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**AN EXAMINATION OF THE LEGITIMACY OF DEMOGRAPHIC REPRESENTIVITY
AS A CRITERION FOR SUBSTANTIVE EQUALITY IN EMPLOYMENT.**

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SUMMARY OF MINI-DISSERTATION

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Under the Constitution of the Republic of South Africa the right to equality includes the full enjoyment of all rights and freedoms for all, thus providing not only for formal but also for substantive equality. The preference for substantive equality should be viewed against the backdrop of the fact that South African society is one of the most unequal societies in the world, a situation that is in part a consequence of the racially discriminatory policies of the erstwhile white minority government. The constitutional commitment seeks to address this state of affairs through suitable remedial and restitutory measures. The eventual goal is the achievement of substantive equality.

Arguably the most important legislative measures of this kind is the Employment Equity Act, 55 of 1998. The Act is intended to further the right to substantive equality in the South African workforce. This Act provides for affirmative action measures aimed at the achievement of substantive equality in the field of employment. The central criterion on the basis of which the Act is designed in order to measure the achievement of (substantive) equality is that of representation (representivity). By virtue of the criterion the work force in both the public and private sectors is required to reflect the national population profile in terms of race, gender and disability.

The present mini-dissertation is an inquiry into the suitability or otherwise of the principle of demographic representation as a legitimate criterion for substantive equality. The investigation begins with an enunciation of the concept of substantive equality. This is followed by an analysis of the origin, content and consequences of the criterion of representivity. This analysis is conducted, with reference to selected jurisprudence. The focus of this part of the investigation is enunciate the way in which the courts have defined the relationship between substantive equality and representivity and how it also equated these two concepts.

This is followed in the last chapter by a critical analysis that shows that this equation is in fact ill-conceived since representivity more often than not is incongruent with the notion of substantive equality.

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CHAPTER ONE

Introduction

South Africa is a sovereign and democratic state, founded amongst others, on the following values: human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism, non-sexism, the supremacy of the constitution and the rule of law in order to ensure accountability, responsiveness and openness.¹ In addition to these values, South Africa is also a constitutional state, meaning that the Constitution of the Republic of South Africa is the supreme law of the Republic and that any law or action inconsistent therewith is invalid.²

This constitutional state, based on the rule of law, was preceded by a state under white minority rule that was not based on the value of constitutional supremacy, but parliamentary supremacy. Another principle of the previous system was the exclusion of the majority of South Africans from representation in organs of state (notably parliament).³

Under white minority rule a racially segregated society was pursued through legislation differentiating between the various races. Pass laws were implemented to control the free movement of African people. Racial classification and the prohibition of marriage between whites and non-whites were also instituted.⁴ Different races were segregated and allocated zoned living areas.⁵ In the workplace discrimination was also practised by the implementation of discriminatory laws such as the Industrial Conciliation Act,⁶ the Mines and Works Act⁷ as well as the Wage Act.⁸ The Unemployment Insurance Act⁹ and the Public Service Act¹⁰ also entailed similar

¹ Constitution of The Republic of South Africa of 1996, section 1.

² Constitution of The Republic of South Africa of 1996, section 2.

³ Rautenbach IM, “*The Bill of Rights Compendium: Introduction to the Bill of Rights*” LexisNexis, 2011, 1A1.

⁴ McGregor M, “Affirmative Action and Non-Discrimination: South African Law evaluated against International Law” 39 *CILSA* 2006, 392.

⁵ McGregor M “Affirmative Action and Non-Discrimination: South African Law evaluated against International Law” 39 *CILSA* 2006, 393.

⁶ 28 of 1956. This Act excluded blacks from collective bargaining.

⁷ 2 of 1911. This Act provided for job reservation for whites.

⁸ 27 of 1925. This Act prescribed for differentiations and wage determinations based on both race and sex.

⁹ 53 of 1946. This Act provided for unequal unemployment benefits for men and woman.

discriminatory measures. It stands to reason that these laws and practices played a major role in the entrenchment of inequalities which existed at the time.¹¹

The aim of the Constitution is to achieve an egalitarian society. However, South Africa is still one of the most unequal societies in the world, if measured in accordance with the method known as the Gini coefficient.¹² South Africa has a Gini score of about 0.6 and, with Brazil, has the most unequal income distribution in the world.¹³

Under the current Constitution of the Republic of South Africa, the right to equality includes the full enjoyment of all rights and freedoms. In order to promote the achievement of equality (a founding principle of the Constitution) legislative and other measures may be taken to this effect.¹⁴ These measures are known as restitutionary or remedial measures.¹⁵

One of the most important pieces of legislation enacting such remedial measure is the Employment Equity Act.¹⁶ It was enacted in accordance with section 9(2) of the Constitution and is intended to further the right to equality in South African society.¹⁷ This Act provides for affirmative action measures aimed at the establishment of substantive equality in, amongst other things, the workforce.¹⁸ It also refers to the concept of numerical representation and demographic representation when detailing these affirmative action measures.¹⁹ This Act also provides for the creation of 'employment equity plans' that aim to establish a workforce that is demographically representative of the population of South Africa.²⁰

This need for organised spheres of society to reflect the national gender and racial profile of the country is not required by section 9 of the Constitution. Due to the fact

¹⁰ 54 of 1957, this act allowed for discrimination on the basis of sex.

¹¹ Marie McGregor states in her article (footnote 4 above) on page 392 that these discriminatory laws *created* an unequal society. The validity of this view is questionable as it presupposes a prior egalitarian society, of which, it is respectfully submitted, there is no evidence. Be that as it may it is a reasonable assumption that these laws did preserve or entrench existing inequalities.

¹² The Gini Coefficient measures the distribution of national income, it measures on a scale between 0 and 1, the more equal a society, the closer the value will be to 0.

¹³ Landman JP, "Poverty and Inequality in South Africa, 2004–2014" December 2003, Report, p3.

¹⁴ Constitution of the Republic of South Africa, section 9(2).

¹⁵ *Minister of Finance and Another v Van Heerden 2004 (11) BCLR 1125 (CC)* para 32.

¹⁶ Act 55 of 1998.

¹⁷ The Employment Equity Act 55 of 1998, preamble.

¹⁸ The Employment Equity Act 55 of 1998, preamble.

¹⁹ The Employment Equity Act 55 of 1998, preamble.

²⁰ The Employment Equity Act 55 of 1998, section 20.

that the principle of representivity does not emanate from the equality clause of the Constitution, and the fact that the courts tend to adjudicate affirmative action disputes as disputes that concern the right to equality, the question arises as to whether, and if so, how the pursuit and establishment of a workforce that is in every sphere of society broadly representative of the demographics of the country could serve to advance the right to equality. The legal position regarding affirmative action and employment equity plans is still unclear and courts have adopted different approaches relevant to the relationship between equality, affirmative action and employment equity plans.²¹

The achievement of equality is a founding principle of the Constitution and section 9(2) of the Constitution is intended to facilitate the process to reach this achievement. The Employment Equity Act is enacted in pursuance of the right to equality, but also to promote the goal of demographic representivity of the workforce. This begs the question whether both these aims are remedial measures as envisioned in section 9(2) of the Constitution and if so, how exactly does demographic representivity serve to establish equality as envisioned in section 9 of the Constitution.

In the second chapter, the meaning of equality in the South African legal context will be explored. This will include a discussion of the historical and contextual background against which section 9 of the Constitution was formulated and how that formulation should find application in contemporary South African society.

In the third chapter, the Employment Equity Act 55 of 1998 will be discussed with a specific focus on its nature as a remedial or affirmative action measure and its incorporation of the principle of representivity.

In the fourth chapter, the origins and the meaning of the principle of representivity in sources outside of the Employment Equity Act and certain practical examples of their application in public and private spheres of South African society will be discussed.

After a discussion of these sources and examples, three recent judgements will be assessed in order to establish the courts' reasoning behind their interpretation of the

²¹ McGregor M, "Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures" *TSAR* 2013 4 650.

remedial measures necessary to effect affirmative action measures and measures taken in pursuance of the principle of representivity, specifically in the context of equality jurisprudence.

In the sixth and final chapter, it will be discussed whether compliance with the principle of representivity constitutes a remedial measure as envisioned in section 9(2) of the Constitution of the Republic of South Africa.

CHAPTER TWO

The Constitutional right to equality

Section 9 in the Bill of Rights of the Constitution²² provides as follows for the right to equality:

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

(2) 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.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

In order to interpret and understand the right to equality the provisions of section 9 must be viewed and interpreted within the context of South African history.²³

The present dispensation was preceded by an era of white minority rule. In that system black people were systematically discriminated against, socially as well as economically. This clearly illustrates the following extract from a judgment of O'Regan J in *Brink v Kitshoff NO*:²⁴

“black people were prevented from becoming owners of property or even residing in areas classified as ‘white’, which constituted nearly 90% of the land mass of South Africa; senior jobs and access to establish schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops will also closed to black

²² 1996.

²³ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 211.

²⁴ 1996 (4) SA 197 (CC) para 40.

people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.”

It is against this contextual background that the Constitution and the equality clause were enacted.

South African history post white minority rule also forms part of the context against which the Constitution and its provisions should be interpreted. This is the period since the first inclusive democratic election in 1994.

Currie and De Waal remark that, when assessing the constitutional right to equality, it is necessary to recognise shifting patterns of inequality. Since the fall of white minority rule, intra-racial inequality has been on the rise, while interracial inequality has been on the decline. This can be attributed to the development of the so-called ‘black elite’, a wealthy black upper-class. The development of this ‘black elite’ has also coincided with the development of a significant new black underclass, an even poorer class than the black underclass of the apartheid system.²⁵

The segmentation of society in modern South Africa can be divided into three tiers. The upper tier comprising professional and business people, as well as people forming part of management. This tier is significantly deracialised. The middle tier consists of semi-professionals (white collar workers and the working class) and is also increasingly diverse. The bottom tier comprises of people employed as labourers, farmworkers and similar occupational categories or people who are unemployed. This lower class is overwhelmingly black and increasing in numbers.²⁶

Currie and De Waal remark that the nature of inequality has the following consequences:

“that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality. It is not sufficient simply to remove racist and sexist laws from the books and to ensure that similar laws cannot be enacted in future. That will result in a society that is formally equal but that is unequal in every other way. Indeed, in many respects, modern South Africa can be described as formally equal but substantively unequal.”²⁷

²⁵ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 212.

²⁶ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 212.

²⁷ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 213.

