

## **WHO ARE THE TRUE BENEFICIARIES OF AFFIRMATIVE ACTION?**

**Solidarity obo Barnard v SAPS  
2010 5 BLLR 561 (LC)**

### **1 Introduction**

Affirmative action measures within the workplace seek to ensure equal employment opportunities and create a workforce that is representative of South African society. One of the issues faced by employers in implementing affirmative action is the question of who should be a beneficiary of affirmative action. This case note seeks to answer this question by looking at the definition given to beneficiaries of affirmative action and the concept of disadvantage. The first part of the article will explore the general objective of affirmative action and the two schools of thought on how we identify beneficiaries of affirmative action. I argue that recognition must be given to the fact that individuals who fall within the designated groups are not necessarily equally placed in terms of their experience of disadvantage. I further argue that in recognizing these differing experiences of disadvantage, we can avoid the creation of an elite middle-class black group that benefits from affirmative action to the exclusion of those that truly deserve the protection. The second part of this case note will focus on a landmark decision that highlights the difficulties encountered by employers in fulfilling their obligation of implementing affirmative action policies. In the last part of this case note I shall comment on the lessons that can be drawn from the case. I shall compare the development of affirmative action in the United States and India with that of South Africa in order to show the constitutional principles that need to be advanced within such a social transitional programme and recommend that affirmative action as a means to an end needs to evolve with the understanding that it functions within an ever changing social and economic environment. If such changes are ignored the true beneficiaries of affirmative action are not given recognition and the desired end of creating a workforce representative of South African society and thus reaching our goal of equality cannot be realized.

### **2 Constitutional basis for affirmative action**

In terms of section 9(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution"), "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 disadvantaged persons or categories of persons, disadvantaged by unfair

discrimination, may be taken (s 9(2) of the Constitution states that: "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"). Section 9(3) of the Constitution prohibits unfair discrimination and promotes the full and equal enjoyment of all rights and freedoms. Also included in the Constitution is a provision for corrective action as a necessary constitutional tool of advancing equality (s 9(2) of the Constitution).

It has been suggested that "the meaning of equality in any jurisdiction is influenced by the historical, social-political and legal condition of the society concerned" (Albertyn and Goldblatt "Equality" in Woolman (ed) *Constitutional Law of South Africa* (2002) 35-3). Through legislation and policy the former government was able to exclude blacks and women systematically from having rights in the workplace, as well as socially ensuring that their advancement economically or socially was curtailed (Albertyn and Goldblatt 35-3). Formal equality would require that all persons be treated equally without any differential treatment (Albertyn and Goldblatt 35-36), but substantive equality requires that for equality to be reached recognition must be given not to the fact that difference is not the problem but rather the harm that may flow from this (Albertyn and Goldblatt 35-37).

The Employment Equity Act (55 of 1998) (hereinafter "the EEA") seeks to promote the right to equality enshrined in the Constitution (s 9(1)) and create a workforce representative of South African society. The purpose of the Act is twofold: firstly, to eliminate unfair discrimination in the workplace, and secondly to implement affirmative action policies and, in doing so, redress the disadvantages experienced by designated groups and thus ensure the equitable representation of members of the designated group in all occupational categories and levels in the workforce (McGregor "Affirmative Action: An Account of Case Law" 2002 14 *SA Merc LJ* 253 255). Affirmative action requires that suitably qualified individuals (in terms s 20(3) of the EEA "a person may be suitably qualified for a job as a result of any one of, or any combination of that person's – (a) formal qualification; (b) prior learning; (c) relevant experience; or (d) capacity to acquire, within a reasonable time, the ability to do the job") from the designated group have equal employment opportunities (s 15(2) of the EEA). Designated employers are to draw up employment equity plans and implement their policies in a rational and fair manner (s 15(2) of the EEA).

