

**Balancing employment equity goals with the state's duty to provide an
efficient public service delivery**

by

Rudi Pitts

BCom LLB

Submitted in fulfilment of the requirements for the degree Magister Legum in Labour
Law at the North-West University (Potchefstroom Campus), South Africa

LLM Labour Law Modules Passed:

LMLL 811

LMLL 812

LMLL 821

LMLL 822

Study Supervisor: Prof PH Myburgh

November 2012

The financial assistance of the National Research Foundation (NRF) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at, are those of the author and are not necessarily to be attributed to the NRF.

Index

List of Abbreviations	1
1 Introduction	2
2 Service delivery in the public sector from 1994 to 2012.....	5
2.1 Background	5
2.2 Affirmative action policies, legislation and targets	7
2.3 Implementing affirmative action policies	12
2.4 Affirmative action statistics	14
2.4.1 Gender.....	15
2.4.2 Race	16
2.4.3 Disabled.....	17
3 A critical analysis of the targets set and the implementation of employment equity plans in the public sector	17
3.1 Public Servants Association of SA v Minister of Justice	17
3.2 Stoman v Minister of Safety and Security.....	21
3.3 Coetzer v Minister of Safety and Security.....	23
3.4 Solidarity on behalf of Barnard v SA Police Service	27
3.5 Van Eden and SA Police Service	31
3.6 Engineering Council of SA v City of Tshwane Metropolitan Municipality	32
3.7 The impact of affirmative action.....	37
4 Conclusion and recommendations.....	39
BIBLIOGRAPHY.....	45

List of Abbreviations

ANC	:	African National Congress
BCA	:	Bargaining Council Arbitration
ECSA	:	Engineering Council of South Africa
EEA	:	<i>Employment Equity Act, 55 of 1998</i>
ILJ	:	Industrial Law Journal
LC	:	Labour Court
NES	:	National Evaluation Services
OHSA	:	<i>Occupational Health and Safety Act, 85 of 1993</i>
PERSAL	:	Personnel and Salary Information System
PSA	:	<i>Public Services Act, 103 of 1994</i>
PSC	:	Power System Control
SAPS	:	South African Police Service
The Constitution	:	<i>Constitution of the Republic of South Africa, 1996</i>
The interim Constitution	:	<i>Constitution of the Republic of South Africa, 200 of 1993</i>
WPAAPS	:	<i>White Paper on Affirmative Action in the Public Service, Gen Not 564 in GG 18800 of 23 April 1998</i>
WPTPS	:	<i>White Paper on the Transformation of the Public Service, Gen Not 1227 in GG 16838 of 24 November 1995</i>

1 Introduction

In accordance with the *Employment Equity Act*¹ (hereafter the EEA) all designated employers, including the state, must implement affirmative action measures.² This is to ensure that suitable qualified people, from designated groups,³ are equitably represented in the workplace through equal employment opportunities. The ultimate goal is to reflect the demographics of the country by providing equitable representation in all occupational categories and levels in the workforce of a designated employer.⁴ By implementing employment equity in the public sector the government must take into account the constitutional imperative of “efficiency”.⁵ Although the term “efficiency” is used in various pieces of legislation, a precise definition is not coined to set out the parameters of its application and interpretation. Hence it is necessary to look at how the courts have interpreted the term “efficiency” when affirmative action measures are implemented by designated employers.

*Public Servants Association of SA and others v Minister of Justice and others*⁶ is the first reported case concerning “efficiency” when applying affirmative action measures

1 55 of 1998.

2 The term “designated employer” is defined in s1 of the EEA as:

- (a) an employer who employs 50 or more employees;
- (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;
- (c) a municipality, as referred to in Chapter 7 of the Constitution;
- (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- (e) an employer bound by a collective agreement in terms of section 23 or 31 of the *Labour Relations Act*, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

3 The term “designated groups” is defined in s1 of the EEA as: “black people, women and people with disabilities”.

4 S3 of the EEA.

5 The *Constitution of the Republic of South Africa*, 1996 requires “efficiency”: in all spheres of government and all organs of state, s41(1); in the powers, performance and functions of municipalities in respect of matters listed in Schedules 4 and 5, ss155(7) and 156(4); in the internal procedures of a Municipal Council, s160(1)(d); and in the public administration, s195(1). A Public Service Commission is created in terms of s196. This Commission is regulated through national legislation to perform its functions as set out in s196(4). In emphasising s196(4)(c) it can be seen that this Commission is given the power to propose measures to ensure an effective and efficient public administration and performance within the public service. In terms of s205(2) a national police service must also be created to discharge its responsibilities effectively in the Republic of South Africa.

6 1997 18 ILJ 241 (T).

in the public sector.⁷ Even though this case was decided under the interim *Constitution of the Republic of South Africa*⁸ (hereafter the interim Constitution) some important principles were laid down. The court subjected the appointment of persons in the public service to certain fair and equitable criteria as provided in legislation.⁹ In terms of the *Public Services Act*¹⁰ (hereafter the PSA) section 11 and the interim Constitution section 212(4), the criteria set out were “qualifications, level of training, merit, efficiency and suitability”. These criteria are said to be decisive when employing people in the public service and must be taken into account to provide efficient public service delivery and a public service that is broadly representative of the South African community.

In *Stoman v Minister of Safety and Security and others*¹¹ the court emphasised that a balance has to be struck between efficiency and representativity, when applying affirmative action measures in the public sector.¹² Efficiency and representativity must not be seen as two opposing, separate or competing arms but as interdependent ideals.¹³ Taking into account the history of discrimination in South Africa the ideal of equality will not be promoted if affirmative action measures are only implemented in restricted circumstances where candidates have the same qualifications and merits and nothing else distinguishes them except their race.¹⁴ However, the requirement of rationality still remains.¹⁵ This means that the appointment of people that are wholly unqualified, or less than suitably qualified, or are incapable of performing in responsible positions cannot be justified.¹⁶

In *Coetzer and others v Minister of Safety and Security and another*¹⁷ the court referred to sections 205-208 of the *Constitution of the Republic of South Africa, 1996* (hereinafter the Constitution), that indicates that a balance must be struck between affirmative action imperatives and other imperatives including the need for the police

7 McGregor 2003 *Juta's Business Law* 25.

8 200 of 1993.

9 1997 18 ILJ 241 (T) 242B.

10 103 of 1994.

11 2002 3 SA 468 (T).

12 2002 3 SA 468 (T) 482F.

13 2002 3 SA 468 (T) 482F-G.

14 2002 3 SA 468 (T) 482G.

15 2002 3 SA 468 (T) 482H.

16 2002 3 SA 468 (T) 482H.

17 2003 24 ILJ 163 (LC).

service to discharge its responsibilities effectively.¹⁸ It is however stated that the Constitution is silent on how precisely this balance has to be construed.¹⁹ It is accepted that a rational balance will prevail.²⁰

In the most recent case of *Solidarity on behalf of Barnard v SA Police Service*²¹ the court indicated that in appropriate circumstances the efficient operation of the public service, or what is termed “service delivery”, is a relevant factor to be taken into account when implementing an employment equity plan in the public sector.²² In this case it added weight to the conclusion that there had been an absence of a rational connection between the decision reached by the South African Police Service (SAPS) not to promote a white female and the overall objectives of the employment equity plan.²³

McGregor²⁴ states that even though efficiency and representativity are both required by the Constitution it appears that neither of them outranks the other, nor can they be viewed in isolation from each other. They are linked and interdependent.²⁵ But it appears though, that efficiency may trump representativity in situations where the services rendered or unit concerned is critical to the South African community.²⁶

Given the above-mentioned background, the legal question posed in this mini-dissertation is: Is the enforcement of employment equity targets in government supporting the provision of efficient public service delivery? This mini-dissertation will mainly make use of a literature study of relevant text books, law journals, legislation, case law and internet sources relating to the enforcement and suspension of employment equity targets in the public sector with regard to efficient public service delivery.

18 2003 24 ILJ 163 (LC) 173F.

19 2003 24 ILJ 163 (LC) 173G.

20 2003 24 ILJ 163 (LC) 173G.

21 2010 31 ILJ 742 (LC).

22 2010 31 ILJ 742 (LC) 745C.

23 2010 31 ILJ 742 (LC) 746F.

24 McGregor 2003 *Juta's Business Law* 32.

25 McGregor 2003 *Juta's Business Law* 32.

26 McGregor 2003 *Juta's Business Law* 32.

This study falls within the broad focus of the Research Unit of the Faculty of Law (Potchefstroom Campus), namely *Development in the South African Constitutional State* and relates directly to the affirmative action imperatives enshrined in the Constitution as well as in other legislation and policy papers. This is a legal challenge which needs to be addressed by finding innovative solutions in the development of a young Constitutional State such as South Africa.

