der Westhuizen J wrote separately in order that she voiced her different views on a few aspects as opposed to those reasons advanced in the main and other judgments.[274]

Van der Westhuizen J differed with the main judgment in that she found that the decision of the NC was properly put before court and must be considered whether was

268 *Solidarity* at para 91.
269 *Solidarity* at para 91.
270 *Solidarity* at para 123.
271 *Solidarity* at para 123.
272 *Solidarity* at para 124.
273 *Solidarity* at para 132.
274 *Solidarity* at para 132.

lawful or not; and doing so, Van der Westhuizen made a consideration in terms of the *Van Heerden case.*[275]

Van der Westhuizen J also in the second concurring judgment will consider whether the implementation of the Plan met the standard set in *Van Heerden;*[276] whether it promoted equality;[277]whether it had any impact on any of the constitutional rights, particularly the right to dignity;[278] and lastly will make a consideration upon the public interest in effective service delivery by the SAPS.[279]

This judgment found that the NC's decision not to appoint Captain Barnard fulfilled the NC's corollary duty to promote racial equality[280] and also that the NC's non-appointment of the other two recommended candidates had no bearing or is of little relevance for the determination for the lawfulness of the decision on her appointment.[281]

Van der Westhuizen J admits that Captain Barnard's dignity may be impacted on disproportionally[282] when the affirmative action policies were being implemented. She went further to consider whether the impact was a reasonable and justifiable one in light of the achievement of substantive equality.[283] Van der Westhuizen J made a determination over two factors[284] and found that none of them was present in Captain Barnard's matter[285] and therefore there was no adverse impact on the dignity of Captain Barnard.

In terms of the service delivery question, Van der Westhuizen J found that there was not enough evidence before the CC to impugn the decision on the issue of service

275 *Solidarity* at para 133.
276 *Solidarity* at para 133.
277 *Solidarity* at para 133.
278 *Solidarity* at para 133.
279 *Solidarity* at para 133.
280 *Solidarity* at para 150.
281 *Solidarity* at para 151.
282 *Solidarity* at para 179.
283 *Solidarity* at para 180.
284 *Solidarity* at para 180.
285 *Solidarity* at para 181.

delivery.[286] This judgment found that the decision of the NC was not unlawful and therefore the appeal of the SCA judgment must succeed.[287]

6.5. The Third Concurring Judgment

The third concurring judgment was penned down by Justice Jafta with Moseneke ACJ concurring in the judgment. The judgment of Jafta J concurred fully with the main judgment whilst it differed with the first and second concurring judgments.[288]

Despite concurring with the main judgment on that there should not be a determination of the cause of action in relation to the reviewing of the NC's decision of not having appointed Captain Barnard, Jafta J found it necessary to supplement the reasons for not deciding over the new cause of action.[289]

This judgment established that Captain Barnard brought for the same time before the CC as a cause of action, the issue of whether the NC in making his decision did in fact follow the approach directed in the National Instruction and by the EEA[290] whilst she pursued a claim of unfair discrimination in the LC.[291]

In consideration of the law and practice in the Republic, the judgment stated that it's a principle of the South African law that; "a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them."[292]

Jafta J considered what basis may the CC allow Captain Barnard to raise a different and new cause of action and he concluded that he did not find any.[293] Jafta J also considered whether the decision of the NC was consistent with the purpose of the EEA[294] and found that it was indeed consistent with section 2 of the EEA.[295]

---

286 *Solidarity* at para 189.
287 *Solidarity* at para 195.
288 *Solidarity* at para 197.
289 *Solidarity* at para.197.
290 *Solidarity* at para 198.
291 *Solidarity* at para 200.
292 *Solidarity* at para 202.
293 *Solidarity* at para 213.
294 *Solidarity* at para 225.
295 *Solidarity* at para 225.

The third concurring judgment found that the NC's decision did not constitute unfair discrimination nor could it be accepted to have been an unfair decision.[296]

6.6. Conclusion

The CC with a quorum of eleven judges found that the discrimination against Captain Barnard was not an unfair discrimination and further that the decision of the NC of the SAPS in failing to appoint Captain Barnard and the other two candidates were not unreasonable decisions and did not unfairly discriminate against Captain Barnard, instead the court found that the NC exercised his duty reasonably and within the ambits and prescripts of the EEP of the SAPS. The appeal by the SAPS of the decision of the SCA therefore succeeded. This mini-dissertation in the following chapters will be critically analysing the decision of the CC and making a conclusion and recommendations.