It is therefore necessary to distinguish between formal and substantive equality. Formal equality pertains to similarity of treatment. People in similar positions are entitled to similar treatment from the law. Substantive equality relates to the similarity of outcome, the treatment as such need not be similar as long as the outcome is achieved.²⁸

Formal equality envisages the elimination of inequality by affording all those entitled to the rights concerned the same power in terms of those rights and in the same degree or with the same “neutral norm or standard of measurement”.²⁹ Social and economic disparities between groups and individuals are therefore not taken into account. Substantive equality requires that the social and economic conditions of groups and individuals must first be assessed before it can be determined whether the equality envisaged by the Constitution is being upheld. It is therefore a result orientated approach rather than a form orientated approach.³⁰

The Constitution seeks to establish more than just formal equality. It rather seeks to transform the current grossly unequal society into one in which there is equality between men, woman and people of all races. The Constitution of South Africa differs from other constitutions which are based on the assumption that, from the outset, all citizens are equal. In South Africa, such assumption would have resulted in the Constitutional entrenchment of all inequalities existing at the time of the enactment of the Constitution. The Constitution must therefore obviously be interpreted with a view to eradicating with genuine commitment racial discrimination that was brought about by the previous legal order (under white minority rule).³¹

Section 9 is therefore grounded on a substantive conception of equality.³² This is also implied in section 9(1) of the equality clause, which states that all individuals are entitled to *equal enjoyment and benefit* of the law.

Cathi Albertyn states as follows:³³

“..at the heart of substantive equality is the idea that individuals should be put in a position to participate fully in society, to develop to their full human potential. This entails the removal of

²⁸ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 213.

²⁹ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 213.

³⁰ *Brink v Kitshoff NO 1996 (4) SA 197 (CC)* para 40.

³¹ *Bato Star Fishing v Minister Of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)* Para 74.

³² *Bato Star Fishing v Minister Of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)* Para 74.

³³ Albertyn C, *South African Constitutional Law: The Bill Of Rights*; Lexis Nexis 2004; 4-5.

arbitrary and systematic barriers to such participation as well as the creation of conditions in which this human potential is realised. Such an understanding of substantive equality has clear remedial and redistributive aspects, and has been said to have the particular aim of addressing disadvantage and vulnerability.”³⁴

In the *Bato Star* fishing case Ngcobo J states as follows:

“The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9 (2) of the constitution. That provision makes it clear that under our constitution ‘equality includes the full and equal enjoyment of all rights and freedoms’. And more importantly for present purposes, it permits ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.’ These measures may be taken ‘to promote the achievement of equality’.”³⁵

It is therefore clear that the Constitution envisages the achievement of substantive equality and mandates the taking of positive steps to achieve this goal. These positive steps as referred to in section 9(2) were taken, amongst other steps, through the promulgation of the Employment Equity Act.³⁶ This Act sets out the framework and guidelines for the implementation of affirmative action to redress past and current disadvantage in order to achieve substantive equality.

The Employment Equity Act and the relevant measures it provides for to establish substantive equality will be discussed below.

³⁴ Albertyn C, *South African Constitutional Law: The Bill Of Rights*; Lexis Nexis 2004; 4-5.

³⁵ *Bato Star Fishing v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC)* at para 75.

³⁶ Act 55 of 1998, the preamble states that the act was adopted to promote the constitutional right to equality.

CHAPTER 3

The Employment Equity Act

Subsection (2) of section 9 of the Constitution clearly states that legislative and/or other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken. In accordance with this provision the Employment Equity Act³⁷ (“the Act”) was enacted. The preamble of this act states the following:

“To provide for employment equity and to provide for matters incidental thereto.

- Recognising -

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and

that those disparities creates such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws,

therefore, in order to-

promote the constitutional right of equality and the exercise of true democracy;

eliminate unfair discrimination in employment;

ensure the implementation of the employment equity to redress the effects of discrimination;

achieve a diverse workforce broadly representative of our people;

promote economic development and efficiency in the workforce; and

give effect to the obligations of the Republic as a member of the International Labour Organisation,”

The preamble states clearly that the Act was passed in order to promote the constitutional right to equality and to mandate restitution. The Act also contemplates the establishment of a workforce broadly representative of the people of the Republic.

The preamble is not the only provision dealing with the notion of a demographically representative workforce.

³⁷ Act 55 of 1998.

Section 2 of the Act states that the purpose of the Act is to eliminate unfair discrimination, and it provides for the implementation of affirmative action measures to redress the disadvantages in employment experienced by certain groups. This section calls for equitable representation of all groups, according to the national racial and gender population profile, in all occupational levels in the workforce.

What is the meaning is of equitable representation? Malan observes that equitable representation means that each sector within the national population profile must be reflected in the staff composition of each specified employer to which the Act applies.³⁸

Specified employers are employers in the public and private sphere that have 50 or more employees or who have annual revenues exceeding certain threshold levels. These employers are required to implement affirmative action programmes with regard to employees from designated groups. Designated groups include black people, woman and people with disabilities. “Black people” is a generic term that includes Africans, Coloureds and Indians.³⁹

Section 6 states that affirmative action measures are not to be regarded as unfair discrimination if implemented in a way that is consistent with the Act.

Chapter 3 of the Act addresses affirmative action. Section 15 states that affirmative action measures are:

“(1) measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.

“(2) affirmative action measures implemented by a designated employer must include-

- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

³⁸ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 430.

³⁹The Employment Equity Act 55 of 1998, section 1.

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure that the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce, and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but excludes quotas.

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

Section 19 of the act requires a designated employer to analyse its workforce within each occupational category and level in order to determine to what degree designated groups and people from designated groups are underrepresented in its workforce.

Section 20 defines and explains what an employment equity plan must consist of. Subsection (2)(c) requires a designated employer, if underrepresentation of designated groups have been established by analysis, to compile an employment equity plan and set numerical goals to achieve equitable representation of suitably qualified people from designated groups in its workforce. It is also necessary to set up a timetable within which this is to be achieved and the designated employer must formulate strategies to achieve these goals.

Section 42 of the Act provides for assessment of compliance with the Act. Subsection (1)(a) states that the body conducting this assessment must take into account the extent to which suitably qualified people from amongst the different designated groups are equitably represented, within each occupational level in the employers workforce, in relation to the demographic profile of the national and regionally economical active population.

The notion of a demographically representative workforce is repeatedly mentioned in the Act and it could therefore be regarded as one of the central notions or goals of the Act. According to Brassey⁴⁰ racial representivity is the organising principle of the Act. The Constitutional Court finds constitutional support for affirmative action in the need for remedial or a restitutionary equality.⁴¹ Louw finds the Act's elevation of demographic representation to a central aim quaint and unconvincing for the following reasons:

1. Equitable representation of demographic groups is mentioned nowhere in the constitutional equality guarantee;
2. Considering that section 3(a) of the Act requires the Act to be interpreted in compliance with the Constitution, it is unclear how the principle of demographic representation was incorporated into the Act to begin with and;
3. It is unclear how establishing demographic representation could lead to the establishment of substantive equality in any workplace, or vice versa.⁴²

When considering the above three points, and the lack of an earnest engagement to establish this apparent or possible relation between demographic representation and equality, a *lacuna* in our jurisprudence is revealed. In an attempt to identify a coherent and clear legal position on the relation between the notion of demographic representation and equality, some of the most recent cases regarding affirmative action measures, employment equity plans and their implementation should be considered. A correct application of the Act requires the establishment of its organising principles and the legal concepts they are based on.

An inability to achieve this purpose would lead to a great degree of uncertainty regarding the nature of equality and the manner in which any dispute involving measures designed to achieve equitable representation should be adjudicated.

The notion of a demographically representative workforce, for purposes of this dissertation, will henceforth be referred to as representivity.⁴³

⁴⁰ Brassey M, "The Employment Equity Act: Bad for employment and bad for equity" 1998 *ILJ* 1363.

⁴¹ *Minister of Finance and Another v Van Heerden* 2004 (11) BCLR 1125 (CC) para 28.

⁴² 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) *PELJ* 2015(18)3 611.

CHAPTER 4

Representivity

Malan defines representivity as the norm in terms of which:

“..institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population.”⁴⁴

As explained in the previous chapter the notion of representivity is referred to and pursued in the Employment Equity Act. It is also used outside of legislation, although most other references to representivity is in the political sphere, especially policy documentation of the ruling African National Congress.⁴⁵

The notion of representivity is included in the Constitution, albeit not in section 9 of the Constitution. Since representivity is one of the aims of the Employment Equity Act, it is surprising that it only appears in other, non equality related, clauses of the Constitution. Section 174(2) of the Constitution directs that the judiciary must broadly reflect the racial and gender composition of South Africa. Section 193(2) provides that chapter 9 institutions must be composed in the same way. Section 195(1)(i) provides that the public administration must be broadly representative of the South African people.

Malan compares proportional representation in the legislator to representivity, as both are based on the same principle. The main difference is that proportional representation reflects the electoral strength of the political parties in the legislature whereas national representivity requires that the demographic profile of the population must be mirrored in the composition of the workforce of state and public institutions and other spheres of civil society.⁴⁶

⁴³ Taken from an Article of Malan K ‘Observations on representivity, democracy and homogenisation’ *TSAR* 2010 (3) 430 will again be referred to below, see also the article referred to in footnote 42 above, where the term is used by Louw AM.

⁴⁴ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 427.

⁴⁵ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 427.

⁴⁶ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 427.

It was explained above how the notion of representivity is one of the central principles of the Employment Equity Act.⁴⁷ In other legislation corporate, legislative or private bodies or associations are required to represent a broad cross-section of the population of the Republic.⁴⁸ There is also legislation explicitly requiring that the body in question must be composed in accordance with the principle of representivity.⁴⁹

As to the meaning of representivity, Malan comments that when considering the provisions of the Employment Equity Act, equitable representation in terms of the Act in fact means numerical representation. This can be inferred from an analysis of the provisions of the Act. For all intents and purposes the Act requires that all categories and levels in the workforce must consist of approximately 79, 6% Africans, 8.9% coloureds, 2.5% Indians and 9.1% whites. The achievement and maintenance of quotas in the workforce is therefore pursued.⁵⁰

In the public discourse representivity is also vigorously pursued. This is illustrated by the regular insistence of government spokespersons, members of the executive and other prominent figures for institutions to be reflective of the national population profile.⁵¹

The following statement from former Constitutional Court judge Kriegler, illustrates this point:

“But, from where I look at the judiciary today, and the way I have been watching the judicial service commission, this ethnic/gender balance in section 174 of the constitution has become

⁴⁷ Act 55 of 1998.