This study will also fall within the sub-project of *New Thinking in Law* due to the fact that labour law is an evolving field that does not stagnate. Affirmative action policies and the courts' willingness to promote public service delivery make it a relevant development that must be taken into account. This mini-dissertation will critically evaluate affirmative action procedures in the public domain where inefficient public service is delivered at the cost of experienced people. This paper thus falls within the scope and aims of the sub-project. A possible solution for this deficiency will be proposed at the end.

2 Service delivery in the public sector from 1994 to 2012

2.1 Background

According to Milne²⁷ the new democratic dispensation, which is currently governed by the African National Congress (ANC), inherited a public service that was deeply divided and generally characterised as lacking representativity, legitimacy, accountability, transparency and service delivery. Before 1994 the Public Service was strongly influenced by discriminatory employment policies and practices that were based on race, gender and disability.²⁸ This inevitably meant that designated groups were poorly represented at decision-making levels in the public sector.²⁹ A new predominantly black government thus faced a largely white senior public service.³⁰ Initiatives must therefore be put in place to remove these discriminatory

27 Milne 2009 *Journal of Public Administration* 970-971.

28 Gen Not 564 in GG 18800 of 23 April 1998 5.

29 In answering the questions who should benefit from affirmative action measures; how these benefits should be allocated; and when the allocation of benefits should end see Dupper O "Affirmative action: Who, how and how long?" 2008 *SAJHR* 425-444.

30 Milne 2009 *Journal of Public Administration* 971.

practices and policies in employment and to redress the poor representativity of designated groups in the public service.³¹

One of the Government's primary tasks is to transform the Public Service into an efficient and effective instrument that will be capable of delivering equitable services to all citizens in the Republic of South Africa.³² But the Public Service lacks the legitimacy and credibility in the eyes of the majority of South African citizens due to the fact of its legacy of ineffectiveness, unfair discrimination and division on the basis of race and gender.³³ In restoring this lost credibility and legitimacy, the Government is of the view that a broadly representative Public Service by way of a transformation process is the best solution.³⁴ Milne³⁵ argues that the rationale within affirmative action policies points towards an underlying theory called representative bureaucracy.

This term was coined in the British public service in 1944, whereby it was viewed that the civil service should reflect the characteristics of the ruling social class.³⁶ Over time the basis of representative bureaucracy has changed and has moved away from just representing the ruling social class.³⁷ Race, gender and ethnicity are now used as a more appropriate basis of comparison between society and the public service.³⁸ This means a representative bureaucracy will therefore consist of a workforce that reflects the composition of the citizens of the specific country.³⁹

Representative bureaucracy revolves around the main principle of reflecting the diversity of the society within which it functions and will then be more likely to be responsive to all the diverse interests and requirements of the population.⁴⁰ If a public service is representative of the composition of the citizens, then the political role it has will be accommodated with some of the basic doctrines of democracy,

31 Gen Not 564 in GG 18800 of 23 April 1998 5.

32 Gen Not 564 in GG 18800 of 23 April 1998 8.

33 Gen Not 564 in GG 18800 of 23 April 1998 8.

34 Gen Not 564 in GG 18800 of 23 April 1998 5.

35 Milne 2009 *Journal of Public Administration* 971.

36 Milne 2009 *Journal of Public Administration* 972.

37 Milne 2009 *Journal of Public Administration* 972.

38 Milne 2009 *Journal of Public Administration* 972.

39 Milne 2009 *Journal of Public Administration* 972.

40 Milne 2009 *Journal of Public Administration* 972.

majority rule, minority rights and equal representation.⁴¹ The relevance of a representative bureaucracy thus has a visible relationship with the rationale for implementing affirmative action measures in the post-1994 South Africa.⁴² Representative bureaucracy consists of two components, namely passive representation and active representation.⁴³

Passive representation refers to “the extent that public service reflects the composition of the population of the country, including the historically disadvantaged communities”.⁴⁴ Active representation refers to “the relationship between passive representation and the extent to which those interests represented are part of policy formation, implementation and outcome”.⁴⁵ This means active representation reflects the actions taken and the policy preferences expressed by bureaucrats that are similar to the preferences of the people represented demographically in the population.⁴⁶

2.2 Affirmative action policies, legislation and targets

The ANC assured the implementation of a wide range of affirmative action policies as well as the promulgation of much legislation to improve and reform the representation of the workforce in the public sector. These include:⁴⁷ the PSA,⁴⁸ the *White Paper on Reconstruction and Development*,⁴⁹ the *White Paper on the Transformation of the Public Service*,⁵⁰ the Constitution, the *White Paper on Human Resource Management in the Public Service*,⁵¹ the *White Paper on Affirmative Action*⁵² and the EEA.⁵³

41 Milne 2009 *Journal of Public Administration* 972.

42 Milne 2009 *Journal of Public Administration* 972.

43 Milne 2009 *Journal of Public Administration* 972.

44 Milne 2009 *Journal of Public Administration* 973.

45 Milne 2009 *Journal of Public Administration* 973.

46 Milne 2009 *Journal of Public Administration* 973.

47 Milne 2009 *Journal of Public Administration* 973.

48 103 of 1994.

49 Gen Not 1954 in GG 16085 of 23 November 1994. This White Paper was published for general information.

50 Gen Not 1227 in GG 16838 of 24 November 1995. This White Paper was published to serve as a broad framework of government policy during the process of transformation and reform.

51 Gen Not 2011 in GG 18594 of 31 December 1997. This White Paper was published to provide a policy framework that will enable the development of human resource management practices

The Constitution provides the basis in applying affirmative action policies in South Africa.⁵⁴ Even though it does not use the term “affirmative action” explicitly it can be derived from section 9(2).⁵⁵ This section states:

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.

The permit for implementing affirmative action policies and procedures are thus found in the term "advance".⁵⁶ Section 195(1)(i) further allows the private and public sector to implement affirmative action procedures in making the labour force more representative. This section stipulates that the:

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

It can be gathered that the Constitution provides an all-embracing policy on affirmative action. All other affirmative action policies will be measured against the Constitution to determine its legality or lack thereof.

Milne⁵⁷ states that the *White Paper on the Transformation of the Public Service* (hereafter the WPTPS) is the first policy created by the ANC as government, which defined affirmative action. This document describes affirmative action as follow:⁵⁸

which will support an effective and efficient Public Service that is geared for economic and social transformation.

52 Gen Not 564 in GG 18800 of 23 April 1998. This White Paper was published by the Department of Public Service and Administration to provide a policy framework that sets out the mandatory requirements and steps national and provincial administration must take to develop and implement their affirmative action programmes.

53 55 of 1998.

54 For a discussion on how the Constitutional Court has interpreted the affirmative action clause see the article of Pretorius JL “Fairness in transformation: A critique of the Constitutional Court’s affirmative action jurisprudence” 2010 *SAJHR* 536-570.

55 Grogan *Employment Rights* 250.

56 Grogan *Employment Rights* 251.

57 Milne 2009 *Journal of Public Administration* 974.

58 Gen Not 1227 in GG 16838 of 24 November 1995 par 10.2.

Given the priority assigned by the government to increasing representativeness, a proactive approach will clearly be vital, and this will predominantly take the form of affirmative or corrective action.

Affirmative action can be defined as laws, programmes or activities designed to redress past imbalances and to ameliorate the conditions of individuals and groups who have been disadvantaged on the grounds of race, colour, gender or disability.

It is the intention of the Government of National Unity that the development and implementation of affirmative action programmes will allow special measures to be taken to ensure that people from disadvantaged groups inside and outside the public service will be identified and appointed through proper procedures within all departments and at all levels of the public service, with the aim of achieving representativeness and improved service delivery.

The WPTPS sets out some initial affirmative action objectives, in the form of targets, which must be reached. In terms of paragraph 10.5 of the WPTPS all departmental establishments should within four years have at least 50% black staff at management level; at least 30% of all new recruits should, within four years, be women at senior and management level; and within ten years, 2% of the public service staff should comprise people with disabilities. In addition to the general targets as set out by the policy paper, each department is required to draw up a detailed affirmative action plan that is designed to meet the specific needs of black people, women and people with disabilities.⁵⁹ These affirmative action plans, however, had to be consistent with the principles of the interim Constitution.⁶⁰

In implementing these targets and achieving the goals as set out in the WPTPS other important principles have to be taken into account. It is clearly stated in paragraph 2.2 of the policy document that the transformation of the public service will be in accordance with the vision and mission of the WPTPS. The policy document

59 Gen Not 1227 in GG 16838 of 24 November 1995 par 10.6.

60 Gen Not 1227 in GG 16838 of 24 November 1995 par 10.6. This include section 212(2)(b) which provides that the "public service shall promote an efficient public administration broadly representative of the South African community". Schedule 4 of the interim Constitution also provides some constitutional principles that have to be taken into account. Principle XXX states:
There shall be an efficient, non-partisan, career-orientated public service broadly representative of the South African community, functioning on a basis of fairness and which shall serve all members or the public in an unbiased and impartial manner, and shall, in the exercise of its powers and in compliance with its duties, loyally execute the lawful policies of the government of the day in the performance of its administrative functions. The structures and functioning of the public service, as well as the terms and conditions of service of its members, shall be regulated by law.

has as central goals the following: In terms of paragraph 2.2(a) “to create a genuinely representative public service which reflects the major characteristics of South African demography, without eroding efficiency and competence” and paragraph 2.2(g) “to upgrade the standards of efficiency and effectiveness of service delivery”.

