DYASI M INCORPORATED ATTORNEYS

Refusal of Appointment due to Overrepresentation of a Specific Race Group in Terms of the Solidarity OBO Barnard Case

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TABLE OF CONTENTS

1. SOLIDARITY OBO BARNARD

1.1.1. Facts

Barnard was a white female that was employed as a constable for the South African Police Service ('SAPS') from 1989.[1] She served many years in service. In 1997 she was promoted to become a captain and was later transferred to another branch. [2] She remained loyal and dedicated to all of her assigned positions within SAPS. In 2005, a new position was created and was stated to be a non-designated post. [3] Barnard was interviewed by a panel for the position and was the highest scoring candidate. [4] Despite this, SAPS had adopted an employment equity plan that set targets for the positions that were available. [5] The employment equity plan was intended to reflect the racial demographics of the population. After the adoption of the employment equity plan, the recommendations made stated that appointing a white individual would not add to the ratio of black officers at that level. [6]

The post was withdrawn. The post was re-advertised the following year and Barnard obtained the highest score again. [7] She was recommended by the interview panel to be appointed.8 Despite Barnard's highest rank out of all the candidates present at the interview, the National Commissioner made the final decision not to appoint her. [9] Again, the Commissioner deliberated that it would not address representivity. [10] The post remained vacant. [11] Barnard approached the Commissioner for Conciliation, Mediation and Arbitration ('CCMA') where she filed a grievance. [12] Thereafter, the dispute was referred to four courts, four different judgments were decided but ultimately a judgment was handed down by the Constitutional Court.

[1] Solidarity obo Barnard v South African Police Services 2010 5 BLLR 561 (LC) at para [24.1]; South African Police Services v Solidarity obo Barnard [2013] 1 BLLR 1 (LAC) at para [5].
[2] Barnard (LC) at para [24.1].
[3] Barnard supra at para [24.4] and [24.5].
[4] Barnard supra at para [24.6]; Barnard (LAC) at para [5] and Barnard (CC) at para [8].
[5] Barnard (LAC) at para [11].
[6] Barnard (LC) at para [24.9] and [24.11]; Barnard (LAC) at para [8].
[7] Barnard supra at para [24.13] and [24.15]; Barnard (LAC) at para [7].
[8] Barnard supra at para [24.16]; Barnard (LAC) at para [6].
[9] Barnard supra at para [24.20]; Barnard (LAC) at para [8].
[10] Barnard supra at para [24.20].
[11] Barnard supra.
[12] Barnard supra at para [24.21].

1.1.2. Labour Court

The court had to decide whether SAPS had unfairly discriminated against Barnard by denying her a promotion on two occasions because she is white. [13] Acting Judge (AJ) Pretorius set out a series of unopposed propositions. Firstly, the EEA and SAPS equity plan was required to give regard to affected employees' right to dignity and equality, thus, the two were meant to be applied fairly. [14] In order to assess whether SAPS had complied with the propositions, the court outlined the relevant sections in the EEA which contained the essence of the purpose of it and prohibition against unfair discrimination. [15] Secondly, the court stated that the law limits the extent to which equity plans may discriminate against employees. [16] This means that the employer bears the onus of proving that the alleged discrimination is fair in terms of the EEA. [17] Thirdly, provisions from the EEA are required to be applied fairly and rationally whilst taking all the employees' rights into consideration. [18] It is insufficient for the employer to merely apply a numerical goal to achieve representivity. [19] Furthermore, a person from another group should not be denied appointment or promotion without a valid reason where a candidate from an under-represented group cannot be found to fill the vacant position. [20]

Barnard understood the repercussions of affirmative action and how they could adversely affect people. [21] SAPS raised the defence that Barnard could not claim that she had been discriminated against because the post had remained vacant and no appointments had been made. [22] Pretorius AJ held that the failure to appoint Barnard was based on her race and amounted to discrimination, the non-appointment of other candidates did not alter the fact that it was unfair and did not comply with the EEA. [23] The failure to leave the position vacant when there was a suitably qualified black candidate available was an unfair and irrational way to implement an equity plan. [24] SAPS equity plan had provided that when filling in posts, service delivery must be taken into account. In concluding its judgment, the court clearly emphasised that they failed to understand how failure to fill a post could rationally be justified by the need for an efficient police force. [25] The labour court decided the matter by ascertaining what is required in an employment equity plan and what representivity entails. [26] This decision seemingly confirmed that affirmative action measures may be subjected to judicial scrutiny. [27] Additionally, when an employer's equity plan is challenged, that employer must, at most prove that the equity goals that they are pursuing are reasonable, rational and fair. [28] SAPS appealed on the basis that they believe that Pretorius AJ had misread their equity plan, the EEA and the Constitution.