It is worth to note that the three judgments, despite the fact that they reach the same consensus in that there was indeed a differentiation and discrimination against Captain Barnard in relation to her race; that the discrimination or differentiation was not unlawful and was carried out in terms of section 9 of the Constitution and section 6 of the EEA, the judgments reach these conclusions differently and with different methodologies and interpretations.

In the following chapters this mini-dissertation will also explore and critically analyse the ways in which the various judgments were reached and how the different judges who authored the judgments reasoned, exploring how they each reached the same conclusions despite that in some instances the judges were differing and even opposed to the methodology, application and reasoning of the others.

296 *Solidarity* at para 227.

CHAPTER SEVEN

A CRITICAL ASSESSMENT OF *SOUTH AFRICAN POLICE SERVICES V SOLIDARITY obo BARNARD*

7.1. Introduction

In *South African Police Services v Solidarity obo Barnard*[297] ("*Solidarity*"), the CC was approached on appeal against a decision of the SCA in which appeal, the SAPS was aggrieved by the decision of the SCA and therefore sought the reversal of the decision of the SCA.

The CC did grant the prayers of the SAPS as the appellant and because the CC is the apex court of the RSA,[298] and further because the decisions of the courts are binding on all persons and state organs in the RSA,[299] the matter was laid to rest and therefore the Respondent, Captain Barnard has no further recourse.

This mini-dissertation seeks to critically assess the decision of the CC with all due respect of the court and without the intention of scandalising the court. The research is rather undertaken in an attempt to research against the applicable laws of the Republic, International law, books and articles written by scholars before on this matter or any other related matter in order to establish how the CC made the decision and whether the decision taken is in line with the International Law prescripts and lastly; whether in the opinion of the researcher the CC may have viewed and decided the matter in the way they did or differently.

7.2. A critical assessment of the judgment in *Solidarity*.

The CC's found that the SCA was obliged to decide the matter through the prism of section 9(2) of the Constitution and section 6(2) of the EEA.[300] Can one say the CC implied that the SCA ought to have disregarded any other prescripts of the Constitution or of the EEA when deciding this matter? This would be wrong. The Constitution must

---

297 [2014] ZACC 23.
298 S 167(3)(a) of the Constitution.
299 S 165(5) of the Constitution.
300 *SAPS v Solidarity obo Barnard* ZACC: para 51.

be applied as a whole as it is a living document. The equality rights as prescribed by section 9 of the Constitution must be read and be applied as a whole. The prescriptions cannot be separated but rather must be read together. The prescription by section 9(2) does not disqualify the prescription of section 9(1), rather section 9(2) is a continuation or driver to the achievement equality as prescribed by section 9(1). The decision of the CC to prescribe that there was supposed to be a decision based only on section 9(2) of the Constitution and section 6(2) of the EEA makes a view that they are contradictory to the prescriptions of the other parts of the sections or that they cannot be applied together with the other contents of the section 9 of the Constitution and section 6 of the EEA, this is not the actual case.

The CC found that there was a new task the CC is presented with, the task of reviewing the decision of the NC of the SAPS not to appoint Cap Barnard,[301] and the CC found that this was not placed before the LC as the court of first instance and therefore the CC did not intend to permit the matter to be presented before them nor to adjudicate on this new task.[302] The CC has the powers to regulate its processes as a superior court and further have the powers to condone none compliance with its rules and procedures. What was at stake was a matter of strong public and constitutional importance.

The CC in the case of *Prince v President, Cape Law Society,*[303] ("*Prince*") made a decision in the form of an interim order in order for the CC to allow for the presentation and adduce of new evidence by the parties. In this matter of Captain Barnard, the CC could make an interim order and allow for the introduction and adduce of evidence in relation to the new matter which was not presented before the LC, the parties would have been given the opportunity by the court to adduce evidence and the court decide the matter at the end. The court in *Prince* reasoned that the decision to allow for the provision of new evidence on appeal was because the case was a rare case as the appellant was belonging to a minority group and further that the constitutional right asserted by the appellant went beyond his own interest, it affected the community of

301 *Solidarity* at para 59.
302 *Solidarity* at para 59.
303 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

Rastafarians who are not a powerful group but rather are a vulnerable group.[304] The white race is a minority and have very low political and democratic bargaining power and therefore can be said to be a minority which is vulnerable and thus needing the protection of the courts in order that they may be able to enjoy the freedoms enjoyed by citizens and inhabitants of South Africa. Captain Barnard indeed needed this protection from the CC.