The *White Paper on Human Resources Management in the Public Sector* is seen as a supportive affirmative action policy to the WPTPS concerning employment in the public sector.⁶¹ The policy document states that a professional and impartial public service that is representative of all sections of the society is essential for an efficient and effective government that wishes to achieve democratic, economic and social goals.⁶² The purpose of the *White Paper on Human Resources Management in the Public Sector* is to provide a policy framework that facilitates the development of human resource management practices which in turn will support an effective and efficient public service that is geared for social and economical transformation.⁶³

The *White Paper on Affirmative Action in the Public Service* (hereafter WPAAPS),⁶⁴ which is to be read in conjunction with the framework of the EEA and the *White Paper on Human Resource Management in the Public Service*, provides a policy framework that sets out the mandatory requirements and steps that national departments and provincial administration should take in developing and implementing their affirmative action programmes. This policy document directly addresses representative bureaucracy by setting out a framework for the creation of a representative public service.⁶⁵ The WPAAPS states that the targets as set out in the WPTPS must be seen as the minimum or baseline national targets that have to be reached.⁶⁶ The ultimate goal is that all groups and levels within the public service should be representative of the society as a whole.⁶⁷

61 Milne 2009 *Journal of Public Administration* 974.

62 Gen Not 2011 in GG 18594 of 31 December 1997 par 1.1.1.

63 Gen Not 2011 in GG 18594 of 31 December 1997 par 1.1.3.

64 Gen Not 564 in GG 18800 of 23 April 1998 2, 5.

65 Milne 2009 *Journal of Public Administration* 974.

66 Gen Not 564 in GG 18800 of 23 April 1998 23 par 1.10.

67 Gen Not 564 in GG 18800 of 23 April 1998 23 par 1.10.

The WPAAPS is focused on promoting a more productive and service delivery-oriented public service.⁶⁸ It is stated in this policy document that affirmative action programmes will play a decisive role in improving effectiveness, efficiency and productivity by maximising contributions of a more diverse workforce.⁶⁹ This representative workplace will in turn assist in developing a more responsive and effective public service that will improve the relationship between the employees and the public as a whole.⁷⁰

The EEA was promulgated with the objective to provide the implementation framework for the guidelines as set out in other affirmative action policies.⁷¹ The preamble of the EEA states that this piece of legislation wants to redress the discriminatory laws and practices as had been undertaken during the apartheid era. Section 20 of the EEA unequivocally states that affirmative action targets must be prepared and implemented to achieve reasonable progress towards employment equity, in that specific employer's workforce.⁷² This means the targets as set out in the EEA are much broader than those contained in the WPTPS.⁷³ When implementing employment equity in the workforce, the designated employer must take into account factors as stated in sections 15 and 42 of the EEA. Section 15(1) defines affirmative action measures as:

Measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

Grogan⁷⁴ suggests that the EEA itself provides some more limitations in applying affirmative action procedures that have to be taken into account. Firstly, beneficiaries of affirmative action programmes must be suitably qualified.⁷⁵ Secondly, these beneficiaries must be afforded equal and not greater opportunities

68 Gen Not 564 in GG 18800 of 23 April 1998 29 par 2.5.

69 Gen Not 564 in GG 18800 of 23 April 1998 29 par 2.5.

70 Gen Not 564 in GG 18800 of 23 April 1998 29 par 2.5.

71 Milne 2009 *Journal of Public Administration* 975.

72 See also the *Code of Good Practice: Preparation, Implementation and monitoring of Employment Equity Plans*, GN R1394 in GG 20626 of November 1999 that relates to section 20 of the EEA.

73 Milne 2009 *Journal of Public Administration* 975.

74 Grogan *Employment Rights* 251.

75 Grogan *Employment Rights* 251.

than their counterparts.⁷⁶ If no suitably qualified designated candidate can be found for a post, the employer's failure in not appointing a qualified person from the non-designated groups cannot be justified.⁷⁷ The same applies when an untrained designated candidate is affirmed into a position that will put himself, his co-workers or the public in danger.⁷⁸

Section 42(a)(i) provides the ultimate goal for affirmative action targets. This section states that suitably qualified people from designated groups must be equitably represented within each occupational category and level in a designated employer's workforce by taking into consideration the demographic profile of the national and regional economically active population.

2.3 Implementing affirmative action policies

Affirmative action policies revolve around the preferential treatment of designated groups, namely Africans, Coloureds and Indians.⁷⁹ This undoubtedly discriminates against people that lack the characteristics of the designated groups, for example white males.⁸⁰ Those who support affirmative action policies will defend it on the basis that it seeks to correct the effect of past discrimination under the apartheid regime.⁸¹ The detractors of affirmative action strongly believe that this is nothing more than discrimination against non-designated groups that does not enjoy the same protection under the EEA as their counterparts.⁸² In viewing affirmative action policies objectively, it will only be regarded as defensible if it seeks to achieve the objectives as set out in the preamble of the EEA.⁸³ When these goals have been achieved or outlived, the EEA will become nothing more than discriminatory legislation.⁸⁴ Therefore it can be concluded that affirmative action policies must be

76 Grogan *Employment Rights* 251.

77 Grogan *Employment Rights* 252.

78 Grogan *Employment Rights* 252.

79 Grogan *Employment Rights* 249-250.

80 Grogan *Employment Rights* 250.

81 Grogan *Employment Rights* 250.

82 Grogan *Employment Rights* 250.

83 Grogan *Employment Rights* 250.

84 Grogan *Employment Rights* 250.

temporary in application and its use must be limited to promoting the interests of only the previously disadvantaged groups.⁸⁵

According to Grogan⁸⁶, the EEA has two approaches that are applied to correct the effects of the systematic employment discrimination which was imposed under the apartheid regime. One approach, which is embodied in Chapter 2⁸⁷ of the EEA, is to prohibit all remaining forms of discrimination and open the way for the appointment, promotion, the determination of remuneration and the distribution of benefits on the basis of merit alone.⁸⁸ The second approach, and definitely more controversial than the first one, is to compel designated employers to prefer those that were previously discriminated against in the apartheid era over other individuals who are not from these designated groups.⁸⁹ Grogan correctly indicates that the first approach is a more acceptable method in dismantling a former unacceptable system in a positive way. The second approach arguably only replaces the old system of racial discrimination with another discriminating one.⁹⁰ The characteristics of a so-called “reverse discrimination” can be identified in this second approach.

This dual approach as found in the EEA attempts to reconcile the logically irreconcilable.⁹¹ On the one hand it forbids designated employers to discriminate and on the other hand it forces them to discriminate to attain the goals of employment equity.⁹² The only way to overcome this contradiction will be to distinguish between fair discrimination and unfair discrimination.⁹³ The EEA provides the process to eliminate unfair discrimination in Chapter 2, and in Chapter 3 how to apply affirmative action measures in the work place. Affirmative action will only be justified when it can be proved that it is fair discrimination in accordance with the EEA.⁹⁴

85 Grogan *Employment Rights* 250.

86 Grogan *Employment Rights* 250.

87 Sections 5 to 11.

88 Grogan *Employment Rights* 250.

89 Grogan *Employment Rights* 250.

90 Grogan *Employment Rights* 250.

91 Grogan *Employment Rights* 250.

92 Grogan *Employment Rights* 250.

93 Grogan *Employment Rights* 250.

94 Grogan *Employment Rights* 250.

Affirmative action procedures must be rational to make it defensible in its implementation in the workforce.⁹⁵ Grogan⁹⁶ states that there are two requirements that have to be taken into account when assessing the rationality of an affirmative action plan. Firstly, an affirmative action plan must be created by the designated employer as reference and starting point for rational procedures.⁹⁷ In *Gordon v Department of Health: KwaZulu-Natal*⁹⁸ it was concluded by the court that in the absence of an affirmative action plan, the appointment of a black candidate who had been rated less suitable by the selection committee than the white male appellant was irrational and arbitrary in every sense.⁹⁹ Secondly, if a designated employer has an affirmative action plan, it is crucial that he must adhere to it.¹⁰⁰ If the employer ignores his own affirmative action plan or does not even adhere to the goals as set by himself, his implementation of the plan is as irrational as a decision taken without any plan.¹⁰¹ The EEA requires that designated employers who adopt affirmative action plans must adhere to it.¹⁰²

2.4 Affirmative action statistics

Milne¹⁰³ made a study in analysing the results of affirmative action policies within the public sector through statistics. The specific targets, as set out and described above, are used as the basis from which the results of the affirmative action measures are assessed.¹⁰⁴ The Personnel and Salary Information System¹⁰⁵ (PERSAL) data, as kept by the Department of Public and Social Affairs, were used to do an accurate analysis. The total public service showed a decline in public servants from 1 267 766 in 1995 to 1 025 137 in 2001.¹⁰⁶ This number, however, increased to 1 166 753 in 2008.¹⁰⁷ The 2011-2012 data shows that the public service has a slight

95 Grogan *Employment Rights* 255.

96 Grogan *Employment Rights* 256.

97 Grogan *Employment Rights* 256.

98 2008 29 ILJ 2535 (SCA).