To implement an affirmative action policy, it is necessary to identify a previously disadvantaged individual. The EEA defines, "designated groups" as black people, women and people with disabilities. "Black people" are defined as Africans, Coloured, Indians (s 1 of the EEA) and people of Chinese descent (*Chinese Association v Minister of Labour* 59251/2007). People with disabilities are defined as people who have a "long-term or recurring physical or mental impairment which substantially limits their prospects of entry into or advancement in employment" (s 1 of the EEA). It is further noted that a beneficiary of affirmative action must be a South African

---

citizen (Amendment to the Employment Equity Regulations published under GN R841 in GG 29130 of 2006-08-18).

Within the definition of “designated employee”, it is clear that there are groups within groups, for example, women constitute a designated group but a black woman also belongs to another designated group, namely “black people”. It is also clear that a white woman is also a member of the designated group (Dupper “Affirmative Action: Who How and How Long?” 2008 24 *SAJHR* 425 426).

The challenge for employers is thus firstly identifying who the true beneficiaries of affirmative action are. There are two schools of thought: the first holds that it is only necessary that the individual is a member of a designated group in order to qualify as a previously disadvantaged person (Dupper, Bhoola, Garbers, Jordaan, Kalula and Strydom *Understanding the Employment Equity Act* 1ed (2009) 98-99; and see also Benatar “Justice, Diversity and Racial Preference: A Critique of Affirmative Action” 2008 125 *SALJ* 274). The other school of thought holds that in order to be identified as a beneficiary of affirmative action, the individual needs to have actually been disadvantaged personally (Dupper *et al* 99-100).

The second challenge for employers is ensuring that the beneficiaries they identified are suitably qualified or have the capacity to be trained and become suitably qualified to do the job. The third challenge of the employer is that they must ensure that the true beneficiaries identified are able to be a “right fit” in maintaining a workforce that is representative of South Africa, but also meeting the goal of creating an efficient workforce. This is most evident within the public service, besides creating a representative workforce, the challenge in this sector is finding the correct designated employee who is suitably qualified to thus maintain a efficient workforce and in turn an efficiently run department.

In a landmark affirmative action case, the Labour Court found that the South African Police Services’ (SAPS) failure to appoint Captain Barnard (*Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC)), a white female, in the position of Superintendent of the Complaints Investigation Unit, in circumstances where the SAPS failed to fill the position at all, constituted unfair discrimination (*Solidarity obo Barnard v SAPS supra* 563). It has long been said that affirmative action is not only a sword in the hands of designated employees, but also a shield in the hands of employers who face claims from disgruntled non-designated employees who were overlooked for promotions in favour of employees from the designated groups (*Abbott v Bargaining Council for the Motor Industry (Western Cape)* 1999 20 *ILJ* 330 (LC) par 12; and see also *Harmse v City of Cape Town* 2003 6 BLLR 557 (LC)). The recent Labour Court decision in the *Barnard* matter made it clear, however, that employers cannot use affirmative action as an absolute shield (Ainslie “Affirmative Action Must Still be Fair” April 2010 *Business Day Law & Tax Review* 11). Nor may employers apply or give effect to the numerical goals set out in an employment equity plan rigidly and without having regard to the overall principles of fairness and the particular circumstances of individuals who may be adversely affected by the implementation of the plan

---

(*Solidarity obo Barnard v SAPS supra* 571). The *Barnard* case illustrates the problems that arise in identifying the true beneficiary of affirmative action and balancing that with the challenges of creating an efficient and representative public service.

### 3 Barnard case

In the *Barnard* matter, Captain Barnard was denied promotion on two occasions for the sole reason that she was white (*Solidarity obo Barnard v SAPS supra* 571). During both promotion phases Captain Barnard was shortlisted for the position and was the best candidate for the position by far. On both occasions the other members of the SAPS shortlisted for the position included employees from the designated groups (*Solidarity obo Barnard v SAPS supra* 569-570). Captain Barnard's appointment to the position of Superintendent would have aggravated the over-representivity of white males and females on that particular salary level, but at the same time would have enhanced the representivity at the salary level where she was employed at the time (*Solidarity obo Barnard v SAPS supra* 573). Notwithstanding this, the interview panel in each of the promotion phases recommended Captain Barnard's appointment, indicating that representivity within the division as a whole would have remained unaffected (*Solidarity obo Barnard v SAPS supra* 573). Notwithstanding the interview panel's recommendations, the National Commissioner failed both times to promote Barnard. What was interesting, however, was that although Barnard was not appointed, not one of the other shortlisted employees from the designated groups was appointed either and on both occasions the position was simply not filled (*Solidarity obo Barnard v SAPS supra* 573).

