IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 165/13

Reportable

In the matter between:

SOLIDARITY OBO MRS R M BARNARD **Appellant**

and

SOUTH AFRICAN POLICE SERVICE **Respondent**

and

VERENIGING VAN REGSLUI VIR AFRIKAANS **Amicus Curiae**

Neutral Citation: *Solidarity obo Barnard v SAPS* (165/2013) [2013] ZASCA 177 (28 November 2013).

Coram: NAVSA ADP, PONNAN, TSHIQI & THERON JJA & ZONDI AJA

Heard: **6 November 2013**

Delivered: **28 November 2013**

Summary: **Employment Equity Act 55 of 1998 – Employment Equity Plan**

devised in terms thereof – white female police captain not appointed as Superintendent despite being evaluated as best candidate – competing African male candidates not appointed – sought to be justified by National Commissioner of Police on the basis that there was no discrimination because competing candidates had not been appointed and that the appointment of a white female would affect representivity and militate against employment equity – also contended that post not 'critical' – held that there had been discrimination on the basis of race – that the SAPS had not discharged the onus of showing that the discrimination was fair – that classifying the position as not being 'critical' was contrived – that the Employment Equity Plan could not be mechanically and rigidly applied – not an absolute bar to appointment of the complainant – discussion of the difficulties attendant upon transforming society.

ORDER

On appeal from: The Labour Appeal Court, Johannesburg sitting as court of appeal (Mlambo JP (Davis and Jappie JJA, concurring).

The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the Labour Appeal Court is set aside and substituted as follows:

'The appeal is dismissed with costs.'

JUDGMENT

Navsa ADP, (Ponnan, Tshiqi & Theron JJA and Zondi AJA concurring):

[1] This appeal, which deals with the application of the Employment Equity Act 55 of 1998 (EEA) and an Employment Equity Plan (EEP) devised in terms thereof, is a peculiarly South African tale. It demonstrates the difficulties we face in forging a future in which everyone ultimately will have a place in the sun. In our journey towards that end we have in juxtaposition those who were previously denied opportunities and those who had them. In redressing the skewed situation created by our racist past, and to recalibrate and achieve a balanced society, there has to be an accommodation and a scrupulous adherence to fairness. It is that exercise that has as a consequence difficult, awkward and even acrimonious moments for those who find themselves in contestation and for society as a whole. Sometimes we get it right and sometimes we get it wrong. We are, of course, dealing with the legacy of an institutionalised racially divisive past, the effect of which continues to haunt us as a nation recently come to democratic values. Put simply, we are experiencing nationhood's growing pains.

[2] The appeal concerns the grievance of an erstwhile police captain, who twice applied unsuccessfully for a promotion to the position of Superintendent in a specialised unit of the respondent, the South African Police Service (SAPS). It is the second rejection that is the subject of the present appeal. Her grievance is that despite it being admitted that she was the best candidate for the position she was denied the promotion solely because she was white and that such conduct on the part of her employer, the SAPS, constituted unfair discrimination. The question is whether that claim is justified. The background is set out hereafter.

[3] The appellant is Solidarity, a registered trade union, representing the interests of Renate Mariette Barnard (Barnard), who at the material times to the dispute was a police captain. This court granted an application admitting the Vereniging van Regslui vir Afrikaans as *amicus curiae.* The *amicus* presented written and oral argument in support of Solidarity's case.

[4] At the time of the hearing of the appeal Barnard was a Lieutenant-Colonel in the SAPS. The promotion position that Barnard applied for, which is at the centre of this dispute, no longer exists and consequently her claim in the Labour Court, the Labour Appeal Court (LAC) and before us was limited to compensation in the form of the difference in remuneration that she would have received had she been appointed to the position.

[5] Barnard joined the police force in 1989. Her father had been a policeman and as a child her only career ambition had been to be a policewoman. She worked her way through the ranks and it appears that her single-mindedness and talents saw her rise rapidly. From 1996 to 2004 she was the branch commander at Hartebeespoort Dam Detective Services where she was ultimately responsible for the investigation of all crimes in that particular station area. She was promoted to the rank of captain in 1997. Due to a restructuring she was transferred to a bigger division, namely Brits Detective Services, where she served as a section commander.

[6] Nine months thereafter Barnard was transferred to the complaints investigations division at head office, which at that stage was called National Evaluation Services (NES). That displacement is called a lateral transfer, which meant that she remained on the rank of captain.

[7] In her testimony in the Labour Court, Barnard explained what the NES entailed. It dealt with complaints by the public and by public office bearers concerning the broad spectrum of police services. NES staff scrutinised newspapers for negative publicity. The majority of complaints were about inadequate investigations but they also included corruption and poor police behaviour. Barnard was sometimes required to accompany evaluation teams when they paid visits to specialised units such as the Family and Child Sexual Offences unit. She had done a special course and had served as a family and child sexual offences investigating officer for quite some time and her expertise in that regard was called upon from time to time. Her duties at NES required extensive interaction with members of the public. She testified that complaints come from a variety of sources including the offices of the President, the Minister of Police, the National Commissioner of the SAPS (the National Commissioner) as well as from the public. She was of the view that her extensive experience as an operational officer ensured that she was well-placed to understand the dynamics of daily life in the SAPS, and her placement at head office made her aware that sometimes perspectives differed.

