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13

EMPLOYMENT EQUITY AND AN IMPROVED QUALITY OF LIFE: THE CASE OF A WHITE WOMAN AND THE SOUTH AFRICAN POLICE SERVICE

Jacobus S Wessels and Thevan Naidoo

INTRODUCTION

The adoption of the Constitution in 1996 was a critical juncture in the history of the South African nation. This Constitution represents a distinct change of direction for the country towards healing the divisions of the past, establishing a society on democratic values, social justice and fundamental rights, and improving 'the quality of life of all citizens and free[ing] the potential of each person' (RSA 1996: Preamble). This is further emphasised as 'the advancement of equality' (RSA 1996: s 1(*a*)). This vision of an improved quality of life for all citizens has not only become an integrated driving force for the South African government's National Development Plan (NPC 2012), but it also resonates with the African Union's Agenda 2063 (African Union Commission 2015) and with the United Nations' 2030 Agenda for Sustainable Development (United Nations 2015). This vision of an improved quality of life for all citizens, but especially for the neglected and the poor, is universally shared by national governments.

The Constitution also provides for the realisation of this vision in an improved quality of life. This is done by providing a value framework in the form of a Bill of Rights (RSA 1996: Chapter 2) and the requirements for the various separated power structures of the state (RSA 1996: Chapters 3–9). Most relevant to this study is its provision that deals with public administration and public service and their execution of the lawful policies of the government of the day (RSA 1996: Chapter 10). In addition to the provisions for a public administration, the Constitution provides separately for security services such as the defence force, the police service and the intelligence services (RSA 1996: Chapter 11). The purpose of the police service is specifically outlined as being 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' (RSA 1996: s 205(3)). It therefore follows that the government is set to improve the quality of life of all citizens through the implementation of lawful policies by the public administration in a safe, peaceful and secure environment.

It can reasonably be assumed that the improvement in the quality of life for all implies the imperative of the advancement of equality. The Constitution not only establishes a vision for improved quality of life for all citizens, but also provides the means for realising that vision: the public administration and the security services. Collectively, these facilitate the Constitution's goals, objectives, programmes and activities towards the advancement of equality and an improved quality of life, particularly for the poorest of the poor in South African society.

Moreover, the Constitution affirms not only the right to equality as the full and equal enjoyment of all rights and freedoms; it also provides for the promotion of those rights and freedoms by protecting and advancing those categories of person disadvantaged by unfair discrimination (RSA 1996: s 9(2)). This may be regarded as an additional emphasis on the imperative to improve the quality of life of those categories of people who may have been disadvantaged in the past through optimal service delivery by the public administration.

In the field of Public Administration, this call for optimal service delivery is explained through the theoretical lens of the common good (Gawthrop 1993; Murphy 2005; Hanasz 2010; Marginson 2016), also referred to as public interest (Wolfson 2007). The Italian philosopher, Machiavelli, universally regarded as one of the founders of this theory, regarded the common good as a manifestation of freedom, safety and dignity (Hanasz 2010: 64). Murphy eloquently postulated this theory as a criterion for state action:

> [A]ppropriate aims of state action are in fact such only if they can be brought under the description necessary or useful to promoting, protecting, or honoring the common good (Murphy 2005: 136).

State action must therefore honour the freedom, safety and dignity of all members of the state. The improvement in the quality of life of all in the South African society seems not only to meet this criterion for appropriate state action but may serve as an overarching purpose for the state and its organs. The implication of this is that the state and its organs should execute functions and render services according to the constitutional values and lawful policies.

Two years after the adoption and commencement of the Constitution of 1996, the Employment Equity Act 55 of 1998 was adopted by the South African Parliament and assented by the president (RSA 1998). Whereas section 9 of the Constitution affirms equality for everyone and the advancement of all categories of persons previously disadvantaged, this Act pertains to equality for those eligible for employment by a designated employer, including all organs of state. From this provision, though, the National Defence Force (SANDF), the National Intelligence Agency (NIA) and the South African Secret Service (SASS) are excepted (RSA 1996: s 239, 1998: s 1). The main purpose of this Act is the obligatory implementation of affirmative action measures by all designated employers and therefore by all organs of state. Accordingly, whereas the Constitution provides for equality for all and the advancement of everyone (including those who are not in employment), this Act is confined to those eligible for employment. While affirmative action measures are aimed at redressing the employment disadvantages among designated employers, including the organs of state, the implication is that the implementation of these measures should ultimately be aimed at the improvement of the quality of life all citizens.

The purpose of this study is therefore to make sense of the implementation of affirmative action measures in organs of state in the context of the ultimate vision of an improved quality of life for all (and specifically the poor) in the country. For this study, the South African Police Service (SAPS) has been selected as a typical South African organ of state and a specific context for the widely reported case of *South African Police Service v Solidarity obo Barnard* as being one of implementing the Employment Equity Act as an affirmative action measure. In the case of this selected organ of state, a specific instance of the implementation of employment equity measures is studied.

This study is informed by a brief overview of the employment equity measures in South Africa, a review of selected literature on 'the common good', 'quality of life', 'a representative society' and 'employment equity' and the chronology of the *Barnard* case. This chapter therefore reports on the theoretical perspective for this study, the chronology of the case of alleged unfair discrimination against Renate Barnard, the attempts of four different courts to make sense of this case, and the application of the conceptual framework to make sense of this case as an instance of the implementation of affirmative action measures in the context of improving the quality of life of society. The methodological considerations for this study are discussed next.