⁴⁸ See eg s 28(1)(a) of the Competition Act 89 of 1998; s 13(4)(c) of the Broadcasting Act 4 of 1999; s 5(3)(b) of the Independent Communications Authority of South Africa Act 13 of 2000; s 128(2) of the Firearms Control Act 60 of 2000; s 14(4)(b) of the Private Security Industry Regulation Act 56 of 2001; s 4(4)(b)(i) of the Media Development and Diversity Agency Act 14 of 2002; s 8(6)(a) of the Land and Agricultural Development Bank Act 15 of 2002; s 8(1)(c) of the International Trade and Administration Act 71 of 2002; s 6(2)(b) of the National Energy Regulator Act 40 of 2004; s 28(1)(a) of the National Credit Act 34 of 2005.

⁴⁹ See eg s 5(3) of the Cultural Institutions Act 119 of 1998; s 3(2)(b) of the South African Geographical Names Council Act 118 of 1998; s 14(2) of the National Heritage Resources Act 25 of 1999; s 3 of the Architectural Profession Act 44 of 2000; s 3 of the Landscape Architectural Profession Act 45 of 2000; s 3 of the Engineering Profession Act 46 of 2000; s 3 of the Property Valuers Profession Act 47 of 2000; s 3 of the Project and Construction Management Professions Act 48 of 2000; s 3 of the Quantity Surveying Profession Act 49 of 2000; s 24(5) of the Planning Professions Act 36 of 2002.

⁵⁰ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 431.

⁵¹ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 2010 (3) 432.

the be all and the end all when the JSC makes its selections. And if it is not the be all and end all, at the very least it has been elevated to the overriding fundamental requirement⁵²

Solidarity trade union and former President De Klerk have expressed their dissatisfaction at representivity becoming the overriding principle in the application of affirmative action. President De Klerk particularly remarked that representivity did not serve the purpose for which the affirmative action clause was included in the Constitution.⁵³

The administration of professional and amateur sport also pursues the ideal of representivity. The most recent example of the effect of representivity on the management of sport is the strategic transformation plan of the South African Rugby Football Union.⁵⁴

This document is a written commitment to change the demographic profile of the rugby playing population of South Africa at amateur and professional levels, and its background section contains the following statement:

“The Department of Sport and Recreation has in place a target of at least 50% generic black representation for a team or dimension to be regarded as having been transformed. Within that 50% representation the expectation is that half of those will be black African. It has been anecdotally suggested by the Eminent Persons’ Group that that requirement for black African representation should be raised to 60%. Generic Black is defined by the Department of Sports and Recreation as “black African, coloured and Indian”. Black African is not specifically defined by the department but is generally accepted as meaning a South African of an indigenous African tribe. In the transformation monitoring section of the Plan, reference is made to area of jurisdiction. This refers to the area under the stewardship of a provincial rugby union or SARU depending on the dimension being measured.”⁵⁵

The strategic objective of the document reads as follows:

“To change SARU’s demographic profile at provincial and national level on and off the field of play.”⁵⁶

It is particularly striking that the motivation for this plan compiled by the South African Rugby Union nowhere mentions neither the pursuit of equality nor restitution of any kind. It is borne out by and is solely aimed at the pursuit of racial representation according to pre-determined targets laid down by the Department of Sport and

⁵² Kriegler J “Can judicial independence survive transformation?” A public lecture delivered at the Wits Law School on 18 Aug 2009. Quote extracted from article referred to above.

⁵³ Malan K, “Observations on representivity, democracy and homogenisation” *TSAR* 210 (3) 433.

⁵⁴ proteamedia.com/pdf-saru-strategic-transformation-plan, researched April 2016.

⁵⁵ proteamedia.com/pdf-saru-strategic-transformation-plan, researched April 2016.

⁵⁶ proteamedia.com/pdf-saru-strategic-transformation-plan, researched April 2016.

Recreation. The main goal with this plan is therefore to achieve the representation targets and any restitution that might occur in the process of achievement of these targets would, considering the aim and strategic objective of the plan, appear to be purely incidental.

When considering the scope and application of the notion of representivity it must be asked whether representivity finds application in equality jurisprudence, or whether it has a broader ideological base and purpose? Is it an ideological end in itself, or is it a tool through which to achieve some form of substantive equality? If it is the former (an ideology), what does that ideology entail?

The concept of equality in South African law, as well as the definition of representivity considering all relevant sources of this notion was discussed in the preceding chapters of this dissertation. The two concepts have been shown to be distinct, and it is evident that they can not be used interchangeably. The courts have nevertheless, on several occasions adjudged representivity and the right to equality as synonyms. It is not even clear whether the courts are of the opinion that representivity does establish or is capable of establishing equality. In the absence of any motivation for the views held by the courts in this regard, great uncertainty prevails as to the alleged association of equality with representivity.

This uncertainty stems from the way in which the notion of representivity was included in the Employment Equity Act and the lack of any proper explanation for the basis or relevance of that inclusion. Does the Employment Equity Act aim to achieve equality in society or does it aim to establish representivity? In this regard, after considering the preamble of the Act, especially section 2 thereof, Louw remarks as follows:

“But here, in section 2 of the Act, the drafters of the EEA tell us that redress of past disadvantage is apparently just a means to *another* end! The purpose of the Act is to implement affirmative action to redress disadvantage, *in order to ensure the equitable representation of members of designated groups in the workplace.*”⁵⁷

As has been explained in the previous chapter, the Employment Equity Act was enacted to ensure the achievement of substantive equality in society. One of the guiding principles of the Act is also the establishment of representivity. If the

⁵⁷ 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) *PER / PELJ* 2015(18)3 609.

purpose of the Act is to promote the establishment of substantive equality for all individuals in society then the establishment of representivity should serve to ensure substantive equality in the workforce (and other spheres of society) for the Act to fulfil its Constitutional mandate. If the principle of representivity cannot find its basis in the right to equality, it could fall outside the scope of an affirmative action or restitutionary measure as envisioned by section 9(2) of the Constitution.

Probably for this reason, there has been a tendency in jurisprudence to equate measures pursuing representivity with measures that concern the right to and establishment of equality. Courts also tend to use these terms and concepts as if they were interchangeable. No explanation of the relation between the establishment of representivity and the establishment of equality has been advanced, nor has it been confirmed that the one in fact follows or flows from the other.

It will be investigated in this dissertation whether these concepts can be identified with each other as explained above.

The investigation will entail an analysis of three recent decisions in the various courts of South Africa. The decisions concerned are those of *SAPS v Solidarity obo Barnard*,⁵⁸ *Naidoo v Minister of Safety and Security & Others*⁵⁹ and the less-known *Unisa v Reynhardt*.⁶⁰

These three cases are similar in the sense that they all entail the review of decisions of public institutions not to promote certain individuals in the pursuit of employment equity targets that were applied in accordance with affirmative action plans, formulated in accordance with section 20 of the Act. These employment equity plans all set targets for the respective employers that were based on race and gender.

The approaches of the Constitutional, Labour Appeal and the Labour Courts will be investigated and compared.

⁵⁸ 2014 11 BLLR 1025.

⁵⁹ 2013 (3) SA 486.

⁶⁰ 2010 JOL 25714 (LAC).

First the majority and minority judgments in *Barnard* will be investigated. It will specifically be investigated what role the concepts of representivity and equality played in these judgments.

CHAPTER 5

The Barnard Case

In this case the applicant, Mrs Barnard, twice applied for a promotion to the rank of superintendent in the South African Police Service (SAPS) between September 2005 and June 2006. On both occasions she was recommended as the ideal candidate by the interviewing committee, only to be denied promotion on the grounds that her promotion would not enhance representivity at the relevant salary grade level. The SAPS was structured in a manner that divides the employees of the service into sectional business units referred to as salary grade levels. There were sixteen such levels in total, organised in hierarchical fashion, with grade level 1 being the lowest and grade level 16 the highest.⁶¹ Barnard twice applied for a vacant position on salary grade level 9. On both occasions she was interviewed by a racially diverse interview panel and was recommended for the post as the top candidate, but because white females were overrepresented at that salary grade level, she was on both occasions not appointed to the position.⁶²

Barnard referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration. The dispute remained unresolved and she was forced to turn to litigation. The Labour Court was first approached for relief, and what followed was an extended legal battle which was fought in the Labour Court and Labour Appeal Courts, as well as the Supreme Court of Appeal and eventually the Constitutional Court.⁶³ The judgment of the latter court is the subject of the present discussion. This judgment consisted of one majority and three concurring minority judgments, but the outcome was unanimous, as the applicant's claim was dismissed in all the judgments. The majority judgment was handed down by Moseneke J.

In the majority judgment the Court first discusses the applicable law that should be considered in the dispute.⁶⁴ The right to equality and the need for remedial measures were highlighted as the central concepts in terms of which the review of the

⁶¹ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 44-45.

⁶² *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 6-16.

⁶³ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 18-27.

⁶⁴ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 28-30.

contested decisions should take place. Moseneke J stated the following regarding the goal of the Constitution and the right to equality:

“..so plainly, it has a transformative mission. It hopes to have as reimagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who are disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.”⁶⁵

The Court emphasised that the ultimate goal of the Constitution was to urge us towards a more equal and free society, a non-racial, non-sexist and socially inclusive society. The Court proceeded as follows:

“Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a nonracial, nonsexist and socially inclusive society.”⁶⁶

In paragraph 32 the Court confirmed that the right to equality as well as affirmative action was applicable to the matter before the Court. Although the Court discussed the Employment Equity Act and the sections thereof relevant to the dispute,⁶⁷ it declined to discuss the meaning of the concept of quotas as mentioned in section 15(3), simply proclaiming that in this instance it was not relevant.⁶⁸

The Court confirmed that a restitutionary affirmative action measure had to be rationally related to the terms and objects of the measure, and then declares that it had to be applied to achieve its legitimate purpose, if not its implementation would attract unlawfulness.⁶⁹

The Court considered the employment equity plan of the police, which was designed according to the national demographic racial and gender profile of the country, to be an affirmative action measure geared towards the achievement of substantive equality.⁷⁰ The right to equality and the need for affirmative action were discussed, and the employment equity plan was referred to, but the Court did not venture to explain the relation between the achievement of representivity and the establishment of substantive equality.

⁶⁵ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) para 29.

⁶⁶ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) para 32.

⁶⁷ S6; S13; S1; S15; S20; S42 and S43 of the Employment Equity Act 55 of 1998.

⁶⁸ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 40-43.

⁶⁹ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) para 39.

⁷⁰ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) para 40.

In paragraphs 65 and 66, the Court for the first time discusses the notion of representivity and equality in relation to each other. The Court states as follows:

“...Is the decision of the National Commissioner injudicious and invalid because he overemphasised representivity at the expense of competence? The question recast: was the National Commissioner entitled to refuse to fill a vacancy for the reason that it would have negatively affected the numerical targets of the employment equity plan? If so, did it undervalue the competence of Mrs Barnard? More aptly, was the decision of the National Commissioner reviewable because it was unreasonable and thus unlawful?

The employment equity plan obliged the National Commissioner to take steps to achieve the targets, provided he acted rationally and with due regard to the criteria set by the instruction. He was within his right and indeed duty to take steps that would achieve the set targets. It is so that the implementation of a valid plan may amount to job reservation if applied too rigidly. But was that the case here? For several reasons, I do not think that the National Commissioner pursued the target so rigidly as to amount to quotas. First, overrepresentation of white woman at salary level 9 was indeed pronounced. That plainly meant that the police service had not pursued racial targets at the expense of other relevant considerations. It had appointed white female employees despite Equity targets. Had the police service not done so, white female employees would not have been predominant in any of the levels including salary level 9 nor would they have been able to retain the posts.”

Louw points out that the Court in this paragraph explicitly approved of numerical targets. It is worth noting that the Court did not investigate whether the alleged or stated overrepresentation of white females at the relevant salary grade level was brought about by unfair discrimination in the past.⁷¹ According to the Court the overrepresentation of white women at that salary grade level was indicative of the establishment of substantive equality for white women. This can be inferred from the fact that the Court was of the opinion that white women were appointed “in spite of” employment equity targets. White women were therefore not entitled to affirmative action measures and the benefit thereof in the relevant salary grade level. The Court did not explain why the achievement of a numerical target for a designated group facilitated the achievement of substantive equality for that group.

Since the women referred to by the Court were appointed after the implementation of a employment equity plan, It is submitted that it does not follow automatically that overrepresentation of white women at salary level 9 occurred due to an initial unfair discrimination against other designated groups. If an employment equity plan is an affirmative action measure, its goal should be to eradicate the effects of past discrimination. Would it then not be prudent for a Court to identify the particular form

⁷¹ 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) *PER / PELJ* 2015(18)3 692.

of past discrimination that any proposed employment equity plan seeks to redress? A further question which arises is whether the Court implied that underrepresentation of a specific race or gender at a level in the workforce of a particular employer was an indication of the presence of inequality at that level? If so, one would have expected sound motivation to justify such implication.

In paragraph 69 the Court stated that the commissioner had chosen to create an opportunity to enhance an employment equity goal by not appointing Ms. Barnard. It therefore follows that the attainment of strict numerical targets is a yardstick for substantive equality.

The Court ultimately based its decision not on the interpretation of section 9 of the Constitution or the notion of representivity, but on a technical point regarding civil procedure. In her original statement of claim, Ms. Barnard launched a detailed attack on the employment equity plan of the SAPS, as well as an instruction by the National Commissioner of Police on the manner in which promotions should be dealt with. In oral argument in the Constitutional Court on Barnard's behalf, the decision of the National Commissioner was attacked and contended to be unlawful and unreasonable. The Court held that this was a new line of argument, and therefore impermissible.⁷²

In the first minority judgement, judges Cameron, Majiedt and Froneman state in paragraph 75:

“Second, we analyse the appropriate standard that should apply when a litigant challenges the implementation of a constitutionally compliant restitutionary measure in a particular case.”

This statement once again creates the impression that the judges were of the view that the pursuit of representivity, or numerical targets according to national demographics, was a restitutionary measure. It also seems that they regarded the employment equity plan of the SAPS to be constitutionally compliant. The implication of the above statement is therefore that numerical targets were considered to be a measure or tool through which substantive equality could be established.

⁷² *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) paras 46-59.

In paragraph 110 while contemplating whether service delivery considerations were relevant in the adjudication of Ms. Barnard's case, the Court distinguished as follows between representivity and equality:

“If a decision-maker does not justify how he or she balances the important considerations of representivity and service delivery, remedial measures will suffer in invidious gloss. A decision-maker could price representivity over service delivery without sufficient regard to the specific facts of the case. This would suggest that representivity is always more important than the quality of service provided by a public body. But this is a false choice. There is no evidence that we must sacrifice the quality of our public bodies to achieve the important goals of representivity and to redress past disadvantage. Persons disadvantaged by our history are just as capable and talented as Mrs Barnard. This observation is especially true given the act's definition of suitably qualified as someone with capacity to acquire, within a reasonable time, or the ability to do the job.”

The Court referred to the important goals of representivity *and* the redress of past disadvantage. In the opening statement of this judgment, the Court seems to suggest that measures in pursuit of representivity and remedial measures that would ensure the achievement of equality were one and the same thing. In the statement above however, the Court referred to the important goals of representivity and remedial measures (referred to as redress of past disadvantage) separately, as if these were different goals and that the achievement of one would not necessarily guarantee the achievement of the other.

The Court found that the National Commissioner of Police had implemented the plan in a fair manner, and not as an impermissible quota, because he was entitled to emphasize racial representivity over gender representivity, on the facts of this particular case.⁷³ The Court did not offer any clarification on whether representivity could establish equality. It is not clear whether the Court considered representivity to be a legitimate instrument to achieve substantive equality or whether representivity and equality were interchangeable concepts. The Court referred to these concepts as if their relation to each other was already a well documented and explained legal concept.

In the second minority judgment, Van der Westhuizen J offered the first meaningful engagement with the relation between equality and representivity. In paragraph 150 he stated as follows:

⁷³ *SAPS v Solidarity obo Barnard* 2014 11 BCLR 1195 paras 121-123.

“Before focusing specifically on the facts of this case, it must be pointed out that equality can certainly mean more than representivity. Affirmative measures seek to address the fact that some candidates were not afforded the same opportunities as their peers, because of past unfair discrimination on various grounds. By focusing on representivity only, a measure’s implementation may thwart other equality concerns. For example, if a population group makes up 2 or 3% of the national demographic, then, in an environment with few employees, the numerical target for the group would be very small or even non-existent. If a candidate from this group is not appointed because the small target has already been met, this may unjustly ignore the hardships and disadvantage faced by the candidate or category of persons, not to mention the candidate’s possible qualifications, experience and ability.

The judge stated that this case differed from the example given by him above as it did not concern the non-appointment of a candidate because a small target had already been met. The judge explained that the duty to eradicate inequality included the duty to prevent inequality from increasing. After considering the above, the judge stated:

“Although equality can manifest in various forms, in the context of this case it takes the form of representivity. By appointing Mrs Barnard, a designated group would have been significantly over-represented and appointment would have aggravated racial inequality. Accordingly, the decision not to appoint Mrs Barnard fulfilled the corollary duty.”⁷⁴

In view of this argument it is very difficult to decide whether the Court was of the opinion that equality and representivity was the same thing or whether representivity was but a tool to establish equality. It was not explained how the pursuit of representivity recognised past disadvantage, and how it could promote substantive equality.

Van der Westhuizen J also mentioned that the appointment of Ms. Barnard would have aggravated racial inequality. This statement was not explained. In both cases the Police Commissioner had to consider the appointment of one person out of five or six individuals. How could a single appointment or promotion entail consequences for an entire race and impact upon the relations between different races? If the goal is to eradicate inequality, would it not be more prudent to design a process whereby the background of the actual applicant is investigated and steps then taken to avoid any disadvantage that the particular applicant could face in the interviewing and employment process? Once again, the Court was of the view that if representivity was achieved, equality was also achieved, and that if representivity was not achieved, inequality would arise.

⁷⁴ *SAPS v Solidarity obo Barnard* 2014 11 BCLR 1195 para 150.

Jafta J delivered his own minority judgement and stated the following in paragraph 227:

“..by not appointing Mrs Barnard and reserving the post for black officers the National Commissioner sought to achieve representivity and equity in the police service. This accords with its employment equity plan and is consistent with the purpose of the act. Therefore, the National Commissioner’s decision cannot constitute unfair discrimination nor can it be taken to be unfair. Consequently, unfairness as a standard cannot be sourced from the act.”

The above statement amounts to an explicit approval of race-based job reservation, justified on the ground of representivity.⁷⁵

Having read the majority judgment and the three minority judgments in this case one finds it difficult to establish the legal position on representivity and equality, and the relation between the two concepts. In this regard Louw arrives at a conclusion, derived from all of these judgments, which can be summarised as follows:

1. Equality does not equal representivity, and these two concepts are distinct;
2. Even though that may be the case, representivity may be a form of equality;
and
3. While representivity is an important goal and consideration, it is something distinct from the redress of past disadvantage.⁷⁶

There is no meaningful consideration, in any of the judgments concerned of the question whether representivity promotes equality, and if so, how exactly representivity could establish such equality. It is simply assumed an employer that promotes representivity is an employer that advances the right to equality. The courts need to clarify the exact relationship between the attainment of substantive equality, on the one hand, and representivity, on the other, or these concepts should be clearly distinguished from each other. In the absence of such clarification, the adjudication of affirmative action disputes would become extremely difficult. In this regard Louw states as follows:

“At best - and acknowledging by implication that representativity involves the pursuit of a numbers game - the CC tells us that rigid enforcement of quotas is illegitimate. Both the Supreme Court of Appeal and the Labour Court agree (even if the wording of the EEA on this

⁷⁵ 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) *PER / PELJ* 2015(18)3 644.

⁷⁶ 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) *PER / PELJ* 2015(18)3 695.

issue is ambiguous at best). But beyond that we are still left in the dark as to the constitutional role and legitimacy of this numbers came.”⁷⁷

The legitimacy of the pursuit of numerical targets in order to establish substantive equality must be questioned, as affirmative action measures or remedial measures are intended to eradicate disadvantage. The courts have so far failed to give any indication as to how numerical representation relates to the eradication of disadvantage or the promotion of equality.

⁷⁷ 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) *PER / PELJ* 2015(18)3 696.

CHAPTER 6

The Naidoo case

The next case to be investigated is the judgment in *Naidoo v The Minister of Safety and Security*.⁷⁸ The facts in this case were quite similar to the facts in the *Barnard* case. It was decided in the Labour Court.

On 14 April 2009 the South African Police Service (SAPS) advertised vacancies for several positions at national and provincial levels of the SAPS. Five of these positions were for those of cluster commanders in the Gauteng region. The applicant, Mrs Naidoo, submitted an application for appointment to the position of cluster commander: Krugersdorp. She was subsequently shortlisted for this position.⁷⁹

In June 2009 a selection panel evaluated the applicant for the position during a two-day assessment workshop conducted in accordance with the pre-scripts of the national instruction 3/2000. The applicant was scored for written appreciation, a drafting test and role-play. She was given a score of 74. 2%. This placed her second among the candidates who had applied for the post. On 22 June 2009 the provincial selection panel recommended her appointment because it would address gender equity and because she was shortlisted as the second preferred candidate for the post.⁸⁰ It can be inferred that the assessment panel was therefore of the opinion that service delivery objectives would not be compromised.

On 24 July 2009 the national panel did not approve the appointment of the applicant. Another officer, ranked fourth in the assessment, was appointed instead. This officer, Mr. T Maswanganyi, was an African male and was forwarded as the second preferred candidate by the assessment committee should Ms. Naidoo not be able to take up the position. The National Commissioner of Police did not approve the

⁷⁸ 2013 (3) SA 486.

⁷⁹ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) Paras 1-3.

⁸⁰ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) Paras 4-5.

appointment of Ms. Naidoo, because it was said that her appointment would not enhance employment equity or service delivery objectives.⁸¹

The applicant subsequently launched internal grievance proceedings but eventually the matter remained unresolved. A dispute was referred to the bargaining council and then to the Commission for Conciliation, Mediation and Arbitration (CCMA) after which a certificate was issued that the matter could be referred to the Labour Court for adjudication.⁸²

The employment equity plan enforced by the SAPS in employment procedures required that no Indian woman be appointed to the salary grade level that the applicant, an Indian woman, had applied for. The employment equity plan specified exactly the number of individuals that should be appointed from different racial and gender groups in every division of the SAPS. This means the ideal number of Indian woman that could be appointed to the salary grade level to which the applicant was applying, was none at all.⁸³ This made the appointment of the applicant a statistical impossibility.

The equity plan also stipulated that the gender target for the police force was 70% male and 30% female, although the plan did not specify what this number was based on.⁸⁴ In pursuit of these numerical targets the respondents decided not to promote the applicant even though she was recommended for the position by the interview panel.

The main difference between the facts in this case and those in the Barnard case was that the applicant in this matter was an Indian woman and not a white woman.

The main consideration for denying the applicant promotion was the numerical targets set out in the employment equity plan. In Paragraphs 110 and 111 of the judgement, Shaik J illustrates this point as follows:

“...this reason, however, does not appear to be convincing consideration or even a consideration at all. Lieutenant-General Phahlane testified with regard to the appointment made, that it was ‘not about her’ and her abilities or experience. He went on to say that it was about the employment equity profile ‘dictating’ the decisions to be made at the time.

⁸¹ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) paras 5-6.

⁸² *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) paras 6-9.

⁸³ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 45.

⁸⁴ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 15.

This view was also expressed by Colonel Ramathoka in his testimony. As far as he was concerned, the appointment of the applicant was a statistical impossibility. The evidence shows that the employment equity was the convincing consideration for the non-appointment of the applicant.”

The Court then assessed the nature of affirmative action and relevant provisions of the Employment Equity Act. The Court confirmed that the test for the validity of an affirmative action measure was the test as formulated in the *Minister of Finance v Van Heerden*.⁸⁵ This test is applied by way of the following three questions which appear in paragraph 37 of the *Van Heerden* case:⁸⁶

1. Firstly, is the target of the affirmative action measure persons or categories of persons from a designated group?
2. Is the measure designed to protect or advance such persons or categories of persons within the designated group?
3. Does the measure promote the achievement of equality?

The Court then proceeded as follows:

“..the Employment Equity Act is legislation enacted to further the objectives of section 9 of the constitution and provide for the adoption of remedial measures as a means to address the adverse effect of apartheid and promote transformation. It is important to bear in mind that, while employment equity prohibit unfair discrimination, it promotes non-racialism and non-sexism. This is the essence of the transformation agenda envisaged in the Constitution. Employment equity, insofar as it is a remedial measure contemplated within the meaning of section 9 (2), carries the imprimatur of the constitution. It requires no further justification”⁸⁷

The Court confirmed that employment equity, as mandated by the Employment Equity Act, and by implication an employment equity plan based on numerical targets, was a valid restitutionary measure as contemplated in section 9(2) of the Constitution.⁸⁸ The Court therefore found that an employment equity plan and the pursuit of numerical targets were aimed at the establishment of substantive equality.

The Court investigated the employment equity plan and applied the test set out in the *Van Heerden* case. The first question raised by the Court was whether the affirmative action measures were targeting persons or categories of persons from a designated group. The Court states the following:

⁸⁵ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) paras 112-116.

⁸⁶ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

⁸⁷ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 117.

⁸⁸ *Naidoo v The Minister of Safety and Security* 2013 (3) SA 486 (LC) para 117.

“it is self-evident that the equity plan set out affirmative action measures in general that target persons and categories of persons previously disadvantaged and afford in the designated group.”⁸⁹

The first leg of the *Van Heerden* test requires the plan or measure to target persons from a group or category contemplated in section 9(2) of the Constitution for advancement. The beneficiaries of the plan must have been disadvantaged by unfair discrimination.⁹⁰

According to the Court, it is self-evident that the plan obviously targets people from a designated group. The Court therefore does not find it necessary to substantiate its assertion that the measure targets people from a designated group that was disadvantaged by unfair discrimination.⁹¹

It is submitted that this fact is not self-evident. Firstly, the plan in question does not specifically target designated groups. It targets the entire demographic profile of the country. The plan even reserves roughly 4.5% of positions for white males, the only group which is not included in the definition of designated groups in terms of the Employment Equity Act.

Secondly the plan allocates the number of employment opportunities for members of the respective race and gender groups in relation to their numbers in the national demographic profile, instead of the degree of disadvantage that they have suffered. As applied in this instance, the plan would not necessarily identify, target or advance the position of even a single person that is in a disadvantaged position due to past discrimination. This results from the fact that, as was explained in the first chapter, the upper tier or class of South African society has deracialised significantly in recent years. It is therefore not correct to assume that a potential candidate or applicant for employment has suffered discrimination in the past because of his or her race. This is particularly true when the position to be filled is for a skilled employee with extensive experience. A person with an education and significant working experience will almost always be a person who is enjoying a privileged position in society. In this case the employment equity plan used by the SAPS was applied through all levels of the service. In order to be employed by the SAPS a candidate

⁸⁹ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) paras 127.

⁹⁰ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 38.

⁹¹ *Naidoo v The Minister of Safety and Security* 2013 (3) SA 486 (LC) para 127.

must have a minimum amount of training and for all levels higher than the baseline first level a minimum amount of experience. With regard to the position advertised that was applied for by Ms. Naidoo significant experience and training was obviously required.⁹² It is almost inconceivable that a poor, indigent, unqualified person from the lower tier of society would ever be able to apply for such a position. How the plan and the application thereof can be justified in the present case is therefore not clear.

The Court proceeded to ask the second question, namely whether the measure which was applied was designed to protect or advance the interests of the relevant persons or categories of persons within the designated group. The contention of the applicant was that the employment equity plan, although it was intended to address the disadvantages pertaining to employment experienced by a designated group, in actual fact created an absolute barrier to the employment of people from the designated group, in this instance the female Indian group.⁹³ This must be ascribed to the fact that the ideal number of Indian woman to be appointed to that salary grade level in accordance with the plan was 0. In paragraph 158 to paragraph 160 of the judgement the court stated as follows:

“..the very purpose of employment equity is to redress the effects of past discrimination suffered by members of the designated group. Its purpose is not to create new de facto barriers to employment. The fact that the barrier is created and results in a person from designated group suffering discrimination, both on the grounds of race and gender, is perverse.

As mentioned before, the focus should be on the group to be favoured, unduly focusing on the group to be disadvantaged holds potential to undermine the effort for remedial action and the pursuit of substantive equality. Although that view was expressed by Moseneke J in a different context, it seems to me an approach that may also hold true in the conduct of comparative within and between members of the designated group.

It may well be that to achieve substantive equality and “equitable representation” a group within the designated group is advanced, while another is disadvantaged. The disadvantage to be endured by the latter group is incidental to the purpose of promoting substantive equality. The disadvantage suffered is in pursuit of a higher purpose and, to the extent that the higher purpose is realised, the disadvantaged group also benefits. Thus, advantage and disadvantage cannot be seen in a narrow context bound by the moment. A situation sensitive approach is required.”

⁹² Salary band 14 of the Police Service, the Position of Cluster commander: Gauteng. See page 22 above for a explanation on the salary grade levels in the Police Service and what they entail.

⁹³ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 128.

In paragraph 158 the Court stated that employment equity was meant to address the disadvantages suffered by certain employees. In paragraph 160, however, the Court distinguishes between substantive equality and equitable representation, suggesting that representivity and substantive equality were considered to be distinct concepts. However, this view was not motivated and the relationship between equitable representation and substantive equality was not dealt with.

The Court pointed out that the target workforce profile, which excluded the appointment of the applicant was the product of an affirmative action measure that created a perverse competition based on race and gender preferences within the designated group. The following hierarchy of entitlement to redress was thus created: African males, African females, coloured males, coloured females, Indian males and Indian females. This, according to the Court, created degrees of disadvantage and orders of preference for granting favours. This is not authorised by the Constitution, the Employment Equity Act, the employment equity plan, or any equity policy.⁹⁴

The Court questioned the validity of numerical targets as set out by the Employment Equity Plan, and especially the 30% employment ideal for females. The Court stated as follows:

“..but, this particular measure presents itself as a form of tokenism. It is minimalistic. We have embraced gender equality and this equality is the hallmark of the composition of Parliament, cabinet, state owned enterprises, and the senior management service (SMS) of the entire public service. In this regard, the SAPS is out of kilter if regard is to be had to the public service in general.”⁹⁵

It is respectfully submitted that the Court was correct in its observation that the measures concerned presented as a form of tokenism. The question also arises whether numerical targets in general do not present as a form of tokenism, and specifically measures as rigid as those required by the Employment Equity Act. An employee who wants to apply for promotion would have to check the demographic profile of the salary grade level of the position he or she aspires for, something which will play a vital role in his or her prospects of promotion. The applicant is therefore treated as a mere number.

⁹⁴ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 165.

⁹⁵ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 174.

With regard to the question whether these affirmative action measures promote the achievement of equality, the court expressed itself as follows in paragraph 177:

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

It is respectfully submitted that this paragraph correctly and succinctly summarises the effects of this particular employment equity plan; this is clearly not the only scenario where a similar effect could result from an employment equity plan which is based on national demographics.

