




Chapter 9

The Constitutional Court's Approach to Affirmative Action

South African Police Service v Solidarity obo Barnard¹

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“It is the fate of this generation . . . to live with a struggle we did not start, in a world we did not make.’ These words of former American President John F Kennedy capture something of the responsibility to deal with the consequences of the past, falling even on those who played no part in it. History is inclined to target the innocent for retribution and restoration following on gross injustice committed by those who thrived on the systematic violation of the human dignity of others. This often seems unfair. Clichés like ‘two wrongs don’t make a right’ express the perceived unfairness” (*Barnard* par 125).

Abstract

The *South African Police Service v Solidarity obo Barnard* case represents a key moment in South Africa's post-apartheid constitutional jurisprudence on affirmative action. This landmark judgment addresses the complex tension between individual rights and the broader societal objective of transformation. The Constitutional Court established what would become known as the “*Barnard* principle”, which permits employers to deny appointments that would negatively impact representivity, even to candidates who scored highest in selection processes. The court articulated a nuanced approach to evaluating affirmative action measures, emphasising that while such measures are integral to achieving substantive equality, their implementation must be rationally connected to their purpose. The case established the minimum standard of rationality for assessing implementation decisions but revealed significant judicial disagreement on whether more stringent standards of fairness or proportionality should apply. This judicial divergence reflects broader societal debates about how to balance competing constitutional imperatives of equality, dignity and transformation. The subsequent *Solidarity* case extended the “*Barnard* principle” to all designated groups, clarifying that it applies not only to white candidates but also to African, coloured and Indian persons and both genders. This expansion demonstrates the principle's far-reaching implications for employment equity implementation across all demographic categories. The *Barnard* judgment's significance lies in its recognition that restitutionary measures are not exceptions to equality but form part of substantive equality itself, while simultaneously acknowledging the importance of human dignity and reasoned decision-making in their implementation. By establishing a framework for evaluating affirmative action measures that balances transformation with individual rights, the case provides crucial guidance for navigating one of the most challenging aspects of South Africa's constitutional democracy: redressing historical injustices while building a non-racial, non-sexist society founded on human dignity, equality and freedom.

9.1 Introduction

The *South African Police Service v Solidarity obo Barnard* case represents a significant milestone in South Africa's jurisprudence on affirmative action and employment equity. This Constitutional Court judgment grapples with the complex interplay between the constitutional imperatives of equality, dignity and redress in the context of employment practices. The case arose from Captain Renate Barnard's unsuccessful applications for promotion within the South African Police Service (SAPS), which were denied on the grounds of maintaining racial representivity within the force.

The *Barnard* case highlights the tension between individual rights and the broader societal goal of transformation, a tension that lies at the heart of South Africa's constitutional democracy. It raises critical questions about how to balance the need for redressing past inequalities with the protection of individual rights, particularly in a workplace context. The court's decision and reasoning provide important insights into the interpretation and application of the Employment Equity Act,² as well as the constitutional principles supporting affirmative action measures.

This discussion will examine the facts of the case, the judgments of the lower courts and the Constitutional Court's findings. It will explore the various tests and standards proposed by the judges for evaluating the implementation of affirmative action measures. Furthermore, it will consider the implications of the so-called "*Barnard* principle" and its subsequent interpretation in the *Solidarity* case. By analysing these aspects, we can gain a deeper understanding of the evolving legal framework for affirmative action in South Africa and the ongoing challenges in reconciling competing constitutional values.

9.2 Facts of the case

The case concerns Ms Renate Barnard, a white female captain and employee in the SAPS, who applied for promotion to superintendent twice but was unsuccessful. In 2005, SAPS advertised a promotion position for superintendent within the

National Evaluation Service Division. Ms Barnard and six other applicants responded to the advertisement.³ Later that year, the applicants were interviewed by a racially diverse panel of six senior police officials. Ms Barnard scored the highest at 86.67% and was recommended as the top candidate by the panel. The only black male candidate on the shortlist scored 17.5% less than Ms Barnard.⁴

The panel met with Divisional Commissioner Rasegatla to discuss their recommendation. The Commissioner declined to support the recommendation, citing insufficient directives on balancing employment equity against service delivery obligations. He noted that black men and women were under-represented in the division and decided that the vacancy should remain unfilled for employment equity reasons. The post was withdrawn and a white male, Superintendent Prinsloo, was laterally transferred to fill the vacancy temporarily.⁵

In 2006, a similar vacancy (post 4701) was advertised.⁶ Ms Barnard applied again and was interviewed along with seven other candidates.⁷ She again obtained the highest score and was recommended as the most suitable candidate by the panel. The second recommended candidate, Captain Mogadima, an African man, scored 7.33% lower than Ms Barnard.⁸ The panel met with Commissioner Rasegatla to present their recommendation. He agreed that Ms Barnard should be promoted, noting that not promoting her after two rounds of applications would foster the wrong impression. Therefore, he recommended to the National Commissioner that Ms Barnard be promoted.⁹ However, the National Commissioner declined to appoint Ms Barnard or Mr Mogadima.¹⁰ He took the view that appointing Ms Barnard would not address representivity requirements and that since the post was not critical for service delivery, it should be withdrawn and re-advertised.¹¹ The post was re-advertised but eventually withdrawn.¹²

Ms Barnard filed a complaint through SAPS grievance procedures requesting her promotion be made effective from 1 December 2005.¹³ SAPS responded, explaining the National Commissioner's reasons for not appointing her, including that it did not address representivity and the post was not critical for

service delivery.¹⁴ Dissatisfied with this outcome, Ms Barnard referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in 2007.¹⁵ When this remained unresolved, she initiated litigation in the Labour Court.¹⁶

The Labour Court¹⁷ found in favour of Ms Barnard, ruling that the SAPS had unfairly discriminated against her by not promoting her to the position of Superintendent. The court established several key principles in its judgment. It held that the provisions of the Employment Equity Act and Employment Equity Plans must be applied fairly and with due regard to an individual's constitutional right to equality. The court stated that "it is therefore not appropriate to apply, without more, the numerical goals set out in an Employment Equity Plan. That approach is too rigid".¹⁸ The need for representivity must be weighed against the individual's rights to equality.

The court emphasised that while individuals from non-designated groups will be adversely affected by employment equity plans, the implementation should be undertaken with due regard to the individual's right to equality and dignity.¹⁹ It held that the extent to which employment equity plans may discriminate is limited by law, requiring rational and fair application, recognition of affected individuals' rights to equality and due recognition of their right to dignity.²⁰ Importantly, the court ruled that where a post cannot be filled by an applicant from an under-represented category because a suitable candidate cannot be found, promotion should not ordinarily be denied to a suitable candidate from another group without clear justification.²¹

In analysing the evidence, the court found that the National Commissioner's reasons for not appointing Ms Barnard were insufficient. The court held that not appointing any candidate was not a fair and appropriate method of implementing the Employment Equity Plan.²² It ruled that having decided not to appoint a recommended black candidate, it was unfair not to appoint Ms Barnard, who was the best candidate for the job and a member of a designated group under the Employment Equity Act.²³

The Labour Court also criticised SAPS for procedural lapses, particularly its failure to engage effectively in mediation and conciliation procedures.²⁴ It emphasised the importance of these processes in preserving employment relationships and fostering dignity and mutual respect.²⁵ On the issue of service delivery, the court found it difficult to understand how failing to fill a necessary post could be rationally justified by the need for an efficient police force.²⁶ In conclusion, the Labour Court ruled that the failure to promote Ms Barnard was based on her race and constituted unfair discrimination²⁷ It found that SAPS had failed to discharge the onus of showing that the proven discrimination was fair.²⁸ The court ordered SAPS to promote Ms Barnard to the post of Superintendent with effect from 27 July 2006.²⁹