A matter of racial discrimination in a country like RSA where racial tension need to be addressed in order that the constitutional hope of a free RSA for all be achieved. The CC ought to have looked at the gravity of the new matter in influencing the decision at the end of the matter and considered the new task. In the event when the CC was of the opinion that the appellant would have not been given enough chance and opportunity to respond to the matter, the CC could have the matter postponed and allowed for the parties to litigate and exchange supplementary processes in this matter in order that justice is not only served but also be seen to have been served on all parties.

The reviewing of the decision of the NC would have allowed the CC a chance to evaluate deeply the decision and make at the end, an informed decision that all parties would have been satisfied with its flow and would have given a certainty upon the decision of the NC.

The CC found that indeed the NC of the SAPS had the sole discretion to appoint, the discretion which the court found was not unlawfully exercised.[305] I fully concur with the findings of the CC but have a few concerns. The decision of the NC must be exercised with great care and reasonability despite that the decision was not unlawful. The NC as the custodian of the SAPS has to strike a balance between interests and "*morale*" of the employees of SAPS.

304 *Prince* at para 49.
305 *Solidarity* at para 62.

In the case of *Kroukamp and Another v Minister of Justice and* Constitutional *Development and Others,*[306] a white male person was denied a promotion to a position of Senior Magistrate because of him being white despite him being qualified for the promotion. The Equality Court in Johannesburg reviewed the decision of the Minister of Justice and Constitutional Development and ordered that the white male be appointed as a Senior Magistrate albeit the EEP of the Department of Justice and Constitutional Development.

In the case of *Du Preez v Minister of Justice and* Constitutional *Development and Others,*[307] a magistrate who was highly experienced was denied a chance to be considered for a Regional Court Magistrate position in Port Elizabeth. The case was decided in terms of the PEPUDA as magistrates do not conform with the definition of employees. The department of Justice and Constitutional Development argued that their decision was taken in conformity with the affirmative action policies of the Department. The court found against the defence reasoning that affirmative action policies ought to be seen as essential and central to the achievement of equality and not to the exclusion of others from the exercise of their equality rights. The court then found that the exclusion of Du Preez was a discrimination in terms of PEPUDA, the discrimination which the court found to be unfair and ordered that the positions be re-advertised.

It is my view that in making the decisions, despite that the functionary has the discretion, the decisions ought to be taken with utmost consideration of the persons that the decision affects and therefore a decision be made that is not offensive upon the person likely to be affected. The failure of the NC to appoint Captain Barnard in my view was *prima facie* an unfair discrimination as the decision was made strictly against the race of Captain Barnard and therefore the CC may have caused the appellant SAPS to show that the discrimination was fair.[308]

306 *Kroukamp and Another v Minister of Justice and Constitutional Development and Others* [2013] Case No: 74236 Equality Court, Gauteng Division, Pretoria.
307 [2006] 8 BLLR 767 (SE).
308 Du Toit D:2015: 11-12.

RSA is a member of the ILO Convention and is bound by the prescripts of the ILO Convention which RSA has ratified. In terms of the Constitution, the courts or any tribunal must consider international law whenever they are interpreting the BoR.[309]

The ILO Convention prescribes for the persuasion of national policies designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with the intention of eliminating any employment and occupation discrimination.[310] RSA has enacted the EEA in which it has incorporated affirmative action. Affirmative action is meant for the achievement of substantive equality.

Whenever there is a differentiation on any of the prohibited listed grounds, the differentiation being for the achievement of affirmative action, the differentiation is deemed not to be an unfair discrimination, it is thus accepted as a fair discrimination and is therefore lawful and acceptable. In the consideration of the differentiation against Captain Barnard on race, it was established that the SAPS NC did so in the advancement and achievement of the EEP which was designed to achieve the purpose of the EEA and therefore the decision was lawful. In making this finding, the CC was not wrong and therefore the CC found correctly in my view as far as the matter of unfair discrimination was concerned, the decision in relation to the fact that the NC was acting in conjunction with affirmative action was properly found.

The judgment in my view did not consider also that Captain Barnard was a female person, a category of persons that have suffered a great deal of discrimination and inequality and are so continuing to be left behind in most aspects of the advancement on careers and appointments to powerful positions.