[8] During September 2005, whilst Barnard was at the NES, a new promotion position of Superintendent was advertised by the National Commissioner, ostensibly acting in terms of his powers set out in s 207 of the Constitution and ss 20 and 27 of the South African Police Service Act 68 of 1995 (the SAPS Act). The specific job description was to 'evaluate and investigate priority and ordinary complaints nationally'. It was described as post 6903. In her statement of case in the Labour Court, Barnard took the view that the National Commissioner, in advertising the post, must have perceived the need to create a new post of Superintendent within the NES 'aimed *inter alia* at ensuring the optimal utilisation of human, logistical and financial resources allocated to the post'. She went on to state: 'The position was furthermore created in order to ensure and improve service delivery by the Respondent to the public'. Those assertions were uncontested.

[9] Barnard's application to be appointed to post 6903 and its outcome is the prelude to the dispute that gave rise to the litigation culminating in the present appeal. Barnard's case is an unfair discrimination case based on the application of the EEA. In essence, it is an equality driven complaint. Section 6 of the EEA prohibits unfair discrimination on listed grounds, as does s 9 of the Constitution, the whole of which reads as follows:

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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

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

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

[10] In *Minster of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) the Constitutional Court, in dealing with the approach to be taken in relation to claims of unfair discrimination based on the equality clause in the Constitution, not unlike complaints in relation to the application of the EEA, pointed out that the achievement of equality goes to the bedrock of our constitutional architecture. Moseneke J explains why the achievement of equality preoccupies our constitutional thinking. Redress and restoration are the driving force behind the positive duty to take steps to promote equality. It is necessary to quote at some length from that decision:

‘[23] For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to “improve the quality of life of all citizens and free the potential of each person”.

[24] Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too.

[25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

[26] The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact.’

[11] In order for the reader to follow and appreciate the remainder of the narrative it is necessary, at this stage, to deal with:

(a) material provisions of the EEA,

(b) relevant parts of the EEP, and

(c) applicable sections of a National Instruction (1/2004) issued by the National Commissioner in terms of s 25 of the SAPS Act.[1]

[12] The EEA's purpose is spelt out in s 2:

'The purpose of this Act is to achieve equity in the workplace by –

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.'

That purpose is given effect to *inter alia* through the provisions quoted in the following paragraphs.

[13] Section 5 of the EEA obliges employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6(1) emphatically prohibits unfair discrimination:

'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

However, s 6(2) recognises that:

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[1] Section 25 of the SAPS Act provides:
'(1) The National Commissioner may issue national orders and instructions regarding all matters which-
(a) fall within his or her responsibility in terms of the Constitution or this Act;
(b) are necessary or expedient to ensure the maintenance of an impartial, accountable, transparent and efficient police service; or
(c) are necessary or expedient to provide for the establishment and maintenance of uniform standards of policing at all levels required by law.
(2) National orders and instructions issued under subsection (1) shall be known and issued as National Orders and Instructions and shall be applicable to all members.
(3) The National Commissioner may issue different National Orders and Instructions in respect of different categories of members.'

‘(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.’

Designated groups is defined as meaning ‘black people, women and people with disabilities’.

[14] Section 11 of the EEA is important in determining the outcome of this appeal. It provides:

‘Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.’

[15] Affirmative Action measures are dealt with in section 15(1) of the EEA:

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

[16] Section 15(3) reads as follows:

‘(3) The measures referred to in subsection (2)*(d)* include preferential treatment and numerical goals, *but exclude quotas*.’(My emphasis)

[17] Section 20 of the EEA obliges a designated employer,[2] such as the SAPS, to prepare and implement an employment equity plan ‘which will achieve reasonable

[2] Designated employer means:
‘*(a)* a person who employs 50 or more employees;
(b) a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act;

progress towards employment equity in that employer's workforce'. Such a plan must state the objectives to be achieved for each year; the affirmative action measures to be implemented as required by s 15(2); and, where underrepresentation has been identified, the numerical goals to achieve equitable representation of suitably qualified people from designated groups within occupational categories and levels in the workforce. The plan must set out a timetable within which equitable representation is to be achieved and the strategies to that end. Sections 20(2)*(d)-(i)* provide:

'(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

(g) the internal procedures to resolve any dispute about the interpretation of implementation of the plan;

(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

(i) any other prescribed matter.'

Under s 1 of the EEA, 'black people' is defined as 'a generic term which means Africans, Coloureds and Indians'. For purposes of representivity it appears, from the purpose and provisions of the Act, that the distinctive population groups are considered in relation to each other and in relation to white persons.

(c) a municipality, as referred to in Chapter 7 of the Constitution;
(d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
(e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.'

[18] The SAPS adopted and applies an EEP. The foreword to the plan was written by the then Minister for Safety and Security. The following part is significant:

'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.'

[19] The executive summary of the SAPS' Employment Equity Plan reads as follows:

'The subsequent Employment Equity Plan of the South African Police Service has been developed. It further commits itself to the implementation of affirmative action measures to ensure that suitably qualified persons from designated groups are equally represented in all occupational categories and levels in the workforce. The tone and ethos are set to identify and eliminate the artificial employment barriers which adversely affect people from designated groups. The transformation process will help to expedite the promotion of diversity and the successful implementation of the Employment Equity Plan based on equal dignity and respect for all, and ensuring reasonable accommodation available for people with disabilities. Effective procedures have been implemented to monitor and evaluate reasonable progress towards Employment Equity in every sphere of employment in the South African Police Service with the objective of achieving service delivery improvement which permeates across all sectors of Human Resource practices.'

[20] The EEP had set itself the goal of achieving employment equity targets agreed upon by the year 2004.[3] It is to be noted that the EEP was devised with due regard to the different 'business units' into which the SAPS is divided. The EEP records that the National Commissioner is responsible for championing its implementation and is the ultimate authority for its overall management.