The Labour Appeal Court³⁰ overturned the Labour Court's decision and found in favour of the SAPS. The court held that the failure to appoint Captain Barnard did not constitute unfair discrimination. The court criticised the Labour Court's approach of treating the implementation of restitutionary measures as subject to an individual's right to equality. It stated that this approach "promotes the interests of persons from non-designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid".³¹ The court emphasised that treating restitutionary measures in this manner would "stifle legitimate constitutional objectives and result in the perpetuation of inequitable representation in the workplace".³²

The court held that the Employment Equity Act and Employment Equity Plans are measures contemplated in section 9(2) of the Constitution, aimed at achieving substantive equality.³³ It found that the SAPS Employment Equity Plan was a "constitutionally mandated tool" to ensure compliance with equitable employment practices and representivity.³⁴ The court noted that white employees were overrepresented at level 9, where the advertised post was located. It found that appointing Barnard "would have aggravated the over representivity of white employees in level 9 and would have represented a step backwards and in direct violation of a clear constitutional

objective”.³⁵ The court held that discriminating against Barnard in these circumstances was “clearly justifiable”.³⁶

The court rejected the Labour Court’s finding that the failure to appoint Barnard compromised service delivery. It held that the National Commissioner, as the accounting officer, was best placed to determine if service delivery would be compromised and his decision was “unassailable”.³⁷ The court stated that it was not open to a court to “second guess” such decisions on service delivery.³⁸ The court also found that the National Commissioner had discretion regarding appointments under National Instruction 1 of 2004, which provides that he is under no obligation to fill an advertised post.³⁹ In conclusion, the court held that the Labour Court had “clearly 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”.⁴⁰ It upheld the appeal and dismissed Barnard’s application.

The Supreme Court of Appeal⁴¹ overturned the Labour Appeal Court’s decision and found in favour of Captain Barnard. The SCA held that the failure to appoint Barnard constituted unfair discrimination. The court rejected the Labour Appeal Court’s conclusion that no discrimination had occurred because no appointment was made. The court stated that it “can ‘hardly be contested’ that in the present case Barnard was not appointed because she was a white female”.⁴² The court held that the fact that no appointment was made did not mean there was no discrimination. The court emphasised that when unfair discrimination is alleged under the Employment Equity Act, the onus is on the employer to establish that the discrimination was fair.⁴³ The court found that the SAPS had not discharged this onus.

The court criticised the National Commissioner’s justification for not appointing Barnard as “scant”.⁴⁴ The court found there was no indication that the Commissioner had grappled with all the issues raised by the recommendation panel and Divisional Commissioner Rasegatla.⁴⁵ The court held that the Commissioner’s failure to provide evidence explaining his reasoning worked against SAPS’ case.⁴⁶ The court rejected

SAPS' argument that appointing Barnard would violate the Employment Equity Plan. The SCA held that numerical targets and representivity are not absolute criteria for appointment, as this would turn targets into quotas which are prohibited by the Employment Equity Act.⁴⁷

The court also dismissed the justification that the post was not "critical". The court found this explanation was "contrived", given that the post had been advertised multiple times and temporarily filled by lateral transfer.⁴⁸ The court held that the Labour Appeal Court had erred in concluding that only the National Commissioner could determine if service delivery would be affected by not filling the post.⁴⁹ Considering all the circumstances, the Supreme Court of Appeal concluded that SAPS had not established that the discrimination against Barnard was fair.⁵⁰ The court upheld the appeal and awarded Barnard compensation equal to the difference in salary between Captain and Superintendent for a two-year period.⁵¹

9.3 Findings of the Constitutional Court

9.3.1 The majority judgment

The majority judgment, written by Moseneke ACJ, upheld the appeal by the SAPS, and set aside the order of the Supreme Court of Appeal. The court found that the National Commissioner's decision not to promote Captain Barnard did not constitute unfair discrimination. The court began by acknowledging the difficult and emotive questions of equality, race and equity at the workplace raised by this case.⁵² It emphasised that South Africa's constitutional democracy is founded on explicit values, including human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.⁵³ The court noted that the Constitution has a transformative mission, enjoining active steps to achieve substantive equality, particularly for those disadvantaged by past unfair discrimination.⁵⁴

The court stressed that the quest for equality must occur within the discipline of the Constitution and measures directed at remedying past discrimination must be formulated with

due care not to unduly invade the dignity of all concerned.⁵⁵ It emphasised that remedial measures are not an end in themselves and are not meant to be punitive or retaliatory.⁵⁶ The judgment outlined the applicable legal framework, including section 9 of the Constitution and the Employment Equity Act. It explained that section 9(2) of the Constitution permits legislative and other measures designed to protect or advance persons disadvantaged by unfair discrimination.⁵⁷

The court criticised the Supreme Court of Appeal for applying the *Harksen*⁵⁸ test, which is used to determine unfair discrimination under section 9(3) of the Constitution.⁵⁹ The *Harksen* test presumes that discrimination based on listed grounds is unfair unless proven otherwise. However, the Constitutional Court held that this approach was incorrect when dealing with affirmative action measures. The court reiterated the three-pronged test from *Van Heerden*⁶⁰ to determine whether a restitution measure falls within the ambit of section 9(2).⁶¹ This test is used to determine whether a restitutionary measure falls within the ambit of section 9(2) of the Constitution, which allows for measures designed to protect or advance persons disadvantaged by unfair discrimination.

The three-pronged test, as outlined by the court, requires that the measure that targets a particular class of people who have been susceptible to unfair discrimination, should be designed to protect or advance those classes of persons and promote the achievement of equality. The court emphasises that once a measure passes this test, it is neither unfair nor presumed to be unfair.⁶² This is because the Constitution explicitly says that such measures may be taken. The court notes that section 6(2) of the Employment Equity Act echoes section 9(2) of the Constitution in stating that affirmative action measures are not unfair. However, the court also clarifies that passing this test does not completely insulate the measure from scrutiny. It states that the court's power to interrogate whether the measure is a legitimate restitution measure within the scope of section 9(2) is not ousted.⁶³

This test is significant because it provides a framework for assessing the constitutionality of affirmative action measures.

By applying this test, the court can determine whether a particular measure, such as the SAPS Employment Equity Plan in this case, is a legitimate restitutionary measure as envisioned by the Constitution. This approach allows for the implementation of substantive equality while still providing a mechanism for judicial oversight to ensure that such measures remain within constitutional bounds.

Importantly, the court held that while the Employment Equity Plan itself was not subject to challenge, the manner in which it was implemented could be scrutinised.⁶⁴ It stated that as a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure.⁶⁵ The court makes a clear distinction between the validity of an Employment Equity Plan itself and the manner in which it is implemented. While the Plan was not subject to challenge in this case (as Ms Barnard had accepted its validity), the court emphasises that the implementation of such a plan can be scrutinised.⁶⁶ This principle, later referred to as the “*Barnard* principle”,⁶⁷ is significant as it allows for oversight of how affirmative action measures are applied in practice, even when their underlying policy is accepted as valid.

The court then sets out the minimum standard for assessing the implementation of restitutionary measures, invoking the principle of legality.⁶⁸ This principle, fundamental to the rule of law, requires that all exercises of public power must be lawful and rational. In this context, the court states that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. The court elaborates that the measure “must be applied to advance its legitimate purpose and nothing else”.⁶⁹ This means that those implementing the measure must act in a way that is logically connected to the goals of the affirmative action policy and not for any other purpose.

Furthermore, the court notes that “irrational conduct in implementing a lawful project attracts unlawfulness”.⁷⁰ This emphasises that even if the Employment Equity Plan itself is lawful, its irrational implementation can be challenged and

potentially found unlawful. By setting out this standard, the court provides a framework for evaluating the implementation of affirmative action measures. It allows for challenges to specific decisions made under such measures, while still respecting the overall validity of affirmative action as a tool for achieving substantive equality. This approach strikes a balance between the need for transformation and the requirement for rational and lawful administrative action.

The court found that the Supreme Court of Appeal had erred in its approach to the case. It held that the equality claim should have been analysed through the lens of section 9(2) of the Constitution and section 6(2) of the Employment Equity Act, rather than as unfair discrimination under section 9(3).⁷¹ The court emphasised that restitutionary measures allowed under section 9(2) are not exceptions to equality, but form part of the substantive equality envisioned by the Constitution.⁷²

The judgment then examined the National Commissioner's decision not to appoint Ms Barnard. It found that the National Commissioner had discretion under the relevant National Instruction to decline to fill an advertised post.⁷³ The court held that his decision was rational and in line with the Employment Equity Plan's targets, as white women were already overrepresented at the salary level of the position.⁷⁴ The court recognised that the National Commissioner, as the head of the South African Police Service, had specific operational knowledge and expertise. This position aligns with the general principle of judicial deference to executive decision-making in operational matters. The court noted that there was "no valid cause to reject the National Commissioner's operational assessment that service delivery would not have suffered from not appointing Ms Barnard".⁷⁵ This suggests that Ms Barnard did not provide compelling evidence to contradict this assessment. The National Commissioner had classified the post as "non-critical".⁷⁶ While the Court acknowledged that the term "critical" has no legal foundation, it still gave weight to this classification as part of the National Commissioner's operational assessment.

The court considered that the post was ultimately never filled, as "the National Commissioner chose to reconfigure the

division concerned".⁷⁷ This lent credence to the assertion that the post was not critical for immediate service delivery. The court rejected the argument that not appointing Ms Barnard would compromise service delivery, finding that there was no evidence to contradict the National Commissioner's assessment that the post was not critical.⁷⁸ It also found that Ms Barnard's non-appointment did not constitute an absolute bar to her advancement, given her subsequent promotion.⁷⁹ In conclusion, the court found that the National Commissioner had exercised his discretion rationally and reasonably in accordance with the criteria in the Instruction, in pursuit of employment equity targets envisaged in section 6(2) of the Act.⁸⁰ It, therefore, upheld the appeal and set aside the order of the Supreme Court of Appeal.⁸¹

9.3.2 The concurring judgment of Cameron J, Froneman J and Majiedt AJ

The concurring judgment, written by Cameron J, Froneman J and Majiedt AJ, agrees with the main judgment's outcome but offers additional analysis on two key points: the tensions inherent in implementing restitutionary measures and the appropriate standard for assessing the implementation of such measures. The justices begin by acknowledging the difficult and emotive questions of equality, race and equity in the workplace raised by this case.⁸² They emphasise the importance of frankly acknowledging the tensions that arise when balancing constitutional imperatives, as this is necessary for societal progress and rational discussion.⁸³ The judgment highlights the tension between the Constitution's commitment to redressing past inequalities and its goal of establishing a non-racial, non-sexist society. It also notes the tension between individual equality rights and societal equality, as well as tensions that arise when advancing multiple disadvantaged groups.⁸⁴

A key focus of the judgment is the appropriate standard for assessing the implementation of constitutionally compliant restitutionary measures. The justices disagree with the main judgment's view that it is unnecessary to deal with this standard.⁸⁵ They argue that Ms Barnard's case falls squarely

within the parameters of the Employment Equity Act and that her statement of case sets out the essential factual allegations for challenging the National Commissioner's decision. The justices propose that the appropriate standard for assessing the implementation of restitutionary measures should be fairness.⁸⁶ They argue that this standard is more rigorous than mere rationality and allows courts to assess consistency with the provisions and purposes of the Act.⁸⁷ They begin by acknowledging that the main judgment considers rationality as the "bare minimum" requirement for implementing remedial measures.⁸⁸ However, they argue that Ms Barnard's challenge requires a "less deferential standard than mere rationality".⁸⁹ The justices contend that the Employment Equity Act imposes a standard "different from, and additional to, rationality".⁹⁰

The justices explain that a fairness standard would require "a more exacting level of scrutiny".⁹¹ This heightened scrutiny is necessary because of the important constitutional values that can be in tension when implementing remedial measures. They argue that a fairness standard would allow judges to ensure that decision-makers have "carefully evaluated relevant constitutional and statutory imperatives" before making decisions based predominantly on criteria like race.⁹² The justices contend that a rationality standard is insufficient because it would make it difficult to determine if a decision-maker had impermissibly converted numerical targets into quotas.⁹³ They argue that a rationality standard does not allow a court to properly examine a decision-maker's balancing of multiple designated groups or the interests of those adversely affected by restitutionary measures.⁹⁴

In proposing fairness as the standard, the justices note that it is "sufficiently encompassing to allow courts to assess consistency with the provisions and purposes of the Act".⁹⁵ They highlight that the Act recognises the importance of "fair treatment in employment".⁹⁶ Furthermore, they argue that fairness is a foundational constitutional value, recognised in various contexts including administrative decision-making, court procedures, labour practices and discrimination.⁹⁷

The justices acknowledge potential objections to using fairness as a standard, such as vagueness and potential internal inconsistency.⁹⁸ However, they counter these objections by noting that other open-ended norms in law, such as reasonableness and public policy, have become more certain over time through the building of precedent.⁹⁹ They also argue that assessing the fairness of individual implementation is different from determining whether measures amount to unfair discrimination at a general level.¹⁰⁰

The justices emphasise that the Employment Equity Act does not sanction overly rigid affirmative action measures, prohibits quotas and requires the advancement of multiple designated groups.¹⁰¹ The justices also highlight the Act's insistence on measures based on "equal dignity and respect of all people".¹⁰² In applying the fairness standard to Ms Barnard's case, the justices examine both the objective facts and the reasons given by the National Commissioner. They criticise the paucity of the National Commissioner's reasons, noting that his decision appears "at best, opaque".¹⁰³ They argue that decision-makers should provide adequate reasons, especially when decisions are based primarily on race or other protected attributes.¹⁰⁴

The judgment pays particular attention to the issues of service delivery and representivity. The justices argue that the SAPS, as a public service provider, is required to prioritise service delivery and should justify decisions that do not enhance it.¹⁰⁵ The judgment notes that the SAPS is constitutionally required to prioritise service delivery and carry out its functions with special regard to efficiency and quality of service. This requirement is not only enshrined in the Constitution but is also recognised in the SAPS's own Employment Equity Plan and internal communications.¹⁰⁶ The justices highlight a letter from the National Commissioner to all provincial commissioners, divisional commissioners and deputy national commissioners, which explicitly stated that interviewing panels should focus on appointing personnel who would enhance service delivery.¹⁰⁷ This demonstrates the importance placed on service delivery within the SAPS. While acknowledging

that the Employment Equity Act does not require the SAPS to always prioritise service delivery over other considerations, the justices argue that it does require the SAPS to justify decisions that do not enhance service delivery.¹⁰⁸ This sets a standard of accountability for decisions that might impact the quality of public services. The judgment critically examines the National Commissioner's decision not to appoint Ms Barnard, noting that it contradicted the recommendation of the Divisional Panel, which had recommended her promotion "in the interest of service delivery".¹⁰⁹

The justices argue that while the National Commissioner has the right to make operational decisions and deserves some deference because of his expertise, this does not relieve him of the duty to justify the factors which he considered in reaching his conclusion. The justices express concern that without proper justification for balancing representivity and service delivery, there is a risk that decision-makers could prioritise representivity over service delivery without sufficient regard for specific circumstances. They argue that this could create a false dichotomy between representivity and quality of service, which is not necessary or desirable. Importantly, the judgment emphasises that there is no evidence suggesting that achieving representivity must come at the cost of service quality. The justices assert that individuals from disadvantaged backgrounds are just as capable and talented as Ms Barnard, especially given the Act's broad definition of "suitably qualified".¹¹⁰ The justices argue that a clear explanation is necessary when balancing service delivery and representivity concerns.¹¹¹ They provide an example of good practice in the Divisional Panel's recommendation, which acknowledged the representivity issues but still recommended Ms Barnard's appointment because of the potential gains in service delivery.¹¹²

They also highlight the complexity of representivity, noting that Ms Barnard's appointment could have ameliorated gender representivity even as it exacerbated racial over-representation.¹¹³ The concurring justices provide a nuanced analysis of the complexity of representivity, particularly in relation to Ms Barnard's case, which highlights the

intersectionality of race and gender in affirmative action measures. The judgment points out that Ms Barnard's identity both as white and a woman presents a complex case for representivity considerations.¹¹⁴ As a white person, she belongs to a historically advantaged group, but as a woman, she is part of a group that has faced historical discrimination. The justices note that women are one of the designated groups under the Employment Equity Act, which requires employers to implement affirmative action measures to redress disadvantages faced by women.¹¹⁵ The justices delved into a detailed analysis of the gender representation within the SAPS branch where Ms Barnard worked. They note that while there was an even split between men and women overall (61 each out of 122 employees), there was a significant disparity in the higher salary levels. At levels 8 to 12, which required the National Commissioner's approval for appointments, there were 53 male employees but only 25 female employees.¹¹⁶

This analysis reveals a substantial pay gap between men and women in Ms Barnard's branch. The justices argue that her promotion to level 9 could have helped to alleviate this imbalance and address gender representivity at that level, where women were under-represented (13 women compared to 16 men).¹¹⁷ The judgment thus highlights a crucial point: Ms Barnard's appointment could have improved one aspect of representivity (gender) while potentially exacerbating another (racial overrepresentation of white employees).¹¹⁸ This demonstrates the complex interplay between different aspects of representivity that decision-makers must navigate. The justices acknowledge that the National Commissioner was not obliged to promote Ms Barnard solely because of the gender imbalance. They state that he was entitled to prioritise racial representivity over gender representivity but emphasised that such a decision requires proper justification.¹¹⁹ This analysis emphasises the importance of a holistic approach to employment equity, as mandated by section 9 of the Constitution and section 15(4) of the Employment Equity Act.¹²⁰ The justices argue that decision-makers must consider all relevant aspects of a candidate's identity and how they could advance representivity in a manner consistent with the Act.¹²¹

Despite their criticisms of the National Commissioner's reasoning, describing his decision as "at best, opaque",¹²² the justices ultimately conclude that his decision not to promote Ms Barnard was fair. They base this conclusion on the pronounced over-representation of white women at the salary level in question and the fact that Ms Barnard's subsequent promotion shows that the decision did not constitute an absolute bar to her advancement.¹²³ While agreeing with the outcome of the main judgment, this concurring judgment provides a more nuanced analysis of the tensions involved in implementing affirmative action measures and proposes a fairness standard for assessing such implementation. It emphasises the importance of careful reasoning and explanation in decisions involving restitutionary measures, particularly when they involve competing constitutional imperatives.

9.3.2 The concurring judgment of Van der Westhuizen J

Van der Westhuizen J's concurring judgment offers a detailed analysis of the constitutional and historical context of affirmative action measures, with a particular focus on human dignity and the balancing of competing rights. The judgment begins by acknowledging the historical context of inequality and the responsibility of current generations to address past injustices.¹²⁴ Van der Westhuizen J emphasises that while individuals may be "innocent" of past wrongs, they may still have benefited from unjust systems.¹²⁵ The judge then turns to the South African constitutional framework, highlighting the importance of human dignity, equality and non-racialism as founding values.¹²⁶ He stresses that discrimination ultimately boils down to the denial of human dignity.¹²⁷

Van der Westhuizen J disagrees with the main judgment's finding that an enquiry into the National Commissioner's decision is not properly before the court. He argues that Ms Barnard's complaint to the Court was indeed about the lawfulness of a decision taken in implementing the Employment Equity Plan.¹²⁸

The judgment provides a detailed analysis of section 9 of the Constitution, emphasising that the measures provided for

in section 9(2) are not exceptions to the right to equality, but form part of it.¹²⁹ The judge begins by outlining the structure of section 9, noting that subsection (2) addresses past wrongs, while subsections (3), (4) and (5) prohibit unfair discrimination to prevent future wrongs. He emphasises that this is the constitutional concept of equality agreed upon by the nation, stating that “equality cannot merely be a formal requirement – it has to have substance”.¹³⁰ Crucially, Van der Westhuizen J argues that the measures provided for in section 9(2) are not exceptions to the right to equality, but form an integral part of it.¹³¹ He cites the Constitutional Court’s decision in *Van Heerden* to support this view, quoting: “[Restitutory measures] are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution... [W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reasons a substantive conception of equality inclusive of measures to redress existing inequality”.¹³² The judge argues that the appropriate assumption under the constitutional framework is that restitutionary or affirmative measures should be welcomed rather than viewed with suspicion. He states that these measures must be understood as “equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory”.¹³³

Van der Westhuizen J further emphasises that affirmative measures are critical to realising the constitutional promise of substantive equality. He notes that the structure and wording of Section 9 indicate that measures meeting the requirements of section 9(2) cannot be unfair discrimination under section 9(3) to (5).¹³⁴ The judge also points out that while race continues to be an important component of many restitutionary measures, the Constitution recognises that unfair discrimination can occur on various grounds, including social origin, disability, culture, language and birth.¹³⁵ This broader understanding of discrimination and disadvantage further emphasises the integral nature of restitutionary measures to the constitutional concept of equality. In essence, Van der Westhuizen J’s analysis presents section 9(2) measures not as exceptions to equality, but as necessary tools for achieving the substantive equality envisioned by the Constitution. This interpretation sees

affirmative action as a positive aspect of equality, rather than a deviation from it, emphasising the transformative nature of the South African Constitution. Van der Westhuizen J argues that restitutionary measures should be welcomed rather than viewed with suspicion.¹³⁶

The judge proposes a more nuanced approach to testing the implementation of affirmative action measures. While agreeing with the *Van Heerden* test for the validity of such measures, he argues that something more is needed when evaluating both a measure and its implementation.¹³⁷ He suggests that the impact of the implementation on other constitutional rights, particularly the right to human dignity, should be considered.¹³⁸ He argues that courts are generally reluctant to presume that provisions in the Constitution operate in tension, but emphasises that we should not overlook the impact of one right on other rights in specific situations.¹³⁹ The judge proposes a proportionality analysis, similar to that used in limitations of rights cases, to navigate the potential tension between different constitutional rights and values.¹⁴⁰ This analysis would consider factors such as the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether less restrictive means could achieve the purpose.¹⁴¹ Van der Westhuizen J emphasises that this approach requires a case-sensitive and concrete assessment of competing rights. He argues that a right or value should not be compromised more than necessary in the context of a constitutional state founded on dignity, equality and freedom.¹⁴²

Van der Westhuizen J expresses scepticism about using fairness as a standard for assessing the implementation of section 9(2) measures, arguing that it may lead to internal inconsistency.¹⁴³ Van der Westhuizen J explains that if “fairness” in this context relates to the unfair discrimination prohibition in section 9(3), relying on it with regard to affirmative measures under Section 9(2) may be problematic.¹⁴⁴ This is because section 9(3) deals with differentiation that amounts to unfair discrimination, while measures under section 9(2), by definition, do not amount to unfair discrimination.

The judge acknowledges that a fair measure may theoretically be implemented unfairly. However, he argues that in practice, it may seem incoherent to subject the implementation of a section 9(2) measure to section 9(3) fairness considerations. He contends that once a measure has withstood the section 9(2) *Van Heerden* enquiry and is found not to be unfair, another investigation into its fairness, informed by section 9(3) considerations, may not always make practical sense. Van der Westhuizen J also expresses reservations about using fairness in a wider, more general sense as a standard in this context. He argues that fairness is a vague concept and that life, and the law are not always “fair”. He points out that the law often imposes restrictions which might seem “unfair” in their impact on individuals, but are necessary for practical reasons.¹⁴⁵ Instead, he proposes a proportionality analysis, which he argues is well-suited for navigating the contested terrain of competing rights or values.¹⁴⁶

The judgment offers a detailed exploration of human dignity in the context of affirmative action measures.¹⁴⁷ Van der Westhuizen J argues that while affirmative action measures can enhance the dignity of society as a whole, their implementation could also impact on the human dignity of individuals.¹⁴⁸ The judge also considers the issue of service delivery, acknowledging the tension that can exist between efficiency and representivity. However, he cautions against courts making evaluations about service delivery from a distance, arguing that the National Commissioner is better placed to make such assessments.¹⁴⁹ Finally, Van der Westhuizen J addresses the issue of reasons given for decisions. He argues that even if a decision does not constitute administrative action, an applicant may still be entitled to reasons.¹⁵⁰ He concludes that in this case, the reasons provided by the National Commissioner were adequate, although they could have been more comprehensive.¹⁵¹

In conclusion, while agreeing with the outcome of the main judgment, Van der Westhuizen J’s concurring judgment offers a more nuanced approach to assessing the implementation of affirmative action measures, with a particular emphasis on

human dignity and the need for a proportionality analysis when balancing competing rights and values.

9.3.3 The dissenting judgment of Jafta J

Jafta J's concurring judgment agrees with the main judgment that the appeal should succeed and the Supreme Court of Appeal's order should be set aside.¹⁵² However, he disagrees with the other judgments and provides additional reasons for not deciding the new cause of action raised by Ms Barnard in the Constitutional Court.¹⁵³ Jafta J emphasises that Ms Barnard's original claim in the Labour Court was for unfair discrimination based on race, not a review of the National Commissioner's decision.¹⁵⁴ He reiterates the legal principle that parties must plead their cause of action in the court of first instance to warn other parties of the case they must meet, promoting fairness in litigation as guaranteed by section 34 of the Constitution.¹⁵⁵ The judgment explains that allowing a party to raise a new cause of action on appeal is a matter of discretion, which should only be exercised if it would not be unfair to the other parties.¹⁵⁶ Jafta J finds no basis to allow Ms Barnard to raise a different cause of action in the Constitutional Court, as it was not covered by the pleadings or fully canvassed in evidence.

Jafta J then addresses the issue of determining an appropriate standard for implementing affirmative action measures, which was not raised by the parties. He states that courts generally should not raise issues *mero motu* unless they are apparent from the papers and necessary for proper adjudication of the case.¹⁵⁷ He argues that determining the appropriate standard is not necessary to dispose of this case and any opinion on it would be *obiter*.¹⁵⁸

The judgment expresses concern about the court attempting to determine a standard when its members disagree on what it should be, with some preferring fairness and others proportionality.¹⁵⁹ Jafta J questions the source of fairness as a standard, noting that section 9(2) of the Constitution and the Employment Equity Act mandate restitutionary measures and declare that implementing them does not constitute unfair discrimination.¹⁶⁰ Jafta J argues that applying a fairness

standard would require weighing competing interests, which could undermine the objective of achieving equality in the workplace.¹⁶¹ He emphasises the importance of considering the historical context that led to white employees being over-represented in certain positions.¹⁶²

The judgment approvingly cites the Labour Appeal Court's reasoning that implementing restitutionary measures cannot be subject to an individual's right to equality, as this would perpetuate inequitable representation.¹⁶³ Jafta J notes that as specialist courts, the Labour Court and Labour Appeal Court should lead in developing labour law jurisprudence.¹⁶⁴ In conclusion, Jafta J argues that these issues could have been addressed if the question of standard had been raised and properly argued. Given the circumstances, he believes that it is appropriate to defer the determination of the standard to another case.¹⁶⁵

9.4 Several different tests

As Le Roux points out,

“[i]t is disappointing that the Court did not decide the issue of the appropriate test for assessing the implementation of affirmative action measures. This is an issue that will have to be dealt with by arbitrators when considering promotion disputes where the employer has sought to rely on an affirmative action measure in the form of an employment equity plan to justify promotions or the decision not to promote. It is also an issue that an employer will have to consider in deciding whether it will utilise affirmative action criteria when deciding on the selection of employees to be retrenched.”¹⁶⁶

That the lower courts find themselves bound to the “bare minimum” standard of rationality endorsed by the majority in *Barnard* was made clear in *Ethekwini Municipality v Nadesan*,¹⁶⁷ where the Labour Court examined a case where an Indian male candidate, despite scoring highest, was denied a senior position because of over-representation of Indian males at that level.

The court, referencing the *Barnard* case, determined that the municipality's decision lacked rationality and was, therefore, unlawful.¹⁶⁸ This finding of irrationality precluded the need to assess the fairness of the decision.¹⁶⁹ The court essentially concluded that the municipality's exclusion of the applicant constituted unfair discrimination. Although the Employment Equity Plan itself was not challenged, the court reasoned that an irrational act cannot be considered compliant with the plan. The court agreed "that *Barnard* did not hold that employees may not challenge decisions purportedly implementing an equity plan without challenging the plan itself. Such a conclusion would lead to the bizarre situation that an employee would be denied the right to allege unfair discrimination each time a decision was taken purportedly in terms of a perfectly valid and acceptable employment equity plan".¹⁷⁰

In his discussion of the case, McConnachie argues that the Constitutional Court needs to develop and clarify its approach to reviewing affirmative action measures in three key ways. Firstly, he contends that the *Van Heerden* test should be applied under the Employment Equity Act and other legislation to assess both affirmative action measures and their implementation. He criticises the court's suggestion in *Barnard* that different tests may be needed for measures versus implementation, arguing that there is "no principled or practical reason for creating entirely separate tests".¹⁷¹ McConnachie argues strongly for applying the *Van Heerden* test consistently to both affirmative action measures and their implementation under the Employment Equity Act and other relevant legislation. He takes issue with the Constitutional Court's suggestion in *Barnard* that separate tests may be needed for assessing measures versus their implementation. He points out that in unfair discrimination cases, a single test (the *Harksen* test) is used to assess both policies and their implementation under section 6 of the Employment Equity Act. He questions why affirmative action should be treated differently, stating "[t]here is no bifurcation of tests in assessing unfair discrimination challenges under section 6 of the EEA".¹⁷² He argues that the *Van Heerden* test was clearly designed to consider both measures and implementation together. He notes that the third requirement of the test, which

focuses on the benefits and negative impacts of affirmative action, “would be impossible to consider ... without any regard for how they are or will be implemented in practice”.¹⁷³

Importantly, McConnachie contends that separate tests could “dilute the protections afforded to historically disadvantaged groups”.¹⁷⁴ He provides an example of how an Employment Equity Plan could harm disabled people either through its design or its implementation. He argues that it would make no sense to apply different levels of scrutiny in these scenarios, as the impact on the disadvantaged group would be the same. The author acknowledges that there are conceptual differences between measures and implementation but maintains that these differences do not justify separate tests. He argues that creating distinct tests could lead to inconsistent outcomes and potentially allow abuses to slip through unchecked.¹⁷⁵ Overall, he advocates for a unified approach using the *Van Heerden* test, arguing that this would provide more coherent and effective protection for disadvantaged groups in affirmative action cases.

Second, McConnachie argues that the court must confirm that the *Van Heerden* test involves a proportionality analysis, rather than mere rationality. He states that “the *Van Heerden* test clearly contemplates some form of proportionality analysis, which involves weighing up the benefits of the affirmative action measure against its impact on those who are excluded”.¹⁷⁶ He interprets the third requirement of the *Van Heerden* test as clearly contemplating a proportionality analysis. This requirement asks whether the measure “promote[s] the achievement of equality”.¹⁷⁷ McConnachie argues that this necessarily involves weighing the benefits of the affirmative action measure against its negative impacts on excluded groups. He criticises the view expressed by some commentators that *Van Heerden* only requires a rationality analysis. McConnachie contends that a mere rationality test would be insufficient, as it “would only be concerned with assessing whether the measure is rationally capable of advancing the legitimate purpose of benefitting disadvantaged groups”.¹⁷⁸ This approach would

ignore any potential negative consequences of affirmative action measures.

McConnachie emphasises the importance of considering these potential negative impacts, particularly where affirmative action measures might harm or exclude members of other historically disadvantaged groups. He provides an example of a bursary scheme that benefits women at the expense of disabled students, arguing that a proportionality analysis is necessary to properly balance these competing interests. He further argues that proportionality is a common tool of practical reasoning used in various areas of constitutional law, not just in the limitations analysis under section 36 of the Constitution. McConnachie notes that proportionality is “applied in areas as diverse as the test for arbitrary deprivations of property, unfair discrimination and public participation in law-making”.¹⁷⁹

Third, and most significantly, McConnachie contends that the court needs to develop a principled approach to varying the intensity of review when applying the *Van Heerden* test. He argues that the court must “openly justify its chosen intensity of review by reference to a set of three principles: the interests at stake, relative institutional competence, and considerations of democratic legitimacy”.¹⁸⁰ McConnachie suggests that this “doctrine of deference” is needed to guide courts on when to apply a more or a less stringent approach to affirmative action measures. McConnachie proposes three key principles to guide this “doctrine of deference”.¹⁸¹

The interests at stake: This principle requires courts to consider both the general constitutional preference for affirmative action and the specific interests in each case. McConnachie argues that where an affirmative action measure has proven benefits, courts should apply less intense scrutiny. Conversely, if a measure severely impacts historically disadvantaged groups, more intense scrutiny is warranted.¹⁸²

Relative institutional competence: This principle asks courts to recognise the limits of their expertise and be cautious about second-guessing decisions made by

bodies with greater capacity, experience and information. However, McConnachie notes that this can also justify more intense scrutiny where courts are better equipped to decide matters or where other state organs have displayed incompetence.¹⁸³

Considerations of democratic legitimacy: This principle requires courts to be cautious about second-guessing decisions made by representative bodies. For example, McConnachie suggests that an Employment Equity Plan developed through a bargaining council should generally receive less intense scrutiny. However, he also notes that democratic legitimacy may sometimes require closer scrutiny, particularly where marginalised groups have been ignored in the decision-making process.¹⁸⁴

McConnachie argues that these principles should be openly weighed and justified in each case. He contends that this approach is necessary not only for transparency and accountability, but also to provide guidance to lower courts on navigating these complex issues. Furthermore, McConnachie suggests that this doctrine of deference should include both a “baseline intensity” of review, a minimum level of scrutiny that cannot be reduced, and principles for varying the intensity beyond this baseline.¹⁸⁵ This approach, he argues, would provide a structured yet flexible framework for courts to assess affirmative action measures consistently and transparently. Overall, McConnachie’s central thesis is that greater clarity and guidance is urgently needed on the appropriate standard of review for affirmative action cases, particularly regarding when and how to vary the intensity of scrutiny. He argues that this is crucial for providing certainty and consistency in future decisions.

9.5 Giving meaning to the *Barnard* principle

The later *Solidarity* case¹⁸⁶ demonstrates how the Constitutional Court interpreted and applied the principles established in *Barnard* when evaluating the Department of Correctional Services’ Employment Equity Plan. The *Solidarity* case

concerned a challenge to the Employment Equity Plan of the Department of Correctional Services for the period 2010 to 2014. Solidarity, a trade union and several individual applicants (mostly coloured employees) contested the Department's refusal to appoint them to certain positions. The Department had based its decisions on the fact that coloured people and women were already overrepresented in the relevant occupational levels according to the national demographic profile used in its plan. The applicants argued that the plan was invalid as it did not comply with the Employment Equity Act, particularly in its failure to consider both national and regional demographics when setting numerical targets. They also contended that the Department's decisions constituted unfair discrimination and unfair labour practices. The case progressed through the Labour Court and Labour Appeal Court before reaching the Constitutional Court, with each court offering different interpretations of the plan's validity and the appropriate remedies for the affected employees.¹⁸⁷

In *Barnard*, the court held that an employer could refuse to appoint a candidate if doing so would worsen representivity at a particular occupational level, even if that candidate scored highest in the selection process.¹⁸⁸ The majority of the *Solidarity* Court affirmed that this principle applies not only to white candidates but also to African, coloured and Indian candidates, as well as to both men and women.¹⁸⁹ As Zondo J, writing for the majority explained, "the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa".¹⁹⁰ The majority emphasised that achieving a representative workforce requires considering all racial groups and both genders, not just focusing on one or two groups to the exclusion of others.¹⁹¹ Zondo J stated that "the level of representation of each group must broadly accord with its level of representation among the people of South Africa".¹⁹² Importantly, the majority judgment clarified that the "*Barnard* principle" allows an employer to deny appointment to a candidate from any designated group (African, coloured, Indian, women) if that group is already adequately represented or overrepresented at the relevant occupational

level.¹⁹³ This extends the application of *Barnard* beyond just white candidates.

The court found the plan to be unlawful on other grounds, particularly its failure to consider both national and regional demographics as required by section 42 of the Employment Equity Act.¹⁹⁴ This demonstrates the court's willingness to scrutinise the details of employment equity plans for compliance with the Act, even while affirming the general principles from *Barnard*. The majority judgment thus shows how the Constitutional Court has built upon and clarified the *Barnard* precedent, providing more detailed guidance on the implementation of employment equity measures while still emphasising the goal of achieving a workforce broadly representative of South Africa's population.

The majority judgment in *Solidarity*, did not explicitly apply or discuss the *Van Heerden* test or directly address the rationality of the Employment Equity Plan's implementation. He also did not engage in a broader fairness or proportionality analysis as suggested by some of the other judgments in *Barnard*. Instead, the judgment focused primarily on whether the plan complied with specific provisions of the Employment Equity Act. The majority's analysis centred on whether the Department's Employment Equity Plan complied with section 42 of the Employment Equity Act, which requires consideration of both national and regional demographics.¹⁹⁵ Zondo J concluded that the Department had acted unlawfully by failing to consider regional demographics: "In failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully".¹⁹⁶

This approach, it is submitted, can be characterised as a "statutory compliance test" for evaluating Employment Equity Plans and their implementation. The approach can be seen as a pragmatic test that prioritises the statutory framework created by Parliament to implement the constitutional mandate for affirmative action, rather than developing additional judicial criteria. This aligns with the principle of judicial deference to

legislative choices in implementing constitutional rights, while still allowing for judicial oversight to ensure compliance with the statutory scheme.