In the case of *Minister of Finance and Another v Van Heerden*[311] ("*Van Heerden*"), the CC through Moseneke J established a three stage test to be engaged in matters when there is an enquiry to determine whether a measure satisfied the standard and criterion of reasonableness. Through the three stages, the first stage of the enquiry is to

309 S 39(2) of the Constitution.
310 Article 2 of the ILO Convention.
311 2004 960 SA 121 (CC).

establish whether the measures in question were targeting persons or a category of persons who were victims of unfair discrimination; secondly, the measure must be crafted for the protection or advancement of the victims of past unfair discrimination and also, the measure must be reasonably capable of bringing about the intended results; and lastly, the measures must be crafted or intended for the promotion and achievement of equality.

Taking a look at the ANC as the dominant political party in the RSA, its top six, for many years we have seen it led by a male President, had never had a female at that position and even the top three positions. The Executive arm of government too, the best we had of females was two stints as Acting Vice Presidents, in the judiciary, the ACJ position and only for a very short period. Taking these into cognisance, the appointment of Captain Barnard would not have hampered the EEP much as it would have on the other hand found to enhance a woman, a member of the designated groups. The omission of the courts of this important matter is a matter of grave concern.

7.3. Conclusion

According to Thompson, there is a

> "*broad consensus that all forms of race discrimination in a new society must be combated. There is a considerable amount of support for the notion that policies of Affirmative Action must be developed in order to redress the past wrongs and achieve equality*."[312]

The South African law makers have indeed crafted the Constitution, the EEA and the LRA to bring the South African laws in conformity with International Laws and the ILO Convention in relation to the combating of any forms of unfair discrimination in the work places in South Africa. What needed to be noted in this research dissertation is the difference between unfair discrimination and fair discrimination.

Unfair discrimination is discrimination that is carried out in a way that infringes the protected rights of one individual by the state or by another individual in way that is unlawful, unjustifiable and capable of degrading the dignity of that individual. On the

312 Thompson C (1993) Jutas: 23.

contrary, fair discrimination is discrimination that is carried out in the way that advances the protection of the other individual or other individuals, recognising the past injustices they suffered against the undue privileges that were enjoyed by the subject in the past.

In the context of Captain Barnard's matter, the CC found correctly that the differentiation against Captain Barnard was not an unlawful differentiation, it was carried out to advance the interests of the Black race whom were previously disadvantaged by the scourge of the apartheid regime, the advancement which was carried out to ensure that the Blacks were being afforded an opportunity to gain competitive powers in the employment of the SAPS as envisaged by the EEP of the SAPS, affirmative action as prescribed by the Constitution,[313] EEA[314] and the ILO Convention.[315]

Affirmative action policies are not an unfair discrimination, they are policies that are designed for the advancement of previously disadvantaged groupings and therefore their implementation is an implementation meant for the achievement of the purpose of the EEA and therefore lawful and acceptable and therefore cannot be termed or accepted as unfair discrimination.

It is because of the above that the CC's decision on the case of Cap Barnard stands the test and therefore is deemed or accepted as correct. The decision puts to rest the question of whether the affirmative action policies are unfair discrimination, the decision of the CC stamps the authority that it is not unfair discrimination to differentiate in order to achieve the purpose of the EEA.

Looking at the three stages established in *Van Heerden*, the CC assessed the matter of the failure of the appointment of Captain Barnard in a satisfactory manner. The decision not to appoint Captain Barnard was made in order that the position is left vacant for the "black appointees", these are persons who were previously

313 S 9(2) of the Constitution.
314 S 15(1) of the EEA.
315 Article 2 of the ILO Convention.

discriminated against their skin colour during the apartheid regime, this conforms with the first stage in the test established in *Van Heerden.*

The second stage is satisfied by that, the affirmative policies of the SAPS are designed specifically for the advancement of the previously disadvantaged and the refusal to appoint Captain Barnard was capable of achieving the intended outcome in that the position remained vacant and therefore could thereafter be filled by the appointment of a person from the said categories of persons.

Lastly, the reservation of the position for a black appointment indeed would have led to the achievement of equality as the level 9 salary bracket was at that moment lacking of black persons or was having fewer and therefore leaving the appointment for a black appointee would have achieved the promotion of equal representation and thus equality in the top brass of the SAPS.