[3] See para 14 of the Employment Equity Plan. It appears that the targets were not met.

[21] The National Instruction (1/2004) referred to earlier, in dealing with the advertising of vacancies identified for promotion purposes, states that the National Commissioner may reserve any vacant post advertised for promotion purposes, on the basis of:

'(a) the employment equity and the strategic objectives of the Service;

(b) a prevailing lack of representivity that cannot be expected to be addressed through normal promotion processes;
(c) a lack of applications received from candidates whose promotion or appointment would enhance representivity; or
(d) applications received from candidates whose promotion or appointment would promote representivity, indicate that they require further development to make them suitably qualified to fill the higher posts.'

[22] The National Instruction sets out, in some detail, the '[g]eneric functions of evaluation panels (whether interviews are conducted or not)'. The material part is set out hereafter:

'(2) A panel must, in considering the applications for promotion, promote equal opportunities, fair treatment, employment equity and advance service delivery by the Service.'

[23] Simply put, the EEA was designed to assist in the national struggle to achieve an egalitarian society by putting in place measures to overcome historical obstacles and disadvantages and providing equal opportunities for all. The most virulent opponents of such measures will be hard put to argue against its noble purpose. Likewise, the most ardent supporters of such measures, I venture, would find it difficult to argue with any conviction that the end result envisaged at the beginning of this paragraph can be obtained by the mechanical application of formulae and numerical targets. Such an exercise would in any event fall foul of s 15(3) of the EEA, which prohibits quotas. The balance to be achieved in our path to a noble end is what this case is all about.

[24] I return to deal with the facts of the case. It is significant that in advertising post 6903 the National Commissioner had not reserved the vacancy for a 'designated group' as defined in the EEA. For present purposes it is not necessary to take a view on whether such a reservation, without more, is legitimate. It is necessary to record that, in this appeal, the validity of the SAPS' EEP is uncontested.

[25] In response to post 6903 being advertised, Barnard and six other applicants, four black and two white persons, applied to be appointed. On 3 November 2005 all the applicants were interviewed. Six people constituted the interview panel which was racially diverse. It was made up of senior police officers, including two Superintendents, presumably because they would best understand the nature and demands of the post being applied for. Barnard received an average score of 86.67 per cent which was the highest by far.

[26] The interview panel recommended four candidates for appointment in the following order of preference:

'(i) Capt RM Barnard;

(ii) Capt JF Oschmann;

(iii) Capt Aschendorf;

(iv) Capt Shibambu.'

The expressions 'interviewing panel' and 'evaluation panel' are used interchangeably.

[27] There was a 17.5 per cent difference between Barnard and Capt Shibambu. In its recommendation the interviewing panel considered that gap to be too great to warrant recommending Captain Shibambu as a first choice candidate as it would compromise

service delivery. The panel took the view that Barnard's appointment would not aggravate the current lack of racial representivity at the Superintendent level, which in levels of rank in the police hierarchy is level nine, because the representivity of the NES as a whole would not be affected as Barnard, if appointed, would remain part of it.

[28] On 9 November 2005 the panel had a meeting with Divisional Commissioner Rasegatla to discuss its recommendation. This occurred in accordance with the National Instruction. The Divisional Commissioner was clearly troubled that the SAPS' directives were not adequate in advising how employment equity was to be weighed against the obligation within the public service to provide efficient services. In current jargon the concern expressed by Commissioner Rasegatla involves 'service delivery'. This concern is reflected in the minutes of that meeting. The meeting wrestled with the problem experienced in the NES, namely the under-representivity of African males and females. Commissioner Rasegatla noted that appointing any one of the first three recommended candidates would aggravate the situation. He decided that the post should remain 'unfilled' for employment equity reasons. Post 6903 was ultimately withdrawn. It is plain that Barnard's race was the reason she was not appointed to post 6903.

[29] It is necessary to record that three months after post 6903 was withdrawn, a white male Superintendent was 'laterally' transferred to the NES presumably to fill-in.

[30] During May 2006 the same vacancy now called post 4701 was advertised as a 'non-designated' post and Barnard once again applied for the position. She was shortlisted and interviewed on 26 June 2006, this time with seven other candidates, four African males, one African female, one Coloured male and one White male. The interviewing panel which once again was racially diverse consisted of senior police officers:

‘Asst Comm AJ Burger	–	Chairperson
Dir Molaba	–	Member
Dir Rossouw	–	Member
Dir Mamogale	–	Member
Snr Supt Netsera	–	Member
SPO A Smith	–	Secretary
S/Supt Jonker	–	Asst Secretary.’

[31] Three weeks before the interview, in a letter dated 7 June 2006, addressed to all Provincial Commissioners, Divisional Commissioners and Deputy National Commissioners, the Deputy National Commissioner clearly stated that interviewing panels should focus, *inter alia*, on the appointment of personnel who would enhance service delivery.

[32] The panel recommended for appointment (one of) three candidates in the following order of preference:

(i) Barnard (with an assessment score of 85.33 %);

(ii) Capt Mogadima (with an assessment score of 78%);

(iii) Capt Ledwaba (with an assessment score of 74%).

Barnard’s score was 7,33 per cent more than Capt Mogadima, the second choice candidate.