Nugent AJ's minority judgment in *Solidarity* offers a different interpretation of the *Barnard* case and its implications. He emphasises the need for a more nuanced and balanced approach to employment equity, drawing on various principles articulated in *Barnard*. Nugent AJ begins by highlighting the court's recognition in *Barnard* of the difficulties in realising the transformative aspirations of the Constitution. He quotes Moseneke ACJ's statement that "[m]easures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned".¹⁹⁷ This sets the tone for his critique of the Department's Employment Equity Plan, which he views as lacking the "thoughtful, empathetic, and textured" approach called for in *Barnard*.¹⁹⁸ The minority judgment interprets *Barnard* as requiring a careful balancing of various constitutional imperatives. Nugent AJ cites the concurring judgment of Cameron J, Froneman J and Majiedt AJ in *Barnard*, which stressed the need to remain vigilant that remedial measures "must not unduly invade the human dignity of those affected by them".¹⁹⁹ He argues that the Department's plan fails to achieve this balance, describing it as "cold and impersonal arithmetic".²⁰⁰

Nugent AJ's interpretation of *Barnard* leads him to scrutinise the Department's plan more closely than the majority. He argues that the plan's rigid numerical targets constitute quotas, which are prohibited by the Employment Equity Act. He disagrees with the majority's view that the provision for deviations makes the targets flexible, stating "[w]e are concerned with the general application of the Plan – not with special cases to which the Plan does not apply".²⁰¹ Drawing on Moseneke ACJ's description in *Barnard* of numerical targets as "employment guidelines", Nugent AJ argues that the Department's plan lacks the necessary flexibility and discretion.²⁰² He contends that without such flexibility, the plan cannot avoid unduly infringing the dignity of applicants, which was a key concern in *Barnard*.²⁰³

Importantly, Nugent AJ interprets *Barnard* as requiring a more holistic approach to achieving representivity. He argues that the Department's focus on national demographics alone, without considering regional distribution, is irrational and fails to serve the purpose of an Employment Equity Plan.²⁰⁴ This interpretation extends the principles from *Barnard* to require a more nuanced consideration of demographic realities. In conclusion, Nugent AJ's minority judgment in *Solidarity* interprets *Barnard* as calling for a "visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests".²⁰⁵ He views the Department's plan as falling short of this standard, demonstrating a more stringent application of the principles articulated in *Barnard* than the majority judgment.

Nugent AJ argues that if population demographics are used to measure employment equity, all relevant characteristics of the population must be considered, not just a select few. He contends that focusing on only one aspect while disregarding other pertinent factors leads to an irrational outcome, which is not acceptable under the law. To support this view, he cites the *Barnard* case, which established that the implementation of restitutionary measures must be as a "bare minimum" rationally connected to their objectives and purpose. Nugent AJ further reinforces this point by referencing the concurring judgment of Cameron J, Froneman J and Majiedt A in *Barnard*, which affirmed that rationality is the minimum standard for all exercises of public power. This emphasis on rationality forms the basis of Nugent AJ's critique of the Department's Employment Equity Plan, suggesting that its narrow focus on national demographics without considering regional distribution fails to meet this fundamental legal requirement.²⁰⁶

Devenish views the *Solidarity* case as a landmark judgment that addresses crucial employment equity and labour relations issues in South Africa. He considers it a "great triumph par excellence for non-racism" in South African jurisprudence.²⁰⁷ The author praises the majority judgment for its interpretation of the Employment Equity Act. He notes that the court held that all subgroups falling under the "black" group must be

equitably represented within all occupational levels, prohibiting overrepresentation of one group over another.²⁰⁸ He also approves of the court's distinction between prohibited quotas and permissible numerical target.²⁰⁹ However, Devenish finds the minority judgment by Nugent AJ more compelling, particularly regarding the issue of quotas versus numerical targets. He argues that Nugent A's approach is "both rational and flexible, and in effect is two-dimensional and as a result, preferable to the one-dimensional one advocated by Zondo J".²¹⁰ Devenish appreciates Nugent AJ's emphasis on both flexibility and rationality in implementing employment equity measures.

Devenish sees the judgment as a significant victory for non-racism and the protection of vulnerable minorities against domination by the African majority. He states that the judgment makes it "categorically clear that there is no place for racial domination in our constitutional dispensation or body politic".²¹¹ He believes that this ruling will have a substantial impact on other government departments and promote diversity and constitutionalism.²¹² Furthermore, Devenish commends the judgment for its nuanced approach to equality, citing various previous cases that have shaped South Africa's equality jurisprudence. He emphasises the importance of achieving substantive equality while being careful not to unduly invade the dignity of all concerned.²¹³

In conclusion, Devenish views the *Solidarity* judgment as an important advancement in understanding and applying non-racism in the South African Constitution. While acknowledging that transformation is not always painless, he argues that the judgment demonstrates the need for a judicious balancing of conflicting interests. Ultimately, Devenish favours Nugent AJ's approach, which he believes epitomises the "wisdom of Solomon" to a greater extent than Zondo J's judgment.²¹⁴

9.6 Conclusion

In conclusion, the *Solidarity* case demonstrates that the Constitutional Court is still grappling with the appropriate test for evaluating the implementation of affirmative action measures. While the *Barnard* case established some key

principles, the divergent approaches taken by the majority and minority judgments in *Solidarity* reveal that there is no clear consensus on how these principles should be applied in practice.

In *Barnard*, the various judgments differ in their approaches to the appropriate test for evaluating the implementation of affirmative action measures. The main judgment by Moseneke ACJ holds that the implementation of remedial measures must be rational, stating this is the “bare minimum” requirement. It does not endorse a more stringent standard, finding it unnecessary to “define the standard finally” in this case.²¹⁵ The concurring judgment by Cameron J, Froneman J and Majiedt AJ agrees with the rationality standard “bare minimum” requirement but argued for a fairness standard that is “rigorous enough to ensure that the implementation of a remedial measure is ‘consistent with the purpose of [the] Act’”.²¹⁶ They contend that mere rationality is insufficient, as it would not allow proper scrutiny of whether numerical targets are being applied too rigidly as quotas or whether the interests of different designated groups are being appropriately balanced.²¹⁷

The concurring judgment by Van der Westhuizen J proposed a proportionality analysis to evaluate the implementation of affirmative action measures. He suggested examining whether “the impact of the implementation of a section 9(2) measure on other rights is more severe than necessary to achieve their purpose”.²¹⁸ This would involve weighing competing rights and interests in a context-specific manner. Van der Westhuizen J is sceptical of using fairness as the standard, arguing that it risks internal inconsistency to subject section 9(2) measures to a fairness analysis after they have already been found not to constitute unfair discrimination.²¹⁹ He contends that proportionality is better suited to navigating “the contested terrain of competing rights or values”.²²⁰ Jafta J, in dissent, argued against determining any general standard in this case. He contends the issue was not properly raised by the parties or adequately argued before the court.²²¹ He expresses concerns about the court raising the issue *mero motu* when it is not necessary to resolve the case at hand.²²²

In *Solidarity*, the majority judgment, authored by Zondo J, focused primarily on compliance with the specific provisions of the Employment Equity Act, particularly the requirement to consider both national and regional demographics. This approach emphasises statutory compliance as the key criterion for evaluating affirmative action measures. In contrast, the minority judgment by Nugent AJ advocated for a more nuanced, context-sensitive approach that considers a broader range of factors, including the impact on individual dignity and the rationality of the measures considering demographic realities.