[13] Barnard supra at para [26]; M Mushariwa 'Who are the true beneficiaries of affirmative action? – Solidarity obo Barnard v SAPS 2010 5 BLLR 561 (LC)' (2011) 32 Obiter at 442.
[14] J Grogan 'Demographic equity: Turning workers into cyphers' (2017) 33 Employment Law at 3.
[15] Mushariwa op cit note 35 at 444; Barnard supra at paras 2-15.
[16] Grogan op cit note 14 at 3.
[17] Barnard (LC) at para [26]; Mushariwa op cit note 35 at 450.
[18] J Grogan 'The Chronicles of Barnard: Affirmative action on trial' (2014) 30 (6) Employment Law at 4.
[19] Ibid.
[20] Barnard (LC) at para [32].
[21] Grogan op cit note 18 at 4.
[22] Barnard (LC) at para [32].
[23] Barnard (LC) at paras [43.7]- [43.8].
[24] Grogan op cit note 18 at 4.
[25] Ibid.
[26] Barnard (LC) at para [42].
[27] J Grogan 'Steel Ceiling: Affirmative Action by numbers' (2013) 29 Employment Law at 5.
[28] Barnard (LC) at para [33].

1.1.3. Labour Appeal Court

The Labour Appeal Court (LAC) noted that the Labour Court judgment concluded that where a post cannot be filled by a suitable candidate from an underrepresented category then a candidate from another group should not be denied the opportunity if they are suitable for the position. [29] The LAC differed in their approach to the case. The court firstly found that the case dealt with the implementation of an equity plan where it is unfavourable to persons from non-designated groups. [30] More specifically, the LAC had to ascertain whether the SAPS equity plan should be suppressed in instances that its implementation would negatively affect people from non-designated groups. [31] The Labour Court had failed to narrow the scope of what the case dealt with. The LAC observed the normal interpretation of discrimination and unanimously found that the present case did not contain any discrimination or differentiation. [32] According to the court, Barnard had neither been discriminated against nor differentiated against in the consideration of her application. [33] Grogan is of the opinion that if there had been an affirmative action appointment then the manner in which Barnard approached the court would have significantly differed. [34] In such an instance, Barnard would have had to prove that the appointed candidate was not suitably qualified and therefore their appointment would have been irrational. [35]

The judges in the LAC found that the issue was the relationship between section 9 (1) and 9 (2) of the Constitution. [36] This entailed considering whether the EEA and SAPS equity plan were applied respectively in accordance with the principles of fairness and bearing in mind the constitutional right to equality afforded to the affected individual. [37] According to the LAC, the Labour Court errored in placing more emphasis on the individual's rights to equality and dignity above equity measures of rationality and fairness. [38] One of the other conclusions that was reached by the LAC was that the failure to appoint a black candidate could not necessarily be regarded as a failure to implement an equity plan. [39] Due to the fact that Barnard's promotion would not have yielded any changes in representivity at that level of employment, her appointment would have stifled the SAPS equity provisions in which black candidates had a claim to be preferred. [4]0 The LAC effectively held that if Barnard had been discriminated against, the discrimination was not unfair because the equity plan was rational. [41]

[29] Barnard (LAC) at para [14]; Grogan op cit note 27 at 6.
[30] Barnard supra at para [11] – [12]; Ibid.
[31] Ibid.
[32] Ibid.
[33] Barnard (LAC) at para [22]-[24].
[34] Grogan op cit note 27 at 6.
[35] Ibid.
[36] Section 9(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; Grogan op cit note 18 at 4.
[37] Ibid.
[38] Grogan op cit note 18 at 5.
[39] Barnard (LAC) at para [15].
[40] Grogan op cit note 27 at 6.
[41] Ibid 10.