The Court further stated as follows:

“As a majority of the population, and a majority within the designated group, in the comparative with any other group the focus should be on the employment of woman and rightly so. No one majority group within the designated group may be so preferred that it results in disadvantage being suffered by the other designated groups. While maintaining the proper focus on balance, care must be taken to avoid naked preference and the creation of employment barriers. A contextualised approach is required in the pursuit of substantive equality, as we strive to create a non-racial and non-sexist society.”⁹⁶

The Court thus once again concluded that the establishment of representivity could also amount to the establishment of substantive equality. This conclusion can be inferred from the Court’s reasoning based on the comparative sizes of the different groups targeted for advancement. Again this contention is not motivated and the relation is between the pursuit of these numerical targets and the achievement of equality is uncertain.

It is further necessary to point out that this judgment does not identify the actual basis for the pursuit of numerical targets apart from the Employment Equity Act itself. If representivity is a method through which barriers to employment are to be removed and substantive equality promoted, the method through which this is to be achieved must be explained.

The Court made the observation that this flawed employment equity plan of the SAPS created new patterns of disadvantage and discrimination against women in general.⁹⁷ It is submitted that this comment would ring true for any scenario where

⁹⁶ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 185.

⁹⁷ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 186.

the numerical targets as set out in an Employment Equity Plan do not accord with the demographics of the economically active regional population.

The Court stated that the measure under scrutiny was not compliant with the “lawful criteria set out in the equity act”. The Court also stated that the criterion “poses as a measure that it’s constitutionally compliant, but in fact discriminates unfairly and unlawfully”.⁹⁸ The constitutionality of the Employment Equity Act was not challenged in this case, nor was the constitutionality of the affirmative action measures of the SAPS challenged. The Court did not motivate its finding that the criteria set out in the Employment Equity Act (the goal of equitable representation) were lawful and constitutionally compliant.

In this judgement a clear and complete investigation of the relation between representivity and substantive equality is lacking. The Court ultimately held that the employment equity plan of the SAPS is not valid and ordered that the applicant be appointed to the position originally applied for.⁹⁹

This judgement brings no more clarity than the Barnard judgment, and it is not clear why the court came to a different conclusion in this case than in that case. The reasoning of the court appears from the following extract from the judgment:

“I’ve illuminated the design flaw of the affirmative action measure and its perverse effects. This flaw in design is significant as it causes prejudice, and not just to persons from the Indian community, but also to a significant majority. A very real danger exists that this design flaw will give rise to a perverse race and gender rivalry, and produce in consequence confrontation and alienation, and will in the long run undermine the promotion of substantive equality and the creation of a nonracial and nonsexist society.”¹⁰⁰

This is a succinct summary of the effects that the application of an employment equity plan based on the pursuit of numerical targets can have. It is an example of one scenario where the pursuit of representivity can undermine equality. Are there more scenarios where these negative effects will be caused by the pursuit of representivity? This will be discussed in more detail below.

⁹⁸ *Naidoo v The Minister of Safety and Security* 2013 (3) SA 486 (LC) para 189.

⁹⁹ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) paras 228-232.

¹⁰⁰ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 211.

CHAPTER 7

The Reynhardt case

In the case of the *University of South Africa v Reynhardt*¹⁰¹ the respondent, Reynhardt, was appointed as the dean of the Faculty of Science at the appellant for a three year term, starting on 1 April 1999 until 31 March 2002. When his term expired, nominations were taken for the appointment of dean of the faculty in accordance with the procedure set out in a circular dated 18 January 2002 that was distributed within the structures of the appellant. Two individuals were nominated, the respondent, and Professor Summers, a black person for purposes of section one of the Employment Equity Act.¹⁰²

The faculty of science of the University of South Africa interviewed the two candidates on 18 February 2002 for the position of dean of that faculty. Both candidates answered questions and made presentations. An opinion poll was also taken. The respondent received 79 votes in favour of his appointment, whereas only 10 members of the faculty voted against him. The other candidate, Prof Summers, enjoyed the support of 10 members of the faculty. After the presentations and interviews the selection committee convened on 21 February 2002 and both candidates were interviewed. The majority of the interview committee found the respondent “to be appointable” and Prof Summers to “not be appointable”. Only two members recommended that Prof Summers be appointed to the position of dean of the faculty. On 22 March 2002, in spite of the recommendations of the interview committee and the earlier opinion poll, the executive director of human resources of the appellant, Mr Moloto, informed the respondent that the council of the appellant had decided to appoint Prof Summers effective from 1 April 2002.¹⁰³

Upon the respondent’s request for written reasons for his non-appointment, Mr Moloto informed him on 12 April 2002 that, on the basis of all available information, including the report of the selection committee, the council had decided that in

¹⁰¹ [2010] JOL 25714 (LAC).

¹⁰² *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 3.

¹⁰³ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) paras 3-6.

pursuance of the employment equity policy Professor Summers should be appointed to the position.¹⁰⁴

The respondent accepted this explanation but reserved his rights and requested that he be allowed to take early retirement, starting 31 March 2002. His pension was dependant on the average of his last two years salary and it would be to his financial disadvantage to stay on as a professor of physics. Despite the respondent's best efforts he was unable to resolve these issues with the office of the principle and he subsequently referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for mediation and arbitration. The complaint of the respondent was that he was unfairly discriminated against on the grounds of race.¹⁰⁵

The respondent alleged that the appellant incorrectly applied its own employment equity policy by promoting a candidate less qualified than him. The dispute was referred to the CCMA where conciliation failed. Thereafter it was heard by the Labour court. The Court found that the respondent had been unfairly discriminated against when he was not appointed to the position of dean of the faculty of science from 1 April 2002. The Court found that the respondent had been discriminated against on the basis of his race and was duly awarded compensation.¹⁰⁶

The University of South Africa appealed against the decision to the Labour Appeal Court.

The appellant contended that the decision to appoint Prof Summers was in accordance with employment equity as stipulated in section 2 of the Employment Equity Act, mandating the establishment of a workplace where there is equitable representation of demographic groups in all occupational categories and levels in the workplace. The contention of the appellant was therefore that the decision to appoint Prof Summers was consistent with the purpose of the Employment Equity Act.¹⁰⁷

¹⁰⁴ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 6.

¹⁰⁵ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) paras 7-9.

¹⁰⁶ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) paras 1-2.

¹⁰⁷ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) paras 15-18.

The Court discussed the appropriate standard of review for a dispute such as this and found the test in *Minister of Finance and another v Van Heerden*,¹⁰⁸ as discussed above, to be applicable. The Court confirmed that affirmative action measures could not be presumed to be unfairly discriminatory.¹⁰⁹

The Court summarised its interpretation of remedial measures and affirmative action as follows:

“in this passage, Moseneke J captures the idea that the drafters of the Constitution chose the route of restitutionary measures to guide the country towards the destination of a transformed society in which race and gender would no longer be employed as obstacles towards the attainment of the prefigured egalitarian society. Equality is the foundational principle but remedial measures are needed for its achievement.”¹¹⁰

The Court’s reference to a prefigured egalitarian society is intriguing. The Court did not explain its understanding of this concept. The affirmative action measures in question set numerical targets, and the Court mentioned that race and gender must not be obstacles in the way of the establishment of an egalitarian society. The Court did not explain however why the establishment of representivity will lead to the establishment of equality. The Court also did not explain what the ideal of a preconfigured egalitarian society would entail. Is the preconfigured egalitarian society one where all organised public and private spheres adhere to the principle of representivity? If this is the court’s contention then the legitimacy of this ideology must be explained.

The Court stated that the third requirement of the *Van Heerden*-test, whether the measure promotes the achievement of equality, was relevant for this dispute.¹¹¹

In this regard Davis J said:

“Appellant’s case was based on the commendable aim of redressing historical imbalances and ensuring that the staff of a critical tertiary institution would more broadly reflect the demographics of South Africa than had manifestly been the case throughout the country’s racist past. For this reason targets of 70:30 had been set.”¹¹²

The Court did not explain how the achievement of a preconfigured racial demographic representation at the institution concerned could ensure that historical

¹⁰⁸ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 37.

¹⁰⁹ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 25.

¹¹⁰ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 28.

¹¹¹ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) paras 25-26.

¹¹² *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 28.

imbalances were redressed. The Court also states that the aim of the appellant was to redress historical imbalances *and* to ensure that the staff of the institution reflects the demographics of South Africa, therefore holding the view that the pursuit of representivity did not necessarily serve to ensure the right to substantive equality for all. It is not explained how the employment equity plan, and the pursuit of numerical targets, can establish substantive equality. The investigation required by the third leg of the enquiry was therefore never actually undertaken. The establishment and pursuit of racial targets were regarded by the Court as restitutionary measures.

The Court analysed a provision of the employment equity plan of the applicant according to which appointments were to be made on merit alone once targets have been met.¹¹³ In terms of the appellant's own equity plan, preferential treatment will no longer be tolerated and appointments must be made on merit. The appellant did not adduce any evidence to show that the merits of the candidates had been considered and on that basis the order was made that the court a quo's judgement was correct.¹¹⁴

The Court stated as follows:

“..it is important to emphasise given the importance of employment equity programs to the transformation of South African society that the resolution of this dispute does not turn on the constitutionality of applicant's equality plan. That plan passes muster in terms of the analysis that I have undertaken. The problem for the Applicant is that the plan provides expressly when remedial measures are no longer necessary. In other words, this case turns upon an application of Appellants plan to the facts of the case”¹¹⁵

In this statement Davis JA held that the employment equity plan of the appellant was valid, even though its validity was never challenged. Neither the respondent nor the appellant had advanced reasons why the plan should be considered lawful for purposes of the Employment Equity Act. Davis JA did engage in a short analysis in terms of the test laid down in the *Van Heerden* case, even though the constitutionality of the plan was never challenged by the respondent. It is therefore strange for the Court to have boldly pronounced that the plan was a constitutional one, in view of the fact that the constitutionality of the plan was never in question. The Court never investigated whether the plan was aimed at the establishment of

¹¹³ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 29.

¹¹⁴ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 31.

¹¹⁵ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 32.

substantive equality, and the only part of the judgment that hinted towards such an investigation was the short statement contained in paragraph 28. In this paragraph the Court basically stated that the plan was valid because it provided for representivity.

The question whether the plan was actually aimed at the promotion of substantive equality through the removal of the effects of past discrimination was never discussed.

Davis JA concluded that the appellant's case was flawed not because of "its commendable policy" but because of the manner in which this policy was implemented. Davis JA upheld the judgement handed down in the court a quo and dismissed the appeal.¹¹⁶

In this case the merits of the appellant's employment equity plan enjoyed such attention. The entire judgement is only 35 paragraphs long. Concepts such as unfair discrimination, affirmative action, employment equity, numerical targets and substantive equality were not properly explored and in the absence of any discussion of the relation between and meaning of these concepts, it is very difficult to determine how affirmative action and the application of employment equity plans should be understood in relation to each other and in relation to the right to equality. The approach followed by the courts in all three of the cases which are relevant for present purposes, will now be considered further in an attempt to identify and clarify some of the issues which emerged from the discussions in those cases.

¹¹⁶ *Unisa v Reynhardt* [2010] JOL 25714 (LAC) para 35.

CHAPTER 8

Analysis and conclusion: The legitimacy of representivity as a criterion to for substantive equality in the workplace

According to the decision in *Minister of Finance and Another v Van Heerden*¹¹⁷ remedial measures should serve to establish substantive equality in order to be constitutionally compliant.¹¹⁸

The case law discussed above does not clarify the question whether the pursuit of representivity, as mandated by affirmative action measures in accordance with the Employment Equity Act, serves to establish substantive equality in the workforce. Thus far there has been no thorough engagement in the South African courts to resolve this question.¹¹⁹

It is therefore necessary to investigate whether representivity can be used to establish substantive equality. Albertyn remarks that a legal commitment to substantive equality must permit the dismantling of actual social and economic inequality. This, according to her, leads to the transformation of a society. She discusses the principles pertaining to this legal commitment with reference to six inquiries that a legal investigation into a dispute concerning substantive equality should entail.¹²⁰

These principles can be used to postulate what a robust judicial consideration of the question, whether the pursuit of representivity can establish substantive equality, would look like, and what the conclusion of the court would be.

The first principle requires that the court should interrogate the actual social, political and legal context in which an alleged rights violation occurs. This is necessary to ensure that judicial pronouncements address systematic and structural roots of

¹¹⁷ 2004 (11) BCLR 1125 (CC).

¹¹⁸ Para 32.

¹¹⁹ 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) *PER / PELJ* 2015(18)3 611.

¹²⁰ Albertyn, Cathi "South African Constitutional Law: The Bill of Rights", 4-6.

inequality and to ensure that the impact of an inequality or disadvantage on the right bearer is examined.¹²¹

The second principle requires the relationship between the individuals or groups concerned to be examined. This means that if equality is a comparative concept the comparison is not between abstract individuals, but between the position of disadvantaged or vulnerable groups relative to more powerful (or privileged) groups. This requires an ongoing consideration of how our current social relationships affect the ability of different groups to survive and flourish.¹²²

Thirdly, the intersection or nature of disadvantage should be examined. This entails the idea that a person or groups of people could be disadvantaged for more than one reason, compounding his or her disadvantage. Albertyn uses the example of race and gender and the significant disadvantages that black woman in society face. She states that this inequality is so unique that it can only be addressed if addressed apart from the needs of white woman or black men.¹²³

Fourthly, the court should assess what act or omission caused the inequality identified. Inequality can emerge either from differential treatment of groups that should be accorded equal treatment or from the failure to differentiate between unequal groups. Equality can be promoted through similar or differential treatment depending on the context.¹²⁴ The court should therefore assess the cause of the disadvantage concerned.

Fifthly, the court should assess what kind of action is necessary to remedy the inequality identified. It may require both negative action and the removal of discriminatory barriers, as well as proactive or positive measures that promote the right of disadvantaged groups to equality. Depending on the circumstances discrimination may ground a claim for remedial, redistributive or positive measures.¹²⁵ It is the task of the court to establish what action is necessary.

Finally the adjudication of equality claims should take into account the rights and values that underlie equality and the purpose of these rights and values. A clear

¹²¹ Albertyn, Cathi "South African Constitutional Law: The Bill of Rights" 2004, 4-6.

¹²² Albertyn, Cathi "South African Constitutional Law: The Bill of Rights" 2004, 4-6.

¹²³ Albertyn, Cathi "South African Constitutional Law: The Bill of Rights" 2004, 4-7.

¹²⁴ Albertyn, Cathi "South African Constitutional Law: The Bill of Rights" 2004, 4-7.

¹²⁵ Albertyn, Cathi "South African Constitutional Law: The Bill of Rights" 2004, 4-7.

exposition of the purpose of the right, and of the constitutional values that underpin it, provides the court with a crucial signpost to a decision most faithful to the Constitution. These signposts allow the courts to determine when impugned differentiation or failure to differentiate amounts to a violation of the equality clause.¹²⁶

Taking the above six principles as guidelines to establish the validity of an affirmative action or restitutionary measure, it can be assessed whether a measure designed to establish representivity can be regarded an affirmative action or restitutionary measure as envisioned by section 9(2) of the Constitution.

The first enquiry that a court should undertake when scrutinizing an affirmative action measure is an investigation of the political and legal context in which an alleged rights violation occurs. The three cases discussed above all concern affirmative action, employment equity plans and employment equity in accordance with the Act (the said three cases will further in this dissertation also be referred to as “the three relevant cases”). One should therefore investigate the context in which these remedial measures operate. In each of the three relevant cases the court was at pains to point out that our society is an unequal one due to decades of oppression caused by white minority rule. It was also stated in those cases that the race based laws of the previous dispensation caused non-whites and females to be relegated to a disadvantaged position in society.

The court never conducts a more in-depth analysis of the political and legal context against which the right to equality must be interpreted than that. In the discussion above on equality, shifting patterns of inequality are also mentioned by Currie and De Waal as an important factor that courts should take note of when assessing the right to equality.¹²⁷ Although it is true that the lower strata of society are mostly black, the upper and middle class are increasingly mixed. For this reason it is incorrect to assume that privilege rests only on previously advantaged individuals (more in particular to white males).

It would be more accurate to say that South African society today consists of an affluent group that is racially diverse, as well as an overwhelmingly black underclass.

¹²⁶ Albertyn, Cathi “*South African Constitutional Law: The Bill of Rights*” 2004, 4-7.

¹²⁷ Currie & De Waal, *The Bill Of Rights Handbook*, 6th Edition, Juta, 2013, 212.

In the three cases concerned the courts did not investigate the political context in which the employment equity plans (or decision to promote, in the case of Reynardt) were applied. In these cases the plans were not applied in South African society in general, but related specifically to the police service (in the cases of *Naidoo* and *Barnard*) as well as the University of South Africa. A candidate applying for a post in one of these two organisations, at the higher salary grade levels concerned in the police service¹²⁸ as well as for the position of dean of a faculty at the University, would have to be qualified and have significant experience in that working environment regardless of their race, this is even required by The Employment Equity Act that requires a beneficiary to be “suitably qualified”.¹²⁹

The effect of the racist regulations and laws of the previous government was to deny black people and females of opportunities in these organisations to acquire the required education and experience to be able to pursue careers such as these. The structural inequality in that instance would have been the fact that the disadvantaged individuals never had the opportunity to pursue those careers, or to develop to such a level that they were in a position to pursue those careers. A “previously disadvantaged” individual in the present dispensation who applies for such a senior position will have the necessary skills and qualifications to secure employment since he or she already satisfies the minimum requirements for employment, and has therefore overcome the barriers that the previous regime could have put in his or her way. The racist laws enacted under white minority rule that barred individuals like these from applying to positions such as these have long been repealed. The effect is that the applicants who applied to these positions, and whose applications were considered in light of the employment equity plans, were not derived from the disadvantaged black underclass living with the legacy of apartheid but from the wealthy and privileged upper class. In this context these employment equity plans cannot address the systematic and structural roots of inequality.

The second principle necessitates the examination of the relationships between the groups or persons that are affected by an alleged rights violation. The three cases concerned a process through which a selection panel had to assess the applications of a few individuals, and ultimately make an appointment.

¹²⁸ Nine in the *Naidoo* matter and salary grade level seven in *Barnard*.

¹²⁹ The Employment Equity Act 55 of 1998, S15(1).

The employment equity plans (or in the case of *Reynhardt* the criteria) guiding the decision making of the three respondents in the above matters were not focussed on the eradication of previous disadvantage but simply set a racial and gender demographic target that the employers had to pursue. The employment equity plans were not concerned with the consideration of the background of the applicants. The courts in the three cases concerned never considered the relation between the different applicants who applied to the posts as advertised. Instead, the court in each of the three cases concerned merely makes a superficial reference to white minority rule and its effects on our society. The courts apparently regarded such superficial, general observation as sufficient. None of the applicants' backgrounds were ever discussed.

In the absence of any discussion of the background of every specific applicant, the three decisions concerned must have been based on the assumption that disadvantage or privilege and the presence thereof could be assessed according to the race of the applicant. A white male applicant is considered to be advantaged whereas a black male or black female candidate is considered to be disadvantaged.

This may or may not be the case but there is no attempt to investigate the presence or lack of actual advantage or disadvantage with regard to each applicant. The Court pointed out in *Naidoo* that the way in which the plan was applied in that case presented itself as a form of tokenism.¹³⁰ It is submitted that in the absence of any real inquiry into the experiences or position of the different individuals considered in an employment process subject to an affirmative action measure in the form of an employment equity plan, the application of the plan will run the risk of projecting a form of tokenism as parties considered in terms thereof will be branded according to their race or gender and not their circumstances. Every applicant is reduced to an entity required to meet a numerical target.

Thirdly the possible presence of intersection of disadvantage should be explored; this is touched on in the *Naidoo* case as well as the *Barnard* case. The manner in which this was done again, smacks of tokenism: as the different ways in which the applicants were disadvantaged were not explored, but different degrees of disadvantage were attributed to the applicants according to their race and gender.

¹³⁰ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 177.

The fourth inquiry requires the court to consider the cause of the inequality. Inequality between groups in general, can emerge from differential treatment of groups or from the failure to differentiate between unequal groups. As stated above the court in the three cases concerned discussed the era of white minority rule, and made the general statement that designated groups were disadvantaged by discrimination under that rule. The nature and legacy of this disadvantage is not discussed, and the presence of current disadvantage is never investigated. A valid affirmative action measure should identify and remove barriers with a view to the attainment of substantive equality. If this is not done, an affirmative action measure runs the risk of not benefitting the classes of individuals who are supposed to benefit from such measure.