[33] The interviewing panel’s considerations were as follows:

'The appointment of Captain Barnard will not enhance representivity on salary level 9 but it will not aggravate the current Divisional Representivity figures as she is already part thereof. Appointing the candidate on salary level 9 will however enhance representivity on salary level 8 in respect of the over-representation of white females on that level. Irrespective of the difference in percentage between the first and second choice candidates, Capt Barnard *was the only candidate* that during the interview displayed an unique blend of passion and enthusiasm to deal with members of the community that are unsatisfied with the services rendered by the South African Police Service. During the interview, she also displayed a high level of commitment towards the SAPS and an eagerness to contribute towards enhanced service delivery.'(My emphasis)

[34] It is necessary to record that, after post 4701 was advertised, the SAPS issued guidelines for equity targets for the 2006/2007 financial year which were said to be in line with the EEP. It was agreed between the parties that the table set out hereafter correctly sets out the SAPS employment equity targets and the race and gender representivity levels at levels nine and ten:

	A/M	A/F	I/M	I/F	C/M	C/F	W/M	W/F	Disabled	Vacant Posts (REP)	TOTAL
Current	6	6	1	0	1	1	8	6			29
EE Target	13.9	9.2	0.5	0.4	1.6	1.1	2.0	1.3	0.6	1	
Over/Under Representation	-8	-3	0	-0	-1	-0	6	5	-1		
Suggested allocation	1										

The table illustrates that, at level nine, white females were over represented by five employees. By contrast African males were under represented by eight, African females under represented by three, and Coloured males and the disabled were each under represented by one. Consequently, the suggested allocation of the positions at levels

nine and ten was one to be allocated to an African male. African males were the most under represented category.

[35] On 30 June 2006 a meeting was once again held between the interviewing panel and Divisional Commissioner Rasegatla. This time he supported Barnard's appointment. His motivation, as recorded in the minutes, is set out hereafter:

'[F]ailing to recognize and appoint this candidate would really send a wrong signal to the candidate. Appointments and promotions are also made to address service delivery, and if the candidate in two years constantly applies for the post and is constantly rated and recommended as the best candidate, it clearly indicates that she is the best candidate for promotion. Other candidates who would have improved representivity within the Division had approximately one year to improve on themselves to compete with the recommended candidate. However, she still beat them.

The panel strongly believed that in the interest of service delivery, and having denied this candidate the opportunity for promotion during the previous promotion phase, that the candidate should be appointed as recommended by the respective promotion panel.'

[36] Rasegatla's written recommendation dated 10 July 2006 to the National Commissioner that Barnard be appointed to post 4701 read as follows:

'The candidate is recommended as the panel's first choice candidate for the post. She has proven competence and extensive experience at National level in the CORE functions of the post and was rated the highest by the promotion panel. She obtained an average rating of 85.33% whereas the second choice candidate, obtained a rating of 78%. The appointment of the candidate will not enhance representivity on salary level nine but it will not aggravate the current Divisional Representivity figures as she is already part thereof. Appointing the candidate on salary level nine will however create an opportunity to enhance representivity on salary level eight in respect of the overall representation of white females on that level.

The same post was advertised during 2005 (Phase 2/2005/6) but not filled due to representivity. Capt. Barnard was rated in first position in the previous promotion phase and was

recommended by the promotion panel and is again rated first by the promotion panel during the current promotion phase.

In terms of the provision of par 13(3) of National Instruction 1/2004 she was not promoted during the previous promotion phase despite the fact that she was the best candidate. As a result, the post was withdrawn and was re-advertised during the current promotion phase. During the current promotion phase she was again among the shortlisted candidates and was, once again rated the best candidate.

Failure to recognize and appoint this candidate would really send a wrong signal to the candidate. Appointments and promotions are also made to address service delivery, and if the candidate in two years constantly applies for the post and is constantly rated and recommended as the best candidate, it clearly indicates that she is the best candidate for promotion.

Other candidates who would have improved representivity within the Division had approximately one year to improve on themselves to compete with the recommended candidate. However, she still beat them.

National Evaluation Service strongly believes that in the interest of service delivery, and having denied this candidate the opportunity for promotion during the previous promotion phase, that the candidate should be appointed as recommended by the panel.'

[37] On 20 July 2006 a meeting was held between Provincial Commissioners and Divisional Commissioners to discuss the recommendations for the promotional posts, including post 4701. In respect of post 4701 the following is recorded:

'The Division: National Evaluation Services, explained why representivity could not be achieved. The chairperson responded that candidates with potential should also be considered – the posts are not critical/scarce skills.

The chairperson concluded the meeting by saying that the recommendations will be presented to the National Commissioner for consideration.'

[38] Despite the recommendations, the National Commissioner did not approve the appointment of any of the recommended candidates. In a letter dated 27 July 2006 signed on behalf of the National Commissioner, Divisional Commissioner Rasegatla's recommendation was responded to. The following are the material parts of that letter:

'2. After due consideration of your recommendations, the National Commissioner has decided not to approve your recommendations, for posts 4702/4701/4710 due to the following reasons:

* your recommendations do not address representivity; and
* the posts are not critical and the non-filling of the posts will not affect service delivery. The posts should be re-advertised during the phase 2-2006/7 promotion process, during which process you should attempt to address representivity.'

[39] It is to be noted that even though the post for which Barnard applied has now been withdrawn due to restructuring, that post was in fact re-advertised after she had been rejected for appointment to post 4701.

[40] Now doubly aggrieved, Barnard filed a complaint in terms of the SAPS' grievance procedure. I consider it necessary to reproduce the written reply to her grievance in full:

'2. The National Commissioner has decided not to approve the recommendation for post 4701 due to the following reasons:

- the recommendation did not address representivity; and
- the post is not critical and the non-filling of the post will not affect service delivery.

3. The National Commissioner further directed that the post should be re-advertised during the next promotion process, during which process it should be attempted to address representivity.

4. Although the officer formed part of the relevant Business Unit, representivity should be achieved at all levels.

5. With reference to the referral to the lateral placement of a white male at the division, it has to be mentioned that lateral placements are not handled in terms of the prescripts of National Instruction 1/2004 on Promotions.

6. The officer's attention is also drawn to the fact that in terms of National Instruction 1 of 2004 (Promotions), the National Commissioner is not obliged to fill an advertised post.

7. It has to be mentioned that the relevant post was re-advertised in the phase 2-2006/7 (post 5101) promotion process, but the post was withdrawn and it was indicated that the filling of the post will be dealt with once the restructuring of the Division has been finalized. This decision further confirms the decision that the post is not a critical post and that the non-filling of the post will not affect service delivery.

8. The status quo with regard to the position of the officer is maintained.

9. Please inform the officer accordingly.'

The letter was signed by JJ van Rooyen, Director Section Head: Promotions and Awards.

[41] Barnard referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) which remained unresolved. The dispute was then adjudicated in the Labour Court (Pretorius AJ). In the view of the Labour Court, an EEP must be applied fairly with due regard to the affected individual's constitutional right to equality and representivity must be weighed against that right. Pretorius AJ stated that the right to dignity of affected individuals is also implicated. He reasoned that it was not appropriate to apply, without more, numerical goals set out in the EEP. Such an approach, he said, was too rigid. At para 25.4 of his judgment the following is stated:

'Where a post cannot be filled by an applicant from an under-represented category because a suitable candidate from that category cannot be found, promotion to that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group.'

[42] In the three subsequent paragraphs Pretorius AJ stated:

'[25.6] There must be a rational connection between the provisions of the Employment Equity Plan and the measures adopted to implement the provisions of that plan.

[25.7] In appropriate circumstances at least, the efficient operation of the Public Service or what is termed *"service delivery"* is a relevant factor to be taken into account in the implementation of an employment equity plan.

[26] The Respondent bears the onus to show that the unfair discrimination alleged by the Applicant is fair. This means that the Respondent must allege sufficient evidence to show, on a balance of probabilities, that its decision was fair. In order to do so the Respondent should place before the court sufficient evidence to enable it to understand this reasoning behind and justification for its decision so that the court is in a position properly to decide the matter.'

[43] Based on the facts that the National Commissioner has the power to make appointments of the kind in question, and the recommendations do not necessarily bind him or her, the Labour Court had regard to what it considered to be scant evidence on the reasoning and justification for the National Commissioner's decision.

[44] In this regard, it is to be noted that the only witness who testified in support of the SAPS' case in the Labour Court was Senior Superintendent Johannes Ramathoka. It is not an exaggeration to say that the nature of his evidence was peculiar. He had no first-hand knowledge of the case or of the various documents such as the EEP and the National Instruction which were put before him. He thus merely confirmed and sought to explain their contents, and often appropriated to himself the right to interpret those documents. He explained the representivity table for levels nine and ten. He was presented with the minutes of the meetings referred to earlier in this judgment and their contents were read to him. It is difficult to discern the purpose of leading the evidence in this manner. Much of his evidence was plainly inadmissible. And that which was admissible carried little, if any, evidential weight. What is clear is that apart from the cryptic statement in the letter signed on behalf of the National Commissioner and the

minutes of the meeting at which he was present which mirrored that statement, we have no insight into the National Commissioner's reasoning and for his failure to respond fully to the motivation by the interviewing panel and Divisional Commissioner Rasegatla. Barnard was the only witness who testified in support of her case.

[45] Pretorius AJ stated that in the absence of a fully reasoned decision it was safe to assume that the National Commissioner did not regard the African candidates that were recommended as suitable. He found that the SAPS had failed to discharge the onus of showing that the National Commissioner's decision not to appoint Barnard was fair. He considered that he had the power to make an order promoting Barnard to the post of Superintendent and did so with effect from 27 July 2006.

[46] Aggrieved by that decision, the SAPS appealed to the Labour Appeal Court (Mlambo JP, Davis and Jappie JJA concurring). That court held unanimously that no discrimination had occurred because no appointment had been made. The Labour Appeal Court (the LAC) went on to state that it was a misconception to 'render the implementation of restitutionary measures subject to the right of an individual's right to equality'. The LAC took the view that, without restitutionary measures 'the achievement of equitable treatment will continue to elude us as a society'. Mlambo JP held that the Labour Court had erred in treating the implementation of restitutionary measures as subject to the individual conception of a right to equality. That approach, so he reasoned, 'promotes the interests of persons from non-designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid. Treating restitutionary measures in this manner is surely bound to stifle legitimate constitutional objectives and result in the perpetuation of inequitable representation in the workplace'.

[47] The LAC found that the EEP bound all of the SAPS' employees. It concluded:

'The application of such plans therefore cannot be relegated as suggested by the Labour Court.'

In dealing with Barnard's claim of discrimination the LAC stated:

'[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.'

Having already held that there had been *no* discrimination, the LAC, after considering the SAPS' quest for representivity, contradictorily said the following:

'Discriminating against Barnard in the circumstances of this case was clearly justifiable.'

[48] Mlambo JP stated that it could not be argued that the EEP sought the appointment of only black employees irrespective of other criteria. He noted that one of the criteria in the EEP is suitability and went on to state:

'That to me suggests that should a black candidate be unsuitable that candidate will not be appointed. This is also defined in National Instruction 1. Clearly, as was aptly argued by counsel for the *amicus,* the Employment Equity Plan does not sanction mediocrity or incompetence. Manifestly this was not the case with the two black candidates in this case.'

[49] The LAC held that the Labour Court's conclusion that the failure to appoint Barnard compromised service delivery was unfounded. In this regard Mlambo JP stated that since the National Commissioner is the accounting officer for the SAPS, he is the only person answerable for service delivery. In this regard the court concluded as follows:

'It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post.'

In the result, the LAC upheld the appeal by the SAPS and set aside the Labour Court's order, substituting it with an order dismissing the application. That decision is before us with the leave of this court.

[50] I turn to consider the correctness of the LAC's decision. The starting point for enquiries of the kind under consideration is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair.[4] When a measure is challenged as violating the Constitution's equality clause, its defender could meet the claim by showing that it was adopted to promote the achievement of equality as contemplated by s 9(2), and was designed to protect and advance persons disadvantaged by prior unfair discrimination.[5] Similarly, as stated above, s 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegations is made must establish that it is fair.

[51] In my view, the LAC's conclusion that Barnard was not discriminated against – contradicted in a later paragraph of its judgment – because the vacancy had not been filled, is flawed. In *Gordon v Department of Health: KwaZulu-Natal* [2008] 11 BLLR 1023 (SCA) Mlambo JA, as he then was, in considering the position where a black candidate was appointed ahead of a white candidate recommended by a selection panel, stated that: 'It can hardly be contested that the appellant was discriminated against on the basis of his colour and race'. In that case the appeal was upheld on the basis that the Department of Health had no policy or plan in place for the implementation of affirmative action measures and that consequently the discrimination complained of was unfair. In the present case Mlambo JP took the view that the application of the EEA was justification for Barnard's non-appointment.

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[4] *Harksen v Lane* NO 1998 (1) SA 300 (CC) paras 43-46. Section 6 of the EEA mirrors the prohibition against discrimination on listed grounds set out in s 9(3) of the Constitution and adds HIV status as an additional ground. Section 9(5) of the Constitution provides:
'(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[5] See *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

[52] If a senior African female or male police officer had all of Barnard's skills and had achieved the same interviewing score, that person would most surely have been appointted to post 4701. It can 'hardly be contested' that in the present case Barnard was not appointed because she was a white female. In *Gordon* the appellant's grievance, like Barnard's, was that he had not been appointed when he should have been. The LAC, in my view, erred in holding that the fact that no appointment had been made meant that there had been no discrimination.

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

[54] In *Van Heerden,* Moseneke J reminded us that it is 'incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but *"situation sensitive"* approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society'. [6] (My emphasis.)

[6] Paragraph 27.

[55] Having determined that there was discrimination based on a specified ground, namely race, it is necessary to turn to the next question; whether the SAPS has established that the discrimination was fair. In this regard, the Constitutional Court in *Harksen* stated the following:

'The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'

Although that case dealt with direct reliance on the equality clause in the Interim Constitution, the same test, in my view, would apply in relation to reliance on s 6 read with s 11 of the EEA.

[56] It will be recalled that the justification on behalf of the National Commissioner for Barnard's non-appointment was scant. The first reason provided to Barnard and the recommendation panel was that her appointment to the post would not address representivity. Second it was stated that the posts were not 'critical' and that the non-filling of the posts would not affect service delivery.

[57] Dealing with transformation which encompasses the notion of representivity is not easy. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) paras 75 – 76 the Constitutional Court said the following:

'The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in s 9(2) of the Constitution. That provision makes it clear that under our Constitution "[e]quality includes the full and equal enjoyment of all rights and freedoms". And more importantly for present purposes, it permits "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". These measures may be taken "[t]o promote the achievement of equality".

But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society

adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.'

[58] To determine whether the discrimination was fair, the facts in this case require closer and scrupulous scrutiny. Regrettably, this is not an exercise that the LAC embarked on. This 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. In *Van Heerden*, as stated above, the assessment of fairness is said to require a flexible but 'situation sensitive' approach.

[59] In making the assessment it should be borne in mind that Barnard herself was part of a designated group, namely, she was female. One cannot ignore that she had previously applied for the same position and not only was she not appointed on the basis of representivity but a white male was moved laterally to fill-in, and the position was re-advertised. Since race representivity within organs of state is graphically obviously apparent, one could rightfully question how appointing somebody temporarily from a non-designated group promotes the employment equity cause and the image presented to the public and the SAPS itself.

[60] It is safe to assume that the interviewing panels are constituted to serve a purpose. They are a management tool, comprised in the present case of senior police officers to be of assistance to the National Commissioner when he makes a final decision on whether to fill a vacancy. Thus, one can conclude that even though he is not bound by a panel's evaluation and recommendation, the National Commissioner must at the very least give consideration to and engage with what is put before him by them.

He discounts relevant and material factors at his peril, rendering him liable to legal challenge.

[61] Requiring the input and intervention of a Divisional Commissioner is another useful management tool and is sound policy. It ensures that the person who holds the highest authority in that division and who must be taken to understand the dynamics and needs within his or her geographical area of jurisdiction and within the management structures of the SAPS provides his or her insights to enable the National Commissioner to arrive at a just decision in terms of the EEA and the EEP. As with the input from the interviewing panel it can hardly be argued that the Divisional Commissioner's views are without value.

[62] It is necessary to consider a little more closely the interviewing panel's motivation for its recommendation, as set out in para 33. It contains more than the fact of Barnard's superior score which was close to ten per cent more than her nearest rival, which motivated the recommendation. It was also that she 'was the only candidate that during the interview displayed an unique blend of passion and enthusiasm to deal with members of the community that are unsatisfied with the services rendered by the South African Police Service'. Clearly the panel, which included three senior black police officers, saw that quality as distinctive and one that would enhance the services rendered by the SAPS. Having regard to Barnard's evidence concerning the nature of the job she was then performing at the NES as a captain, it appears not only that the NES served an essential function within the SAPS, but that the distinctive quality referred to above would be a commendable advantage in the more senior managerial position that she had applied for. Further, the panel saw fit to note as another distinctive feature, Barnard's high level of commitment toward the SAPS and her eagerness to contribute toward enhanced service delivery. Under cross-examination she was placed in the unenviable position of having to answer questions about whether her rivals for the

position did not have the same attributes. What is abundantly clear is that the panel saw these as distinctive characteristics.

[63] Equally important is Commissioner Rasegatla's written recommendation, referred to in para 36 to the National Commissioner, which contained a motivation with factors beyond those stated by the evaluation panel. He took into account that she had already once before been overlooked in relation to post 6903, despite being the 'best candidate'. He considered it important that upon her second interview she was yet again rated the 'best candidate'. His concern, understandable because of his rank and managerial position, that the wrong signal would be sent to Barnard is not one that can lightly be discounted. Human resource management both in the private and public sector must be concerned about morale and cohesion within a workforce. Commissioner Rasegatla noted that competing candidates had had a year within which to meet the standard set by Barnard, but failed to seize the opportunity. Significantly, in the last sentence of his recommendation he speaks on behalf of the NES. That sentence bears repeating:

'National Evaluation Service strongly believes that in the interest of service delivery, and having denied this candidate the opportunity for promotion during the previous promotion phase, that the candidate should be appointed as recommended by the panel.'

[64] Counsel on behalf of the SAPS urged us to consider that representivity at level nine was the crucial factor and that any beneficial effect in relation to the lower level which might result because of Barnard's promotion to Superintendent should be discounted. It will be recalled that both the interviewing panel and Commissioner Rasegatla took the view that, in the event that Barnard was promoted to Superintendent within the NES, it would free up her position at the lower level (level eight) and present an opportunity to enhance representivity within the NES at that level. That idea is not entirely without merit. Barnard's promotion might thus very well have had the indirect effect of advancing the employment equity cause.

[65] If representivity was the genuine driver behind the National Commissioner's refusal to appoint Barnard and if he thought that either of her two rivals were deserving of appointment, the compelling conclusion is that he would have appointed one of them. In terms of the National Instruction, as stated earlier, the National Commissioner may reserve a position to meet employment equity needs and the strategic objectives of the SAPS. If representation was the genuine concern, one would have expected that he would at the very least have considered that option.

[66] The Labour Court appears to have been justified in holding, as it did in para 34 of its judgment, that 'it is reasonable to assume that [the National Commissioner] at least did not regard the other black candidates who were recommended as suitable'. Pretorius AJ went on to say that whatever the witnesses may have said is of lesser importance because they did not make the decision.

[67] Having regard to the importance of the issue, and considering that his decision not to make a senior appointment was being impugned, one would have expected the National Commissioner to have provided assistance to the Labour Court in relation to his motivation and reasoning beyond the cryptic note signed on his behalf. There is no explanation provided for his failure to tender any other evidence in this regard. The effect is that there is no indication that he grappled with all of the issues raised by the recommendation panel and Commissioner Rasegatla. On the contrary, the indications are that he did not engage with what his own management team had put before him.

[68] The National Commissioner's decision not to make the appointment was also defended on the basis that the EEP would be violated if he had appointed Barnard. It was submitted that the representivity imbalance at level nine would be even more negatively impacted. It is important to note that the EEP, in its foreword, states that the

focus of employment equity is on black people, women and persons with disabilities. In the executive summary referred to above, it is envisaged that 'suitably qualified persons from designated groups are equally represented in all occupational categories and levels'. Against the statutory background and the policy documents as well as the EEP it was never contended, nor could it be, that numerical targets and representivity are absolute criteria for appointment. Adopting that attitude would turn numerical targets into quotas which are prohibited in terms of the EEA. The LAC, in my view, erred in holding out the EEP as an absolute legal barrier to Barnard's appointment. The EEP's foreword makes it clear that whilst the focus is on employment equity, no employment policy or practise will be established as an absolute barrier to the appointment of suitably qualified persons from non-designated groups.

[69] It was also sought to justify the National Commissioner's non-appointment of Barnard on the basis that the post was not 'critical' and that therefore not filling it was justified. It is important to note that nowhere in any legislation relating to any post in the SAPS can the term 'critical' be found. It was agreed between the parties that there is no legal foundation for that categorisation. I turn to deal with the constitutional and statutory provisions that *do* apply to public administration, organs of state and appointments within the SAPS.

[70] The principles that apply to administration in every sphere of government, organs of state and public enterprises are set out in s 195(1) of the Constitution, which states:

'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources musts be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and carreer-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

[71] Section 205(2) and s 205(3) of the Constitution deal with the establishment of the SAPS and set out its objects:

'(2) National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[72] The SAPS Act is the envisaged national legislation. It is the National Commissioner who exercises control and manages the SAPS in accordance with the provisions of ss 205 and 207 of the Constitution and in terms of s 11 of the SAPS Act. It is common cause that, in terms of the Act and the National Instruction, it is the National Commissioner who is responsible for appointments of the kind under consideration. The Constitution and the SAPS Act envisage a professional, efficient police force that makes effective use of resources. Representivity is enjoined. Importantly s 11(2)*(a)* requires the National Commissioner to develop a plan before the end of each financial year, setting out the priorities and objectives of policing for the following financial year. Section 11(2)*(b)* requires him to determine the fixed establishment of the SAPS and the

grading of posts. Section 11(2)*(c)* obliges him to determine the distribution of the numerical strength of the SAPS after consultation with the board, and finally on this aspect, s 11(2)*(d)* requires the National Commissioner to organise or reorganise the SAPS at national level into various components, units or groups. The board referred to in s 11(2)*(c)* is a Board of Commissioners consisting of National and Provincial Commissioners presided over by the National Commissioner, the function of which is to promote co-operation in the SAPS.