This ongoing debate about the correct approach is of crucial importance from a societal perspective. Affirmative action measures are intended to address historical injustices and promote substantive equality, but their implementation can have far-reaching consequences for individuals and communities. The approach taken by courts in evaluating these measures can significantly influence their effectiveness in achieving societal transformation, as well as their impact on social cohesion and individual rights. A more rigid, compliance-focused approach might provide clarity and predictability for employers implementing affirmative action plans, but it risks overlooking important nuances and potentially perpetuating new forms of disadvantage. Conversely, a more flexible, context-sensitive approach might better account for the complex realities of South Africa's diverse population, but it could lead to uncertainty and inconsistency in the application of affirmative action measures. The lack of a settled approach also reflects the ongoing societal debate about how best to achieve the constitutional goal of substantive equality while respecting individual rights and maintaining social cohesion. As South Africa continues to grapple with the legacy of apartheid and persistent inequalities, the evolution of legal tests for evaluating affirmative action measures will play a crucial role in shaping the country's path towards a more equitable society.

Ultimately, the tension evident in the *Solidarity* judgments emphasises the need for continued dialogue and jurisprudential development in this area. As the Constitutional Court refines its approach in future cases, it will need to balance the imperative

of transformation with the protection of individual rights, the promotion of social cohesion and the practical realities of implementing affirmative action in a diverse and complex society. This ongoing process of legal and societal negotiation is essential for ensuring that affirmative action measures effectively contribute to the realisation of South Africa's constitutional vision of equality and dignity for all.

The “*Barnard* principle”, as elucidated and expanded in *Solidarity*, has significant implications for the implementation of affirmative action measures in South Africa. This principle, which allows employers to refuse appointments that would negatively affect representivity, has been extended beyond its original application to white candidates. As Zondo J clarified in *Solidarity*, it now applies to all designated groups, including African, coloured and Indian candidates, as well as both men and women.²²³ This extension of the “*Barnard* principle” has far-reaching consequences. It means that members of any designated group may be denied appointment or promotion if their group is already adequately represented or overrepresented at the relevant occupational level. This approach aims to achieve a workforce that is broadly representative of South Africa's demographic diversity across all levels.

However, the application of this principle raises complex issues. While it may promote overall representivity, it can lead to individual hardships and potentially create new patterns of disadvantage within and between designated groups. It may, for instance, disadvantage individuals from designated groups in regions where their group constitutes a majority, as seen in the case of coloured applicants in the Western Cape. Moreover, the “*Barnard* principle”, as applied in *Solidarity*, emphasises demographic representivity as a primary measure of employment equity. This focus on numbers, while quantifiable and seemingly objective, may not always align with the broader goals of substantive equality and social transformation. It might, in some cases, overshadow other important factors such as individual merit, skills shortages, or specific operational needs of employers.

Chapter 9

The expansion of the “*Barnard* principle” thus adds another layer of complexity to the already challenging task of implementing affirmative action measures. It requires employers and courts to navigate a delicate balance between achieving broad representivity and avoiding unfair discrimination against individuals from any designated group.

As South African society continues to evolve, the application and consequences of the “*Barnard* principle” will likely be subject to further scrutiny and refinement. Future cases may need to address how this principle can be applied in a manner that promotes substantive equality while also respecting individual rights and the diverse needs of different regions and sectors of the economy. The ongoing development of this principle will play a crucial role in shaping the future of employment equity and affirmative action in South Africa.

Endnotes

- 1 2014 6 SA 123 (CC) (*Barnard* (CC)).
- 2 55 of 1998.
- 3 *Barnard* (CC) (n 1) par 7.
- 4 *Barnard* (CC) (n 1) par 8.
- 5 *Barnard* (CC) (n 1) par 9.
- 6 *Barnard* (CC) (n 1) par 10.
- 7 *Barnard* (CC) (n 1) par 11.
- 8 *Barnard* (CC) (n 1) par 11.
- 9 *Barnard* (CC) (n 1) par 13.
- 10 *Barnard* (CC) (n 1) par 14.
- 11 *Barnard* (CC) (n 1) par 14–15.
- 12 *Barnard* (CC) (n 1) par 15.
- 13 *Barnard* (CC) (n 1) par 16.
- 14 *Barnard* (CC) (n 1) par 16.
- 15 *Barnard* (CC) (n 1) par 17.
- 16 *Barnard* (CC) (n 1) par 17.
- 17 *Solidarity obo Barnard v South African Police Services* 2010 31 ILJ 742 (LC) (*Barnard* (LC)).
- 18 *Barnard* (LC) (n 17) par 25.1.
- 19 *Barnard* (LC) (n 17) par 25.2.
- 20 *Barnard* (LC) (n 17) par 25.3.
- 21 *Barnard* (LC) (n 17) par 25.4.
- 22 *Barnard* (LC) (n 17) par 33.
- 23 *Barnard* (LC) (n 17) par 33.
- 24 *Barnard* (LC) (n 17) par 38.
- 25 *Barnard* (LC) (n 17) par 39.
- 26 *Barnard* (LC) (n 17) par 42.
- 27 *Barnard* (LC) (n 17) par 43.2.
- 28 *Barnard* (LC) (n 17) par 43.6.
- 29 *Barnard* (LC) (n 17) par 44.
- 30 *South African Police Services v Solidarity obo Barnard* 2013 34 ILJ 590 (LAC) (*Barnard* (LAC)).
- 31 *Barnard* (LAC) (n 30) par 30.
- 32 *Barnard* (LAC) (n 30) par 30.
- 33 *Barnard* (LAC) (n 30) par 34.
- 34 *Barnard* (LAC) (n 30) par 34.
- 35 *Barnard* (LAC) (n 30) par 42.
- 36 *Barnard* (LAC) (n 30) par 42.
- 37 *Barnard* (LAC) (n 30) par 46.
- 38 *Barnard* (LAC) (n 30) par 46.
- 39 *Barnard* (LAC) (n 30) par 43.
- 40 *Barnard* (LAC) (n 30) par 47.
- 41 *Solidarity obo Barnard v South African Police Service* 2014 2 SA 1 (SCA) (*Barnard* (SCA)).
- 42 *Barnard* (SCA) (n 41) par 52.
- 43 *Barnard* (SCA) (n 41) par 50.
- 44 *Barnard* (SCA) (n 41) par 56.
- 45 *Barnard* (SCA) (n 41) par 67.
- 46 *Barnard* (SCA) (n 41) par 75.
- 47 *Barnard* (SCA) (n 41) par 68.
- 48 *Barnard* (SCA) (n 41) par 73.

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- 49 *Barnard* (SCA) (n 41) par 74.
50 *Barnard* (SCA) (n 41) par 79.
51 *Barnard* (SCA) (n 41) par 81.
52 *Barnard* (CC) (n 1) par 1.
53 *Barnard* (CC) (n 1) par 28.
54 *Barnard* (CC) (n 1) par 29.
55 *Barnard* (CC) (n 1) par 30.
56 *Barnard* (CC) (n 1) par 30.
57 *Barnard* (CC) (n 1) par 35.
58 1998 1 SA 300 (CC). See also Van Staden “The right to equality and the adoption of a concrete test for unfair discrimination – *Harksen v Lane*” in Laubscher and Van Staden (eds) *Landmark Constitutional Cases that Changed South Africa* (2023) 185–215.
- 59 *Barnard* (CC) (n 1) par 51.
60 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 43.
61 *Barnard* (CC) (n 1) par 36.
62 *Barnard* (CC) (n 1) par 37.
63 *Barnard* (CC) (n 1) par 37.
64 *Barnard* (CC) (n 1) par 38.
65 *Barnard* (CC) (n 1) par 39.
66 *Barnard* (CC) (n 1) par 38.
67 For example, in *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) (*Solidarity*) par 37–40. See also *Ethekwini Municipality v IMATU obo Naidoo* (D285/15) 2017 ZALCD 15 (6 June 2017).
- 68 *Barnard* (CC) (n 1) par 39.
69 *Barnard* (CC) (n 1) par 39.
70 *Barnard* (CC) (n 1) par 39.
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