METHODOLOGICAL CONSIDERATIONS

This study is primarily a conceptual study. It attempts to reconcile the notion of the common good for all in a society with the implementation of employment equity measures. The materials used for this study are all of a documentary nature. They include a review of the literature on the notions of the 'common good', 'quality of life', 'a representative society' and 'employment equity'. While it is primarily a conceptual study, the case study approach was followed to make a study of one instance of the implementation of an employment equity measure in the South African public sector. This case study was also solely informed by documentary material, such as the rulings of the various courts and scholarly articles published about these hearings and judgments. Owing to the nature of this case study, there was no risk of harming human participants and so it was not necessary to obtain ethical approval for it. The next section provides a brief overview of the main considerations related to the notion of the 'common good' in the context of public administration.

THE COMMON GOOD

Since the purpose of the current study is to consider the state's implementation of affirmative action measures in the context of the 'common good' imperative, it sets out to determine the extent to which these measures ultimately contribute to the promotion, protection and honouring of the common good (Murphy 2005: 134). Murphy elaborates further on the 'good' dimension of this notion, claiming that the 'good' refers to something that the citizen has 'very strong reasons to pursue and promote' (Murphy 2005: 134). For Machiavelli, that 'something' is freedom, safety and dignity (Hanasz 2010: 64). For Duke, the 'something' has a normative significance as it promotes 'human flourishing' (Duke 2016: 224). Regarding the common dimension of this notion, Murphy argues that a common good is common 'only if it is an end that is shared by reasonable agents within the political community' (2005: 134). Informed by Aristotle's conception of the common advantage, Duke emphasises the utility of and motivational reasons for individuals to participate in the political community 'insofar as it promotes their well-being' (Duke 2016: 244). The common dimension includes all citizens, being the political community of the state. The notions of political community, human flourishing and human well-being resonate unmistakably with the notion 'common good' in the context of the state.

In South Africa, 'common good' reflects the vision enshrined in the Preamble of the Constitution of 1996 of an improved 'quality of life of all citizens and [the freeing of] the potential of each person' (RSA 1996: Preamble). This clear

articulation of the common good in the South African context has two optimising dimensions: the quality of life and the potential of citizens.

Trends in the quality of life of South Africans, having being researched in longitudinal studies over more than three decades (Møller & Schlemmer 1983; Møller 1998, 2007, 2013, 2018), indicate that poor South Africans 'who have waited patiently for improved living conditions may be tired of waiting and wish to partake of the good life without further delay' (Møller 2013: 936). Furthermore, these studies found that

> Black South Africans are three times more likely than other South Africans to say they are dissatisfied, unhappy, and angry or impatient, and twice as likely to state their lives are getting worse (Møller 2013: 936).

Their worst experiences of life have been shown to be related the life domains of health, safety and security, and 'legal' issues such as time spent in prison (Møller & Roberts 2019: 1329, 1340).

The weak link in the chain that leads towards an improved quality of life has proven to be 'an education that will provide them with the skills to find jobs' (Møller 2013: 936). Inadequate education and the subsequent persistent lack of opportunities and social mobility are widely associated with high poverty rates and crime (World Bank Group 2018: 26). Citizens' experience of quality of life appears to be directly related to their level of education and social standing as reflected in their standard of living (Møller & Roberts 2019: 1325).

The study also revealed that more South Africans receive a social grant than those who hold down a job. Consequently, the view is held that those 'black South Africans who are sufficiently qualified have advanced to middle-class jobs while the rest lack the skills to compete in the global economy' (Møller 2013: 936). Employment equity measures are therefore aimed at the advancement of those members of the designated groups whose educational and social standing – and therefore their experienced quality of life – is significantly higher than that of the majority of the South African population. There is a direct link between the removal of inequality in South African society (RSA 1996: s 9) and the protection of society against crime (RSA 1996: ss 10, 205). Both of these foci relate to the quality of life of society and constitute core elements within the scope of government functions.

While the purpose of the state is to ensure a life for its society that is 'safe, orderly, and commensurate with human dignity' (Robson, Brynard & Wessels 2007: 16), a network of state organs, structures and processes exists for realising

the various state functions. In South Africa, the realisation of state functions is referred to as 'public administration', which is governed by the democratic constitutional values and principles (RSA 1996: s 195). These values and principles specifically pertain to instances of excellence, such as professional ethics, efficiency, effectiveness and cost-effectiveness, use of resources, impartiality, unbiased and fair service delivery, transparency and the maximisation of human potential (RSA 1996: s 195). In addition to the excellence imperatives, the principles also provide for the broadly representative nature and composition of public administration. Realising an improved quality of life for society depends predominantly on the quality, efficiency and representativeness of the public administration.

A recent study comparing the experiences of Brazil, India and South Africa in relation to representative bureaucracies and performance found that the promotion of historically advantaged groups in bureaucracies can be successful if it is implemented 'gradually, within a merit system that seeks to uphold the values of competence and efficiency, and in concert with measures to train and develop newly hired employees' (Fernandez, Koma & Lee 2018: 551). The implication of their findings for the current study is that it is in fact possible to reconcile the promotion of a representative public sector with the realisation of the common good for the entire society. The next section presents an overview of the implementation of employment equity measures.