According to Vice, dignity is a very important attribute of a person and ought to be respected whilst recognising that the pragmatics of pinning the respect of a person's dignity does not outweigh those of the dignity of a group of persons.[316] This Vice has extended to the respect and upholding of the right to equality. Vice suggests that whenever we are to consider the right to dignity of an individual, we must also seek to understand if it does not affect the dignity and equality rights of a particular group and if it does, the interests protected and prevailing must be those of the group over those of the individual.[317] This may seem interesting as this is *mutatis mutandis* the application of the principle of utilitarianism when resolving ethical conflicts.

I do not see this as the best way of resolving a conflicting ideology. The majority of South Africans suggest that the death penalty be brought back looking at the prevalence of the murder cases in South Africa. The right to dignity and other rights of the criminal according to the CC in *S v Makwanyane and Another*[318] was not balanced purely against the group rights or wishes or opinions, the CC made a decision that the

316 Vice (2015) EJC 155.
317 Vice (2015) EJC 155.
318 (CCT3/94) [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC), [1996] 2 CHRLD 164, 1995 (2) SACR 1 (CC).

wisdom of the court directed them at and even today the legal position is still standing as the case was decided. I believe that even in matters of dignity and equality the wisdom of the court need not have to be influenced by the numbers like in a political matter, the courts ought to make a decision that even if the majority are not happy or catered for or are not agreeing, they can say that "but the wisdom of the courts is reflected herein". Vice on the hand differs with my view when it comes to race as Vice believes that numbers are important more prudently when it comes to racial matters.[319]

Vice also writes that there is a drive by South Africa to achieve equality for the black population as they have been previously disadvantaged by apartheid and they continue to suffer as a legacy of the segregations of apartheid.[320] Vice further suggest that a black person may be afforded some benefit just because they are black.[321] There is nowhere in my view where Vice suggests that the white persons are therefore barred from having benefits accruing to them even though there was no suggestion that the benefits may accrue to a white person just because they are white, therefore the submissions are in my opinion the acceptance of the affirmative policy application and implementation, which acceptance I believe is wise as indeed the achievement of a racially tolerant and substantive society which recognises where we come from and where we wish to be headed is the starting point to healing the divisions of the past and the creation of a peaceful and harmonious society.

According to Vice;

> *"In order for whites not to feel that they are being unfairly discriminated against in the very same way that blacks were under apartheid, they have to identify with, and fully acknowledge, their whiteness, and they have to acknowledge the negative meanings of whiteness".*[322]

It is my view that there is no negativity that comes with being white in South Africa. If anything in my view is to go by, the notion of attaching any negativity to any race will be perpetuating a divided South Africa and driving a curse of apartheid or reverse apartheid. In my view whites who are offended by the application of affirmative action

319 Vice (2015) EJC 157.
320 Vice (2015) EJC 155 - 156.
321 Vice (2015) EJC 156.
322 Vice (2015) EJC 158.

policies and who at times feel discriminated, I would suggest that they take the tables and try to view the situation from the positions of the blacks who the legacy of apartheid has even today left them in appalling poverty and lack of opportunities versus the position of the whites who are continuing to reap the fruits the apartheid legacy befell them. I suggest they do this in a spirit that is not competitive but rather in a constructive mentality seeking to see the eradication of squatter camps, the high levels of poverty, the reduction of poverty, the eradication of unemployment and scourge of racial hatred which at all times I believe they are the result of a lack of buy in from the white persons like Captain Barnard as in at all times if they allow the redistribution of wealth and resources, the society will crawl more to rebuilding and reconstructing and these will lead to a more prosperous and racially tolerant South Africa.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

8.1. Conclusion

The CC in *Solidarity* made the interpretation of the concept of affirmative action when the CC found that the NC of the SAPS acted in a way that did not infringe Captain Barnard's right to equality nor her right not to be subjected to unfair discrimination.

RSA is a signatory of the ILO Convention. RSA has a Constitution that reign supreme,[323] and in terms of the Constitution, all individuals and persons are protected against any forms of unfair discrimination.[324] The Constitution also promotes the achievement of substantive equality by requiring the enactment of legislation that will promote and protect those persons who are from previously disadvantaged grouping.[325] This protection is also echoed by the prescripts of the ILO Convention[326] and the EEA also through the encryption of affirmative action gives effect to the promotion and protection of those from previously disadvantaged groups.[327]

The SAPS' NC acted in conjunction with the prescription of the purpose of the EEA and therefore had acted lawfully. The reasons advanced by the NC of why he did not appoint Captain Barnard despite her being the best candidate and having been seconded by the DC and the interviewing panel are a fair justification of the NC's decisions are compatible with the purpose of the EEA and therefore acceptable and justified.