#### 3.1 Court findings

The issue before the court was whether Captain Barnard had suffered unfair discrimination in being denied promotion on two occasions due to her being white (*Solidarity obo Barnard v SAPS supra* par 1).

In arriving at its decision the court made the following findings. Firstly, the court details the sections in the Employment Equity Act dealing specifically with the purpose of the Act and the prohibition against unfair discrimination (*Solidarity obo Barnard v SAPS supra* par 2-15). The burden of proof is placed on the employer to show that the discrimination alleged is fair in terms of the Act (*Solidarity obo Barnard v SAPS supra* par 6; and see also s 11 of the EEA). The court then looked at the duty placed on employers to achieve employment equity through affirmative action measures and the need for the employer in the achievement of equity to have an employment equity plan (*Solidarity obo Barnard v SAPS supra* par 9).

The court made the point in *obiter* that when employers set numerical goals within an employment equity plan, it is unclear whether such goals are set using population figures as a whole or how they relate to economically active people (*Solidarity obo Barnard v SAPS supra* par 13 fn 1). The court

further states that the manner in which white women are catered for in the employment equity plan is unclear in relation to whether or not it is entirely in accordance with the provisions of the Act (*Solidarity obo Barnard v SAPS supra* par 13 fn 1).

Secondly, the court notes that the numerical goals specific to the Police Service also take into consideration the need for representivity within the Police Service (*Solidarity obo Barnard v SAPS supra* par 18).

Thirdly, the court, using the case of *Coetzer v Minister of Safety and Security* (2003 2 BLLR 173 (LC)), held that when the issue of representivity is raised in the implementation of an affirmation action policy, it is essential that the circumstances of the individual are not adversely affected (*Solidarity obo Barnard v SAPS supra* par 25.4). This is reached by a proper balance between the need for representivity and an individual's right to equality and fair decision-making (*Solidarity obo Barnard v SAPS supra* par 25.2). The implementation of employment equity must be fair and rational in order not to amount to unfair discrimination (*Solidarity obo Barnard v SAPS supra* par 25.3). In the circumstances of the *Barnard* case a suitable candidate within the under-represented group could not be found and without a clear and satisfactory explanation such a position could not then be denied to a candidate from another group (*Solidarity obo Barnard v SAPS supra* par 25.4).

The court held that a consideration of importance is the efficient operation of the public service within the need to ensure representivity (*Solidarity obo Barnard v SAPS supra* par 25.7). The reasons given for non-appointment of Barnard by the National Commissioner were held to be insufficient and it was held further that the promotion of Barnard would have improved representivity at Level 8 (*Solidarity obo Barnard v SAPS supra* par 31).

Fourthly, the court holds that the position taken by the department not to appoint a suitably qualified black candidate did not change the fact of discrimination, as the non-appointment of the candidate who herself was a member of a designated group in terms of the Employment Equity Act and the best candidate for the job, was thus unfair and irrational, particularly due to no satisfactory explanation being given for the failure to appoint a black candidate to the post (*Solidarity obo Barnard v SAPS supra* par 33). The court thus held that the failure to promote Barnard was unfair and therefore not compliant with the provisions of the Employment Equity Act (*Solidarity obo Barnard v SAPS supra* par 35).