IMPLEMENTATION OF EMPLOYMENT EQUITY MEASURES IN SOUTH AFRICA

The Employment Equity Act 55 of 1998 was adopted by the South African parliament and assented by the president (RSA 1998) just more than two years after the adoption and commencement of the Constitution of 1996. As mentioned, whereas section 9 of the Constitution of 1996 affirms equality for everyone and the advancement of all categories of persons previously disadvantaged, this Act pertains to equality of those eligible for employment by a designated employer, including all organs of state, except for the SANDF, the NIA and the SASS (RSA 1996: s 239, 1998: s 1).

Whereas the Constitution of 1996 provides for equality for all and the advancement of everyone (including those who are not in employment), this Act is confined to those eligible for employment. The main purpose of this Act is the obligatory implementation of affirmative action by designated employers. This implies the 'equitable representation [of people from the designated groups] in all occupational levels in the workforce' of such an employer (RSA 1998: s 2). And whereas the term 'designated employer' refers to employers meeting specific

characteristics as set out in the Act, the term 'designated groups' refers to Africans, Coloureds and Indians, women and people with disabilities who are citizens by birth or descent, or by naturalisation before 27 April 1994, or by naturalisation after 26 April 1994 because of previous preclusion from naturalisation by apartheid policies (RSA 1998: s 1).

The Act specifically stipulates that affirmative action measures include 'preferential treatment and numerical goals' with the exclusion of quotas (RSA 1998: s 15). These numerical goals for equitable representation in the different occupational levels are benchmarked against the annual profile of the national and regional economically active population (DoL 2014: 40). The Act does not require a designated employer to take any decision that would establish 'an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups' (RSA 1998: s 15(4)). However, such a decision is subject to the assessment of the employer's compliance with this Act, with specific reference to the implementation of its employment equity plan (RSA 1998: ss 15, 20, 42).

The purpose of an employment equity plan is to achieve 'reasonable progress towards employment equity' in the workforce of a designated employer (RSA 1998: s 20). The Department of Labour (DoL) introduced the national and provincial demographic profiles (race and gender) of the economically active population (EAP) as a benchmark for measuring progress towards achieving employment equity (DoL 1999a).

Section 20 of the Act provides a detailed list of the requirements for an employment equity plan. The objectives to be achieved for each year of the plan and the numerical representation goals for designated groups are probably the most important provisions (RSA 1998: s 20(*a*), (*c*)). These requirements have been supplemented by the publication of a Code of Good Practice in the preparation, implementation and monitoring of such a plan (DoL 1999b, 2015, 2017) and also by Employment Equity Regulations (DoL 1999a, 2014, 2018). The Act also provides for annual reporting by designated employers and an assessment of their compliance with the Act (RSA 1998: ss 21, 42). In addition, no fewer that 18 forms and annexures have been generated to support the administration of the annual reporting, assessment and evaluation of this policy regime (DoL 2018).

Furthermore, the Act provides for the establishment of a Commission for Employment Equity to advise the minister on codes of good practice, regulations and policy, but also to recognise employers for their furthering of the purpose of the Act and to conduct research on aspects related to the Act (RSA 1998: ss 28–33). After the commission's work commenced during the second half of 1999, it focused on interpreting its mandate and identifying priorities such as

the compiling of regulations and codes of good practice (CEE 2001: 8). Since its inception, it has published no fewer than 19 annual reports (CEE 2019).

An analysis of these reports (see the list of reports of the CEE in the references) reveals that the profile of the EAP has gradually changed from 2003 (the first report with comparable data) to 2019. The non-designated group (white male and white female) decreased from 14% of the total population in 2003 to 9% in 2019. The employment profile during this period also changed, the effect being that the employment of members of the non-designated group decreased from 23% in 2003 to 13% in 2019. While the implication is that the opposite trend exists for the designated groups, it is noteworthy that the employment of members of the African group (male and female) increased from 58% in 2003 to 69,3% in 2019. In addition to this broad comparison, the reports provide a detailed analysis of the workforce profile by occupational level, population group, gender and disability. The commission observed in its 19th report that 'the trends … continue to paint a picture of a very slow, but steady pace of transformation especially at the top four occupational levels' (CEE 2019: iv). With these employment equity considerations as background, we now proceed to present a particular case that put the various legislative provisions dealing with affirmative action and employment equity to the test.

ALLEGED UNFAIR DISCRIMINATION: THE STORY OF MS RENATE BARNARD

This section presents the chronology of facts related to the non-promotion of a white woman in a South African government department because she did not meet the required race profile of the institution's employment equity plan. This chronology serves as a typical case for reflecting on the application of employment equity measures in South African government departments. The case arose in the SAPS, an organ of state with the constitutional obligation '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' (RSA 1996: s 205). The 2018/2019 annual report of the SAPS specifically emphasised the role of the SAPS in contributing to a better South Africa and Africa and a context in which all people in the country feel safe (SAPS 2019: 10). Therefore, this organ of state is pivotal in securing the realisation of the common good for members of society, specifically with reference to their freedom, safety, dignity and ability to flourish (Hanasz 2010: 64; Duke 2016: 224).