The CC as a court is not having legislative powers, the CC is guided by the principle of *trias politica* (separation of powers) and therefore should not assume the position of the legislative arm of government. In the matter of Captain Barnard, the CC did not cross the thin line between making legislation and setting aside unlawful and

---

323 S 2 of the Constitution.
324 S 9(1) of the Constitution.
325 S 9(2) of the Constitution.
326 Article 2 of the ILO Convention.
327 S 15(1) of the EEA.

unconstitutional legislation. There was no matter before the CC about the constitutionality of affirmative action, the CC therefore was tasked with only the assessing of whether the actions of the NC were compatible with the law at the time, not the promulgation of a new law. The CC was spot on in finding that there was no unlawful action on the side of the NC.

Of importance is also the realisation of the wording of the ILO Convention,[328] the Constitution[329]and the EEA.[330] The prohibition is not against all forms of discrimination as some discriminations are fair, the prohibition is against all forms of unfair discrimination. The implementation of affirmative action policies is not regarded as unfair discrimination, it is rather accepted as a fair discrimination and therefore is not prohibited.

The Constitution of RSA if founded on the provisions of Chapter 1 of the Constitution and in this research the provision that states that RSA is founded on the value of human dignity, the achievement of equality and the advancement of human rights and freedoms[331] played a pivotal role. The provision made me to critically look at the intention of section 9(2) in the way that assist the Republic to achieve the founding provision of achieving equality amongst the people of RSA. Also of a pivotal role in my research were the words embedded in the Preamble of the Constitution which words I believe are the fundamental building blocks to section 9(2) of the Constitution where it states: "*We, the people of South Africa; Recognise the injustices of the past."*[332]

It is worth noting that the other fundamental constitutional value is a Republic which see the persons for who they are naturally are without having to label them based on the melanin content on their skin or their racial or gender being.[333] This, the Constitution cannot achieve unless South Africans enjoins the fight against racial segregation. This segregation need not only be fought when it's against one race but must be fought at all front in order that we achieve a single Republic as envisaged by

328 Article 1(b) of the ILO Convention.
329 S 9(2) of the Constitution.
330 S 6(1) of the EEA.
331 S 1(a) of the Constitution.
332 Preamble of the Constitution.
333 S 1(b) of the Constitution.

the Constitution.[334] The RSA context of the Constitution is a prophecy of a single and common citizenship[335] which citizenship the Constitution prophecy that it have equal entitlement to the rights, privileges and benefits.[336]

8.2. Recommendations

Affirmative action is a policy that has been crafted in order to bring a balance and the achievement of equality in society. This balance has long been overdue. In achieving the purpose of affirmative action as a policy, the purpose of substantive equality, it is possible that it may surpass the boarder and extent into reversed inequality where the hunter ends up becoming the hunted.

The implementation of affirmative action as a policy has no time period, it seems that the policy will be implemented forever. This leaves the first question; would there ever be the attainment and achievement of substantive equality? In the event when the answer is Yes, then the question is; when do we anticipate that there shall be substantive equality in society and what would then become of affirmative action policies?

The Legislative arm of government and the other world organisation need to come up with time frames as regards to the implementation of affirmative action policies. If the implementation of affirmative action policies is allowed to proceed until infinity, there is a possible preference of those from designated groupings against those from previously advantaged groupings forever, this may lead to great disaster which was never anticipated or intended by the crafters of affirmative action policies.

The continuous implementation of affirmative action policies may lead to the reverse of discrimination policies like apartheid and create a new system of racial or even gender inequality where blacks oppress the whites and females oppress males, these are not ideal societies anticipated by the affirmative action policies.

334 S 1 of the Constitution.
335 S 3(1) of the Constitution.
336 S 3(2)(a) of the Constitution.

In RSA, the white population is already a minority which also is politically vulnerable as they have a low political representation in the government more specially the legislative arm of government, they therefore are reliant on the majority who are also members of the designated groups for political protection. This may make it difficult for the white minority to can trust that they will indeed be protected in the new South Africa, the capping of the duration of affirmative action policies' running time would give a stronger protection and hope that there shall one day be a RSA which is rid of racial discrimination and gender discrimination or any other form of discrimination and we shall have a society that is envisaged and promised by the Constitution.[337]

South Africa can achieve an equal society in the future. The world was hit by the scourge of Covid-19 and RSA was not spared. In response to this pandemic, the world introduced vaccines in order to fight and control the spread of this disastrous virus. The vaccines were if not managed properly, going to open up the discriminative gap between the haves and have-nots. This may also have escalated the racial inequalities taking into account the demographics of RSA as the majority of blacks are in poor rural areas and townships whilst the majority of whites are in the urban and developed areas. The cost of vaccines may have been unaffordable to some and affordable to some, this in my view would have also intensified inequality.