The court concluded that by failing to appoint the other candidates into the position, the National Commissioner regarded them not to be suitable for the position (*Solidarity obo Barnard v SAPS supra* par 35). Had there not been an affirmative action policy, Barnard would have been appointed. She was, however, not appointed on account of her race and this was sufficient to establish discrimination. The onus accordingly fell on the SAPS to show that in the circumstances the discrimination was fair (*Solidarity obo Barnard v SAPS supra* par 35-37; and see also s 11 of EEA). The court held that the National Commissioner could have implemented the employment equity plan

of the SAPS directly by employing a suitably qualified black candidate to the post had he decided to do so. But by not doing so, it could not be held that the SAPS implemented its employment equity plan in a fair and appropriate manner (*Solidarity obo Barnard v SAPS supra* par 35-37; and see also s 11 of EEA). Having decided not to implement the employment equity plan by appointing a recommended black candidate, it was unfair in the circumstances not to appoint Captain Barnard who, according to the interview panel, was the best candidate for the job and who, as a female, was in any event a member of a designated group in terms of the Employment Equity Act (*Solidarity obo Barnard v SAPS supra* par 35). The SAPS was accordingly unable to discharge its onus to establish that their decision was both rational and fair (*Solidarity obo Barnard v SAPS supra* par 35). The Labour Court then directed the SAPS to promote Captain Barnard to the position of Superintendent retrospectively from 27 July 2006. The SAPS was also ordered to pay Captain Barnard's costs (*Solidarity obo Barnard v SAPS supra* par 44).

### 3.2 *Commentary on the case*

It follows that, although employers need to implement their employment equity plans, these plans must be given effect to with regard to all the affected employees' rights to equality (*Solidarity obo Barnard v SAPS supra* par 36). Employment equity plans are not the alpha and omega (Ainslie April 2010 *Business Day Law & Tax Review* 11) and other factors such as the affected employees' personal work history and the circumstances of each matter must be taken into account as well (*Solidarity obo Barnard v SAPS supra* par 36). The *Barnard* case, however, also highlights the challenges faced by employers in identifying the true beneficiaries of affirmative action and applying their employment equity plans in such a way as to allow for representivity as well as efficiency within the workplace. The obligation of balancing these interests is clearly felt more in the public service arena.

To give effect to the principles of affirmative action and the numeric goals set out in an employment equity plan, suitable candidates from designated groups may be given preference for promotion and appointment. If, however, there is no suitable candidate, a failure to appoint a suitable member from a non-designated group will constitute discrimination (*Solidarity obo Barnard v SAPS supra*). If the employer cannot show that it acted rationally and fairly, the discrimination will be deemed unfair. It has been pointed out before that members of the designated group do not have a right to affirmative action (McGregor "The Nature of Affirmative Action: A Defence or a Right" 2003 *SA Merc LJ* 421 435). Affirmative action therefore remains a remedy, a means to an end to rectify past imbalances and achieve equality (Currie and De Waal *The Bill of Rights Handbook* 5ed (2005) par 9.5; and see also McGregor "No Right to Affirmative Action" 2006 14(1) *Juta's Business Law* 16 19). Having regard to the fact that there is no right to affirmative action employers are only able to use affirmative action as a defence to discrimination if their employment equity plan is seen to be applied rationally and fairly. It is therefore fair to say that affirmative action is justified by its

---

consequences, if in the long run it results in an equal society (Currie and De Waal par 9.5).

#### **4 Does representivity equal efficiency and better quality service in public service sector?**

One of the arguments put forward in response to the non-appointment of Captain Barnard was the need to ensure representivity. A balancing act of two important issues is given rise to by such a defence. There is a constitutional obligation for efficiency in the public service (Dupper 2008 24 SAJHR 437) as well as the need to have equal representation across the public service. The question to be asked then, is how does one measure whether representivity equals efficiency and quality of public service? One may argue that suitably qualified individuals being appointed would equal efficiency and quality of service rather than just appointing individuals on the basis of race to enhance representivity. It has been noted that a representative public service as envisioned in our Constitution cannot be promoted at the expense of an efficient administration (McGregor "Affirmative Action and the Constitutional Requirement of 'Efficiency' for the Public Service" 2003 15 SA Merc LJ 82 85; and see also s 205 of the Constitution). In the case of *Public Servants Association of SA v Minister of Justice* (1997 18 ILJ 241 (T) 308), it was held that efficiency and broad representation should be promoted at the same time as this was something both the public and taxpayers were entitled to. It is clear the concepts of efficiency and representivity should not be separated or placed in opposition to each other (McGregor 2003 15 SA Merc LJ 93). Each particular case needs to be looked at within its specific circumstances: this was clearly evident in the *Coetzer v Minister of Safety and Security* (*supra* par 34) case where efficiency was seen to override representivity as the services rendered were critical and the only suitably qualified individuals were not part of the disadvantaged group. In both the *Barnard* and *Coetzer v Minister of Safety and Security* (*supra* par 36) cases it was held that without filling these posts the SAPS could not be seen to be rendering an efficient service.