The SAPS provides its service to South Africans through an approved complement of 192 431 employees, of whom 140 335 occupy positions that are

categorised as critical occupations (SAPS 2019: 309, 314). The overall staff profile of the SAPS in 2019 compared favourably with the corresponding national EAP figures: 48,6% African males (vs EAP of 42,8%), 28,7% African females (vs 36%), 6,9% Indian males (vs 5,7%), 3,9% Indian females (vs 4,4%), 1,7% Coloured males (vs 1,7%), 0,7% Coloured females (vs 1%), 5,5% white males (vs 5,1%) and 3,7% white females (vs 3,9%) (SAPS 2019: 314).

Ms Renate Mariette Barnard had been employed by the SAPS since 1989. She was initially appointed as a constable and was gradually promoted to the rank of captain in 1997. She served as Branch Commander of Detective Services at the Hartbeespoort Police Station before she was transferred to the National Inspectorate (also known as the National Evaluation Services (NES)), still at the rank of captain (Labour Court 2010: para 24). This division of the SAPS was tasked with monitoring public complaints against the police service and submitting their findings to the Divisional Commissioner: National Evaluation Service, the National Commissioner and the Minister (Labour Court 2010: para 24).

In 2005, the SAPS created a new position at the post level of superintendent in the NES; the function of this officer would be to ensure optimal use of human, logistical and financial resources in the NES (Labour Court 2010: para 24). After the post (Post number 6 903) was duly approved, it was advertised in September 2005 as a so-called non-designated[1] post in the NES. Ms Barnard applied for this position at salary level 9[2] as it would imply a promotion for her should she be successful (Labour Court 2010: para 24).

Ms Barnard and six other candidates (four black members and two white members) were shortlisted to be interviewed for the position. The interviews were conducted on 3 November 2005. Ms Barnard obtained an average score of 86,67% during the selection process – the highest of all the candidates. Subsequently, the selection panel recommended her as first preference to be appointed in the post as her appointment 'will definitely enhance service delivery' (Labour Court 2010: para 24.8). The three other candidates who were found appointable were another white female (second), a Coloured female (third) and a black male (fourth). The difference between the first and fourth candidates' scores was 17,5 percentage points. Furthermore, the panel stated that the employment equity profile of the NES would not be negatively affected by her appointment as she was already a staff member of the unit (Labour Court 2010: para 24.8).

1 The meaning of this concept was not clarified or disputed in this case as heard in the four different courts.

2 Salary levels 8 and upwards are considered to be senior management positions, the appointments of which lie at the discretion of the National Commissioner according to Rule 13(4) of the SAPS National Instruction of 2004.

The panel's recommendations were submitted to the Divisional Commissioner for approval. In addition, and in accordance with a national instruction, the selection panel met with the Divisional Commissioner to discuss its recommendation on 9 November 2005 (Supreme Court of Appeal 2014:14). He recommended that the position not be filled as 'appointing any of the first three preferred candidates will aggravate the representivity status of the already under-represented Sub-Section: Complaints Investigation' and that 'such appointment will not enhance service delivery to a diverse community' (Labour Court of South Africa 2010: para 24.9). Three months later, a white male superintendent was transferred to the NES, 'presumably to fill-in' (Supreme Court of Appeal 2014:14).

On 11 May 2006, the department advertised the post again (with a new Post number 4701) as a non-designated[3] position (Constitutional Court 2014a: para 10). Ms Barnard again applied for the position and was shortlisted and interviewed on 26 June 2006 (Labour Court 2010: paras 24.13, 24.14). According to the proceedings of the Labour Appeal Court, she 'was shortlisted, interviewed and once more obtained the highest rating, ie 85,33% followed by Captains Mogadima and Ledwaba with ratings of 78% and 74,67% respectively' (Labour Appeal Court 2013: para 7).

It was later revealed in the proceedings of the Constitutional Court that three weeks prior to the interviews the National Commissioner had sent a directive to all Deputy National, Provincial and Divisional Commissioners. The directive advised that when making their recommendations, the interviewing panels 'had to recommend personnel who would enhance service delivery of the Police Service' (Constitutional Court 2014a: para 10). Notwithstanding this letter and the fact that the position was advertised as a 'non-designated' position, the interview panel considered the criterion of representivity and recognised that her appointment would not enhance representivity on the particular salary level. However, the panel held the view that she displayed 'a distinct brand of passion and enthusiasm vital to the service-delivery needs of the Police Service' (Constitutional Court 2014a: para 12).

The selection panel recommended her appointment for the position and then met with the Divisional Commissioner on 30 June 2006. This time the

3 The following explanation was provided in a case on arbitration: 'In terms of Clause 5(3) of National Instruction 1 of 2004 the posts had to be advertised as designated or non-designated posts. Anybody could apply for non-designated posts irrespective of gender and race. Non-designated posts differed from designated posts in that white males were excluded from applying for designated posts. This has never been changed' (Deysel 2008: para 10). However, although it was mentioned in the various hearings that the post was advertised as a non-designated post, this point was never argued by any of the parties.