The government of RSA introduced the vaccines in a way that all people are able to access and ensured that the vaccine sites are accessible to anybody and anywhere, a person willing to vaccinate can just get into a vaccine site anywhere and vaccinate with no racial, gender, ethnic, religious, academic level even nationality nor any other discriminatory factor. This has shown to me that the majority of South Africans can and are ready for a free South Africa that can be accessible to all the people at all times equally and with no discriminatory labels, the South Africa proclaimed by the Constitution, the South Africa that belongs to all who live it, united in the people's diversities.[338]

337 S 1(a) of the Constitution.
338 Preamble of the Constitution.

Taking lessons from Botswana, the EI Act is crafted with the words “targeted citizen”. The targeted citizen is defined as any Motswana who has suffered discrimination of any sort previously. This category of persons is targeted and through affirmative action policies are propelled to a position of achieving substantive equality. In Botswana the “targeted citizen” is not defined by race like in South Africa, is not defined by gender or any other attributes, the only primary criterion used to declare a person as a “targeted citizen” is the previous predicament of discrimination they suffered and it having caused them to loose opportunities or the capacity to compete for opportunities.

If we take the South African context, there are white persons like Advocate Bram Fischer and others who did not benefit from the apartheid regime but rather suffered and lost opportunities. The descendants of Advocate Bram Fischer are white persons. They are therefore excluded from benefitting from affirmative action policies in South Africa by virtue of being white descendants. Can we call this application of the policy viable and fair? In my opinion, NO! These persons are suffering a double jeopardy. There are black persons who did not suffer under the apartheid regime like the Dr Lucas Mangope and family in the North West province. They continue to benefit because they are black persons now under the auspices of affirmative action, this is an uncertainty and misfortune I believe was not intended by the crafters of affirmative action policies.

The Botswana policy would be the best catalyst if it were to be utilised in conjunction with the South African jurisprudence’s wisdom as contained in cases like *Van Heerden.* The affirmative action policy must be crafted to benefit specifically those persons who were previously disadvantaged by the application of discriminatory laws or any form of discrimination clearly and with closed brackets in operation. The policy must do away with the use of general names like “black” or “female” for example, it must allow for the recognition of the fact that any category of persons from any particular group of persons may have in a certain way suffered some form of discrimination in their life and some persons who may be seen as having suffered discrimination may have in actual fact never suffered discrimination. Therefore, the usage of a non-general reference would be a great benefactor for the actual victims and the best mechanism to ensure there are no double benefactors. The affirmative

action policies must not be open ended nor be applied broadly like the current BBBEE and affirmative action in the EEA, this open ended-ness makes the policies to perpetuate a reverse discrimination against those taken to be past beneficiaries.

BIBLIOGRAPHY

Books

Currie I and De Waal J, The Bill of Rights Handbook sixth edition 2013, Juta Cape Town.

Du Toit D, Cooper SGC, Giles G, Cohen T& Stenkamp BCA, Labour Relations Law: A Comprehensive Guide sixth edition 2015, LexisNexis Pietermaritzburg.

Grogan J, Workplace Law twelfth edition 2017, Juta Cape Town.

Malan K, There is no Supreme Constitution - A Critique of Statist-individualist Constitutionalism first edition 2017, Sun Press, Pretoria.

Rautenbach I & Venter R, Constitutional Law seventh edition 2017, LexisNexis, Johannesburg.

Rossouw D, Business Ethics: A Southern African Perspective first edition 1994, Southern Books Halfway House.

Stonel, Mooki M, Mailula D, Constitutional Law: Study Guide 2016, Unisa Pretoria.

Terreblanche S, A History of Inequality in South Africa 1652 – 2002 first edition 2002, University of Natal Press Durban.

Van Jaarsveld SR, Principles and Practice of Labour Law Service Issue 22 2001, LexisNexis Durban.

Van Niekerk A, Smit N, Christianson MA, McGregor M, Van Eck BPS, Law @ work fifth edition 2019, LexisNexis Johannesburg.

