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The unresolved search for the proper standard of review of affirmative action: *Solidarity obo Barnard v SAPS*¹

1. Introduction

In *Solidarity obo Barnard v SAPS*,² the Supreme Court of Appeal (SCA) set aside the order of the Labour Appeal Court (LAC),³ which upheld the decision of the National Commissioner of Police not to appoint a white female (Barnard) to the position of superintendent in the National Evaluation Services Division of the South African Police Service (SAPS). The most important issue raised by the judgments is the proper standard of review of affirmative action measures in terms of section 9(2) of the *Constitution*⁴ and section 6(2)(a) of the *Employment Equity Act (EEA)*.⁵ The Labour Court (LC),⁶ the LAC and the SCA all subscribed to different versions of what the standard of review ought to be. In so doing, they also applied different interpretations of the leading judgment of the Constitutional Court on affirmative action, *Minister of Finance v Van Heerden*.⁷ In this note, the different interpretations will be identified and analysed.

2. Facts

Barnard, a White female captain employed at salary level 8 in the Internal Audit Division of the National Inspectorate (previously the National Evaluation Services), twice applied for promotion to the newly

1 This note was already in press when the decision of the Constitutional Court in *South African Police Service v Solidarity obo RM Barnard (Police and Prison Civil Rights Union as amicus curiae)* (Case CCT 01/14) was handed down on 2 September 2014. This judgement will be discussed in a follow-up note in the next issue of the Journal.

2 (165/2013) [2013] ZASCA 177 (28 November 2013). Hereinafter referred to as "SCA".

3 *South African Police Service v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC). Hereinafter referred to as "LAC".

4 *Constitution of the Republic of South Africa*, 1996.

5 Act 55/1998.

6 *Solidarity obo Barnard v South African Police Service* [2010] 5 BLLR 561 (LC). Hereinafter referred to as "LC".

7 2004 (11) BCLR 1125 (CC). Hereinafter referred to as "Van Heerden".

created level-9 position of superintendent in that division of the SAPS. This position was advertised as a “non-designated” post. On the first occasion, the selection panel rated her the highest and recommended her as the preferred candidate for appointment. Two White male candidates obtained the second- and third-highest ratings,⁸ followed by four Black male candidates. The difference in rating between Barnard and the highest scoring Black candidate was 17.5 per cent. The selection panel interpreted this difference as indicating that service delivery would be compromised if the latter were to be appointed.⁹ The Divisional Commissioner of Police did not accept the recommendation of the panel and decided not to fill the post. He stated as reasons, *inter alia*, that “appointing any of the first three preferred candidates will aggravate the representivity status of the already under-represented sub-section: complaints investigation” and that “such appointment will not enhance service delivery to a diverse community”.¹⁰ He declined to make any recommendation for appointment to the National Commissioner of Police; the post remained vacant and was later withdrawn.¹¹ However, a White male superintendent was later “laterally transferred” to the complaints section.¹²

The SAPS then re-advertised the same position. Barnard applied and again received the highest rating from the selection panel. Two Black males were the second- and third-rated recommended candidates. Their ratings were, respectively, 7.33 per cent and 10.66 per cent lower than Barnard’s.¹³ This time, the panel’s recommendation was supported by the Divisional Commissioner, who recommended Barnard’s appointment to the National Commissioner. Echoing the findings of the panel, the Divisional Commissioner substantiated the recommendation with reference to, *inter alia*, the fact that Barnard’s appointment, although not improving the representivity profile on salary level 9, would nevertheless not aggravate the overall divisional representivity figures, and could potentially improve representivity on salary level 8 in respect of the over-representation of White females.¹⁴ He also pointed out that Barnard had demonstrated competence and had extensive experience at national level in the core functions of the post and had proven to be the best candidate on two occasions. Her appointment would, therefore, significantly contribute to service delivery.¹⁵

Again, the National Commissioner declined to follow the panel’s and the Divisional Commissioner’s recommendation on the basis that

8 There are different versions of the facts on this point in the LC and LAC judgments. In the LC judgment, the second- and third-rated candidates are indicated as a White female and a Coloured female, respectively.

9 LC paragraph 24.8; LAC paragraph 5.

10 LC paragraph 24.9; LAC paragraph 6.

11 LC paragraph 24.10.

12 LC paragraph 24.12.

13 LAC paragraph 7.

14 LAC paragraph 7; LC paragraph 24.16.

15 LC paragraph 24.19; LAC paragraph 7.

it would not improve representivity.¹⁶ He decided that – since the post was not critical and that not filling it would not affect service delivery – no appointment should be made, but that the post should be re-advertised in the next promotional phase.¹⁷ Barnard responded by lodging a complaint in terms of the SAPS's internal grievance procedure. When this proved unsuccessful, she referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). After the dispute was certified as unresolved, she approached the LC for relief.¹⁸

3. Labour Court decision

Pretorius AJ commenced his analysis by clarifying his understanding of the controlling standard of review of affirmative action. Such measures must, in terms of the *EEA*, be both rational and fair. The respondent bears the onus of showing that the unfair discrimination alleged by the applicant is, on a balance of probabilities, fair.¹⁹ This has a number of implications. There must be a rational connection between the provisions of an employment equity plan and the measures adopted to implement the provisions of the plan.²⁰ The *EEA* and employment equity plans must be applied with due recognition of the affected party's right to equality and dignity.²¹ Due consideration must, therefore, be given to the particular circumstances of individuals potentially adversely affected.²² It would be too rigid to apply, without more ado, the numerical goals set out in an employment equity plan.²³ Fairness requires that the need for representivity must be weighed up against the affected individual's rights to equality.²⁴ Fairness also demands a "satisfactory explanation" for a decision not to appoint a candidate where no suitable candidate from a designated group is available.²⁵ In appropriate circumstances, the efficient operation of the public service ("service delivery") is a relevant factor to be taken into account in the implementation of an employment equity plan.²⁶

In applying the above-mentioned approach, the Court rejected the respondent's contention that no discrimination took place, since the National Commissioner not only did not appoint Barnard, but also did not appoint either of the two eligible Black candidates. Pretorius AJ found that the discrimination flowed from the fact that, but for the affirmative

16 LAC paragraph 8; LC paragraph 24.20.

17 LC paragraph 24.20; LAC paragraph 8.

18 LC paragraphs 24.21-24.23; LAC paragraph 9.

19 LC paragraphs 25.3, 26.

20 LC paragraph 25.6.

21 LC paragraph 25.3.

22 LC paragraph 25.3.

23 LC paragraph 25.1.

24 LC paragraph 25.1.

25 LC paragraph 25.4.

26 LC paragraph 25.7.

action policy, Barnard would have been promoted. She was not, because of her race.²⁷ As to the question of the fairness of the non-appointment, the most important factor militating against a finding of fairness was the fact that the National Commissioner had placed overriding importance on the representivity targets of the employment equity plan, without taking into account any of the relevant competing considerations. The Court accepted that the SAPS was justified in setting representivity targets for specific salary levels and not only for the division as a whole.²⁸ It is, therefore, true that Barnard's appointment would have aggravated the over-representation of Whites on salary level 9. The National Commissioner had erred, however, in emphasising this issue only. In the Court's view, this fact should have been balanced by giving due consideration to factors at the other end of the scale. This included the "countervailing right" of Barnard to equality,²⁹ the fact that her appointment would have improved representivity on the lower salary level, her personal circumstances and work history,³⁰ and the effect of the non-appointment on service delivery.³¹ In the absence of a reasonable explanation for the National Commissioner's decision not to appoint any of the two recommended and suitable Black candidates, the Court found that the burden of proving the fairness of Barnard's non-appointment in these circumstances had not been discharged.³² In this respect, the Court also found that the National Commissioner's statement that the post was not critical was contradicted by the fact that he saw fit to fill the post at least temporarily and had it advertised twice.³³ The Court directed the National Commissioner to promote the applicant to the post of superintendent.

4. Labour Appeal Court decision

On appeal, Mhlambo JP (Davis JA and Sandi JA concurring) overturned the LC's decision. The Court, from the outset, took issue with the LC on what it termed the latter's attempt "to elevate the right of equality of individuals, who may be adversely affected by the implementation of [affirmative action] measures, over the implementation of such measures".³⁴ This, in the LAC's view, was an inversion of what the *Constitution* intended with section 9(2). Mhlambo JP referred, with approval, to the arguments of the SAPS and the *amicus* in this regard. Affirmative action is, by its nature, discriminatory and intended to accord preferential treatment to persons

27 LC paragraph 32.

28 LC paragraph 29.

29 LC paragraph 36.

30 LC paragraph 36.

31 LC paragraph 41.

32 LC paragraph 35.

33 LC paragraph 41.

34 LAC paragraph 13. See also paragraph 29: "[T]he essence of [the LC's argument] is that the right to equality supersedes other considerations such as, in this case, the implementation of employment equity orientated measures."

from designated groups. Allowing such measures to be trumped by individual rights of equality and dignity would frustrate the “clear objects and import of affirmative action *per se*”.³⁵ The LC’s approach would defeat the objects of the *Constitution*’s commitment to substantive equality, since it would allow persons from non-designated groups “to continue enjoying an unfair advantage which they had enjoyed under apartheid”.³⁶

The contextual frame, in the view of the LAC, that ought to set the parameters for the evaluation of the relationship of the individual right to equality and restitutionary measures in this case was “the reality with which the appellant was confronted as to how the designated and non-designated groups were represented in its workforce”,³⁷ that is, the over-representation of Whites and the under-representation of Blacks on salary level 9. Given this “contextual understanding”, it was, therefore, misconstrued “to render the implementation of restitutionary measures subject to the right of an individual to equality”.³⁸ The reality in the appellant’s workforce necessitated corrective intervention as decreed in the *Constitution*.³⁹ This was, in the view of the LAC, underscored by section 20 of the *EEA*, which requires of designated employers to adopt employment equity plans to realise “equitable representivity” in the workplace.⁴⁰ In execution of this mandate, the appellant set numerical goals for all its occupational levels and categories. In particular, for level 9 of the National Evaluation Services Division, the plan set the goal of 10 African males and 6 African females, 1 White male and 1 White female by 2006. In order to achieve these numerical goals, 8 and 6 level-9 posts were reserved for the appointment and/or promotion of African males and Black candidates, respectively, whereas no posts were made available for the promotion/appointment of White candidates. Mhlambo JP argued that “rigid or not, these numerical targets represent a rational programme aimed at achieving the required demographic representivity status quo required by the employment equity plan”.⁴¹ The Court also attached great weight to National Instruction 1 of 2004, issued by the National Commissioner. The instruction emphasises that the fact that a candidate has obtained the highest rating and is recommended for promotion does not establish any right to be promoted. Furthermore, it also establishes that the National Commissioner is under no obligation to fill an advertised post and that he may, in his discretion, either direct that a post be re-advertised or promote a candidate from the preference list other than the recommended candidate.⁴²

35 LAC paragraph 17. See also paragraphs 19, 26.

36 LAC paragraph 30.

37 LAC paragraph 25.

38 LAC paragraph 26.

39 LAC paragraph 26.

40 LAC paragraph 32.

41 LAC paragraph 37.

42 LAC paragraph 40.

The Court also rejected the LC's reasoning that the National Commissioner's failure to appoint Barnard, after deciding that there was no suitable Black candidate, was irrational and compromised service delivery. Conceding that "it is strange that the National Commissioner did not appoint either of the two black candidates who were by all accounts appointable", Mhlambo JP nevertheless concluded that this did not constitute a failure to implement the employment equity plan. Somewhat paradoxically, he argued that this could be explained by the fact that the National Commissioner "simply [focused] his mind on the recommendation to appoint Barnard" and (presumably) not on the fitness for appointment of the two suitable Black candidates. How limiting his discretion in this way nevertheless translates into a rational interpretation and implementation of the employment equity plan is explained by Mhlambo JP in essence by reference, once again, to the fact that Barnard's appointment would have aggravated the over-representation of Whites on salary level 9. The Court also rejected – without substantiation – the argument that Barnard's appointment would have improved representivity on level 8, as "fanciful". All of this, of course, still begs the question as to why one of the eligible Black candidates was not appointed.⁴³

Mhlambo JP also found a justifying basis for the non-appointment of Barnard in National Instruction 1 of 2004, which, as pointed out above, states that the National Commissioner is under no obligation to fill an advertised post. He interpreted this provision as granting the Commissioner an unfettered discretion in this regard.⁴⁴ He relied on *SA Police Service v Zandberg*,⁴⁵ which, strictly speaking, does not provide support for his contentions, since, in that case, the Commissioner, after deciding not to appoint the best-rated, non-designated candidate, did in fact appoint one of the lower-rated, recommended designated candidates.

Lastly, the Court also rejected the LC's finding that the failure to appoint Barnard compromised service delivery.⁴⁶ In its view:

The National Commissioner is the accounting officer of the appellant and is the only person who is answerable regarding service delivery matters. It is not open to a court to "second guess" a decision that not filling a post will or will not compromise service delivery.⁴⁷

43 Mhlambo JP's reasoning in this regard is even more puzzling in the light of what he states later in the judgment (paragraph 45): "It cannot be argued on the facts of this matter that the appellant's Employment Equity Plan seeks the appointment of only black employees irrespective of other criteria. One of the criteria set out in the plan is the suitability of candidates. That to me suggests that should a black candidate be unsuitable that candidate will not be appointed. This is also defined in National Instruction 1. Clearly, as was aptly argued by Counsel for the *amicus*, the Employment Equity Plan does not sanction mediocrity or incompetence. Manifestly this was not the case with the two black candidates in this case." If so, then what rational justification explains their non-appointment?

44 LAC paragraph 43.

45 (2010) 31 *ILJ* 1230 (LC).

46 LAC paragraph 46.

47 LAC paragraph 46.

5. Supreme Court of Appeal decision

The SCA upheld the complainant's appeal against the LAC's decision. Navsa ADP (Ponnan, Tshiqi, Theron JJA and Zondi AJA concurring) held that the starting point for evaluating the lawfulness of affirmative action "is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair".⁴⁸ The employer, against whom the allegation of discrimination is made, must establish the fairness of its conduct.⁴⁹

The SCA rejected the LAC's conclusion that, because no appointment was made, no discrimination took place. Navsa ADP reasoned that, if a senior African female or male police officer had similar skills and had achieved the same interviewing score as the complainant, that person would most probably have been appointed. It could, therefore, not credibly be denied that Barnard was not appointed because she was a White female.⁵⁰

Regarding the question as to whether the National Commissioner had discharged the burden of proving the fairness of his decision, the SCA held that a fairness enquiry involves close and "scrupulous" scrutiny of the facts, something which, in its view, the LAC had failed to do.⁵¹ It also requires a flexible, but "situation-sensitive" approach.⁵² Navsa ADP considered both reasons advanced by the National Commissioner in justification of the non-appointment of Barnard as insufficient. In assessing the Commissioner's reasoning that her appointment would not address representivity, the Court noted that it should be borne in mind that Barnard, being female, was herself part of a designated group. Furthermore, it could not be ignored that she had previously applied for the same position and not only was not appointed on the basis of representivity, but also that a White male was moved laterally to fill in, with the position being re-advertised. Given the obvious racial disparity on the relevant salary level, the Court questioned how the Commissioner's decision to appoint somebody temporarily from a non-designated group could promote the employment equity cause and the image presented to the public and the SAPS itself.⁵³

Navsa ADP held that the Commissioner did not give due consideration to the views of the interviewing panel and to the input of the Divisional Commissioner as he was legally obliged to do. He had, therefore, failed to take into account and address relevant considerations emphasised by the panel and the Divisional Commissioner. These included more than the fact

48 SCA paragraph 50, with reference to *Harksen v Lane* NO 1998 (1) SA 300 (CC) paragraphs 43-46 and section 11 of the *EEA*.

49 SCA paragraph 50.

50 SCA paragraph 52.

51 SCA paragraph 58.

52 SCA paragraph 58.

53 SCA paragraph 59.

of Barnard's superior score. Such considerations also involved the fact that, among all the candidates, she stood out in terms of commitment to the SAPS and the personal qualities required to fulfil the responsibilities of the particular senior managerial position and to enhance the quality of services rendered by the SAPS.⁵⁴ Equally important was the concern raised by the Divisional Commissioner that overlooking Barnard again would send a signal that would negatively affect service delivery, as well as morale and cohesion within the workforce.⁵⁵ The Court, unlike the LAC, also viewed the argument that Barnard's appointment did not negatively affect representivity in the division as a whole, as being "not entirely without merit".⁵⁶ If representivity was the true reason for the National Commissioner's refusal to appoint Barnard, and if he thought that either of her two rivals were deserving of appointment, the compelling conclusion was that he would have appointed one of them.⁵⁷ However, apart from the cryptic note signed on his behalf, the Commissioner had provided no explanation for his failure to make any appointment. This made the conclusion inevitable that he did not apply his mind to all of the issues raised by both the recommendation panel and the Divisional Commissioner.⁵⁸

The Court was also not impressed by the National Commissioner's attempt to defend his decision on the basis that the SAPS's employment equity plan would have been violated if he had appointed Barnard. It was submitted that the racial imbalance at the relevant salary level would have been even more distorted had he appointed Barnard. Navsa ADP held, in this regard, that, in terms of the statutory background, the policy documents, as well as the employment equity plan itself, it could never be contended that numerical targets and representivity are absolute criteria for appointment. Adopting that attitude would turn numerical targets into quotas, which are prohibited in terms of the *EEA*. In his view, the LAC had, therefore, erred in presenting the plan as an absolute legal barrier to Barnard's appointment. The plan itself made it clear – in line with section 15(4) of the *EEA* – that, whilst the focus was on employment equity, no employment policy or practice would be established as an absolute barrier to the appointment of suitably qualified persons from non-designated groups.⁵⁹

The National Commissioner's submission that his decision was justified on the basis that the post was not "critical" and that no pressing need existed to make an appointment, also found no favour with the SCA.⁶⁰ Having regard to the constitutional principles that underpin public administration (section 195 of the *Constitution*) and the provisions of

54 SCA paragraph 62.

55 SCA paragraph 63.

56 SCA paragraph 64.

57 SCA paragraph 65.

58 SCA paragraph 67.

59 SCA paragraph 68.

60 SCA paragraph 69.

the *South African Police Service Act*⁶¹ giving effect to the constitutional mandate of the SAPS, the Court held that it could hardly be contended that a senior position, such as the one at issue in the case, was not important in order to further the SAPS's mission of providing a professional and efficient police service. In the absence of a reasoned substantiation by the National Commissioner, the Court was left "with the distinct impression that the explanation that the post was not filled because it was not 'critical' was contrived". This conclusion was supported by the fact that, after the first rejection, a senior superintendent was moved laterally to fill in temporarily and that the post was advertised on no less than 3 occasions.⁶²

The SCA was also unimpressed by the very deferential attitude adopted by the LAC that it was for the National Commissioner alone to determine whether service delivery would be affected by a post not being filled. Given the normative constitutional and legislative framework within which the SAPS is to function, such an attitude was clearly wrong.⁶³ In addition, the National Instruction issued by the National Commissioner himself admonished evaluation panels not only to take into account the promotion of equal opportunities and employment equity, but also to have regard to whether the promotion would advance service delivery. Failure to appoint Barnard to a position which, in terms of the regulatory constitutional and statutory framework, must have been necessary, left room for no other conclusion than that service delivery must have been affected.⁶⁴

As a result, the SCA held that, in the light of all the circumstances and the failure of the National Commissioner to provide persuasive justification for his decision, the appeal had to succeed.

6. Analysis

The judgments represent different approaches to the fundamental question of the proper standard of review of affirmative action measures. The LAC's fundamental disagreement with the judgment of the LC is stated to be that the latter had sought to "elevate the right to equality of individuals, who may be adversely affected by the implementation of restitutionary measures, over the implementation of such measures",⁶⁵ or that the Court had "employed individual rights of equality and dignity to trump the principle of affirmative action".⁶⁶ This is not an accurate statement of the LC's approach. Unlike the LAC, the LC was explicit about its understanding of the proper standard of review of affirmative action. Pretorius AJ, as stated above, held that affirmative action must be both rational and fair. It was in the course of the fairness testing that he argued

61 Act 68/1995.

62 SCA paragraph 73.

63 SCA paragraph 74.

64 SCA paragraph 76.

65 LAC paragraph 13.

66 LAC paragraph 17.

that affirmative action must be implemented with due regard to, among other things, the affected party's rights to equality and dignity. Given the fairness framework, this does not entail a dogmatic "elevation" of the affected party's right to equality above the restitutionary objectives of affirmative action. After all, it is clear from the LC's judgment that Barnard would have had no case if the National Commissioner had decided to appoint any of the eligible Black candidates. It is in this particular factual context that the Court concluded that the National Commissioner had ignored her right to equality, her personal situation and work history, as well as considerations related to service delivery.

For its part, the LAC, by implication, adopted an extremely deferential rationality requirement as the proper standard of review. This approach is best illustrated in the LAC's statement of its understanding of the defining contextual frame of reference within which disputes of this nature ought to be evaluated:

The issue rather is whether there is a rational connection between the transformational goal of promoting the achievement of equality by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workforce on the one hand and the means used to achieve that goal on the other hand.⁶⁷

The only role for a court in affirmative action disputes is "to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan".⁶⁸ The Black candidates had an unquestionable claim to be appointed over Barnard, in keeping with the employment equity plan. Discriminating against Barnard in the circumstances of this case was, therefore, in the LAC's view, clearly justifiable.⁶⁹

This approach also explains the LAC's exceptionally deferential attitude regarding the National Commissioner's views on whether the non-appointment of Barnard would compromise service delivery. It leaves very little scope for considerations outside of the contextual frame of furthering the employment equity objectives to be taken into account. It is therefore not open to a court to "second-guess" a decision that not filling a post will or will not compromise service delivery. This decision is the Commissioner's "prerogative" and is "unassailable". Should he err in this respect, he is "answerable [only] to his accounting authority, being the Minister and ultimately to Parliament".⁷⁰ That this self-understanding of the court's role practically negates the judicial enforceability of binding constitutional good-governance norms, such as those contained in

67 LAC paragraph 44.

68 LAC paragraph 46.

69 LAC paragraph 42.

70 LAC paragraph 46.

section 195 of the *Constitution* – primarily aimed at securing proper service delivery – needs no further elaboration.⁷¹

For its part, the SCA's view on the governing standard of review is not without ambiguity. As to what is required to meet the employer's burden of establishing fairness, Navsa ADP, with reference to *Van Heerden*,⁷² argued:

[W]hen a measure is challenged as violating the Constitution's equality clause, its defender could meet the claim by showing that it was adopted to promote the achievement of equality as contemplated by s 9(2) [of the *Constitution*], and was designed to protect and advance persons disadvantaged by prior unfair discrimination.⁷³

It is not clear whether this means that the restitutive nature of the measure as such would suffice to establish its "fairness" (as was held by the LAC), or whether the nature and extent of its impact on non-favoured individuals or groups need to be considered as well and be fairly weighed up against the remedial objectives (as was held by the LC). On the one hand, Navsa ADP argued that the National Commissioner could have met the burden of proving fairness if he had, in the furtherance of employment equity, appointed one of the two suitably qualified African male candidates.⁷⁴ This would suggest that establishing that the measure was intended to, and in fact did, realise an affirmative action purpose would suffice to establish its fairness.⁷⁵ On the other hand, the SCA appears to interpret the fairness

71 For further elaboration of this point, see Pretorius 2010:560-561. See also Fredman 2005:175-176.

72 See *Van Heerden*: paragraph 37, where Moseneke J held: "When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."

73 SCA paragraph 50.

74 SCA paragraph 53: Of course, if the National Commissioner had appointed one of the African male candidates who had also been interviewed and explained that, although the latter's interview score was lower than Barnard's, he was nevertheless suitable for the job and that he approved the appointment as an affirmative action measure, and assuming further that the explanation was borne out by the objective facts, the SAPS would have established that the discrimination complained of was fair and the present debate might well not have ensued.

75 This seems to correspond with the view that affirmative action constitutes a "complete defence" against an unfair discrimination challenge, i.e. (as stated by Moseneke J in *Van Heerden* in footnote 49) "the view that once measures have been shown to qualify as designed to protect and advance groups previously disadvantaged they are not open to constitutional attack on the grounds of fairness or disproportionality". See, further, Albertyn & Goldblatt 2007:35-33;

requirement as involving the consideration and balancing of all competing interests. In summing up the broad intentions of the *Employment Equity Act* (in paragraph 23), Navsa ADP argued:

The most ardent supporters of [affirmative action] measures, I venture, would find it difficult to argue with any conviction that the end result [of achieving an egalitarian society] can be obtained by the mechanical application of formulae and numerical targets ... The balance to be achieved in our path to a noble end is what this case is all about.

The SCA also quoted with approval a passage in the *Van Heerden* judgment⁷⁶ which enjoins courts to scrutinise all equality claims with reference to “the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context”, and to maintain, in the assessment of fairness, “a flexible but ‘*situation sensitive*’ approach ... because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society”.⁷⁷ This suggests a more exacting fairness enquiry that goes well beyond merely establishing the restitutive nature of the impugned measure.

Given the ambiguity, it is unclear whether the fairly extensive fairness analysis to which the SCA subjected the National Commissioner’s decision was premised on a finding that the decision fell outside the purview of section 9(2) of the *Constitution* (or section 6(2)(a) of the *EEA*); or, stated differently, whether the SCA would have required nothing more than proof that the decision served a restitutive end if it were classified as a section 9(2) (or section 6(2)(a)) measure.

Without repeating arguments that have been made in some detail elsewhere,⁷⁸ it must be noted that the same ambiguity applies to the Constitutional Court’s leading judgment on affirmative action. In the majority judgment, Moseneke J held that a measure that differentiates in terms of the listed grounds of discrimination does not attract the presumption of unfairness if it complies with the “internal requirements” of section 9(2) of the *Constitution*. Logically, these internal requirements themselves cannot then involve any form of fairness testing; if they did, it would amount to the same thing as if the impugned measure had been held to be presumptively unfair in the first place – which is exactly what Moseneke J held is not the case. A consistent application of the Court’s starting point would result in a deferential, rationality-based standard of review similar to that of the LAC.⁷⁹ However, in his actual application of

Du Plessis & Corder 1994:144-5; Kentridge 1999:14-59–14-60; Cachalia *et al.* 1994:31.

76 *Van Heerden*: paragraph 27.

77 SCA paragraph 54. Emphasis in the original.

78 Pretorius 2010; Pretorius 2013.

79 See Pretorius 2010:561-567.

the internal requirements of section 9(2) to the facts in the case, Moseneke J did, in fact, subject the measure at issue to a limited degree of fairness testing.⁸⁰ Given the internal inconsistency of the majority judgment and the apparent differences in the individual judgments in *Van Heerden* itself, the judgment is open for interpretations supportive of all the conflicting judicial approaches in the Barnard saga.

7. Conclusion

As a result, the SCA judgment is but another judicial instalment in the still unresolved search for the proper standard of review of affirmative action. To be welcomed is the SCA's intuition that, in order to give effect to the value structure of the *Constitution* as a whole, a balanced approach that fairly considers and weighs all competing interests is to be preferred above a dogmatic elevation of either the goal of restitution or the opposing interests of the non-favoured group. What is needed for the sake of legal clarity, however, is that this intuition be developed into a coherent, argumentative framework – such as the *Harksen v Lane* fairness test⁸¹ – that can provide an analytical foundation for more predictable and fair adjudication of affirmative action.

In the absence of such an analytical framework, the basis for the selection of contextually relevant considerations for the adjudication of affirmative action disputes remains unexplained and unsubstantiated, and prone to the subjective sensitivities of the adjudicator. It is very difficult to perceive how a court would be in a position to persuasively substantiate its finding that a particular impugned affirmative action measure does or does not “constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened”,⁸² other than on the basis of such a fairness-focused analytical framework. Without it, such a conclusion will be mere postulation, not the result of a reasoned analysis.

Labour Court adjudication of affirmative action often leaves the impression of an unstructured enumeration of conflicting considerations (reflecting competing interests) that are ultimately resolved – in the absence of an integrative normative perspective – by a dogmatic preference for the one or the other. Thus, even in cases where courts purport to postulate the same standards of review (whether fairness or rationality) as the basis of their analysis, the weight given to particular factors may substantially differ from case to case. Although neither the Labour Courts nor the SCA have resolved this uncertainty, they have at least – by identifying and defending the opposing views – set the scene for the Constitutional Court to do so.

80 *Van Heerden*: paragraph 44: “[A] measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.”

81 *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC).

82 *Van Heerden*: paragraph 44.

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