Divisional Commissioner approved the selection panel's recommendation. He subsequently recommended to the National Commissioner of Police that the candidate be appointed as 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' (Labour Appeal Court 2013: para 7). He furthermore argued that her appointment at salary level 9 would not aggravate divisional representivity as 'she is already part of it' and her promotion would create an opportunity to enhance representivity at salary level 8 (Labour Appeal Court 2013: para 7). He did not refer to the fact that the position was advertised as a non-designated position; nor did he refer to the National Commissioner's 7 June 2006 directive with respect to the emphasis on service delivery as the ultimate criterion (Labour Court 2010: para 24.18).

Despite the fact that the position was advertised as a non-designated position, though, and despite the order in an earlier letter that the enhancement of service delivery should be the decisive criterion for this position, the National Commissioner of Police did not approve the recommendation. The reasons he provided were that the Divisional Commissioner had not referred to representivity in his recommendation. The National Commissioner held the view that the position was not critical; therefore, by not filling the position, service delivery would not be negatively affected (Labour Court 2010: para 24.20; Labour Appeal Court 2013: para 8).

In response, Ms Barnard filed a complaint about her non-appointment in accordance with the grievance procedures of the SAPS. She also requested that she be promoted, backdated to 1 December 2005 (Labour Court 2010: para 24.21). The written reply to her grievance provided the reasons given by the National Commissioner. She subsequently referred the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). However, the dispute was certified 'unresolved' on 11 April 2007 as the SAPS did not attend the conciliation meeting (Labour Court 2010: para 24.23; Constitutional Court 2014b: 17). This marked the end of her efforts to resolve the dispute according to the provisions of the Act (RSA 1998: s 52). With the assistance of her labour union, Solidarity, she took the matter to the Labour Court in Johannesburg.

THE STORY OF RENATE BARNARD: SENSE-MAKING BY FOUR DIFFERENT COURTS

Ms Renate Barnard approached the Labour Court with a claim for relief for unfair discrimination as she was 'denied promotion on two occasions for the sole reason that she is white' (Labour Court 2010: para 1). The relief she sought

was a declaration that she was unfairly discriminated against on the basis of race and that the SAPS be ordered 'to promote her to the rank of Superintendent retrospectively to 1 December 2005' and pay her the monetary damages suffered since 1 December 2005 until the day of judgment (Labour Appeal Court 2013: para 10).

The Labour Court, Johannesburg

The court had to decide whether this was indeed a case of unfair discrimination in the context of the Employment Equity Act of 1998. The core focus of the court was on the provisions in section 20 of the Act concerning the preparation and implementation of an employment equity plan for 'achieving reasonable progress towards employment equity in that employer's workforce' (RSA 1998: s 20(1)). The court found that the decision of the SAPS not to appoint Barnard, or any of the other recommended candidates, 'was not shown to be a rational method of implementing the Employment Equity Plan' (Labour Court 2010: para 37). The court (2010: paras 43(1), (2)) concluded that the non-promotion of Ms Barnard, despite her being the best candidate for the post, was based on her race. The court subsequently declared the decision of the National Commissioner of the SAPS as an act of discrimination. Furthermore, the court found that the SAPS merely applied the numerical targets in the institution's employment equity plan, without considering (*a*) any mitigating effect of her promotion on the alleviation of underrepresentation of the lower salary level, (*b*) her right to equality and dignity, and (*c*) her personal work history and circumstances (Labour Court of South Africa 2010: para 43(3), (4), (5)). This court, in its judgment of 24 February 2010, found that the decision of the National Commissioner was not

> a fair and appropriate method of implementing SAPS's Employment Equity Plan and that … the National Commissioner … did not discharge its onus to establish that the decision was rational and fair (summary by the Constitutional Court 2014a: 1).

The SAPSs was furthermore ordered to promote Ms Barnard to the level of Superintendent with effect from 27 July 2006 (Labour Court 2010).

The Labour Appeal Court

The SAPS were granted leave to appeal to the Labour Appeal Court. The case was heard on 4 May 2011 and the judgment was delivered on 2 November 2012 (Labour Appeal Court of South Africa 2013). The Court upheld the appeal and made no order as to costs (2013: para 49). The court found that it is misconstrued

'to render the implementation of restitutionary measures subject to the right of an individual's right to equality' (Labour Appeal Court 2013: para 26) and dignity (Labour Appeal Court 2013: paras 17, 23, 47) as the implementation of restitutionary measures is not subject to an individual's right to equality in terms of section 9(3) of the Constitution. The court argued furthermore that the numerical targets in the Employment Equity Plan implied that no posts were available for the promotion or appointment of white candidates (Labour Appeal Court 2013: para 37). Therefore, the court concluded that 'appointing her … would have aggravated the overrepresentation of whites in level 9' (Labour Appeal Court 2013: para 42). Therefore, the Labour Appeal Court ruled that the decision of the National Commissioner not to promote Ms Barnard was lawful as he was not obliged to fill the advertised post.

The Supreme Court of Appeal

Ms Barnard and Solidarity were granted leave to appeal to the Supreme Court of Appeal, which reversed the Labour Appeal Court's decision (Supreme Court of Appeal 2014). The question that this court considered was whether Ms Barnard's claim was justified 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 her employer's conduct 'constituted unfair discrimination' (Supreme Court of Appeal 2014: para 2). This court subsequently found that Ms Barnard was unfairly discriminated against on the ground of race in terms of section 9(3) of the Constitution (RSA 1996) and section 6(1) of the Act (RSA 1998), and that the SAPS had failed to provide any evidence to refute the presumption of unfairness in this regard (Supreme Court of Appeal 2014: paras 51, 76).