99 Grogan *Employment Rights* 256.

100 Grogan *Employment Rights* 256.

101 Grogan *Employment Rights* 256.

102 Grogan *Employment Rights* 256.

103 Milne 2009 *Journal of Public Administration* 975.

104 Milne 2009 *Journal of Public Administration* 975.

105 The PERSAL data from 1995 to 2008 are used by Milne in his article.

106 Milne 2009 *Journal of Public Administration* 976.

107 Milne 2009 *Journal of Public Administration* 976.

decrease to 1 061 809 public servants.¹⁰⁸ The total number of women as public servants increased from 618 603 in 1995 to 670 929 in 2008.¹⁰⁹ This number has decreased to 562 871 in 2012.¹¹⁰ By taking the affirmative action policies into consideration, the representation of females in the public service is to be expected. By 2008, women represented 57.5% of the total public service.¹¹¹ The latest figures now show that women represent 53.01% of the total public service.¹¹²

2.4.1 Gender

The target set by government in affirming women was originally set at 30% for senior management level in the public sector. This target was reached in March 2006, which led to the Cabinet revising this target to 50% by the end of March 2009.¹¹³ This new target is seen to be in line with a representative bureaucracy if taken into account that women make up 52% of the population.¹¹⁴ It is also stated that the revised target, in its implementation, must be reflected across all levels of employment and not be limited to senior management only.¹¹⁵

The numbers of women in the public service have grown considerably and steadily with 274 in 1995 to figures of 1 792 in 2004 and 4 052 in 2008.¹¹⁶ The senior management level had the lowest level of female representation of 35%, which fell short of the revised target of 50%.¹¹⁷ The 2011-2012 employment equity statistics show that females now represent 35.1% of the top management.¹¹⁸

108 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

109 Milne 2009 *Journal of Public Administration* 976.

110 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

111 Milne 2009 *Journal of Public Administration* 977.

112 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

113 Milne 2009 *Journal of Public Administration* 975.

114 Milne 2009 *Journal of Public Administration* 975.

115 Milne 2009 *Journal of Public Administration* 975.

116 Milne 2009 *Journal of Public Administration* 978.

117 Milne 2009 *Journal of Public Administration* 978.

118 The Department of Labour 2012 *Commission for employment equity: Annual Report* 19.

2.4.2 Race

The original affirmative action target based on race was that all departments should have 50% black people at management level by 1999.¹¹⁹ This was to be seen only as a minimum target, and was later revised to be representative of the society as a whole.¹²⁰ In a survey concerning the economically active workforce it was found that the economically active population consisted of 74,8% Africans, 12,4% Whites, 10,3% Coloureds and 2,5% Asians.¹²¹ If the terminology is used as described in the WPTPS, it can be concluded that the workforce consists of 88% black and 12% white people.

The number of black people in the public service showed a steady increase from 75% in 1995 to 85% in 2001 to 90% in 2008.¹²² The 2012 data shows an increase to 91.3%.¹²³ While the percentage of whites showed a steady decline across the same period to make up just about 10% of the total public service.¹²⁴ At management level the percentage of whites nearly halved from 1995.¹²⁵ But, in real numbers, there has been an increase in employment of whites only in the senior management service from 2161 in 1995 to 3410 in 2008.¹²⁶ Compared to blacks, their numbers have risen from 1288 to 8249 in the same period.¹²⁷ The figures show that whites were still over represented in the senior management level of the public service by 29% in 2008.¹²⁸ The overall representation of whites in the public sector has dropped to 8.7%.¹²⁹

119 Milne 2009 *Journal of Public Administration* 975.

120 Milne 2009 *Journal of Public Administration* 975.

121 Milne 2009 *Journal of Public Administration* 975, 978.

122 Milne 2009 *Journal of Public Administration* 977.

123 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

124 Milne 2009 *Journal of Public Administration* 977.

125 Milne 2009 *Journal of Public Administration* 978.

126 Milne 2009 *Journal of Public Administration* 978.

127 Milne 2009 *Journal of Public Administration* 978.

128 Milne 2009 *Journal of Public Administration* 981.

129 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

2.4.3 Disabled

The target for the public service in reaching the employment of people with disabilities was set at 2%.¹³⁰ This had to be achieved by 2005. However, the date was postponed and had then to be reached by March 2010.¹³¹ A concerning stumbling block in reaching this target for the disabled is to identify a standardised definition for the term.¹³² The lack of progress towards affirming the disabled can be drawn towards the Government's greater focus on achieving targets for race and gender at the expense of the disabled.¹³³ The 2011-2012 data shows that only 6516 people with disabilities are appointed within the public service.¹³⁴ This equates to only 0.6%. It is clear that a lot must still be done in this area.

3 A critical analysis of the targets set and the implementation of employment equity plans in the public sector

The relationship between affirmative action and the constitutional imperative of efficiency in the public service delivery has been addressed by the courts in numerous judgements. The following judgments will be critically analysed in light of how the courts interpret employment equity plans when effective service delivery is at stake.

3.1 *Public Servants Association of SA v Minister of Justice*

In this judgement the Public Servants Association together with several other individuals successfully sought relief against the appointment of 30 affirmative action candidates to state attorney posts countrywide. It was argued by the applicants that the respondent failed in negotiating affirmative action policies with them.¹³⁵ For this reason a "matter of mutual interest" existed in terms of the then *Public Service*

130 Milne 2009 *Journal of Public Administration* 976.

131 Milne 2009 *Journal of Public Administration* 976.

132 Milne 2009 *Journal of Public Administration* 976.

133 Milne 2009 *Journal of Public Administration* 979.

134 The Department of Labour 2012 *Commission for employment equity: Annual Report* 41.

135 1997 18 ILJ 241 (T) 241G.

*Labour Relations Act*¹³⁶ and therefore required a negotiation between the affected parties before implementing affirmative action plans.¹³⁷

The respondent wanted to advance the constitutional ideal of creating a representative public service and consequently allocated the vacant posts exclusively to designated groups of people.¹³⁸ Sixteen white males also applied for some of these posts, but were not even interviewed.¹³⁹ Their applications were simply rejected from the start. However, the applicants' relevant experience, training, education and years of employment in the Department of Justice were considered by Swart J as relevant evidence concerning this case and was therefore taken into account.¹⁴⁰ Females were then appointed to the vacant posts even though they had considerably less seniority and significantly less experience than their counterparts.¹⁴¹

The applicants alleged that the respondent committed unfair discrimination against them on grounds of race and gender in terms of section 8(2) of the interim Constitution.¹⁴² The respondents bore the *onus* of establishing that the discrimination was fair.¹⁴³ The respondents contended that their affirmative action plan is legitimate in terms of section 8(3) of the interim Constitution.¹⁴⁴ The interim Constitution provided in section 212(2) a "career oriented" public service that functions according to "fair and equitable principles" and which shall promote an "efficient public administration" that is "broadly representative" of the South African community.¹⁴⁵ In appointing candidates to vacant posts in the public service, the interim Constitution required, in terms of section 212(4), that "qualifications, level of training, merit, efficiency and suitability" of the person who qualifies for the appointment must be taken into account, subject to section 212(5).¹⁴⁶ This section

136 Proclamation 105 of 1994. This entire act is now repealed by s212 of the *Labour Relations Act*, 66 of 1995.

137 1997 18 ILJ 241 (T) 241G.

138 1997 18 ILJ 241 (T) 241I.

139 1997 18 ILJ 241 (T) 241I-J.

140 1997 18 ILJ 241 (T) 247A-253J.

141 1997 18 ILJ 241 (T) 242.

142 1997 18 ILJ 241 (T) 242A.

143 1997 18 ILJ 241 (T) 242B.

144 1997 18 ILJ 241 (T) 281I.

145 1997 18 ILJ 241 (T) 242B-C.