Although the equity plan itself was not thoroughly observed, the court found that where an equity plan was rational in achieving an attainable goal then no discrimination can be said to have taken place, if it had, it would be fair. [42] The equity plan served as a method of removing the inequality that existed in the past. [43] The consequence thereof is that the implementation of affirmative action measures operate to the detriment of non-designated groups. [44] Grogan states that after the decisions in both the Labour Court and LAC, a question arose on whether the Barnard decision raised an absolute barrier to claims of unfair discrimination by overrepresented race groups in a particular workforce where the employer presents its equity plan as a defence. [45]

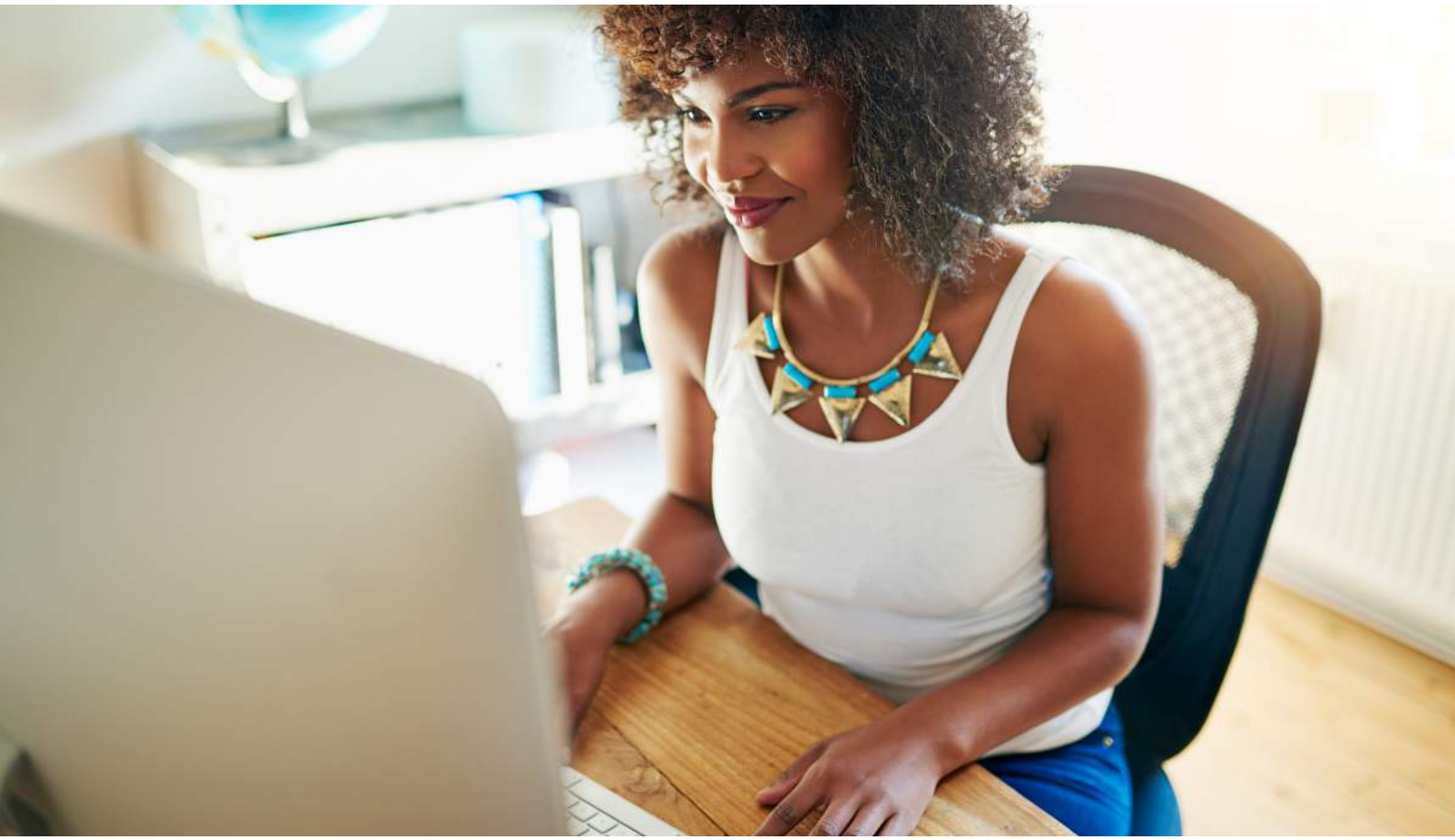
Grogan discusses the judgment in detail. [46] He does this by making reference to two judgments, namely, Naidoo v Minister of Safety and Security [47] and Munsamy v Minister of Safety and Security and Another. [48] The facts of both cases do not differ significantly to that of Barnard. The only differences were that firstly, Naidoo and Munsamy were both Indians, one female and the other a male respectively, whereas Barnard was a white female. [49] Secondly, the posts in both cases were not left vacant but rather filled. [50] Thirdly, the applicants in both cases contended that the equity plans were not in accordance with the EEA. [51]

In Munsamy, the court noted a document that detailed the numerical goals in KwaZulu-Natal demographics that had been compiled by the employer. [52] The document detailed the different race groups that would need to be allocated to certain posts to meet equity goals. In the end, the court in Munsamy noted that employers may utilise discriminatory measures in order to make their workforces equally representative. [53] The court relied on the LAC decision of Barnard as confirmation and also added that an employer cannot prefer one group of designated employees over another who are already overrepresented without proof of a valid equity plan which permits it. [54] The employer in Naidoo denied that their appointment of a black candidate was made solely on the basis of achieving numeric targets which were set out in their equity plan. [55] The court found that plenty of focus had been placed on African candidates and the focus needed to shift to other members within the designated group. [56] The court further held that the equity plan created an employment barrier against indian people which was prohibited in terms of the EEA. [57] It was held that Indians were overrepresented but the equity plan did not consider or make provision for the employment of Indian females, this amounted to unfair discrimination. [58] The Munsamy case serves to show the influence that the Labour Court and LAC decision in Barnard has had on subsequent cases. Whilst the Naidoo case serves to show the general consideration that courts have towards females being appointed despite an overrepresentation of their race group, this approach was unfortunately not followed in the Barnard case. Ultimately, Barnard had not challenged the SAPS equity plan which required the appointment of a black candidate to the relevant post. [59] Barnard had contended that she had been unfairly discriminated against because she was white. She argued that this using section 6 (1) of the EEA. [60] She wanted the court to order SAPS to promote her to the relevant post because she had achieved the highest score and had been recommended by the interview panel as the preferred candidate. [61] The court held that due to an overrepresentation of her race group, Barnard was aware that black candidates were targeted for the post. The matter proceeded to the Supreme Court of Appeal (SCA).

[42] Barnard (LAC) at para [33]- [34].
[43] Barnard supra at para [38].
[44] Ibid.
[45] Ibid 10.
[46] Ibid 10.
[47] [2013] 5 BLLR 490 (LC).
[48] [2013] 7 BLLR 695 (LC).
[49] Grogan op cit note 27 at 10.
[50] Ibid.
[51] Ibid.
[52] Ibid
[53] Ibid, 11.
[54] Ibid.
[55] Naidoo supra note 47 at para [9].
[56] Naidoo supra at para [200].
[57] Naidoo supra at para [209].
[58] Naidoo supra at para [184] –[188].
[59] Grogan op cit note 18 at 5.
[60] Barnard (LAC) at para [9].
[61] Barnard supra at para [5] and [10].

1.1.4. Supreme Court of Appeal

The SCA noted the purpose of the implementation of the EEA. [62] The EEA was enacted in order to assist the country in overcoming historical injustices by placing measures to facilitate equal opportunities being granted to all. [63] The SCA found Barnard's experience to be a pivotal point. [64] The advertisements that contained information of the posts that Barnard applied for had not been reserved for candidates of designated groups. Judge Navsa rejected the suggestion from the LAC that Barnard had not been discriminated against by the actions of the employer to leave the post vacant. [65] This suggestion by the LAC incorrectly presumes that an individual is only discriminated against where another person is advantaged by the act. [66] The SCA could find no reason why the LAC had treated Barnard as if she was not a designated employee when she was a designated employee by virtue of being a female.[67] Although the EEA permits numerical goals, [68] it does not deliberate on the distribution of the weight of the four designated groups in equity plans. [69] The SCA held that the EEA prohibits an absolute barrier approach that is created where an employer fails to find a suitable black candidate to fill a post and overlooks a suitable available white candidate. [70] The LAC decision had affirmed that employers are entitled to set targets and overlook members of overrepresented groups in all appointments until the targets are met. [71] So the concept of non-appointment of overrepresented groups was not a new concept when the CC judgment was written. For the purpose of this dissertation, the SCA decision does not deliberate further on the subject-matters related to the theme of the paper.