Writing on the problem of who benefits from affirmative action, McGregor states the following:

“Affirmative action which is based on race to benefit Blacks as a group, but which does not distinguish between relatively privileged Blacks and those who are truly disadvantaged, does not reach the neediest. To rectify this, the Indian example of the ‘creamy layer’ may be considered. The ‘creamy layer’ (constituting the upper strata among the ‘Other Backward Classes’ (‘OBCs’) that have become prosperous partly as a result of land reform and partly as a result of effectively mobilising political power) was excluded from the benefits of affirmative action by the Supreme Court of India in 1992. The entitlement of an individual as a member of an OBC will thus depend on whether the individual enjoys privileged status in her or his group.”¹³¹

McGregor’s view shows that affirmative action programmes in other countries have faced the same problem, namely that those that benefit from affirmative action are the privileged within a designated group. This was the case in India, where a more substantive approach that considers the applicants background has now been introduced. The previous government deprived millions of people of employment and education opportunities, and as was explained above, a candidate whom applied to a position as advertised in the three relevant cases would already have considerable experience and education. The barriers that could have prevented them from applying for those positions have been removed. The differential treatment or disadvantages that could have caused inequality between the

¹³¹ M McGregor: “Blowing The Whistle?: The Future Of Affirmative Action In South Africa “ (2014) 26 *SAMERC LJ* 78.

applicants is therefore not present in the context in which these employment equity plans are applied. The court assumes these barriers to the attainment of equality still exist without investigating if this is the case. In this regard, David Benatar writes:

“Whatever compensation is due to the least disadvantaged of the disadvantaged, whether ‘black’ or ‘white’, is owed on account of the injustice and not on account of racial membership. A just approach to past injustice avoids the fallacy of division. It compensates those individuals who deserve compensation, rather than assuming that an individual deserves compensation because he shares a racial attribute with most of those who are most disadvantaged. Racial affirmative action is a poor substitute for a program of compensating individuals.”¹³²

In the three cases concerned barriers are assumed to exist due to the over or underrepresentation of certain races. This was implied in the *Barnard* case where the Court proclaims that the non-appointment of Ms. Barnard was not unlawful because white females were already overrepresented in that salary grade level.¹³³ The Court did not investigate whether this overrepresentation is due to unfair discrimination.¹³⁴ It cannot be taken for granted that a sphere or organisation that is not representative must be unequal. In this regard Benatar states:

“..even in the absence of injustice, we cannot expect that racial, ethnic and other groups and both sexes will be represented proportionately in all professions, trades and activities. Groups are often disproportionately prevalent without their being the beneficiaries of injustice. For example, there was a disproportionately large number of Jews at the University of Vienna in the late nineteenth and early twentieth century, despite discrimination *against* them. In early twentieth-century India, Parsees held a disproportionate number of university degrees, especially in sciences and engineering. In the Catholic Church in the United States, disproportionately many priests and bishops were Irish and disproportionately few were Italian. There were a disproportionately large number of female doctors in the Soviet Union. More recently, Cambodian immigrants ran 80% of doughnut shops in California, and a disproportionately large number of African born residents of the United States, relative to any other immigrants or US citizens, hold doctoral degrees.”¹³⁵

The absence of representivity therefore does not signify the absence of equality, nor does the presence of representivity ensure the establishment thereof.

The fifth inquiry a court must make is the establishment of the type of action necessary to ensure equality. The establishment of substantive equality requires either the removal of discriminatory barriers or proactive or positive measures that

¹³² Benatar D, “Justice, Diversity and Racial Preference: a Critique of Affirmative Action” *SALJ* 2008 (2) 283.

¹³³ *SAPS v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC) para 66.

¹³⁴ See the discussion above on page 23-24.

¹³⁵ Benatar D, “Justice, Diversity and Racial Preference: a Critique of Affirmative Action” *SALJ* 2008 (2) 298-299.

promote the right of disadvantaged groups to equality. An employment equity plan is intended to be an affirmative action measure that operates as a positive step to remove barriers and establish substantive equality. Affirmative action measures in South Africa are recognised as some of the most extreme in the world.¹³⁶ They also relate closely to the notion of representivity.

The government and the Act expect all spheres of society to reflect the national demographic profile. The irresistible question arises whether this is a realistic or legitimate expectation? Malan states the following:

“..none of the communities to which we belong reflect the national population composition or national interests. On the contrary, communities are identifiable and distinguishable as communities precisely because they differ from (the rest of) the national population and from other communities that make up the national population. They are different in nature and interests. They are differently composed, have different interests and express themselves differently. They look, think and behave differently.”¹³⁷

A plan designed in accordance with a calculation according to national demographics when applied at a station in the Western Cape will cause barriers in the form of limited employment opportunities for coloured individuals. In the Limpopo province an employment equity plan, based on national demographics, applied in an area such as Venda could cause discrimination against black individuals, since almost the entire population of the area of Venda is black African and the employment equity plan will require the appointment of 20% minorities. It will present itself as a barrier that negatively affects people whose race or gender is in accordance with the Act considered to be disadvantaged. The plan will therefore function as a barrier and not a remedial measure as in the *Naidoo* and the *Barnard* case.

It is difficult to fathom any scenario where an employment equity plan that is rigidly applied and calculated according to national demographics will not impede in some way the achievement of equal employment opportunities. This is because the national demographic profile is a national average and does not reflect in every, or possibly not in any, area of the country.

¹³⁶ Guest R, ‘The World’s most extreme affirmative action program’ *The Wall Street Journal*, 23 December 2004 A10.

¹³⁷ Malan K, “Observations on representivity, democracy and homogenisation” TSAR 210 (3) 434.

The court in the *Naidoo* case notes that that particular plan, calculated on national racial demographics, can lead to a perverse race rivalry, where a hierarchy or entitlement is created.¹³⁸ The right to equality does not make provision for such a hierarchy of entitlement. It is submitted that this is the effect of a remedial measure by which representivity is pursued. Affirmative action measures based on the pursuit of representivity do not deliver remedial measures in relation to the disadvantage suffered by designated groups, but in relation to the national demographic profile. The more prevalent an applicant's race or gender is in society, the more "restitution" or "redress" he/she will receive, regardless of how advantaged or disadvantaged the applicant may actually be.

Remedial measures should seek to provide opportunities to individuals who are unable to access employment and education opportunities on their own. It is debatable whether race is a good yardstick to measure disadvantage, considering the racial make-up of our current upper and middle class. Socio economic background could be a much better and more effective yardstick.¹³⁹

Due to the effect of employment equity plans on our workforce, they do not effectively promote the right to substantive equality or remove barriers that deny employment to the disadvantaged. In some cases they even operate as barriers themselves. As to whether the pursuit of representivity establishes equality, Malan states as follows:

"The closest this gets to equality is equality in the formal sense, which is no less than a flimsy cover-up for systemic inequality and repression of minorities. It works like this: the same principle, namely that of national representivity, is applicable to all. However, since various people and groups find themselves in different positions they are differently – sometimes vastly differently – affected by the application of the very same principle. This is in fact what is occurring with the application of representivity. It is highly beneficial to the majority and glaringly disadvantageous to the minorities. It institutionalises a system of majority domination and minority repression. Hence, representivity is not a strategy of equality but a strategy of systemic substantive inequality to the detriment of minorities. In fact, the working of representivity is a textbook example of the distinction between formal and substantive equality and how harmful the effects of formal equality can be."¹⁴⁰

The final factor that the court must take into account is the values and rights that underlie equality disputes. In all three the relevant cases mention was made of the

¹³⁸ *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC) para 177.

¹³⁹ McGregor M, "Blowing The Whistle On Affirmative Action: The Future Of Affirmative Action In South Africa (Part 2)" (2014) 26 *SA MERC LJ* 300-303.

¹⁴⁰ Malan K, "Observations on representivity, democracy and homogenisation" *TSAR* 210 (3) 447.

need for substantive equality as well as the remedial goal of affirmative action measures. These remedial measures are intended to be positive measures designed to promote the right to equality by removing barriers that stand in way of the continued employment and promotion of certain individuals. None of the judgments in the three cases concerned contain any discussion on the question as to how representivity establishes equality. Instead, references are made to representivity and equality: in some instances, as if these concepts are interwoven; in other instances, as if they are distinct concepts; sometimes (such in the *Naidoo* case) both these possibilities are recognised in the same judgment.¹⁴¹ There is no indication in any of the judgments concerned that the nature of equality and remedial measures were taken into consideration.

Even on the assumption that the courts considered these concepts to be interchangeable, the conclusion that the establishment of representivity leads to the establishment of equality should have been motivated. Any proposed affirmative action measure must still entail a remedy for the disadvantage identified. Affirmative action in accordance with the Act does not perform this function effectively. Although affirmative action measures may benefit certain individuals who may have suffered past discrimination, this would be purely incidental to the main goal or aim of affirmative action in terms of the Act, namely the pursuit of representivity.

After conducting the above analysis and considering whether affirmative action measures according to the Act could be utilised to establish substantive equality, it can be concluded that they fit poorly within the meaning of remedial measures and do not serve to establish substantive equality, as the pursuit of representivity does not serve to establish substantive equality in a workforce, or any other organised public or private sphere.

Although the courts have taken the stance that affirmative action measures in terms of the Act are remedial measures in accordance with section 9(2) of the Constitution, it is submitted with respect that this view is not justified because the concept affirmative action measures cannot be accommodated under the same meaning as that of the remedial measures. Disputes concerning affirmative action measures should not be adjudicated in terms of the right to equality, and it is respectfully

¹⁴¹ See the discussion on page 35 above.

submitted that they may in certain circumstances be at odds with the right to equality.

The pursuit and establishment of representivity, in the context of the right to equality, is therefore not a constitutional imperative, but possibly rather a political ideology.

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SUMMARY OF MINI-DISSERTATION

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AN EXAMINATION OF THE LEGITIMACY OF DEMOGRAPHIC REPRESENTIVITY AS A CRITERION FOR SUBSTANTIVE EQUALITY IN EMPLOYMENT.

Under the current Constitution of the Republic of South Africa (the Republic), the right to equality includes the full enjoyment of all rights and freedoms for all citizens. The Republic is also one of the most socio-economically unequal countries in the world. It is due to the high prevalence of inequality in the Republic that the constitution envisions a substantive conception of equality. In order to promote the achievement of substantive equality (a founding principle of the Constitution) legislative and other measures may be taken to this effect. These measures are known as restitutionary or remedial measures.

One of the most important pieces of legislation enacting such a remedial measure is the Employment Equity Act (the Act). It was enacted in accordance with section 9(2) of the Constitution and is intended to further the right to substantive equality in the South African workforce. This Act provides for affirmative action measures aimed at the establishment of substantive equality in, amongst other things, the workforce. The central aim of the act however, seems to be the establishment of a workforce (in the public and private sphere) which is demographically (in terms of gender and race) representative of the population of South Africa.

This mini-dissertation investigates the question whether demographic representation is a legitimate criterion through which substantive equality can be established in the workforce. This question will be scrutinised by analysing the nature of the constitutional right to equality, the origin and nature of the ideology of representivity (or demographic representation), as well as the manner in which the judiciary have considered disputes emanating from restitutionary measures in accordance with the Act, and specifically their take on the definition and possible relationship between representivity and substantive equality.