[73] Having regard to the constitutional principles that underpin public administration and organs of state, and the provisions of the SAPS Act referred to in the preceding paragraph, it can hardly be contended that a senior position such as the one under discussion was not given serious consideration when it was created and advertised. Put simply, it must have been thought by all concerned that it was necessary in furtherance of the SAPS' mission of providing a professional and efficient police service. As stated above, Barnard's assertions in this regard in her statement of case in the Labour Court were uncontested. These considerations have to be weighed alongside Barnard's description of the importance of her job within the NES, including the role that it plays in the SAPS meeting its mission as well as the importance of a managerial position within that division. Against that 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. This is all the more evident if one considers that after the first rejection, a senior Superintendent was moved laterally to fill-in temporarily. Moreover, the post was advertised on no less than three occasions, lending a lie to the assertion that it was not 'critical'.

[74] The LAC adopted the attitude that it is for the National Commissioner alone to determine whether service delivery would be affected by a post not being filled. In my view, that conclusion cannot be reached without closer scrutiny of the applicable

constitutional and statutory provisions and the facts set out in the preceding paragraph. In this regard too, the LAC erred.

[75] In relation to the assertion on behalf of Barnard that the failure to appoint her would impact on service delivery, the following part of the heads of argument on behalf of the SAPS, bears repeating:

'Given the paucity of evidence in this respect, it cannot be argued that the failure to appoint Mrs Barnard prejudiced the interests of the SAPS.'

[76] Given that it bore the onus, the paucity of evidence is not a virtue for the SAPS. The evidence referred to in preceding paragraphs militates against the SAPS' case (and the National Commissioner does not assist their cause by not providing any evidence in explanation or rebuttal) and the conclusions by the LAC. The National Commissioner would have done well to remind himself that the National Instruction issued by him and which has the force of law, admonishes evaluation panels, not only to take into account the promotion of equal opportunities and employment equity but also to have regard to whether the promotion would advance service delivery. The letter referred to in para 30 above, sent to all Provincial Commissioners, Divisional Commissioners and Deputy National Commissioners urged the interviewing panel to focus on the appointment of persons who would enhance service delivery. Failure to appoint Barnard to a position which, in terms of the regulatory constitutional and statutory framework must have been necessary leads ineluctably to the conclusion that service delivery must have been affected.

[77] Further, the negative impact of a double rejection on dubious grounds on a loyal and dedicated servant of the SAPS, such as Barnard, cannot, as identified by Commissioner Rasegatla, be overlooked. On this aspect we are dealing with the impact

on both the aggrieved individual and on the SAPS. If we are to build a cohesive society with cohesive components within the state structure, we have to be ‘situation sensitive’.

[78] Whilst it is true that in terms of the National Instruction the National Commissioner is not obliged to fill a vacancy, the most obvious instance being where there is no suitable person capable of fulfilling the requirements of the position, it does not follow that where the only suitable person is from a non-designated group in relation to representivity, that person should not be appointed. The foreword to the EEP makes that clear. This is particularly so where there is no rational or proffered explanation, or none proffered at all.

[79] No doubt many South Africans will agree that those previously advantaged might in appropriate circumstances have to forego employment opportunities in favour of employment equity. In the present case, having regard to all the circumstances and bearing in mind the onus that rests on the SAPS, and for all the reasons set out earlier, it cannot in my view be concluded that it has been established by the SAPS that the discrimination complained of was fair. In the result the decision by the LAC, for which there is no factual foundation given the dearth of evidence to which I have alluded, cannot stand.

[80] As stated earlier, the facts in this case determine the outcome. In striving to achieve an egalitarian society and in addressing employment equity whilst maintaining fairness as a standard and meeting the country’s needs there can be no victors nor should there be persons considered to be vanquished. Dealing with race classifications, as is necessary under the EEA, feels almost like a throw back to the grand apartheid design. If we are to achieve success as a nation, each of us has to bear in mind that wherever we are located, particularly those of us who have crossed over from the previous oppressive era into our present democratic order, it will take a continuous and

earnest commitment to forging a future that is colour blind. This necessarily includes serious and sustained efforts to overcome the prejudices that inevitably attach to us because of our programming, relative to the segregated societies from which we emerged, in order to build a cohesive and potentially glorious rainbow nation. For now, ironically, in order to redress past imbalances with affirmative action measures, race has to be taken into account. We should do so fairly and without losing focus and reminding ourselves that the ultimate objective is to ensure a fully inclusive society – one compliant with all facets of our constitutional project.

[81] It was agreed that in the event of Barnard being successful, compensation would necessarily be the difference between what she would have earned as a Superintendent and what she continued to earn as a captain, but limited to a two year period. That is the effect of the order by the Labour Court. Although counsel on behalf of the SAPS suggested that it was the upper limit and that it was perhaps too generous, he could not, in principle, object to such an order. The following order is made:

1. The appeal is upheld with costs including the costs of two counsel.

2. The order of the Labour Appeal Court is set aside and substituted as follows:

‘The appeal is dismissed with costs.’

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MS NAVSA

ACTING DEPUTY PRESIDENT

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