[62] Barnard (SCA) at para [1].
[63] Grogan op cit note 18 at 6.
[64] Barnard (SCA) at para [7].
[65] Barnard supra at para [51]; Grogan op cit note 18 at 7.
[66] Barnard supra at para [52]; Ibid.
[67] Ibid 8.
[68] Barnard (SCA) at para [17]; With the exception of quotas, section 15 (3) states that the measure referred to in section 15 (2) (d) include preferential treatment and numerical goals but excludes quotas.
[69] Grogan op cit note 18 at 8.
[70] Barnard (SCA) at para [68]; Ibid.
[71] Barnard (LAC) at para [42].

1.1.5. Constitutional Court

Justice Moseneke firstly noted the values enshrined in the Constitution including human dignity and the achievement of equality. [72] The guarantee of equality is that everyone will be afforded equal protection and benefit of the law. The Constitution also considers the history of the country and seeks transformative change by allowing for active steps to be made to achieve substantive equality. [73] These steps should not infringe on the dignity of other individuals. Although remedial measures are implemented to advance people who were previously disadvantaged, they must not unduly infringe on the rights of the people who are affected by them. [74] Justice Moseneke reemphasised a point that was previously discussed in this dissertation which is that, restitution measures alone are inadequate to advance social equity. [75]

After discussing discrimination and its effects on society, Justice Moseneke looked at the EEA and considered the aims and purpose of it. In Minister of Finance & another v Van Heerden [76] the court established how restitution measures are able to be constitutional, this included the fact that the measure must target a particular class of people who have previously experienced unfair discrimination. [77] Furthermore, the restitution measure must be designed with the purpose of either protecting or advancing that particular group of people and the promotion of equality within the workforce. [78] Once the measure passes the test, it is not considered or presumed to be unfair. [79] The court still reserves the right to intervene and investigate whether the measure falls within the scope of section 9 (2) of the EEA. The majority noted an important point which was that the EEA permits for affirmative action to include preferential treatment and numerical goals but to exclude quotas. [80] Justice Moseneke failed to understand why the EEA did not define what quotas are. [81] Although the definition of quotas was not required for the present case, the legislature should have given a clear and concise definition for it. Not having a clear definition provides judges with too much discretion and the power to 'make the law' which is not the role of the judiciary. [82]

[72] Barnard (CC) at para [28]; Grogan op cit note 18 at 8.
[73] Ibid.
[74] Ibid.
[75] Barnard (CC) at para [33].
[76] [2004] 12 BLLR 1181 (LC).
[77] Barnard (CC) at para [36].
[78] Barnard supra; Grogan op cit note 18 at 8.
[79] Barnard supra at para [37]; Ibid.
[80] Barnard (CC) at para [42]; Section 15 (3) of EEA; Grogan op cit note 18 at 9.
[81] Barnard supra.
[82] Grogan op cit note 18 at 9.

The SAPS restitutionary measures were based on targets that took into account national demographics and provided numerical targets for different levels. [83] This suggests that it is important for a company to ascertain the demographics of that particular area and set numerical targets based on that. [84] In considering the numerical targets, companies should also bear in mind the demographic of the area. Where an area consists of a large amount of a particular race group, it is futile to set targets to advance other races and disregard the race that forms a large part of the area because that specific demographic will be prejudiced by that particular restitution measure. [85] The majority found that the SCA's judgment had been concluded based on the premise that the equality claim was unfair discrimination on the ground of race. [86] In the SCA reaching their decision, they were obliged to approach the claim through section 9 (2) of the Constitution and section 6 (2) of the EEA. [87] The majority of the CC considered the test in Harksen v Lane NO & others [88] and concluded that it was incorrect to use this test as the SAPS equity plan's application was never challenged. [89]

Another issue that the CC majority raised in their judgment was how Barnard's claim had changed from being directed at unfair discrimination. [90] It was aimed at the national commissioner's decision not to appoint her and this ultimately amounted to a review of his decision. [91] Based on this point only being raised at the final stage of appeal, it could not be raised. [92] When the court considered the issue of service delivery, they found that service delivery was not adversely affected by the failure of SAPS to appoint Barnard. [93] This finding was contrary to the finding of the SCA. [94] Furthermore, the national commissioner could not be found at fault for the general fact that white women were overrepresented at that level. [95] The decision of the national commissioner had not set a barrier to her advancement. [96]