Journals

Albertyn C and Kentridge J, 'Introducing the Right to Equality in the Interim Constitution', 1994 South African Journal on Human Rights 149 – 178.

Du Toit D, 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' 2015 Social Law Project; University of the Western Cape.

Gaibie S, 'Constitutional Court decision in Barnard: A sequel to the Van Heerden judgment' 2015 36 Industrial Law Journal 80 – 93.
http://jutastat.juta.co.za/nxt/gateway.dll/iljn/inlj/20169/20170/20318/20323?f=templates$fn=default.htm

Horwitz FM and Jain H (2011), An assessment of employment equity and Broad Based Black Economic Empowerment development in South Africa". Equality, Diversity and Inclusion, Vol. 30 No. 4 pp 297 - 317.
https://doi.org/10.1108/02610151111135750

Jeremiah K, 'Is Affirmative Action necessary for Botswana?', 2017 European Journal of Education Studies 239 – 262.

Le Roux R and Jordaan B, 'Contract of Employment. Thompson and Benjamin 1965: E1-1 – E1-49' 2009.

Louw AM, '"Affirmative" (measures in) action? Revising the lawfulness of racial quotas (in South African (professional) team sports)', 2019 De Jure Law Journal 380 – 414.
http://dx.doi.org/10.17159/2225-7160/2019/v52a20

Louw AM, '"The Employment Equity Act, 1998 (And Other myths about the pursuit of "Equality", "Equity" and "Dignity" in post-apartheid South Africa) (Part 1)', 2015 Law Journal 593 – 667.
http://dx.dox.org/10.4314/pelj.v18i3.065

Louw AM, '"The Employment Equity Act, 1998 (And Other myths about the pursuit of "Equality", "Equity" and "Dignity" in post-apartheid South Africa) (Part 2)', 2015 Law Journal 668 – 733.
http://dx.dox.org/10.4314/pelj.v18i3.06

Malan K, '"Constitutional Perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in Solidarity (acting on behalf of Bernard) v South African Police Services", 2014 De Jure 118 – 140.

O' Regan K, The right to Equality in the South African Constitution' 2013 Columbia Journal of Gender and Law 110 – 115.

Thompson C, 'Legislating Affirmative Action: Employment Equity and Lessons from Developed and Developing Countries in Adams C. Affirmative Action in Democratic South Africa. Kenwyn', 1993 Jutas 21 – 46.

Vice S, 'Dignity and Equality in *Barnard*' 2015 Constitutional Court Review, Juta and Company (Pty) Ltd 135 - 162

INTERNATIONAL LAW

International Convention on the Elimination of All Forms of Racial Discrimination.

International Labour Organisation Convention 111.

TABLE OF LEGISLATION

South Africa

Broad Based Black Economic Empowerment Act, No: 53 of 2003.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act, No: 55 of 1998.

Promotion of Equality and Prevention of Unfair Discrimination Act, No: 4 of 2000.

Botswana

Constitution of the Republic of Botswana, Chapter 01.

Economic Inclusion Act, 2021.
Employment Act, Chapter 47:01.

Interpretation Act Chapter, 01:04.

TABLE OF CASES

Attorney General of Botswana v Dow [1992] BLR 119 (CA).

Attorney General of Botswana v Rannoge and Others [2017] 1 BLR 494 (CA).

Coetzer & another v Minister of Safety & Security & another [2003] 24 ILJ 163 (LC).

Du Preez v Minister of Justice and Constitution*al Development and Others* [2006] 8 BLLR 767 (SE).

Gordon v Department of Health: KwaZulu-Natal [2008] 11 BLLR 1023 (SCA).

Fedlife Assurance Ltd v Wolfaardt 2001 22 ILJ 2407 SCA.

Glenister v President of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011).

Harsken v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; (1) SA 300 (7 October 1997).

Kamanakao and Others v Attorney General and Another [2001] 2 BLR 654.

Kroukamp and Another v Minister of Justice and Constitutional *Development and Others* [2013] Case No: 74236 Equality Court, Gauteng Division, Pretoria.

Mathe and Others v Attorney General (HC Case No. ooo321-20) [2022] MAHBH.

Prince v President, Cape Law Society 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 CC).
Solidarity obo Barnard v South African Police Services (JS455/07) [2010] ZALC 10.

South African Police Services v Solidarity obo Barnard (JA24/2010) [2012] ZALAC.

Solidarity obo Barnard v South African Police Services (165/2013) [2013] ZASCA 177 (28 November 2013).

South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014) 22.

Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC).