

Constitutional perspectives on the judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*¹

1 Introduction

Save for a possible appeal to the Constitutional Court, the unanimous judgment of the Supreme Court of Appeal (SCA) in *Solidarity (acting on behalf of Barnard) v South African Police Services (Vereniging van Regslui vir Afrikaans amicus curiae)* (Case number 165/2013 delivered on 28 November 2013) has brought to a close a legal battle of more than eight years between Captain Renate Barnard and the South African Police Services (SAPS) on Barnard's promotion to the rank of superintendent. The saga surrounding Barnard's promotion began in 2005. It went through the internal grievance procedure, the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court (LC) and then the Labour Appeal Court (LAC). Barnard was successful in the LC (*Solidarity abo Barnard v SAPS* 2010 (10) BCLR 1094 (LC)) but on appeal by the SAPS to the LAC in *South African Police Services v Solidarity*

¹ I am grateful to colleagues Christo Botha and Anton Kok with whom I had the opportunity to discuss some of the arguments presented in this note.

abo Barnard (2013 (3) BCLR 320 (LAC)) she was unsuccessful. The judgment of the SCA was on appeal from a ruling of the LAC.

From the point of view of the right to equality and against unfair discrimination in general and, more particularly, from an employment equity point of view, the judgment of the SCA is certainly important, albeit, as indicated in 6.5, not beyond criticism. However, it is also important for another very significant reason, in that it serves to demonstrate the manner in which courts of law should discharge their distinctive responsibility to dispense justice. Entrusted with this responsibility, a court must vigilantly maintain its detachment from the parties. It must carefully apply its mind to the relevant facts as presented by the parties and even-handedly apply the relevant law to pronounce a just verdict. This is the ideal way in which courts are traditionally required to arrive at equitable conclusions. Sometimes, however, as the judgment in the LAC in the case under discussion starkly demonstrated, courts do deviate in a spectacularly reprehensible manner from the ideal manner of adjudication. In the present case, the LAC, for instance, failed to maintain the basic standards which a court of law operating in a constitutional order and committed to the protection of basic constitutional rights is required to meet in compliance with the rule of law and the principle of judicial independence. In the context of the *Barnard* case, the judgment of the SCA is therefore of extreme importance because it corrected that which had gone appallingly wrong in the LAC.

At least some of the LAC's obvious errors are highlighted in the SCA's judgment. However, the LAC's argumentation poses additional questions of a constitutional nature which the SCA did not address directly but of which awareness can be inferred from certain parts of the judgment. These questions are important and are dealt with in part 6 of this discussion. It will not be argued there that the LAC, after having applied its mind to the merits of the matter, came to a legally incorrect conclusion. The argument will be that, on a proper analysis of the LAC's judgment, it is obvious that the approach followed by the LAC resulted in it not actually adjudicating the case at all, thus failing to discharge the distinctive responsibilities of a court of law.

In the discussion below I first relay the material facts of the case (in part 2). A concise account of the judgments of the LC and the LAC follows in parts 3 and 4. Part 5 contains a synopsis of the judgment of the SCA. Part 6 is an analysis consisting of five sub-parts. The first four of these contain a critique of the judgment of the LAC. This is done with reference to applicable tenets of constitutional law, which in part also resonate in the argumentation of the SCA. In the last sub-part, the judgment of the SCA is criticised. Paragraph references are references to paragraphs of the judgment of the SCA, unless indicated otherwise.

2 Factual Background

Renate Barnard, a White female, joined the SAPS in 1989. Her single-mindedness and talents caused her to move rapidly up through the ranks, reaching the rank of Captain in 1997. From 1996 to 2004 she was Branch Commissioner at Hartbeespoort Dam Detective Services and then, following restructuring, Section Commander to a larger division, namely Brits Detective Services (par 5). Thereafter she was transferred to the Complaints Investigation Division at the head office of the SAPS, which at that stage was called National Evaluation Services (NES) (par 6).

During September 2005, Barnard applied for a newly created position of Superintendent at the NES (par 8) and on 3 November of that year Barnard and five other applicants were interviewed by a racially diverse interviewing panel and received an average score of 86.67%, which was by far the highest score of all the candidates. The second and third-best candidates were also White. In the fourth place was a Black male, Captain Shibambu who scored 17.5% less than Barnard (parr 25-27). The panel recommended Barnard's appointment to the position in spite of the fact that it would not advance representivity of Black staff as envisaged in the Employment Equity Plan (EEP) of the SAPS adopted in terms of the Employment Equity Act (55 of 1998) (EEA). The panel reasoned that the gap between Barnard and Shibambu was too big to recommend the latter for the position as that would compromise effective services. It took the view that Barnard's appointment would not aggravate the racial representivity at the level of Superintendent, which in the ranking hierarchy of the SAPS is on level nine, because the representivity of the NES as a whole would not be affected since Barnard, if promoted, would remain part of NES (par 27). The panel met with the relevant Divisional Commissioner, Commissioner Rasegatla. The meeting grappled with the under-representivity of Blacks in the NES which, in their view, would be aggravated by the appointment of any of the first three candidates.

In consequence, the Divisional Commissioner decided not to make any appointment and eventually the position was withdrawn. It was clear that Barnard's race was the reason why she was not appointed (par 28). In May 2006 the same vacancy was once again advertised. Barnard again applied for the position and she and seven other candidates – five Africans, one Coloured and one White male – were interviewed by an interviewing panel which was once again racially diverse. Three weeks before the interview the Deputy National Commissioner wrote to Provincial and Divisional Commissioners that interviewing panels should focus, *inter alia*, on the appointment of personnel who would enhance service delivery (par 31). In the assessment of the interviewing panel Barnard was the top candidate once again. She scored 7.33% more than the runner-up, a Black applicant (parr 30& 32). This time, both the interviewing panel and the Divisional Commissioner recommended Barnard's promotion. The panel reasoned that Barnard's appointment would not enhance representivity on salary level nine. However, it would not aggravate these figures in the Division as a whole as she was already

part of it. Concerning Barnard's exceptional merits, the panel noted that she was the only candidate that displayed a unique blend of passion and enthusiasm for the position that she applied for, that she displayed a high level of commitment towards the SAPS and an eagerness to contribute towards enhanced services (par 33). In the ensuing meeting between the panel and Divisional Commissioner Rasegatla, he supported her promotion (par 35). In consequence, Rasegatla recommended to the National Commissioner, in whom the authority vests to decide on promotions, that Barnard be promoted. Rasegatla noted that as the best candidate, Barnard had proven competence and experience to perform all the core functions of the post; that even though her promotion would not enhance representivity at level nine it would not aggravate representivity in the Division as she was already part of it and that it would, moreover, create an opportunity for enhancing representivity on level eight as a result of the vacancy caused by her promotion. To this the Divisional Commissioner added that it would be in the interest of service delivery to promote Barnard (par 36).

Despite the recommendations of Divisional Commissioner Rasegatla and of the views of the interviewing panel, the National Commissioner did not approve the appointment of any of the candidates. A letter on behalf of the National Commissioner stated that he had decided not to approve the recommendation because, firstly, it would not address representivity and secondly, filling of the post was not critical and that non-filling would not affect service delivery (par 38). The post was nevertheless re-advertised (par 39). Having unsuccessfully sought redress through a grievance procedure and at the CCMA, Barnard, assisted by Solidarity Trade Union, then approached the LC.

3 Labour Court

On 24 February 2010, the LC, per Pretorius AJ, ruled in Barnard's favour. According to the LC, the numerical goals envisaged in the SAPS' EEP could not be conclusive. Such a plan had to be applied fairly, that is, balanced against the affected person's (Barnard's) right to equality and her right to dignity (par 41; par 25.2 LC). The LC noted that efficient operation – effective service delivery – was another relevant factor to be taken into account in the implementation of an EEP (par 42; par 25.7 LC). According to the LC, the respondent (SAPS) bore the onus of proving in terms of section 9(5) of the Constitution, that discrimination based upon a listed ground in section 9(3) of the Constitution – race in the present case – was not unfair. In the present case it failed to discharge this onus.

4 The Labour Appeal Court

On appeal by of the SAPS from the judgment of the LC the LAC, on 2 November 2012, overturned the judgment of the LC and ruled in favour of the SAPS. The LAC bench in this matter – a trio consisting of Mlambo JP, Davis and Jappie JJA, unanimously found that there was no discrimination against Barnard. The LAC stated that it was a

misconception “[t]o render the implementation of restitutionary measures subject to the right of an individual to equality” (par 46; LAC par 26 328G &30). It held that the LC was wrong in treating the implementation of restitutionary measures as subject to the individual conception of the right to equality (par 46). The LAC argued that there was in fact no discrimination simply because, on the facts there was not even any differentiation. If anyone else but Barnard had been appointed there would in fact have been differentiation. In this case, however, there was none because no one was appointed. The LAC stated that:

[w]hen one talks of discrimination; that is one is in fact, alleging that a differentiation of some sorts between and/amongst people has taken place. On the facts of the case before us, there is no evidence of such differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred (LAC par 22).

However, as the SCA pointed out (par 47), the LAC contradicted itself because, in spite of its finding that there was no differentiation (and discrimination), it thereafter went on (LAC par 42 333G) to find that “Discriminating against Barnard in the circumstances of this case was clearly justifiable”. The LAC also held that there was no basis for holding that the failure to appoint Barnard would compromise efficient services. According to the LAC, the decision of the National Commissioner was, on proper analysis, final when it comes to promotions in the SAPS and it “[i]s not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post” (LAC par 46).

5 The Supreme Court of Appeal

The SCA held that the SAPS unfairly discriminated against Barnard and overturned the LAC’s judgment. Underpinning the argumentation of the SCA is a trite and obviously correct principle, namely that decisions of the National Commissioner of the SAPS purporting to implement employment equity measures, such as the present decision not to promote Barnard, were to be adjudicated with reference to the distinctive facts of each case. The SCA was at pains to emphasise that employment equity measures should not be applied mechanically and that all relevant considerations pertinent to each individual decision purporting to implement such measures had to be scrutinised. This includes the impact of such measures on members of non-designated groups, such as Barnard, as well as considerations of effective service delivery. The SCA found pertinent support for this view in section 15(3) of the EEA which stipulates that affirmative action measures include preferential treatment and numerical goals, but exclude quotas (par 16) and also in the SAPS’ own employment equity plan, which states in its foreword that “Whereas the focus of employment equity is on Black people, women and persons with disabilities, no employment policy or practice will be established as an absolute barrier to prospective or continued employment or advancement of persons not from designated groups” (par 18). The SCA also referred to National Instruction (1/2004) which, amongst other things, sets out the generic functions of evaluation (interviewing) panels

such as those that interviewed Barnard, which pertinently states that “A panel must, in considering the applications for promotion, promote equal opportunities, fair treatment, employment equity and advance service delivery by the Service” (par 22). Thus the Court stated in conclusion that, the EEA was designed to assist in the struggle to achieve an egalitarian society by putting measures in place to overcome historical obstacles and disadvantages and provide equal opportunities for all. These objectives, the court stated, could not, however, be achieved by the mechanical application of formulae and numerical targets (par 23).

In adjudicating the dispute whether Barnard was in fact unfairly discriminated against, the SCA followed the approach laid down in *Harksen v Lane NO* (1998 1 SA 300 (CC) par 43-46 as well as s9 of the Constitution and ss6 & 11 of the EEA). Hence, the first question to answer was whether the decision of the respondent not to promote Barnard constituted discrimination and, if so, secondly, whether the discrimination was unfair (par 50). The SCA rejected the finding of the LAC that Barnard had not been discriminated against. (As pointed out above, the LAC contradicted itself in this regard in par 22 & 47 of its judgment) (par 50). The SCA argued that, unlike Barnard who was not promoted, a senior African police officer with Barnard’s distinctive skills would certainly have been promoted (par 52).

Save for the remarks made in 6.5 *infra*, the SCA was clearly correct in making this finding. Discrimination may be either direct or indirect. Both are prohibited by section 9(3) of the Constitution and section 6(1) of the EEA. Direct discrimination occurs when a measure expressly discriminates, that is, where two categories of persons are clearly treated differently – one category less favourable than the other. Discrimination is indirect when it is by stealth, that is, where a measure does not openly discriminate, but where on closer scrutiny it produces discriminatory results (*City Council of Pretoria v Walker* 1998 (2) BCLR 257 (CC) par 32 273-274; see also Currie & De Waal *The Bill of Rights Handbook* (2013) 238-9). The present case was not one where a less qualified Black applicant was promoted over the head of a much better qualified White applicant. Arguably there was no overt – direct – discrimination. However, the only exceptionally well-qualified candidate, a White woman, highly recommended for promotion by the interviewing panel and the Divisional Commissioner, was not promoted because she was White and would therefore, in the words of the National Commissioner, “not address representivity”. Hence, if the discrimination was not direct, it certainly produced discriminatory consequences, thus constituting indirect discrimination. The LAC failed to consider this aspect of the discrimination question. Fortunately the SCA corrected this blunder.

The discrimination against Barnard was on the basis of race, which is one of the listed grounds in terms of section 9(3) of the Constitution (and s6(1) of the EEA). If discrimination was on a listed ground, unfairness is presumed under section 9(5) of the Constitution unless the discriminator (the respondent in the present case) rebuts such presumption. The test

for fairness, as the Constitutional Court noted in *Harksen*, mainly focusses on the impact of the discrimination on the complainant and similarly placed persons (par 55). To determine whether the discrimination was fair, the facts pertinent to the case must therefore be scrutinised. The LAC, however, completely failed to conduct such an inquiry into the facts of the case and simply made the peremptory declaration that the discrimination was fair (after earlier in its judgment it stated that there was no discrimination at all. As the SCA stated:

Regrettably, this is not an exercise that the LAC embarked on. The appeal turns on the facts and it would be presumptuous to assert and foolish to assume that this decision will be a Merlin-like incantation to address the varied cases likely to come before courts in relation to the application of the EEA (par 58).

The LAC therefore completely failed to conduct an inquiry into the fairness or otherwise of the discrimination in a situation-sensitive way, as laid down in *Van Heerden* (par 58). Once again, as in the case of the LAC's erroneous finding that there was no discrimination, the SCA also corrected this error by carefully assessing the considerations relating to the question of unfairness. In doing so, it pointed out that the recommendations of the interviewing panel were particularly relevant. These panels are important management tools composed of senior police officers assisting the National Commissioner in considered decisions regarding the filling of vacancies. The National Commissioner must at least give consideration to these recommendations (par 60), which in the present case amounted to a particularly strong recommendation to appoint Barnard (parr 33&62). The same applies to the views of the Divisional Commissioner. The Divisional Commissioner, as the line manager, has first-hand knowledge and insight into the needs and dynamics of his division and his recommendations should therefore be taken account of by the National Commissioner in order to arrive at a just decision in terms of the EEA and the EEP (par 61) and who, moreover, in his written recommendations stated that it would be in the interest of service delivery to promote Barnard (parr 36&63). The respondent also sought to justify the decision not to appoint Barnard on the basis of the National Commissioner's view that the position that Barnard applied for was "not critical". Dealing with this attempt to justify the decision not to appoint Barnard, the SCA referred to the values underpinning the public administration (also applicable to the SAPS) as outlined in section 195(1) of the Constitution, section 205(2) and (3) of the Constitution that pertinently deals with the SAPS, and to the South African Police Service Act (68 of 1995) (par 70-72), all of which envisages "a professional, efficient police force that makes effective use of resources" (par 72). Having regard to these constitutional and legislative provisions, it cannot be contended that a senior position such as the one that Barnard applied for was not seriously considered when it was created and advertised in the first place. The management of the SAPS must have been convinced of the need for such a position and for the need to fill it. Moreover, the National Commissioner's view that filling of

the vacancy was not critical is contradicted by the letter of the Deputy National Commissioner referred to in paragraph 31 of the judgment, that interviewing panels should focus, *inter alia*, on the appointment of personnel who would enhance service delivery (par 76).

Hence, the SCA stated as follows with regard to the National Commissioner's assertion that it was not critical to fill the position:

Against this background and in the absence of a reasoned motivation by the National Commissioner, one is left with the distinct impression that the explanation that the post was not filled because it was not 'critical' was contrived (par 73).

The unfair nature of the discrimination is underscored by the unjustifiable detrimental impact of the discrimination on Barnard who, in spite of her being a loyal and dedicated servant of the SAPS, was twice rejected on dubious grounds (par 77).

Certainly of great importance from the point of view of labour law, the SCA stated that although the National Commissioner was not obliged to fill a vacancy, especially where there is no suitable person meeting the requirements of the position, it does not follow that where the only suitable candidate is from a non-designated group in relation to representivity, that person should not be appointed (par 78).

The available evidence clearly shows that the respondent failed to rebut the presumption that the racial discrimination against Barnard was not unfair. In consequence, there was no factual basis for the LAC's decision (par 79), which was overturned.

The judgment of the SCA corresponds in all material respects with that of the LC. What it shows is that there was in fact no basis for the LAC overturning the judgment of the LC. The LAC's judgment, as will be shown in this discussion, was in fact nothing but a dreadful miscarriage of justice.

6 Analysis

The judgment of the SCA is a welcome and much-needed correction to the judgement of the LAC judgment by Mlambo JP, Davis and Jappie JJA. However, the judgment of the SCA, having done what was necessary to correct what went wrong in the LAC, did not embark on a full-blown critical analysis of the unhappy discourse that constituted the judgment of the LAC. That after all, is also not the responsibility of a court (of appeal). The SCA judgment nevertheless provides valuable confirmation to what I will now do, namely, to critique the judgment of the LAC from a constitutional point of view.

The gist of the critique is that the LAC approached the case in such a manner that on proper analysis, it proves not to have adjudicated it at all. It is argued that the LAC:

- (1) So completely deferred to an absolute power of the National Commissioner on decisions regarding promotions, and to the policy of representivity, that it prevented itself from considering the merits of the case before it, thus effectively imposing an ouster clause on itself;
- (2) materially erred in defining the dispute that it was seized to adjudicate in such generic terms that it could not and did not adjudicate the actual dispute between the parties before it; and
- (3) misunderstood the distinctive responsibility of a court in contrast to the legislature and the executive, resulting in its abdicating its judicial duties.

These three errors are closely inter-related, partially overlapping and mutually reinforcing. All three caused the LAC to abdicate its duties and responsibilities as an independent and impartial adjudicator in contrast to the legislature and the executive, thus denying the appellant – and by implication also the respondent – the constitutional right of access to court.

6 1 The LAC Abdicated Absolute “Prerogative” of the National Commissioner and to the Policy of Representivity and thus Administered an Ouster Clause on Itself

It is common cause that the power regarding promotions in the SAPS vests in the National Commissioner. However, the exercise of this power is judicially reviewable. If not, the power is absolute and above judicial control. Such prerogatives and absolute powers are wholly inimical to the principle of the rule of law and the notion of a supreme constitution in which, as stated in section 165(4) of the Constitution, the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

The approach of the LAC was at variance with this. Instead of treating the power of the National Commissioner as reviewable, it dealt with it as if it was absolute, and describes it, quite strikingly, as a prerogative (par 46 443I; also in parr 4 322D & par 17 325H). Not only did the LAC describe the power in absolute terms, it also considered and applied it as an absolute and non-reviewable prerogative.

In the present case, the National Commissioner decided not to promote Barnard solely on account of what he clearly regarded as the unconditional need to achieve prompt representivity in the staff composition of the SAPS. In doing so, he disregarded the whole collection of factors which had been considered by the SCA before concluding that in the circumstances Barnard was entitled to be promoted.

In dealing with the decision of the National Commissioner not to promote an applicant (that is, an applicant in general terms, and not Barnard specifically) the LAC referred to sections 5(7) and 13(7) of National Instruction 1 of 2004 of the SAPS in terms of which the National

Commissioner has a discretion, notwithstanding the recommendations of an interview panel, whether or not to promote a recommended candidate, to leave a vacancy unfilled, or to promote another candidate from the list of recommended candidates submitted to him or her, or to direct that the post be re-advertised (LAC par 43 333G-I). According to the LAC, the National Commissioner is the only person who is answerable as to any determination made regarding service delivery matters. The LAC stated:

It is not open to a court to 'second guess' a decision that not filling a post will not compromise service delivery ... In any event, I am of the view that the National Commissioner was the only person well-placed to determine if service delivery would be compromised by the failure to fill the post and his decision that this would not be so is unassailable. Frankly speaking that is his prerogative and should he be incorrect in so deciding and imperil service delivery as a result, he is answerable to ... the Minister and ultimately to Parliament. The National Commissioner is similarly answerable in that manner should he fail to achieve the targets set out in the Employment Equity Plan. Our role as courts is to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan such as we have here. It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post (par 46 334G-335B).

The LAC then concluded that the purpose of employment equity orientated measures may not be subjected to (that is, hampered by) an individual's right to equality and dignity. This conclusion follows logically from the LAC holding that the LC was wrong in finding that the purpose of employment equity orientated measures was subject to an individual's right to equality and dignity (par 47 335C). The LAC made the same wrong assertion in paragraph 20 (326H). (As shown below, the LAC erred in making this assertion, as the LC in fact never made any such decision.)

As the discussion of the judgment of the SCA shows, there was overwhelming evidence showing that Barnard had to be appointed and, conversely, that not to appoint her in fact constituted unfair racial discrimination. (This evidence includes information of Barnard's excellence advanced on her behalf and clearly showing that she was by far the best candidate; the findings and recommendations of the interviewing panel supported by Divisional Commissioner Rasegatla; the fact that the position for which Barnard applied was created and advertised; and the evidence that her promotion would promote effective services.)

These and other relevant factors must be shown to have been considered in order to satisfy the requirement that he had duly exercised the power vested in him. The National Commissioner, however, went no further than to give effect to his own rigid interpretation of representivity in rejecting the recommendation of the Divisional Commissioner to promote Barnard on the basis that it "... did not address representivity" (par 8 323B) and that filling the position was not "critical" (par 8 323E), thus bluntly ignoring all relevant considerations, including the individual

rights of Barnard as well as the operational needs of the SAPS, the institution of which the National Commissioner was the head.

Instead of duly exercising its powers of judicial review, as is incumbent on a court of law devotedly discharging its judicial authority, the LAC simply rubberstamped the National Commissioner's failure to apply his mind to all relevant considerations. In complete deference to the "prerogative" – the absolute power – of the National Commissioner, the LAC, faithfully in step with the Commissioner, also elevated the prompt achievement of representivity to the sole and decisive factor to be considered when decisions regarding promotions are to be made. Thus the LAC held that appointing Barnard "... would fly in the face of the employment equity orientated measures applicable in the appellant's environment and would have aggravated the overrepresentation of Whites in level 9" (LAC par 42 333F). The decisive importance of the representivity factor in fact permeates the whole discourse of the LAC in paragraphs 25, 32, 34, 37 and 40-43 of its judgment. In consequence of this wholesale deference to the representivity factor, the court failed to deal with the pertinent dispute namely, the alleged violation of Barnard's constitutional right against unfair discrimination resulting from the decision of the National Commissioner not to promote her. In so doing, the LAC erroneously tried to effect something which the SCA rejected, namely to pursue employment equity measures by the mechanical application of formulae in order to meet numerical targets.

By the same token, the LAC also deferred to the *ipsissima verba* of the National Commissioner on the question of service delivery instead of reviewing the decision with reference to the relevant evidence as the SCA eventually did. Once again, the effect of this deference was that the LAC failed to attend to the specific dispute before it, namely whether or not Barnard's constitutional rights had been infringed.

Had the LAC duly applied its mind to the actual dispute in the way the SCA did, thus considering the relevant evidence instead of deferring to the "prerogative" of the National Commissioner in conjunction with the representivity factor, it would have come to the same conclusion as the SCA in favour of Barnard. The problem is that the LAC, having so wholly deferred to the decision of the Commissioner and having completely failed to consider the relevant evidence before it, had in fact completely disregarded the actual dispute and, in consequence, failed to adjudicate it.

So what was the LAC, on account of its deference to the National Commissioner's "prerogative" and unjustified subservience to the policy of representivity, actually doing by bluntly declining to decide the case before it? What, specifically, was it doing from a constitutional point of view? Although the SCA identified and corrected this mistake of the LAC, it did not proffer an express answer to this question. On close analysis the answer to the question is that the LAC imposed an ouster clause upon itself, thus preventing itself as a court of law, from adjudicating the merits

of Barnard's complaint that her constitutional rights to equality and dignity had been violated. The LAC did this by proclaiming in general terms, that the constitutional rights of an individual cannot trump decisions implementing an employment equity plan that purports to pursue representivity. Hence, the LAC abandoned the jurisdiction that the Constitution confers upon the courts to adjudicate and rule against decisions that violate rights - in the present case a decision purporting to be in pursuance of an EEP that violates individual constitutional rights. The LAC placed decisions purporting to implement EEP's and promoting representivity beyond judicial review. Ordinarily, ouster clauses are legislative provisions that exclude the jurisdiction of the courts to review decisions of functionaries, more in particular, decisions of executive organs of state, taken in terms of empowering provisions contained in such clauses. Ouster clauses render such decisions final and therefore not subject to judicial control in spite of the fact that they could violate individual rights. Ouster clauses featured in some legislation before 1994. Understandably, they are generally and justifiably regarded as repugnant because they exclude the jurisdiction of the courts to review decisions that violate constitutional rights, thus permitting uncontrolled invasion of constitutional rights. Section 34 of the Constitution now provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This right has obviously rendered all ouster clauses unconstitutional.

The right of access to the courts is a core constitutional right in that it enables people to seek judicial redress for the invasion of any right provided for in the Constitution. The enforcement of all other constitutional rights is dependent on the right of access to court. If the latter is tampered with, all other constitutional rights become unsettled because judicial redress for their violation can no longer be sought. Ouster clauses therefore undermine the very foundation of a constitutional order premised on the supremacy of the Constitution, the rule of law and the guaranteed protection of constitutional rights.

There is no legislative ouster provision in the present case. What did occur was that the LAC's recognition of the "prerogative" of the National Commissioner and its mechanical interpretation of the policy of representivity amounted to an imposition upon itself of an ouster clause, stripping itself of its own jurisdiction and denying Barnard the right of access to court in order to seek redress for the violation of her right to equality and human dignity. This is egregiously inimical to the principle of constitutional supremacy and the rule of law. The violation of the right was not authorised by the legislature or the executive, something which could be expected in a totalitarian state where scant recognition is afforded to basic rights, but certainly not to be forthcoming from a court of law entrusted with the protection of rights and supposed to be the supreme guardian of the rule of law.

6 2 The LAC's Error on the Nature of the Disputed Issue

Apart from the fact that it allowed itself to be incapacitated by a self-imposed ouster clause, the LAC also, in a different but related way, prevented itself from discharging its adjudicatory duties. What it did was to incorrectly define the dispute that it had to decide materially, in consequence of which it failed to respond to and adjudicate the actual dispute placed before it. According to the SCA, the dispute revolved around the broad and general question whether, in the event of a clash, employment equity measures or the individual rights to equality and dignity should prevail. This was obviously a misdirection because the actual dispute was not a broad, but a narrow one. It merely required the court to weigh up the merits of the National Commissioner's specific decision not to promote Barnard against her individual rights. By making a material error as to the nature of the subject matter of the dispute, the SCA denied the parties, more particularly the appellant who was unsuccessful, the right of access to court and thereby abdicated its core duty as a court of law to acquit its responsibility of considering the actual life disputes it is called upon to decide.

The SCA also identified this error and its judgment was largely focussed on correcting it. The SCA emphasised that employment equity measures should not be applied mechanically but with due consideration of all relevant factors pertinent to the case concerned. It also scolded the LAC for failing to do so. The pertinent constitutional implications of this blunder will now be considered.

When defining the dispute it had to decide, the LAC stated that "the issue ... is whether the implementation of equity orientated measures should be stifled in the event that such implementation will adversely affect persons from non-designated groups" (par 20 326H).

According to the LAC, the LC erroneously decided that "... the implementation of employment equity measures must yield to an individual's right to equality and dignity where such individual is adversely affected by the implementation of such measures" (LAC par 23 327H). This means "that the right to equality supersedes other considerations such as, in this case, the implementation of employment equity orientated measures" (LAC par 23 327I), or, as the LAC also stated, the LC "misconstrued the purpose of the employment equity orientated measures by decreeing that their implementation was subject to an individual's right to equality and dignity" (LAC par 47 335C; see also par 20 327H-I).

It should first be emphasised, that the SCA was wrong in its assertion that the LC defined the issue in these general terms. The LC's judgment belies that. The LC in fact only decided the pertinent issue concerning the specific decision relating to Barnard and not the non-pertinent, generic and abstract question which the LAC erroneously identified to be in issue.

Having made these incorrect statements on the supposed dispute, the LAC went on to reject the alleged view of the LC (parr 26 & 30) and then “decided” that employment equity measures trumped individual rights. Solely on account of this general “finding”, and without considering the specific facts pertinent to the National Commissioner’s decision regarding Barnard, the LAC illogically leapt to the non-premised conclusion that the decision not to promote Barnard was legitimate.

The LAC was clearly wrong in interpreting the issue in these broad and generic terms. This was simply not the issue. It could therefore not make a “ruling” that employment equity measures trump individual rights simply because that was not in issue. The issue before the court was not whether in general – *in abstracto* – the right to equality, dignity (and other constitutional rights) trump or are trumped by the implementation of employment equity measures. The issue was specific. It was whether or not the decision of the National Commissioner (that had to, but as the SCA clearly indicated, did not account for all the facts pertinent to that decision) not to promote Barnard was legally, more specifically constitutionally, justified.

The LAC’s erroneous generic definition of the issue and its ensuing finding, instead of applying its mind to the actual specific dispute it had to decide, sent its whole discourse astray. It went on an exposition of employment equity measures in general, instead of properly engaging with the actual question in issue in the way the LC and the SCA did.

In support of the LAC’s generic assertion that employment equity measures trump individual rights in contrast to the opposite view that it erroneously attributed to the LC (par 26 328G), the LAC strayed through the legal basis of employment equity measures, the EEA and to EEP’s (parr 31-39) and the representivity policy. All these considerations could at best, serve as a general background indicating why the decision not to promote *an* applicant *may* or *may not* be taken, and presenting the first preliminary steps for dealing *in abstracto* with *an applicant* for promotion. However, the LAC never reached the point where it dealt with the merits of the specific application, namely that of Barnard, and never gave due consideration to the specific evidence pertaining to Barnard’s application for promotion which was the actual question to be decided.

It should be trite that these general considerations which, in any event, are not in dispute, can obviously not determine the specific decision in issue, namely why Barnard was not promoted. This is clear from the SCA judgment and also from the judgment in *Minister of Finance v Van Heerden* (2004 11 BCLR 1125 (CC)) in which Moseneke J, as he then was, stated that it was obvious that affirmative action could often come at a price for those who were previously advantaged (par 44 1143H). However, that does not mean that all individual decisions purportedly taken in terms of such measures are, as a matter of principle, always constitutionally beyond reproach. All such measures and, as in this case, all individual decisions purported to be taken in terms of such

measures, must be considered with reference to all relevant facts pertaining to the case in question in order to determine whether they measure up to what the Constitution requires. The effect of such a decision on the rights of any individual is crucial in this context and might be indicative of the unconstitutionality of the measure. In this regard the significance of the following observation from Moseneke J in *Van Heerden* is obvious:

However, it is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. *In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, 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* (*Van Heerden* par 44 1144A-C). (Emphasis added)

In consequence, a court duly adjudicating a case before it, cannot rule a decision purported to pursue employment equity, to be legally and constitutionally justifiable without first having considered the effects of such decision on the rights of a person allegedly adversely affected by it. This, however, is exactly what the LAC failed to do in the present case. By its incorrect abstract and generic, instead of correct concrete and specific definition of the disputed issue and its ensuing purported “decision” of this supposed issue, the LAC denied the parties, more in particular the appellant, the right of access to court in terms of section 34 of the Constitution.

The primary prerequisite for exercising this right is that the court adjudicating a matter must apply its mind to the specific dispute before it instead of being carried away by some other imagined dispute which is not in issue. The judgment of the court must respond pertinently to the disputed issues presented by the parties, and not to a supposed issue based upon an erroneous interpretation of what the dispute supposedly entailed, but in fact did not entail. The court must therefore adjudicate the actual *facta probanda*, that is, the disputed issues. The *facta probanda* determine the relevant *facta probantia*, that is, the evidential material that will be relevant to prove or disprove the disputed issues. By the same token, the *facta probanda* also determine which evidential material is in fact not relevant. If the court errs on the disputed issues – on the *facta probanda* – it will also err on the *facta probantia*, that is, if it is wrong on what the actual disputed facts are, the court will also err on the relevance or otherwise of the evidence required to prove or disprove the disputed facts. Having misconstrued what is in dispute, it will also err in deciding which evidence to admit, and which not to admit. Hence, in the final analysis, it will “decide” the wrong dispute on the basis of the wrong evidence. It will not decide the actual dispute in issue between the

parties, but a supposed one that is not really in issue and which is not really before the court. The court's "adjudication" of such (supposed) dispute might benefit the respondent (as in this case it did), or the appellant, or it might be to the detriment or to the benefit of either party (depending on the scenario in question). However, regardless of these variable scenarios, it will undoubtedly amount to a patent denial of the right of access to court and to a serious violation of the integrity of the administration of justice and the rule of law.

This was exactly what occurred in this case as a result of the LAC's erroneous definition and consideration of the dispute before it. The LAC's incorrect definition of what it had to decide, namely whether the specific decision of the National Commissioner taking into account all the facts pertinent to such decision not to promote Barnard, was legally justified or not, caused the right of access to court to be brazenly flouted. The LAC incorrectly defined the *factum probandum* in the above-mentioned abstract and generic terms. However, this was not in issue. The specific issue – and the real pertinent *factum probandum* as described above, was whether or not Barnard was entitled to promotion. Having incorrectly defined the *factum probandum*, the court also dealt incorrectly with the *facta probantia*. It erroneously allowed itself to "decide" the case on the basis of merely generic and background facts (and, as shown above, by a legal misconception that the decision of the National Commissioner was beyond judicial review) that was materially irrelevant for the actual specific dispute in question. At the same time, it disregarded the most relevant evidence that was crucially important for a finding of the specific dispute that it actually had to decide, namely all the evidence that the SCA eventually scrutinised.

On proper analysis therefore, the LAC's judgment was no judgment at all, simply because it did not respond to the dispute that it was seized to decide. It was a general discourse culminating in an assertion that affirmative action measures trump individual rights. However, since the actual specific dispute was not entertained with reference to the pertinently relevant *facta probantia*, the discourse of the LAC amounted to a refusal to give judgment. In doing so, the LAC divested itself of its responsibility to decide the issue, thus denying the parties, more in particular the appellant, the constitutional right of access to court.

6 3 The LAC's Misunderstanding of the Distinctive Responsibility of a Court in Contrast to that of the Legislature and the Executive

Ideally, the three branches of governmental authority should be united in the pursuit of justice. In this pursuit it is, however, crucial to clearly distinguish the salient characteristics of the judicial function from those of the legislature and the executive. Legislatures and executives seek to achieve this through general policies. Well-considered policies designed in terms of Constitution that account for the rights of all sectors of the populace will generally achieve this purpose. However, it is impossible to

foresee the effects of such policies in individual cases, that is, for each specific individual in his or her singularly unique circumstances. The point is that good and well-intended policies aimed at the achievement of a general public good may, in given circumstances, prejudice specific individuals. In such cases the pursuit of justice requires specific decisions in order to achieve justice for such an individual and for the public in general. Aristotle was keenly alive to this dilemma. According to him, general rules aimed at achieving overall justice may, in certain circumstances, prove to be ineffective, thus causing injustice. This is an inevitable consequence of the fact that the circumstances of every specific case are not always foreseeable.

Specific cases require specific decisions based on the unique facts of every particular case. This is necessary in order to achieve fairness in the case concerned and also to secure overall justice for everyone (Aristotle *Nicomachean ethics*, English translation by Martin Oswald, Prentice Hall (1962) 141-2). In the context of the individual case with its unique facts, the distinctive responsibility of the courts is obvious.

In this regard it is appropriate to refer to the views of Ronald Dworkin, expressed in two of his main works (Dworkin, *Taking Rights Seriously* (1977); and Dworkin, *Law's Empire* (1986)). In these works this distinctive feature was emphasised or identified and the unique responsibilities of the courts elucidated. These insights are important: They not only resonate our legal tradition but also clarify the distinctive responsibility of the courts in general. This responsibility is of extreme significance in a constitutional order such as ours, which, amongst other things, avows the values of the supremacy of the Constitution and the rule of law (s1(c) of the Constitution) and where the courts are required to be independent and not subject to considerations of expediency, policy and executive instructions but only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice (s165(2) of the Constitution).

In formulating and applying policies, legislatures and executives should take care to act within the confines of the law and to respect and promote individual rights (also expressly provided for in s7(2) of the Constitution) and in so doing, pursue the achievement of justice. However, the distinctive characteristic of the functional terrain of legislatures and executives is not *specifically individual* and *personal* but *general* and *abstract*. Lawrence Baxter (*Administrative Law* (1984) 349) stated for example, that legislation usually connotes action which is of *general* application or effect in contrast to action which is specific in application. This corresponds with the observation of the Appellate Division in *South African Roads Board v Johannesburg City Council* (1991 4 SA 1 (A) 12-13), which in itself harks back to the Roman *Digest*. (Also see the brief observation of the Constitutional Court in *UDM v President of the RSA* 2002 11 BCLR 1179 (CC) 1200A-B par 70). In consequence, legislatures and executives design and execute policies with a view to achieving an overall collective social, political or economic goal. Courts

are not isolated from such policies. They should generally be inclined to give effect to them. However, this should take place in line with the basic assumptions of constitutionalism. This entails that these policies must be compatible with the Constitution, more particularly with constitutional rights in individual cases. Hence, the central focus of the judicial function and primary responsibility of courts, unlike that of the legislature and the executive, are not these general collective social policies and goals, but the protection of individual (constitutional) rights (as described by Dworkin, among others, in *Law's Empire* 381).

A court adjudicating a case which involves individual constitutional rights can only fulfil its judicial responsibilities when it establishes and gives effect to the rights of the litigating parties. To that end, courts must reason in a principled way. They must not primarily pursue policies deemed to advance or secure an economic, political or social situation for the benefit of all. That is the distinctive terrain of the legislature and the executive. Courts must fulfil their distinctive function and reason on the basis of principle. This will inevitably secure justice and fairness for individuals in specific cases. (For Dworkin's distinction between policy and principle see, amongst others, *Taking Rights Seriously* 22 & 82.) The courts' principled argumentation should be intended to secure the establishment (of the ambit and consequences) of the (constitutional) rights of the parties in an instant case. It should not be premised on policy that is directed towards the establishment (and promotion) of collective goals, (See for e.g. *Taking Rights Seriously* 90; *Law's Empire* 244) which policies might possibly infringe upon the constitutional rights of individuals in a specific set of circumstances. Policies seeking to achieve an overall good are essentially utilitarian, that is, in the words of Dworkin, "statistically defined" in contrast with matters of principle that focus on the rights of an individual regardless of the statistical considerations. (*Law's Empire* 223; 243. See also Fiss "The limits of judicial independence" 1993 (vol 25) *Inter-American LR* 57 59-60). Litigants are therefore entitled to the adjudication of their disputes upon the principles underpinning their rights (*Law's Empire* 218, 410).

When a court simply enforces policy instead of discharging its judicial duty of adjudicating individual rights on the basis of principle, it renounces its responsibility as an adjudicator and assumes a new role, namely that of a deputy of the legislature or the executive. This would defeat the very idea of constitutional adjudication. In the words of the Constitutional Court in *S v Makwanyane* (1995 BCLR 665 (CC) par 89) (when dealing with the question of public opinion in the judicial process):

[t]he protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution ... The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the

rights of minorities and others who cannot protect their rights adequately through the democratic process.

In the present case, the LAC refused to consider the merits of the decision of the National Commissioner with reference to the rights of Barnard. It wholly deferred to the “prerogative” of the National Commissioner and to the notion of representivity without appreciating the impact of the National Commissioner’s decision on the individual rights of the appellant. In effect, the court assumed the distinctive role of the legislature and abdicated its own distinctive responsibility as a court of law.

6 4 Separation of Powers

Although the LAC never mentioned the doctrine of the separation of powers, it is clear, however, that it was prominently in its mind all along. Its wholesale deference to an absolute power of the National Commissioner and to the policy of representivity, to the extent that it inflicted an ouster clause on itself, attests to the LAC subscribing to a form of separation of powers that aggrandised the legislature and the executive. At the same time, it also minimised the role of the courts to such an extent that it in fact reduced the court to a mere deputy of the political branches and, in this case, more specifically to the National Commissioner of the SAPS. The SCA, however, was clearly not concerned about having to overcome any possible obstruction posed by the doctrine of separation of powers. That is obviously why it did not defer in the way the LAC did. There is also no indication that the SCA deemed its ruling against the SAPS, being an organ of the state and purporting to enforce government policy of representivity, as particularly activist and in disregard of the separation of powers doctrine. So, which of the two courts are correct in this regard? The answer to this question is provided by the explanation in 6.3 above, of the distinctive role of the courts in contrast to that of the executive and the legislature. When a court is called upon to decide on the constitutionality of a broad policy which falls squarely within the terrain of the legislative or the executive, the risk looms large that the court might find itself trespassing on that terrain. That is not to say that the court is necessarily precluded from deciding such an issue. However, realising the risk involved the court should act with careful restraint. If it gives judgment disrupting such broad policies, it could most probably legitimately be blamed for usurping powers that do not really fall within the province of the judiciary. Conversely, however, when the issue before the court is limited and specific and does not relate to the justifiability of a general policy, but merely to the impact of a single decision on a particular individual, the risk of trespassing on the terrain of the executive or the legislature is highly unlikely and a separation of power issue does not arise. If in such a case a court should refrain from deciding the issue and defer to the decision of the state organ in question, it relegates itself to the mere deputy of such state organ, instead of living up to its responsibilities as a court.

The present case was of a specific nature. The risk of the court infringing upon the terrain of the legislature or the judiciary was therefore a remote, if not non-existent, one. There would have been no such risk had the court given judgment against the state, as the SCA in fact did. There was no separation of power issue at stake. However, the LAC incorrectly interpreted the issue. It treated it as a broad issue of policy instead of the specific issue which it in fact was. In consequence, a separation of powers issue was artificially involved in this case. As, if a broad policy issue was at stake, the LAC unjustifiably concocted the need for judicial deference. In complete acquiescence to the prerogative of the National Commissioner and to the policy of representivity, it allowed itself to be relegated to an agreeing delegate of the National Commissioner. Ironically, in doing so, it did not evade a separation of powers question; on the contrary, it created one, but not one involving the risk of the court trespassing onto the terrain of the other branches, but exactly the opposite, that is, of allowing the other branches to trespass upon the functional terrain of the judiciary, in such bold fashion that the court was incapacitated to rule on a human rights issue involving a single individual. In consequence, the LAC disregarded the separation of powers principle instead of affirming the principle by discharging its judicial responsibilities in respect of the dispute before it.

6 5 Possible Flaws in the SCA's Argumentation

Although the judgment of the SCA is to be hailed for correcting the wrongs that occurred in the LAC, it is not necessarily correct in all respects. It might be argued that the SCA erred in part in its argumentation even though its conclusions were correct.

Generally, when dealing with a claim of alleged unfair discrimination based on one of the listed grounds (including race) in terms of section 9(3), read with section 9(5), of the Constitution, unfairness of discrimination is presumed unless the respondent (discriminator) can prove that the discrimination was in fact not unfair. In such cases the tests for equality and unfair discrimination, as developed in the Constitutional Court judgment in *Harksen v Lane* (*supra*) are applied.

However, the present case is not an ordinary case of alleged unfair discrimination. It deals with constitutionally authorised measures of remedial or restitutionary equality aimed at achieving equality as envisaged in section 9(2) of the Constitution. The decision of the National Commissioner was taken in pursuance of an EEP under the EEA which was adopted in terms the operative part of section 9(2) (the second sentence of section 9(2)) which provides:

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.

This part of section 9(2) basically envisages restitutionary equality among which counts the affirmative action measures outlined in the EEA.

Employment equity measures such as those in the EEP of the SAPS necessarily differentiate on the basis of race (and other grounds such as gender and disability). The question therefore arises whether measures for restitutionary equality adopted under section 9(2) should be dealt with in the same way as other forms of differentiation. Two options are possible:

First, measures for restitutionary equality grounded in section 9(2) that differentiate on one of the listed grounds of section 9(3), read with section 9(5), are to be considered on the same footing as other forms of racial differentiation. They will also be regarded as *prima facie* unfairly discriminatory, unless the author of the measures proves the contrary. The tests of *Harksen v Lane* (*supra*) will apply to them in the same way as to any other differentiating measure. Loot Pretorius (“Fairness in transformation: a critique of the Constitutional Court’s affirmative action jurisprudence” 2010 *SAJHR* 536-570) is an advocate of this view.

Second, restitutionary measures, in pursuance of section 9(2), should be treated differently from other forms of differentiation, more particularly, they should not be regarded as *prima facie* discriminatory. This is the view that the Constitutional Court per Moseneke J (as he then was) took in *Van Heerden* (*supra*) where the following is said:

It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in section 9(3), pass muster under section 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of section 9 is internally inconsistent or that the provisions of section 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly (par 33) (footnotes removed).

Viewed against the backdrop of this view, the SCA might have been wrong to apply the *Harksen* test to the National Commissioner’s decision not to promote Barnard and thus to have considered the decision as constituting *prima facie* unfair discrimination in terms of section 9(3), read with section 9(5). It does not follow, however, that the SCA was necessarily wrong because it did not deal with a restitutionary measure as such – an EEP – as envisaged in section 9(2) of the Constitution. What it did deal with was an individual decision purported to have been taken in pursuance of an EEP. The SCA seems to have been correct in applying sections 9(3) and (5) to the decision of the National Commissioner. However, even if sections 9(3) and (5) were not applicable, and even if the decision of the National Commissioner was to be considered solely on the basis of section 9(2), the SCA’s reasoning and its conclusion would remain valid. The reason for this conclusion is that the constitutionality of both measures for restitutionary equality under section 9(2), such as EEP’s, and of individual decisions purported to be taken in pursuance of such measures, cannot be assumed to be measures or decisions for

restitutionary equality solely on the basis of what they purported. They have to be scrutinised in order to establish, with reference to the relevant evidence, whether they are in fact truly measures and decisions that promote equality for all. To qualify as such, both the interests of beneficiaries of such measures and decisions (those previously disadvantaged by unfair discrimination), as well as all other persons, such as those in Barnard's position, will have to be taken into account. No one must be unfairly discriminated against and the enjoyment of all rights and freedoms must be equally available to all. The clear basis for this is to be found in the first sentence of section 9(2) that provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms".

Following the basic tenets of contextual interpretation, section 9(2) must be read as a whole. It cannot be interpreted as if its first provision is not in existence. In fact, measures for remedial equality, including affirmative action adopted in terms of section 9(2), are indeed regarded as expressions of the right to equality and not exceptions thereto, because the provision (the second sentence of s9(2) follows on the first) includes into the right to equality the full and equal enjoyment of all rights and freedoms. This underscores the importance of reading section 9(2) as a whole.

The restitutionary measures authorised in the second sentence of section 9(2), that is, the "... legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination ..." are in fact authorised to promote, in the words of the first sentence of section 9(2) "... the full and equal enjoyment of all rights and freedoms". Restitutionary measures may therefore quite obviously not create new inequalities. If so, they unjustifiably go beyond the aim of such measures and are incompatible with the above quoted first provision of section 9(2). They are provided for in order to enable full and equal enjoyment of all rights and freedoms, not only for some categories of persons but for all. For that very reason, section 9(2), the provision that allows restitutionary measures, is also the provision that sets the standard for such measures. To the extent that such measures or individual decisions in pursuance thereof create inequalities and discrimination, as in the case of Barnard, and disregard other relevant constitutional provisions (such as s195(1), which the SCA referred to) such measures or decisions will be incompatible with the first provision of section 9(2). In order not to fall foul of that provision and thus to avoid any unconstitutional conclusion, the court should deal fully with all the relevant evidence and its impact, including the impact of the decision on the complainant, which is exactly what the SCA did in the present case. Moreover, it would have been fair and appropriate also to require the respondent to motivate its decision by tendering relevant evidence since the respondent, as the author of the decision, unlike the complainant, possesses all such information and is in the best position to assist the court in this regard. If it is a measure against which the complaint is lodged, the respondent will have to show that the measure is a remedial

equality measure. In the case of an EEP that will be fairly easy to do as the respondent need only show that the measure was properly adopted in terms of the EEA. In the case of a decision purporting to have been taken in terms of an EEP, such as in the present case, the respondent will have to tender evidence showing that the decision was *intra vires* the EEP and that it complies with section 9(2) and has properly accounted for all other relevant considerations, such as those dealt with by the SCA in the present case. The conclusion following from this argumentation is that if the SCA had not followed the route it did, by involving section 9(3) and (5) – and the *Harksen* test but, had confined itself to an inquiry solely in terms of section 9(2), it would have reasoned in materially the same way and would have reached the same conclusion as it in fact did.

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