[83] Barnard (CC) at para [45].
[84] Grogan op cit note 18 at 9.
[85] Ibid.
[86] Barnard (CC) at para [208]; This would entail an inquiry of section 9 (3) of the Constitution and section 6 (1) of the EEA.
[87] Grogan op cit note 18 at 10.
[88] 1998 (1) SA 300 (CC).
[89] Barnard (CC) at para [208]; Grogan op cit note 18 at 10.
[90] Barnard supra at para [211]; Ibid 11.
[91] Ibid.
[92] Barnard (CC) at para [213].
[93] Barnard supra at para [64] Grogan op cit note 18 at 10.
[94] Barnard supra.
[95] Barnard supra at para [66]; Grogan op cit note 18 at 10.
[96] Ibid.

Although the Barnard case deliberated on many points and had a majority and minority judgment, for the purposes of this dissertation it is crucial to only consider a few points that were raised in the majority judgment. In the majority judgment written by Justice Moseneke, the national commissioner was permitted to exercise his discretion and with that he decided not to appoint Barnard because of representivity. [97] His exercise of discretion was not found to be unlawful. [98] In Justice Jafta's judgment, he refers to the LAC's judgment as a crucial point regarding representivity on the level that Barnard was applying for. [99] Ultimately Barnard was denied relief because white officers were 'overrepresented' at the level she had applied for. [100] The Barnard principle which denotes that an employer may refuse to appoint a candidate who is a race group that is already adequately represented in that workforce was read into the case as it was not expressly stated in it. [101] This ruling was initially introduced by the CC and imposed on Barnard who was a white female. This principle favoured overlooking Barnard for the position based on an adequate representation of her race at that workplace. This meant that her non-appointment was accepted by the court and did not amount to unfair discrimination. [102]

Two years after Barnard came the CC judgment of Solidarity and others v Department of Correctional Services and others (Police and Prisons Civil Rights Union and another as amici curiae) [103]. One of the issues that the majority judgment addressed was whether the Barnard principle could be raised by the defendants against black people who seek positions and promotions if those positions are already overrepresented by that race group. [104] The case decided whether this principle could be applied to employees that are part of the designated groups? Justice Zondo summarised his findings in the following passage:

> *"…the application of the Barnard principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the Barnard principle. Indeed, both men and women are also subject to that principle. This has to be so because 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. A workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce."105*

[97] Barnard (CC) at para [70].
[98] Barnard (CC) at para [62] and [70].
[99] Barnard supra at para [196]; Labour Appeal Court judgment at para 38 reads as follows:
"The over representivity of white males and females is itself a powerful demonstration of the insidious consequence of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks. The over representivity of whites in level 9 is a stark reminder of our past and indeed the present and yet another wake up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution."
[100] Grogan op cit note 18 at 11.
[101] Barnard (CC) at para [62]; H Pienaar, S Jamieson and J Long 'Constitutional Court clarifies Employment Equity Measures' (2016) EMPLOYMENT ALERT, available at https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/employment/employment-alert-1-august-constitutional-court-clarifies-employment-equity-measures.htmln, accessed on 27 November 2018.
[102] Barnard supra.
[103] [2016] 10 BLLR 959 (CC).
[104] Grogan op cit note 14 at 8.
[105] Department of Correctional Services supra note 103 at para [40].

This judgment essentially ruled that no person is immune to the application of the Barnard principle. The court went so far as to give an example that stated that a workforce that consisted of only whites and Indians could not be broadly representative any more than that with only Africans and Indians. [106] The meaning of equitable representation means that all race groups must be spread proportionally regardless of whether they are within or outside the designated groups. [107] Justice Zondo also made an example which illustrated that broad representation also refers to an equitable representation of all race groups in different management positions. [108] The court failed to deliberate on the rationality of the demographic figures considered in the case and whether these were based on national or regional statistics. [109] Section 15 (3) explicitly prohibits the use of quotas and the Barnard principle has been described by Grogan as amounting to a quota because it limits a candidate from being appointed due to the fact that the workforce already has an adequate amount of people representing that race group. [110]