The Constitutional Court

The SAPS then applied for leave to appeal against the judgment, which was granted by the Constitutional Court. The Constitutional Court upheld the appeal against the decision of the Supreme Court of Appeal and set its order aside (Constitutional Court 2014b). Furthermore, the Constitutional Court upheld the order of Labour Appeal Court but also ruled that no order is made related to costs in all the court proceedings. In arguing its findings, the court departed from the constitutional values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law (RSA 1996: ss 1(*a*)–(*c*), 9(1)).

The court argued that in order to achieve that envisaged equality, non-punitive and non-retaliatory remedial measures are necessary (Constitutional Court 2014c: para 30). For this reason, legislative and other measures to this effect were needed (RSA 1996: s 9(2)). These include the Employment Equity Act 55 of

1998, which rules that affirmative action measures must be taken in accordance with an approved employment equity plan (RSA 1998: s 20). The court had to decide whether the National Commissioner of Police had acted fairly within the framework of a lawful and valid Employment Equity Plan (Constitutional Court 2014b: para 50). The court eventually came to the conclusion that the National Commissioner lawfully exercised his discretion not to appoint Ms Barnard as it was rational and reasonable in the pursuit of the employment equity targets envisaged in the Act and the Employment Equity Plan (Constitutional Court 2014b: para 70).

Restitution measures applicable to this case

An analysis of the reported judgments of the four different courts revealed that the story of Ms Renate Barnard and all other public officials in similar situations evolved within a specific regulatory framework. Therefore, the decisions and actions of all the role-players are supposed to meet the objectives and prescriptions of the various elements of this framework.

The point of departure was the Constitution, with specific reference to sections 9 and 10 (RSA 1996). Section 9 deals with the right of equality, with specific provision in section 9(2) for legislative measures to advance 'persons or categories of persons, disadvantaged by unfair discrimination' (RSA 1996: s 9(2)). Section 10 constitutes the right of everyone to inherent dignity and respect for and protection of their dignity (RSA 1996: s 10). The constitutional provision of legislative measures that lead to the dignified advancement of categories of person previously disadvantaged by unfair discrimination referred to above was never disputed by any of the parties or the courts in this case.

The Employment Equity Act of 1998 (RSA 1998) is a legislative measure provided for in section 9(2) of the Constitution. The purpose of this Act is to achieve equity in the workplace through two categories of intervention: the elimination of unfair discrimination and the implementation of affirmative action measures 'to redress the disadvantages in employment experienced by designated groups' (RSA 1998: s 2). Whereas they considered various sections of the Act (eg ss 2, 6, 11, 13, 15, 20 and 50), the respective courts focused primarily on section 20, which provides for the development and implantation of an employment equity plan by a designated employer. The provisions and constitutional validity of this Act were not disputed by any of the parties or the courts in this case.

The SAPS' employment equity plan was used by the courts and Ms Barnard as a valid benchmark for measuring the decision of the SAPS not to appoint her (Constitutional Court 2014b: paras 83, 144, 155, 182, 199). As a benchmark, an

employment equity plan is supposed to provide information on nine items as prescribed by the Act (RSA 1998: s 20). Such a plan is expected to be prepared for a minimum period of one year and a maximum of five years and it is supposed to state the annual objectives and affirmative action measures to be implemented according to section 15(2) of the Act. The plan should include, among other provisions, a statement on the objectives to be achieved, the measures to be implemented, numerical goals for each under-represented group necessary for achieving equitable representation, a timetable for achieving the goals and internal procedures for monitoring and dispute resolution (RSA 1998: s 20). The validity of the SAPS employment equity plan was not disputed.[4] The content of the plan served as a fundamental benchmark or yardstick during the various court cases to assess the actions and decisions of the SAPS regarding the non-appointment of Ms Barnard. The application of this benchmark by the courts assessing the implementation of this plan with respect to Ms Barnard was done through the lenses of specific values and criteria, which are discussed in the next section.

Values, principles and standards applied by the courts

A review of the judgments of the four courts in this specific case revealed that the courts considered several values, principles and standards in their reasoning and ultimate ruling on this case. The values of human dignity and equality were foundational to this case (RSA 1996: ss 9, 10; Labour Court 2010: paras 10, 19, 25, 36, 38, 39, 43.5; Labour Appeal Court 2013: paras 27, 28, 29, 30, 47; Constitutional Court 2014b: para 28). The constitutional value of equality comprises 'the full and equal enjoyment of all rights and freedoms' (RSA 1996: s 9(2)) while the value of inherent human dignity refers to everyone's right to have their inherent human dignity respected and protected (RSA 1996: s 10).