In *Stoman v Minister of Safety and Security* (2003 23 ILJ 2020 (T)) authority was given to the need to strike a balance between efficiency and representivity and the need to ensure that suitably qualified individuals take up the affirmative action positions, if the ideal of equality is to be achieved in a rational manner. It is not, however, rational to fail to appoint a suitably qualified individual as in the *Barnard* case. In terms of section 205 3(b) of the Constitution the South African police force are under a constitutional obligation to ensure that they deliver both an effective and efficient public service. Representivity is crucial, but this must be balanced with the need for efficiency. A police force that is representative will enjoy the trust, co-operation and support of the community which will only enhance its performance (Dupper 2008 24 SAJHR 438).

## 5 The beneficiaries of affirmative action case law

In the case of *Dudley v City of Cape Town* (2004 25 ILJ 305 (LC)) the court held that the EEA does not afford an individual a right to affirmative action, and there is no enforceable claim by an individual employee from a designated group for preferential treatment. To implement an affirmative action policy, it is necessary to identify previously disadvantaged individuals. There are two schools of thought: the first holds that it is only necessary that the individual is a member of a designated group in order to qualify as a previously disadvantaged person (Dupper 99). The other school of thought holds that in order to be identified as a beneficiary of affirmative action, the individual needs to have actually been disadvantaged personally (Dupper 100).

Dupper makes the distinction between strong affirmative action and weak affirmative action (Dupper "In Defence of Affirmative Action in South Africa" 2004 121 *SALJ* 187 195). Strong affirmative action gives preference to black people or women solely on that basis over candidates who are in fact better qualified for the position. Weak affirmative action ensures that members who are not black people or women who would qualify for positions under normal circumstances are not overlooked. The "apartheid" background of South Africa and a constitutional imperative, however, argue for a strong affirmative action although it may evoke strong criticism of unfairness (Dupper 2004 121 *SALJ* 195).

McGregor points out that race and gender discrimination are different in nature and that the extent of disadvantage cannot be measured. There is no standard of measuring if one is subjected to race discrimination that such an individual suffered more disadvantage than one who is subjected to gender discrimination (McGregor 2002 14 *SA Merc LJ* 267). For example, McGregor, argues that a white woman during "apartheid" would not have experienced disadvantage in terms of certain laws which specifically targeted the movement of blacks, but a white woman in a predominantly male-dominated profession that curtailed the advancement of women would be considered to have been at a disadvantage.

How is one to judge which of the two was a greater disadvantage? McGregor ends the debate by stating that such an exercise is unnecessary and would only complicate the process (McGregor 2002 14 *SA Merc LJ* 267).

It is interesting to note that in the *Barnard* case race was the only consideration to exclude the applicant from promotion. Factors such as her gender in a male-dominated profession, and her position as an actual member of the designated group were not taken into consideration at all. Dupper notes that when race is used as the only criterion for appointment this would not only be irrational but impose undue burdens on those excluded (Dupper 2008 24 *SAJHR* 435).

Rycroft notes with regards to degree of disadvantage, that it would be difficult to calculate degree of disadvantage and thus it is preferable to focus



on the broad social purpose of the EEA, which is demographic representivity regardless of whether a person in the designated group comes from a wealthy background and has received the best education (Rycroft "Obstacles to Employment Equity? The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" 1999 20 *ILJ* 1411 1423, as quoted in McGregor "Disadvantage in Affirmative Action" 2002 10 *Juta's Business Law* 141 143). Albertyn is of the opinion that it is unnecessary to look at the degree of disadvantage as this results in an unnecessary and wasteful experience giving rise to worsening conflict and division, as individuals within the designated group try to prove historical discrimination (McGregor 2002 10 *Juta's Business Law* 143). Albertyn argues that such a stance would focus more on the wrongs of the past, rather than the hopes of the future and that it promotes an unhealthy social ethic, as one endeavours to prove oneself a victim, which is far removed from the aim of affirmative action (McGregor 2002 10 *Juta's Business Law* 143).