146 1997 18 ILJ 241 (T) 242C.

states that the provisions of section 212(4) will “not preclude measures to promote the objectives” as set out in 212(2). In interpreting this subsection the respondent formulated an affirmative action programme that allocated certain state attorney posts to affirmative action candidates.

Section 11 of the PSA, before the amendment in 1997,¹⁴⁷ also required the criteria of “qualifications, level of training, efficiency, merit and suitability” when appointing a person to a post in the public sector. The respondent argued that the term “suitability” as one of the criterion permitted in the identification and appointment of affirmative action candidates as suitable candidates to the specific allocated posts.¹⁴⁸ The court held that section 11 of the current PSA was an exact re-enactment of section 10 of the 1984 PSA and in both these pieces of legislation representativity was not a criterion.¹⁴⁹

The interim Constitution prohibited unfair discrimination in terms of section 8(2). But an exception is made in section 8(3) that allowed “measures to achieve the adequate protection and advancement” of people that were exposed to unfair discrimination in the past. However, these measures must be adequate, which meant it must take into account the rights and legitimate expectations of the present incumbents.¹⁵⁰ The court further held that the directives issued by the Public Service Commission to the Department of Justice to promote representativity did not constitute “designed measures” and was therefore set aside on administrative law grounds.¹⁵¹ These measures were seen as haphazard, random and overhasty. It gave the respondent untrammelled discretion to allocate posts for blacks, women and the disabled without any affirmative action policy or plan as basis.¹⁵² Without this policy or plan, no explanation could be given why the affirmative action posts were created or even how the respondent envisaged “broadly representative”.¹⁵³ This is not called for by the interim Constitution, or the final Constitution. This inevitably led to the earmarking

147 *Public Service Laws Amendment Act, 47 of 1997.*

148 1997 18 ILJ 241 (T) 242E.

149 1997 18 ILJ 241 (T) 242E.

150 1997 18 ILJ 241 (T) 242G.

151 1997 18 ILJ 241 (T) 242H.

152 1997 18 ILJ 241 (T) 242I.

153 1997 18 ILJ 241 (T) 242I.

of posts without neither properly consulting with all parties concerned nor creating any affirmative action policy or plan.

The respondent wanted to achieve the constitutional imperative of broad representativity as quickly as possible within all levels of the civil service.¹⁵⁴ Swart J concluded that broadly representative public administration must not be seen in isolation.¹⁵⁵ It is further suggested that an efficient administration must be promoted in parallel with a broadly representative administration.¹⁵⁶ Representativity must not be pursued as an objective *in vacuo* which will undermine the rest of the constitutional imperatives.¹⁵⁷ Swart J further stated that:¹⁵⁸

It is the civil service which bears the enormous responsibility and requires the extensive expertise to manage the country on the ground from day to day, which management encompasses a myriad of statutory provisions, scientific and technological requirements and logistical and administrative applications, to mention but a few. This is particularly true of professional departments such as for instance the state attorney's offices. To my mind a broadly representative public administration can, in terms of section 212, not be promoted at the expense of an efficient administration. That is not what section 212 permits.

This judgment, even though it was handed down during the interim Constitution, laid down some important principles to take into account when affirmative action policies and plans are implemented in the public sector. This judgement concluded that the ideals and imperatives, as found in both the interim and final Constitution, must be balanced against each other. Special reference is made to the constitutional imperative of efficiency and the importance thereof in a democratic country. Given the history of South Africa, it is understandable that employment equity procedures were introduced to redress the imbalances created by apartheid, but affirmative action policies must be introduced in such a manner that it can be legitimised. The interim Constitution, section 8(3), and the Constitution, section 9(2), grant designated employers the right to implement affirmative action policies. However, this must be done in accordance with an employment equity plan that is drawn up by the designated employer and which sets the basis for implementing employment equity

154 1997 18 ILJ 241 (T) 243A.

155 1997 18 ILJ 241 (T) 309G.

156 1997 18 ILJ 241 (T) 309H.

157 1997 18 ILJ 241 (T) 309I.

158 1997 18 ILJ 241 (T) 308A-B.

goals. The measures that are designed to advance and protect those who were disadvantaged by the past discrimination must take into account the rights and interests of those who will now be affected by these measures.

Affirmative action cannot be achieved overnight and time is needed to implement this policy in a rational manner. Representativity is not meant to be a mathematical percentage, but rather an ideal that all communities should be represented on a broad basis. In interpreting the meaning of “suitability” the court stated that this exclusively refers to the criterion of merit in respect of the requirements of the post.

3.2 *Stoman v Minister of Safety and Security*

The term “efficiency” was discussed in a much greater sense of depth in this court decision.¹⁵⁹ In this judgement the respondent, a black policeman, was appointed instead of the applicant, a white policeman, to a vacancy in the SAPS.¹⁶⁰ The applicant unsuccessfully sought an order against SAPS to set aside the appointment of the respondent.¹⁶¹ The applicant was included in the shortlist for the post and he achieved the highest percentage mark of all the candidates who applied for the vacancy.¹⁶² SAPS contended that the relief sought by the applicant must not be granted because they were obliged to adhere to the affirmative action policy as set out by the police service.¹⁶³ This policy was drawn up within the scope of the EEA.¹⁶⁴

SAPS argued that the employment equity plan which was drawn up compels them to enforce the ideals of representativity as set out in this document.¹⁶⁵ However, the applicant states that SAPS have unfairly discriminated against him in terms of section 9(3) of the Constitution.¹⁶⁶ In spite of the fact that he was the most suitable candidate for the post, he was overseen on the basis of race, and a black candidate

159 McGregor 2003 *Juta's Business Law* 27.

160 2002 3 SA 468 (T) 468F.

161 2002 3 SA 468 (T) 468F, 485E.

162 2002 3 SA 468 (T) 468G.

163 2002 3 SA 468 (T) 468G-H.

164 2002 3 SA 468 (T) 468H.

165 2002 3 SA 468 (T) 468H.

166 2002 3 SA 468 (T) 468H-I.

was appointed in his place.¹⁶⁷ However, the court held that the important question to consider is whether the affirmative action policy or practice can be seen as justifiable and acceptable within the context and wording of the Constitution.¹⁶⁸ In the context of section 9(2) of the Constitution the “measures” in question must make it possible to promote the achievement of equality.¹⁶⁹ A haphazard, random or overhasty policy or practice cannot be described as a designed “measure” to achieve anything.¹⁷⁰ A rational connection must be established between the measures taken and the aim with which it is to be achieved.¹⁷¹ Random and haphazard discrimination will achieve little and might even be counter-productive.¹⁷² To honour the constitutional imperatives, for example the ideals and values of the Constitution to move to substantive equality, proper employment equity plans and programmes must be designed and be put in place.¹⁷³

Van der Westhuizen J disagrees on some remarks by Swart J in the *Public Servants Association of SA v Minister of Justice* concerning efficiency and representativity.¹⁷⁴ He states that situations may exist where a conflict between efficiency and representativity occurs, and therefore requires that a balance must be struck between these ideals.¹⁷⁵ Efficiency and representativity must not be seen as two separate competing or opposing arms, but rather as measures which are interdependent.¹⁷⁶ If affirmative action measures are only implemented where candidates have the same qualifications, merits and experience and whereby nothing else differentiates them between each other, the ideal of equality will not be advanced.¹⁷⁷ But it must also be stated that the requirement of rationality still remains and the appointment of candidates in responsible positions who are wholly unqualified or less than suitably qualified cannot be justified.¹⁷⁸ Van der Westhuizen J states that the requirement of representativity is often linked to the ideal of

167 2002 3 SA 468 (T) 468I.

168 2002 3 SA 468 (T) 469E.

169 2002 3 SA 468 (T) 469E.

170 2002 3 SA 468 (T) 469E.

171 2002 3 SA 468 (T) 469F.

172 2002 3 SA 468 (T) 480C-D.

173 2002 3 SA 468 (T) 482C.

174 2002 3 SA 468 (T) 481G.

175 2002 3 SA 468 (T) 482F.

176 2002 3 SA 468 (T) 482F-G.

177 2002 3 SA 468 (T) 482G.

178 2002 3 SA 468 (T) 482H.

efficiency.¹⁷⁹ For example, a police service will not be efficient if its workforce is not representative of the population or the community that it is supposed to serve.¹⁸⁰ Van der Westhuizen J states:¹⁸¹

A ruthless and draconian police force may be 'efficient' in the sense that it rules with an iron fist and ensures some stability and safety over the short term; but it could hardly be efficient in the long run if it does not enjoy the trust, co-operation and the support of the community because the members of the force, including those in commanding positions, are all perceived to be representative of a different group which may be regarded as strangers or even with hostility or suspicion. In other words the ideal of representativity, or the ideal of the achievement of full equality, cannot necessarily be separated from the ideal of efficiency.