In addition to these two values, the Supreme Court of Appeal referred to democratic values (Supreme Court of Appeal 2014: para 70) with specific reference to section 195(1) of the Constitution, which stipulates that public administration 'must be governed by the democratic values and principles enshrined in the Constitution' (RSA 1996: s 195(1)). The Supreme Court of Appeal specifically referred to the implied envisaged 'professional, efficient police force that makes effective use of resources' (Supreme Court of Appeal 2014: para 72). The applicability of these three values is deliberated on in detail in the

4 The validity of the SAPS Employment Equity Plan for the period 2010–2014 was successfully disputed in the Labour Court case, *Solidarity v Minister of Safety & Security & Others* (Labour Court 2016).

various judgments as they were found to be fundamental to the decisions of the respective courts.

The courts also applied certain principles in their assessment of the case. A fundamental principle is that of legality. For the Constitutional Court this principle implies that the implementation of a legitimate restitution measure, such as an employment equity plan, 'must be rationally related to the terms and objects of the measure' (Constitutional Court 2014b: para 39). This principle, with specific reference to the requirement of rationality, was similarly applied by the other courts in this specific case (Labour Court 2010: paras 25.6, 35, 37; Labour Appeal Court 2013: paras 14, 23, 43, 44; Supreme Court of Appeal 2014: paras 42, 78). The implication of the principle of legality and its criterion of rationality is the existence of a 'rational connection between the provisions of the Employment Equity Plan and the measures adopted to implement the provisions of that plan' (Supreme Court of Appeal 2014: para 42).

The criterion of rationality implies the ability to provide reasons for an administrative decision. One of the dissenting judgments concluded that 'the National Commissioner's decision could in principle possibly be subject to review on the basis of rationality' (Constitutional Court 2014b: para 141). For such a review, three criteria were posed, namely whether these measures:

(*a*) target those who have been disadvantaged by unfair discrimination;
(*b*) are designed to protect those people; and
(*c*) promote the achievement of equality (Constitutional Court 2014b: para 142).

Whereas the first two criteria pertain to the Employment Equity Plan as a measure, the last focuses not only on the measure, but also on its implementation. This specific judgment concluded that by not appointing Ms Barnard and therefore not significantly increasing the over-representivity of white female persons and aggravating racial inequality, the decision of the National Commissioner met the third criterion stated above as it promoted the achievement of equality as set out in the employment equity plan (Constitutional Court 2014b: para 150).

The decision of the National Commissioner has also been shown to pass the measurement of rationality as applied by the courts. The main judgment and the second dissenting judgment concluded that the reasons provided by the National Commissioner were adequate (Constitutional Court 2014b: paras 69, 194). However, one of the dissenting judgments was of the view that his reasons did not provide sufficient evidence that the plan was implemented fairly (Constitutional Court 2014b: para 121); this was confirmation of the Labour Court's conclusion that the decision of the National Commissioner was not 'a fair and appropriate method of implementing SAPS's Employment Equity Plan' and therefore 'not

fair to the applicant' (Labour Court 2010: para 33). The Constitution refers to fairness in the context of equality as the non-discrimination 'directly or indirectly against anyone on one or more grounds' (RSA 1996: s 9(3)).

In the context of this case, the Constitutional Court considered fairness as an appropriate standard and a fundamental constitutional value (Constitutional Court 2014b: paras 76, 98). However, the court appeared to experience difficulty finding a standard according to which fairness could be measured (see the reflection of Justice Jafta in Constitutional Court 2014b: para 223). In his dissenting judgement, Jafta refers to Smallberger J in another case, stating that, in judging fairness,

> a court applies a moral value judgement to establish facts and circumstances … And by doing so it must have due and proper regard to the objectives sought to be achieved by the Act (Constitutional Court 2014b: para 229).

Fairness therefore refers to the consistency of informed (facts and circumstances) decisions with the provisions and purposes of the Act. Fair employment practices are therefore recognised not only as important, but also as a 'foundational constitutional value' (Constitutional Court 2014b: para 98). This accounts for the Constitutional Court's scrutiny of the National Commissioner's decision to determine whether it was a fair implementation of the employment equity plan (Constitutional Court 2014b: para 102).

MAKING SENSE OF THE *BARNARD* CASE AS AN INSTANCE OF APPLYING EMPLOYMENT EQUITY MEASURES IN SOUTH AFRICA

The chronology of Ms Renate Barnard's struggle has been selected as a typical case of the implementation of restitution measures aimed at achieving substantive equality in the workplace. The previous section specifically considered the legal lenses which were applied by the various courts to this case. These lenses are not only highly applicable in the process of sense-making of the implementation of employment equity measures in South Africa; they are also consistent with the globally accepted view that public administration is confined to a specific regulatory context.

Sense-making is a process of establishing what is happening in a specific case (Weick 1993, 2012). In the study of the *Barnard* case we therefore set out to understand what happened in the context of employment equity in the South African state through several theoretical lenses and assumptions. In essence, the

case concerns the actions of an organ of state and their implications for individuals such as Ms Barnard.

From the literature on the 'common good', one can deduce various propositions. The first is a statement of how we understand the position of a citizen in this country:

- Proposition one: All citizens are entitled to the common good, experienced as quality of life, well-being, freedom, equality, safety and dignity (RSA 1996: Chapter 2, s 195; Hanasz 2010: 64; Duke 2016: 224).
- Proposition two: Ms Renate Barnard is a citizen of South Africa.