In *Motala v University of Natal* (1995 3 BCLR 374 (D)) it was noted that the apartheid government had a hierarchical system of race. The most advantaged being whites and the most disadvantaged being African and Coloured people, with Indians situated in the middle. It is, however, noted that accepting an affirmative action policy within an admission to University programme simply on the basis that Africans were more disadvantaged than Indians was incorrect. The proper enquiry was rather whether such a programme was rational and carefully constructed so as to achieve equality (Currie and De Waal par 9.5).

In the case of *Fourie v Provincial Commissioner of SA Police Service (North West Province)* (2004 25 ILJ 1716 (LC)) the Labour Court pointed out that the issue of degrees of disadvantage could not be decided in a vacuum but consideration needed to be given to the history of South Africa and the imbalances of the past. The applicant, a white woman, though suitably qualified was not appointed as in the circumstances there were no black officers at the police station in question and the quota for white women had been exceeded (*Fourie v Provincial Commissioner of SA Police Service (North West Province)* *supra* 1737C).

It was held in the *Barnard* case that the personal work history and circumstances of Captain Barnard needed to be assessed and taken into account by the National Commissioner (*Solidarity obo Barnard v SAPS* *supra* par 36). It was noted that South Africa is a deeply patriarchal society, which subordinates women in their public and private life both socially and economically (Albertyn and Goldblatt 35-3). One can see the justification of women regardless of race being held to be beneficiaries of affirmative action. The question to be asked therefore, is why Captain Barnard's gender was not considered to be a factor and why she was clearly not recognized as a beneficiary of affirmative action.

In the case of *Minister of Finance v Van Heerden* (2004 6 SA 121 (CC)) it was held that the Constitution allows for affirmative action measures which target whole categories of people to be advanced on the basis of

membership of a group (*Minister of Finance v Van Heerden supra* par 85ff). But even within the group there are differing degrees of disadvantage (Dupper 2008 *SAJHR* 427). Dupper points out that the forward-looking rationale of affirmative action is that it is a way of overcoming prejudice by changing widely held attitudes towards members of disadvantaged groups as well as affirmative action being a tool for intergrating disadvantaged groups into a democratic society, thereby breaking down what would be an endlessly continuing cycle of poverty, subservience, and social inequality (Dupper 2004 121 *SALJ* 205). It has been noted that to distinguish between persons in a particular designated group would require not only legal but historical and social evidence (Dupper 2008 *SAJHR* 427).

## 6 Gender discrimination in the Police Service

In *Public Servants Association v Free State Provincial Administrator* (CCMA 21 May 1998 (case no FS 3915) Unreported), where a black man had been appointed in preference to a white woman, it was held that blacks generally were at a greater disadvantage than white women during apartheid. Such distinction clearly shows difference in disadvantage between members of the designated group. It is clear in the *Barnard* case that the fact that she is a woman, and therefore a member of the designated group, was completely disregarded. It is submitted therefore, that if there is a difference in the disadvantage (Dupper 2008 *SAJHR* 427) experienced by members within the designated group, individual distinction of degree of disadvantage must therefore be given consideration. This disadvantage would be specific not only to the individual but include the position for which the individual is applying.

For example, using *Barnard* as a case in point, within the SAPS there is well documented evidence of gender discrimination within the male-dominated police force (see Bezuidenhout and Theron "Attitudes of Male and Female Officers Towards the Role of Female Police Officers" 2000 13(3) *Acta Criminologica* 19; and Morrison "Study of Women in Policing" 2002 23 *Annual Journal of SA Association of Women Graduates* 24). It has been noted that women within the police force face various challenges that stem from their status as women (Morrison "Gender Discrimination versus Equality in the Police" 2005 18(3) *Acta Criminologica* 20). Such disadvantage includes male police officers not accepting the authority of female officers, evidence of beliefs that female officers are incompetent and the stereotyping of women which results in an "intimidating working environment" (Morrison 2005 18(3) *Acta Criminologica* 20). This is rooted in the perception that it is not appropriate for women to work in the "environment of men" (Morrison 2005 18(3) *Acta Criminologica* 22). The supposition is that women are not biologically or socially equipped to perform traditionally male jobs in areas such as policing and fire fighting (Morrison 2005 18(3) *Acta Criminologica* 21).