The Barnard principle is not authorised under the EEA and therefore there is no justification behind it other than the hindrance of the appointments of different race groups. [111] Another problem with the principle is that it fails to consider the demographics of a particular area. [112] In an area with a high population of Indian people, it is highly probable that the workforce will have a wider representation of them at most of the levels of the workplace. [113] Thus, the Department of Correctional Services case concluding that the Barnard principle includes black people as well as both males and females. [114] Although the application of the principle on all individuals that belong to the designated groups [115] defeats the purpose of which the EEA seeks to accomplish, its main aim is to attain representativity of all race groups in workplaces. [116] In Department of Correctional Services, the applicants were Coloured people in the Western Cape, a place that has a high demographic of Coloured people. Rather than considering only national demographics, the regional statistics should be taken into account to ensure that the individuals are given fair opportunities of being appointed.

[106] Grogan op cit note 14 at 9; Department of Correctional Services supra.
[107] Ibid at 9.
[108] Ibid.
[109] Ibid, 10.
[110] Grogan op cit note 18 at 8.
[111] Ibid.
[112] Grogan op cit note 18 at 9 ; S Harrison and PM Pillay 'Employment equity demographics- going national or staying regional?' The Mercury 31 January 2014 at 2.
[113] Grogan op cit note 18 at 10.
[114] Department of Correctional Services at para [40].
[115] Department of Correctional Services at para [40] is silent on whether the principle is applicable to disabled persons as well.
[116] Department of Correctional Services at para [40] –[41].

The courts have not commented on the legality of not appointing someone because their group is adequately represented. [117] There also seems to be no correlation between that and the EEA. [118] It is difficult to comprehend how both the Barnard principle and the EEA can co-exist and operate simultaneously and both yield their intended outcomes. Although both have the aim to diversify workplaces and have broadly representative workforces, one can possibly limit the other to achieve its goal. The EEA permits for designated groups to be preferred in certain relevant instances and the Barnard principle effectively permits employers to refuse appointing a person, whether from a designated group or not, due to overrepresentation. [119] Courts are yet to address the issue of how workforces are expected to have an equal representation of all the race groups in South Africa. [120] Although 'broadly representative' sounds appealing and fair, expecting workplaces to set targets for how many race groups they are to employ in a year seems drastic and too burdensome. [121] The CC must also address why quotas are not permitted and furthermore explain the difference between that and having numerical targets of race groups to employ.

2. CONCLUSION

There is no plausible explanation on why the courts would formulate a principle that would contradict with existing legislation. The difference in how the courts assessed, deliberated and decided the Barnard case is evident in their judgments. The SCA decision was favourable to Barnard, while the LAC and CC could not conclusively find that there was unfair discrimination present in the refusal to appoint her. This case clearly illustrates how the courts will view unfair discrimination cases and that the individual who bears the onus of proving it should be persuasive in their argument. The Department of Correctional Services case served to illustrate how the courts have responded to affirmative action cases after Barnard. [122] The case not only followed the Barnard principle but also extended its narrow application to include other races and genders. Although the judgment explained that this was to realise the goal of broadly representative workforces, it did not explain how the principle will operate whilst the EEA attempts to rectify the past discriminations faced by individuals from the designated groups. [123] This still remains open and undiscussed. Although it seems unfair to argue that the principle's application is more complicated on a person from a designated group by virtue of their race, some could argue that it represents equal treatment. Conversely, if the principle was held to not apply to individuals from the designated groups then it would have opened the floodgates at courts for claims of unfair discrimination. People that do not belong in the designated groups would have felt prejudiced twice, firstly for affirmative action measures and secondly for being denied employment where their race group is said to be adequately represented. Consequently, if a black individual approaches a court for a matter of being refused employment because their race group is already overrepresented, will the courts look at their right to be considered for the job, restitutionary measures offered by the EEA, assess the equity plan of that workplace or will it simply rule in favour of the Barnard principle? These questions will most likely be answered if another similar case comes before the CC.

[117] Grogan op cit note 18 at 11.
[118] Ibid.
[119] Grogan op cit note 27 at 17.
[120] Ibid.
[121] AM Louw 'The Employment Equity Act, 1998 (And Other Myths about the pursuit of "Equality" and "Dignity" in post-apartheid South Africa' (2015) 18(3) PER 594 at 596.
[122] Grogan op cit note 18 at 18.
[123] Ibid.

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