This judgement illustrated that the ideal of efficiency in the public sector is not separate from, or opposed to, the constitutional requirement of representativity. Therefore representativity must be linked to efficiency. It is also concluded that no meaningful effect is given to section 9(2) of the Constitution if a candidate from the designated group is appointed over a candidate from the non-designated group where both have broadly the same qualifications and merits and nothing else distinguishes them from each other except their race and sex. Employment equity was created to advance the designated groups who were discriminated against under the apartheid era. But the appointment of an unqualified, less than suitably qualified, or incapable person will never be justified.

3.3 *Coetzer v Minister of Safety and Security*

In this judgement the applicants, highly trained white male explosives inspectors that are employed in the explosives unit of SAPS, applied for non-designated promotional posts within the explosive unit, which were very limited.¹⁸² These posts were created due to the relocation of the forensic science laboratory.¹⁸³ Employees who were captains of the unit were promoted to the rank of superintendent and a similar promise was made to inspectors whereby they will be promoted to captains, but this

179 2002 3 SA 468 (T) 482C.

180 2002 3 SA 468 (T) 482C.

181 2002 3 SA 468 (T) 482D-E.

182 2003 24 ILJ 163 (LC) 164G-H.

183 2003 24 ILJ 163 (LC) 166J.

promise was not kept.¹⁸⁴ Later in the year, 70 posts were created in the SAPS for promoting employees from inspectors to captains whereby 63% of these vacancies were allocated to the designated groups and 37% to non-designated groups.¹⁸⁵ Not all the designated groups' vacancies were filled and re-advertised leaving at the end 20 posts to be filled.¹⁸⁶ In terms of the general SAPS employment equity plan, white males belong to the non-designated group of people.¹⁸⁷ Once all the non-designated posts were filled, the applicants applied for the posts reserved specifically for the designated groups.¹⁸⁸

Even though no applications were received from the designated groups for the remaining 20 posts, the applicants were refused promotion to these posts.¹⁸⁹ The commander of the lab requested from the divisional commissioner that at least 17 of the 20 posts to be filled by members of the non-designated group for the following reasons:¹⁹⁰ firstly, the services of the members belonging to the non-designated group are indispensable for an effective and professional service; secondly, the explosive unit cannot afford losing their expertise through better offers elsewhere and it must be taken into account that the state has spent large amounts of money on these experts in training them; and thirdly, the explosives unit does not have enough qualified employees belonging to the designated groups. The applicants called upon the Labour Court (LC) to determine whether SAPS had unfairly discriminated against them on a racial basis, in terms of section 6 of the EEA, by not promoting them to the 20 vacant posts that were specifically preserved for the designated groups.¹⁹¹ SAPS argued that the discrimination was fair and in line with its affirmative action policy as contained in the employment equity plan.¹⁹²

SAPS only provided a general affirmative action plan which applied to all persons employed in the SAPS.¹⁹³ Employment equity plans are important because it

184 2003 24 ILJ 163 (LC) 166J.

185 2003 24 ILJ 163 (LC) 167B.

186 2003 24 ILJ 163 (LC) 168A.

187 2003 24 ILJ 163 (LC) 164H.

188 2003 24 ILJ 163 (LC) 164H.

189 2003 24 ILJ 163 (LC) 164H.

190 2003 24 ILJ 163 (LC) 168B-F.

191 2003 24 ILJ 163 (LC) 164I.

192 2003 24 ILJ 163 (LC) 164I and 169F-G.

193 2003 24 ILJ 163 (LC) 164J.

justifies the discrimination that is undertaken.¹⁹⁴ The general employment equity plan of the SAPS records that:¹⁹⁵

The SAPS has taken the approach of implementing Employment Equity Plans per business unit. Due to the large size of SAPS, 123 204 members and the spread throughout the different provinces it is impractical to develop a single plan that will integrate all the dynamics and cater for specific needs and unique circumstances.

However, the forensic science laboratory¹⁹⁶ did not have its own employment equity plan even though it was required by the general SAPS employment equity plan.¹⁹⁷ The court was thus tasked to determine whether the general SAPS employment equity plan can be used to justify its discrimination against the applicants, when the forensic science laboratory failed to draw up an employment equity plan.¹⁹⁸ It was noted by the court that the employment equity plan must be scrutinised within the framework of the Constitution.¹⁹⁹ The Constitution sets out other goals and values which must also be taken into account, for example sections 205-208 which deal with the police force. Section 205(2) requires that the police force must discharge its responsibilities effectively, thus giving the impression that a balance must be struck between the imperatives of affirmative action and efficiency.²⁰⁰ A clear indication of how a balance must be struck between these imperatives is not given by the Constitution, but it is accepted that a rational one will prevail.²⁰¹

The court held that when a complaint is made in terms of section 6 of the EEA, the defence of the state as a designated employer must not only be adjudicated within the scope of section 6(2) of the EEA but also within the constitutional provisions of the Constitution.²⁰² This will ensure that the affirmative action measures as found in the employment equity plan are in harmony with the Constitution.²⁰³ The Constitution envisages an integrated system of law and government which will see

194 2003 24 ILJ 163 (LC) 164J.

195 2003 24 ILJ 163 (LC) 171F.

196 The explosives unit is a business unit within the forensic science laboratory.

197 2003 24 ILJ 163 (LC) 164J.

198 2003 24 ILJ 163 (LC) 164J.

199 2003 24 ILJ 163 (LC) 165A.

200 2003 24 ILJ 163 (LC) 165B.

201 2003 24 ILJ 163 (LC) 165B.

202 2003 24 ILJ 163 (LC) 165C.

203 2003 24 ILJ 163 (LC) 165D.

common law and legislation giving expression to the Constitution by enhancing the values and ideals set out by this document as well.²⁰⁴

The court held that the SAPS' justification of its conduct in relation to the applicants failed on two grounds.²⁰⁵ Firstly, no specific affirmative action plan was set in place for the explosives unit.²⁰⁶ Secondly, the National Police Commissioner's refusal to promote the applicants was based purely on the imperatives as contained in the general SAPS employment equity plan to promote representativity.²⁰⁷ This decision overlooked the constitutional imperative of "efficiency" and notice must be taken that the extensive affirmative actions, which had already been implemented, were insufficient because it did not address the vacancies and operational needs of the explosives unit.²⁰⁸

The court concluded that one of the EEA's goals is to achieve equity in the workplace by way of promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment experienced by the designated groups.²⁰⁹ This will ensure equitable representation in all occupational categories in the workforce. The general employment equity plan of SAPS does not deal specifically with the obligation of discharging their responsibilities effectively.²¹⁰ Therefore an unrepresentative police service is converted to a police service that is representative of the demographics of the South African population in a gradually increasing manner whereby the expertise of serving non-designated members can be utilised.²¹¹ This will ensure that SAPS adhere to the constitutional imperative of "efficiency" while undergoing transformation.

204 2003 24 ILJ 163 (LC) 165D.

205 2003 24 ILJ 163 (LC) 165F.

206 2003 24 ILJ 163 (LC) 165F.

207 2003 24 ILJ 163 (LC) 165F.

208 2003 24 ILJ 163 (LC) 165F-G.

209 2003 24 ILJ 163 (LC) 174H-J.

210 2003 24 ILJ 163 (LC) 174J.

211 2003 24 ILJ 163 (LC) 175A.

The retention of non-designated groups with the relevant skills, expertise and experience are crucial to the explosives unit of SAPS.²¹² The explosives unit cannot immediately replace their capable employees if a sudden loss is incurred; therefore the explosive experts must be in reserve to ensure that if an emergency occurs it will be dealt with effectively.²¹³ It would therefore be reasonable and rational to promote the applicants to the vacant positions.

In conclusion, this case stated that the affirmative action imperative must be balanced with the constitutional imperative that the police service discharges their responsibilities effectively. A rational balance must be struck between these two ideals. The explosives unit could not show any justification for their discrimination against non-designated groups because they failed to draw up a specific employment equity plan for the business unit.

3.4 Solidarity on behalf of Barnard v SA Police Service²¹⁴

The applicant, a white female captain employed in the National Evaluation Services (NES) of the SAPS, applied for a promotion to a newly created superintendent post in 2005.²¹⁵ Her application was considered and she was shortlisted and interviewed, and received the highest score among all other candidates and was recommended by the selection panel to fill the post.²¹⁶ Even though the selection panel contended that service delivery will be adversely affected if she was not appointed, the highest scoring black candidate who was rated fourth during the interviews, was appointed instead.²¹⁷ It was also stated that representativity in the NES will not be affected by the applicant's promotion, as she was already a member of the NES.²¹⁸ The post

212 2003 24 ILJ 163 (LC) 175F.

213 2003 24 ILJ 163 (LC) 175F-G.