Kentridge holds that the "legitimate beneficiaries of affirmative action are those disadvantaged by unfair discrimination, that is, those who are, or have been, disadvantaged by measures which impair their fundamental human

dignity or adversely affect them in a comparably serious way” (Kentridge “Equality” in Chaskalson *Constitutional Law of South Africa* 1ed (1996) 14-39). She notes that this type of unfair discrimination can be restrictively interpreted to require only that the individual actually suffered discrimination by the body whose affirmative action policy is under scrutiny and is compensating for its “sins of discrimination” (Kentridge 14-39). Women within the police force have clearly been unfairly discriminated against for years.

In the Canadian case of *Action Travail des Femmes v Canadian National Railway Company* ([1987] 1 SCR 1114 par 41) it was held that:

“an employment equity programme...is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears”.

Gender inequality within the police force as seen in the *Barnard case* is a clear barrier that required consideration. It is submitted that this, too, is the aim of the EEA: namely to open up opportunities and break down real and perceived barriers to employment at all levels of the workplace, and thus leading to the creation of a working environment that is demographically representative of a free and democratic South Africa. The Institute for Democracy defines a working condition of affirmative action as “a process designed to achieve equal employment opportunities, in order to achieve this goal, the barriers in the workplace which restrict employment and progressive opportunities have to be systematically eliminated” (Institute for Democracy in South Africa 1995 *Making Affirmative Action Work: A South African Guide* Rondebosch: IDASA <http://www.idasa.org.za> accessed 2010-07-19).

Captain Barnard was seeking promotion within a male-dominated profession. Besides the fact that she was white, as a female she was a member of the designated group. The appointment of Captain Barnard would not have affected the representivity of the department negatively and since she was the best candidate in the group and therefore suitably qualified she would have promoted efficiency within the department. Further statistically, women, regardless of race, are shown to be under-represented in mid- to high-level jobs (Dupper 2004 121 *SALJ* 203).

## 7 Comparative law

In looking at what has been written on the difference between the United States and the South African affirmative action policies (McGregor “Actual Past Discrimination or Group Membership as a Requirement to Benefit from Affirmative Action: A Comparison between South African and American Case Law” 2004 29(3) *Journal of Juridical Science* 122), it is clear that within South Africa recognition is given to the historically disadvantaged due to the

principles of substantive equality. Within the United States the concept of formal equality is advocated in which everyone must be treated the same (Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (2009) 163). This clear difference is seen in the “post race ethic” (Barnes, Chemrinsky and Jones “A Post Race Equal Protection?” 2010 *Georgetown LJ* 967) articulated through United States case law which invalidates the use of racial guidelines to remedy past discrimination in education (Barnes, Chemrinsky and Jones 2010 *Georgetown LJ* 972). In the landmark case of *Regents of the University of California v Bakke* (57 L. Ed. 2d 750), it was held as follows:

“The purpose of helping certain groups who are perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination” (*Regents of the University of California v Bakke supra* 783).

It is noted in regard to the *Bakke* case in *Gratz v Bollinger* (156 L. Ed. 2d 257), that:

“Bakke emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education. The admissions program described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity. Instead, under the approach described, each characteristic of a particular applicant was to be considered in assessing the applicant’s entire application” (*Gratz v Bollinger supra* 271).

The principle of substantive equality in South Africa, however, allows for an individual to benefit from affirmative action by virtue of being a member of the “designated group” without having to have suffered discrimination personally on the basis of race (McGregor 2002 10 *Juta’s Business Law* 147). In the *Barnard* case the appointment of a white female would not have affected representivity within the department. However, the employer did not promote Captain Barnard. There is a clear, underlying issue here: there is a perception of difference of degrees of disadvantage within designated groups which influence employers in their implementation of affirmative action policies. This results in the employer losing sight of who are the true beneficiaries of affirmative action.

In India the Supreme Court eventually narrowed its approach to the definition of disadvantage after it became apparent that preferential policies entrenched in the country’s constitution since the 1950s were only benefiting a small and privileged membership in the named group (Albertyn and Goldblatt 35-36; see also Menski “The Indian Experience and its Lessons for Britain” in Hepple and Szyszczak *Discrimination: The Limits of the Law* (1992) 330; and Nair “Search for Equality through Constitutional Process: The Indian Experience” in Jagwanth and Kalula (eds) *Equality Law:*

*Reflections from South African and Elsewhere* (2001) 255). Dupper notes the backward looking rationale of affirmative action would hold that firstly every member of a designated group has suffered from the effects of past discrimination and similarly every member of the non-designated group has benefited (at least indirectly) from the effects of past discrimination. Dupper further notes that those who are being compensated are not individual victims but rather the groups to which they belong and thus only those groups who have actually suffered from past discrimination should be given preference in terms of affirmative action (Dupper 2004 121 *SALJ* 197-198). The areas of discrimination are seen through education and opportunities to pursue higher learning (Dupper 2004 121 *SALJ* 197-198). The argument against this justification of affirmative action has been that those who have suffered most under discrimination are seldom those who benefit from these policies (Dupper 2004 121 *SALJ* 204).

India thus maintains a list of disadvantaged groups and uses empirical factors including social discrimination, educational deprivation and economic status to determine group status (Dupper 2008 24 *SAJHR* 442). It is noted by Dupper that what is required is a more nuanced approach to affirmative action that involves a detailed study of the area in which affirmative action is being undertaken and identifying the real sources of disadvantage suffered by the relevant individuals and groups, as well as taking account of the complexity of disadvantage and of the continuous shifts taking place in our social and economic relations (Dupper 2008 24 *SAJHR* 428). This is clearly the challenge for employers in the implementation of affirmative action that they keep abreast of the shifts, not only within their organization, but how social and economic shifts within the society broadly will affect their organization.

## 8 Conclusion

There is no doubt that the legacy of “apartheid” is still evident in the labour market. Affirmative action measures are there to promote and in the end achieve substantive equality in the workplace (Van der Walt and Kituri “The Equality Court’s View on Affirmative Action and Unfair Discrimination: *Du Preez v The Minister of Justice and Constitutional Development*” 2006 5 SA 592 (EqC) 2006 27 *Obiter* 674 681). To this end, it is important that in the implementation of affirmative action the purpose of the corrective action should not be overlooked. It is vital that consideration be given to the fact that individuals who fall within the designated group are not equally placed, in terms of their experience of disadvantage. It is submitted that consideration of differing experiences of disadvantage needs to be taken into account so as to avoid the creation of an elite middle-class black group, which benefits from affirmative action to the exclusion of others and the impact this may have on women in male-dominated professions.

Further, the implementation of affirmative action should be strictly on a case-by-case basis with regard to the demographic profile of the specific workforce, and the Employment Equity policy of the particular workplace. It is clear that issues of social, gender, political, economic and educational

disadvantage are factors that should be given consideration in identifying the true beneficiaries of affirmative action. In this regard, the *Barnard* case has taken our law forward in looking at the issue of gender disadvantage in the area of affirmative action.

It is submitted that over time affirmative action will bring about a change in ideology and perceptions of people, as they see one another on an equal footing in terms of their ability and potential within a working environment. The reality will be that individuals will not want to be token appointments, but rather be employed on the basis that they are the best qualified candidates and not just because of their race or gender. Ultimately, the goal of affirmative action must be seen to break down both the visible and invisible barriers of equality within the workforce and, in doing so, create an environment where constitutional values of equality, human dignity and freedom are truly recognized and protected.

Muriel Mushariwa  
*University of the Witwatersrand, Johannesburg*