Following from the above, proposition one can conclude that she, as all other citizens in the same position, is entitled to the common good. While the common good includes the notion of equality, we acknowledge the Constitutional provision for substantive equality in the form of restitution measures (RSA 1996: s 9(2)). In this case, these measures were the Employment Equity Act of 1998 and the employment equity plan of the SAPS. With the *Barnard* case in mind, it is reasonable to ask whether the measures applied to her were appropriate. This brings us to the third proposition deduced from the literature on the common good:

- Proposition three: Any state action is appropriate only if the aims of those actions are necessary for promoting, protecting and honouring the common good (Murphy 2005: 136).

Proposition three, however, is not fully satisfactory as it is unclear who determines and articulates these necessities. Therefore, proposition four:

- Proposition four: The necessity to promote, protect and honour the common good is authorised by the Constitution, legislation and lawful policies (Constitutional Court 2014b: para 39).

Proposition four refers to the principle of legality embedded in universal democratic, constitutional and public administration values. However, the employment equity measures applied in the *Barnard* case should have been not only legal but also appropriate. The question, then, is: What is necessary for employment equity measures to be appropriate?

- A review of the case revealed two criteria, namely, rationality and fairness. The rationality criterion holds that rational congruence should exist: between the different elements of these measures, namely, the objectives of the authorising legislation, the instruments and their implementation; and

- between these measures and the appropriate state action by the relevant organ of state (Labour Court 2010: para 37; Supreme Court of Appeal 2014: para 42; Constitutional Court 2014b: para 70).
- The fairness criterion holds that employment equity measures and their application should be consistent with:the relevant facts and circumstances;
- the provisions and purposes of the constituting legislation; and
- the appropriate state action of a relevant organ of state (Labour Court of South Africa 2010: para 37; Supreme Court of Appeal 2014: para 42; Constitutional Court 2014b: para 70).

In the *Barnard* case, the rationality and the fairness of the employment equity plan of the SAPS was not disputed. This case disputed the fairness of the decision of the National Commissioner. Barnard argued that the commissioner did not consider the relevant facts and circumstances (eg her competence, prior learning, training and development, quality of performance and suitability for the post, and her disciplinary record) of her specific case (Constitutional Court 2014b: para 214). The Court nevertheless ruled that the implementation of this plan was indeed both rational and fair (Constitutional Court 2014b: para 123).

While the various courts in this case analysed the legality, rationality and fairness of the decision of the National Commissioner, the public administration value of the common good was not considered at all. This case revealed that the various courts restricted their focus to the actions of the relevant decision-makers in the narrow context of the Employment Equity Act and its measures. The realisation of the common good for society at large was not used as a consideration in assessing the rationality and fairness of the implementation of an employment equity plan.

It is therefore necessary to ask: To what extent was the possible negative impact on the common good for society of not appointing Ms Barnard considered?

This question is especially relevant as the SAPS created the advertised position with a view to improving its service delivery (Constitutional Court 2014b: para 7). Advertising the position as 'non-designated' (Labour Appeal Court 2013: para 5) furthermore created the impression that the SAPS wanted to appoint the best candidate, irrespective of such a candidate being a member of one of the designated groups (Robertson 2007; Constitutional Court 2016). It would seem, therefore, that the SAPS created a position aimed at improving service delivery to society at large and advertised that position to attract the best candidate, irrespective of the candidate's designated status.

In the light of this stated intention, the two consecutive decisions of the SAPS not to appoint Ms Barnard, and also its decision not to fill the position with

other suitable candidates, did not make sense. Furthermore, the statements by the National Commissioner that the post was not critical and that not filling the position would not affect service delivery did not correspond to either the underlying reasons for creating the position or the terminology used in the advertisement. The risk of a negative effect on the numerical employment equity profile of the SAPS was evidently considered higher than the non-quantifiable adverse impact on realising the common good for society at large.

CONCLUSION

The chapter set out to make sense of the implementation of affirmative action measures in organs of the state in the context of the ultimate vision of an improved quality of life for all (and specifically the poor) in the country. The widely reported case *South African Police Service v Solidarity obo Barnard* was selected as a typical case for the purposes of this study. In this selected organ of state, a specific instance of the implementation of employment equity measures was studied. This case study consisted primarily of an analysis of the relevant regulatory documents and the reports of four court cases.

This case study has been framed within the theoretical reflections on the reasons for the existence of the state, and then specifically the notion of realising the common good. The proposition that all citizens of a state are entitled to the common good (quality of life, well-being, freedom, equality, safety and dignity) has been selected as one of the theoretical foundations for this study. In addition to this affirmation of citizens' rights, a second theoretical foundation relates to the appropriateness of state action, namely, that it should aim only to promote, protect and honour citizens' right to the common good. The foundation of this study implies that citizens are entitled to the common good and that state actions should protect that entitlement. However, a third founding proposition for this study is that any state action, irrespective of its nobility, should be legally authorised and constitutionally governed.

The analysis of the chronology of the *Barnard* case revealed that four different courts each had their own interpretation of the facts of the case. This study shows that although the implementation of employment equity measures occurs within a legal framework outlining the various criteria to consider, the final decision is of a discretionary nature depending on interpretations of the framework of constitutional values and principles. Both the Constitution of 1996 and the Employment Equity Act of 1998 require public managers to apply their minds in taking considered, legal, rational and fair employment equity decisions in the interests of the difficult-to-measure common good of society.

Chapter 13

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