214 Please take note that at the time of submitting this mini-dissertation the LC's judgment was overturned by the LAC. However, Solidarity that is acting for the applicant indicated that they will take the case to the Constitutional Court. For more details refer to Legalbrief Today 2012 *Affirmative action test heading to ConCourt* <http://www.legalbrief.co.za>.

215 2010 31 ILJ 742 (LC) 744B.

216 2010 31 ILJ 742 (LC) 744B-C.

217 2010 31 ILJ 742 (LC) 744C.

218 2010 31 ILJ 742 (LC) 744C.

was withdrawn seeing that the divisional commissioner did not support the panel's recommendation and advised the national commissioner not to fill the post.²¹⁹

In 2006, the exact same position was advertised whereby the applicant applied once again.²²⁰ She was shortlisted, interviewed and again she was recommended by the selection panel as the first choice candidate to fill the post.²²¹ The selection panel stated that the applicant had proven her competence and extensive experience in the core functions of the post.²²² It was stated for a second time that representativity will not be negatively affected, as she is already a member of the NES.²²³ This time the regional commissioner supported the selection panel on their recommendation to appoint the applicant but the national commissioner disapproved and withdrew the post yet again.²²⁴

The national commissioner held that the recommended appointment would not address representativity and the post was not "critical", therefore the filling would not affect service delivery.²²⁵ The applicant lodged a grievance, which was then not properly resolved to her satisfaction.²²⁶ This inevitably led to a referral of unfair discrimination in terms of section 10 of the EEA.²²⁷ A certificate of non-resolution was issued by the commissioner seeing that the SAPS failed to attend the conciliation meeting, and the dispute proceeded to the LC.²²⁸

The court evaluated the relevant EEA provisions as well as the employment equity plan that was set forward by the SAPS.²²⁹ The following principles formed the court's decision. Provisions of the EEA as well as the employment equity plan must be applied and interpreted in accordance with the principles of fairness and with due regard for the affected person's constitutional right of equality.²³⁰ It will not be

219 2010 31 ILJ 742 (LC) 744C-D.

220 2010 31 ILJ 742 (LC) 744D.

221 2010 31 ILJ 742 (LC) 744D.

222 2010 31 ILJ 742 (LC) 744D.

223 2010 31 ILJ 742 (LC) 744E.

224 2010 31 ILJ 742 (LC) 744E-F.

225 2010 31 ILJ 742 (LC) 744F.

226 2010 31 ILJ 742 (LC) 744F.

227 2010 31 ILJ 742 (LC) 744F-G.

228 2010 31 ILJ 742 (LC) 744G.

229 2010 31 ILJ 742 (LC) 744G.

230 2010 31 ILJ 742 (LC) 744H.

appropriate to apply employment equity procedures by simply referring to numerical goals as set out in the employment equity plan.²³¹ This approach is too strict and due regard must be paid to the individuals who are adversely affected by these policies.²³² Therefore representativity must counterbalance the affected individual's right to equality and fair decision making.²³³

The court accepted that it is inevitable that individuals from non-designated groups will be affected through the implementation of employment equity plans.²³⁴ However, these plans must, as a matter of substance and procedure, have due regard for the affected individual's right to equality and dignity.²³⁵ Hence the law will establish to what extent the implementation of employment equity plans will be justified to discriminate or adversely affect an individual's rights.²³⁶ The court stated that the following considerations are relevant and will therefore be taken into account:²³⁷ firstly, the EEA requires that the application of its provisions must be made in a rational and fair manner; secondly, due recognition must be given to the affected individual's right to equality; and thirdly, in implementing the employment equity plan, due recognition must be given to the affected individual's right to dignity.

The court held that when a post cannot be filled by an applicant from an underrepresented category, because a suitable candidate cannot be found, the promotion of a suitable candidate from another group cannot be denied without a clear and satisfactory explanation.²³⁸ A rational connection must be made between the provisions of the employment equity plan and the implementation thereof.²³⁹ The term efficient "service delivery" is a relevant factor which may be taken into account when implementing employment equity plans, in appropriate circumstances.²⁴⁰

231 2010 31 ILJ 742 (LC) 744H.

232 2010 31 ILJ 742 (LC) 744I.

233 2010 31 ILJ 742 (LC) 744I.

234 2010 31 ILJ 742 (LC) 744I.

235 2010 31 ILJ 742 (LC) 744I-J.

236 2010 31 ILJ 742 (LC) 744J.

237 2010 31 ILJ 742 (LC) 745A.

238 2010 31 ILJ 742 (LC) 745B.

239 2010 31 ILJ 742 (LC) 745C.

240 2010 31 ILJ 742 (LC) 745C.

The employer must prove that the alleged discrimination against the applicant is fair.²⁴¹ Thus the court must be placed in a proper position by way of sufficient evidence which will enable it to understand the reasoning behind the justification of the decision taken by the SAPS not to promote the applicant.²⁴² The court, however, found that the evidence before it did not justify the national commissioner's reason and justification for the decision taken not to promote the applicant.²⁴³ The SAPS argued that the decision was taken within the scope of the EEA as well as the employment equity plan to achieve representativity at the salary level to which the applicant sought promotion, namely level 9.²⁴⁴ It was stated that her employment in this salary level would have aggravated the over-representativity of white males and white females.²⁴⁵ The court accepted this argument as correct, but pointed out that representativity would have been approved at salary level 8 if the applicant was promoted.²⁴⁶

The SAPS then contended that it was not only the applicant, who was not appointed, but other suitable black candidates were also denied this promotion; therefore no discrimination had taken place on account of race.²⁴⁷ The court rejected this argument and stated that the allegation of discrimination had a much broader implication.²⁴⁸ It can be accepted that if no affirmative action policy existed, the applicant would have been appointed. However, she was not appointed due to her race.²⁴⁹ This was enough to establish discrimination against the applicant. Even though other suitable black candidates were also not appointed, the non-appointment of the applicant will not be rendered fair.²⁵⁰ The court held that when SAPS did not adhere to the employment equity plan by not appointing a suitable black candidate, it was unfair to the applicant not to appoint her.²⁵¹ The applicant is

241 2010 31 ILJ 742 (LC) 745C.
242 2010 31 ILJ 742 (LC) 745C-D.
243 2010 31 ILJ 742 (LC) 745D.
244 2010 31 ILJ 742 (LC) 745E.
245 2010 31 ILJ 742 (LC) 745E.
246 2010 31 ILJ 742 (LC) 745F.
247 2010 31 ILJ 742 (LC) 745F.
248 2010 31 ILJ 742 (LC) 745F-G.
249 2010 31 ILJ 742 (LC) 745G.
250 2010 31 ILJ 742 (LC) 745H.
251 2010 31 ILJ 742 (LC) 745H.

a member of the designated group in terms of the EEA and was the best candidate for the promotion.²⁵²

It was thus concluded that the decision taken by the SAPS, through the national commissioner, was irrational and no rational connection can be made between the provisions in the employment equity plan and the measures adopted to implement them.²⁵³ If no suitable candidate is found from the designated group of individuals, it will be unfair and irrational not to appoint a member of the non-designated group when efficient service delivery is in jeopardy. In this judgement the applicant was a member of the designated group, because she fell under the SAPS employment equity plan as an individual who was discriminated against in the past. It was unfair in every sense not to appoint the applicant in the light of other black candidates not being deemed suitable to fill the post.

3.5 *Van Eden and SA Police Service*²⁵⁴

The first respondent, the SAPS, advertised a post of senior artisan superintendent within the workforce.²⁵⁵ The applicant, a white male, who had been acting in this position for some time and had held a motor mechanic and an automotive electrician certificate together with accreditation as a training adviser, had applied for this job.²⁵⁶ The applicant is a highly qualified individual and was rated best candidate for the post by the evaluation panel. Hence he was recommended to fill the vacancy.²⁵⁷ However, the post was given to the second respondent, M, who was rated fourth by the evaluation panel.²⁵⁸

The second respondent only held an automotive electrician certificate and had not even undergone any mechanically related training.²⁵⁹ The SAPS held that in appointing the second respondent “service delivery” would be promoted and equity

252 2010 31 ILJ 742 (LC) 745H.

253 2010 31 ILJ 742 (LC) 746A-B.

254 2010 31 ILJ 1286 (BCA).

255 2010 31 ILJ 1286 (BCA) 1286G.

256 2010 31 ILJ 1286 (BCA) 1286H.

257 2010 31 ILJ 1286 (BCA) 1286H.

258 2010 31 ILJ 1286 (BCA) 1286I.

259 2010 31 ILJ 1286 (BCA) 1286I.

would be addressed at the relevant salary level.²⁶⁰ The applicant claimed that in terms of section 186(2)(a) of the *Labour Relations Act*,²⁶¹ the first respondent's failure to appoint him to the post amounted to an unfair labour practice.²⁶² It was further argued that the second respondent's automotive electrician certificate was mainly irrelevant because the SAPS did not train automotive electricians and most of the electrical repairs were outsourced.²⁶³ The training required for a motor mechanic to be a qualified artisan entailed a three-year exercise.²⁶⁴

In terms of section 20(3) of the EEA, a person will only be considered "suitably qualified" if he or she has the capacity to acquire, within a reasonable time, the ability to do the job properly. It will require the second respondent at least three years to qualify as an artisan and to perform the core functions of the job.²⁶⁵ The three-year period was therefore not a reasonable time as required by the EEA.²⁶⁶ The applicant contended that the first respondent did not apply its mind to the task of filling the post when it appointed an inexperienced person whose qualifications were irrelevant.²⁶⁷

This arbitration award reiterated that section 15(1) of the EEA requires that suitably qualified people from designated groups must have equal employment opportunities that will ensure equitable representation in all occupational categories and levels in the workforce. However, the SAPS took an irrational decision by promoting an unqualified and inexperienced candidate on the sole basis of employment equity.

3.6 *Engineering Council of SA v City of Tshwane Metropolitan Municipality*²⁶⁸

In this judgement the second applicant, an electrical engineer whom is employed by the first respondent municipality, held the position of Managing Engineer: Power

260 2010 31 ILJ 1286 (BCA) 1286I.

261 66 of 1995.

262 2010 31 ILJ 1286 (BCA) 1286I-J.

263 2010 31 ILJ 1286 (BCA) 1286J.

264 2010 31 ILJ 1286 (BCA) 1286J.

265 2010 31 ILJ 1286 (BCA) 1287C.

266 2010 31 ILJ 1286 (BCA) 1287C-D.

267 2010 31 ILJ 1286 (BCA) 1286J-1287A.

268 2008 29 ILJ 899 (T).

System Control (PSC).²⁶⁹ As a professional engineer he is also registered with the Engineering Council of South Africa (ECSA).²⁷⁰ One of his professional duties included the duty to ensure that the municipality complied with the *Occupational Health and Safety Act*²⁷¹ (OHSA) and therefore he had been issued with a certificate of appointment in terms of regulation 2(7) of the *General Machinery Regulations*.²⁷² The PSC section, as its primary function, must ensure that the correct systems of configurations and safety measures are applied in the municipality's high, medium and low voltage networks.²⁷³ This is to ensure that customers receive a safe supply of electricity.²⁷⁴

For this reason the work was inherently dangerous and the second applicant had to ensure that when he recruited and appointed PSC system operators that they would be competent and able to do this highly dangerous work without placing the lives and safety of the public, themselves and other employees in jeopardy.²⁷⁵ Managers within the municipality, who lacked the necessary technical expertise in this dangerous field, pressurised the second applicant to appoint systems operators within the PSC who did not have the necessary skills or experience.²⁷⁶ The second applicant raised his concerns with senior managers at high level meetings of the municipality and refused point blank to appoint incompetent people simply for the sake of employment equity, who would endanger the lives of the public and fellow employees.²⁷⁷

The second applicant made it clear to the senior management of the municipality that he would be obliged to report the matter to the ECSA, should he be forced to appoint personnel that he believed lacked the necessary competencies.²⁷⁸ Hence, he wrote a letter to the senior managers of the municipality expressing his concerns and asked to be relieved from his professional duties flowing from his appointment

269 2008 29 ILJ 899 (T) 900D.

270 2008 29 ILJ 899 (T) 900E.

271 85 of 1993.

272 2008 29 ILJ 899 (T) 900E-F.

273 2008 29 ILJ 899 (T) 900F.

274 2008 29 ILJ 899 (T) 900F.

275 2008 29 ILJ 899 (T) 900F-G.

276 2008 29 ILJ 899 (T) 900H.

277 2008 29 ILJ 899 (T) 900H-I.

278 2008 29 ILJ 899 (T) 900I-J.

under regulation 2(7) of the *General Machinery Regulations*.²⁷⁹ Copies of the letter were also sent to the Department of Labour and ECSA.²⁸⁰ This action motivated the municipality to take disciplinary action against the second applicant and he was ultimately found guilty of sending copies of the letter to external organs without taking up his concerns at the highest level and without prior authorisation or approval from the municipality.²⁸¹ Before any sanction could be imposed on the second applicant, he obtained an interim order from the High Court interdicting the municipality from continuing with disciplinary proceedings or imposing any disciplinary sanction against him for his supposed misconduct in sending the letters to the said external organs.²⁸²

The court then proceeded to evaluate the relevant provisions of the OHS Act as well as the *General Machinery Regulations* and agreed with the applicants that these documents emphasised the importance of workplace safety.²⁸³ The court stated unambiguously that workplace safety carried an importance that superseded an individual employer's wants and needs.²⁸⁴ It was also mentioned that the EEA played an important role in the events leading up to the actual writing of the letter by the second applicant and the subsequent decision of the municipality to institute disciplinary action against him.²⁸⁵ The court indicated that the following was seen to be a fair summary of the facts concerning the employment equity debate between the parties:²⁸⁶ the PSC centre was seriously understaffed; all the suitably qualified system operators were working unacceptable high levels of overtime to finish work; new operators had to be appointed urgently to help alleviate the work pressure; and the safety of employees and the public as well as the need for proper service delivery were at stake.

279 2008 29 ILJ 899 (T) 900J.

280 2008 29 ILJ 899 (T) 901A.

281 2008 29 ILJ 899 (T) 901A.

282 2008 29 ILJ 899 (T) 901A-B.

283 2008 29 ILJ 899 (T) 901H-I.

284 2008 29 ILJ 899 (T) 901I.

285 2008 29 ILJ 899 (T) 922H.

286 2008 29 ILJ 899 (T) 922I-923A.

The second applicant drew up a test for the selection of a foreman as well as system operators which was approved by his supervisor as being “appropriate”.²⁸⁷ These posts were initially advertised internally and 13 applications were received.²⁸⁸ All the applicants completed the test and the top four candidates were all white with a score between 62% and 42%.²⁸⁹ The next eight candidates, also all white, received a score between 38% and 21% and the only employment equity candidate came last with a score of 12%.²⁹⁰ The second applicant expressed his concerns that the employment equity candidate could not be considered for the position as he would endanger his own life and that of others.²⁹¹ This warning was ignored and the employment equity candidate was later appointed by the respondent.²⁹² Nonetheless, the top four candidates were shortlisted and forwarded to the human resources department.²⁹³ The human resources department challenged the shortlist and suggested a meeting, at which an agreement was reached that four system operators would be appointed from the competent group based on test results.²⁹⁴ Another four system operators positions would be re-advertised and filled from a group of people with the necessary qualifications, who could be trained up within a reasonable time to become competent”.²⁹⁵

As a result of the agreement an external advertisement was placed in the Pretoria News, for system operators, which attracted 120 applications.²⁹⁶ Of these applications only 15 applicants were employment equity candidates with the necessary electrical trade certificates and some relevant experience.²⁹⁷ All 15 employment equity candidates were invited to complete the test and only 11 attended.²⁹⁸ Their scores were disappointingly poor and they averaged between 32% and 2%.²⁹⁹ The scores were adjusted upward by 10% and the most successful

287 2008 29 ILJ 899 (T) 923A.
288 2008 29 ILJ 899 (T) 923H.
289 2008 29 ILJ 899 (T) 923I.
290 2008 29 ILJ 899 (T) 923I.
291 2008 29 ILJ 899 (T) 923I-J.
292 2008 29 ILJ 899 (T) 923J.
293 2008 29 ILJ 899 (T) 923J.
294 2008 29 ILJ 899 (T) 924A.
295 2008 29 ILJ 899 (T) 924A.
296 2008 29 ILJ 899 (T) 924H.
297 2008 29 ILJ 899 (T) 924H.
298 2008 29 ILJ 899 (T) 924I.
299 2008 29 ILJ 899 (T) 924I.

candidates were shortlisted.³⁰⁰ Shortly after concluding the above process a new General Manager: Electricity Development and Energy Business was appointed.³⁰¹ He had no knowledge regarding the previous efforts made to appoint system operators from the white and employment equity ranks and accused the human resources department of blocking transformation by listing only white applicants for employment.³⁰² As remedy he insisted that only employment equity candidates would be shortlisted irrespective of their skills and expertise and that this approach had the full support of council.³⁰³

In terms of the first respondent's recruitment policy, this "newly created" recruitment plan was arbitrary in every sense of the word.³⁰⁴ The recruitment policy of the employer reads as follow:³⁰⁵

The shortlist must also be representative of all races and genders. If representativity is unobtainable (eg in the engineering field) it must be explained and motivated in a shortlist letter why specific candidates were invited and why the shortlist is not representative (eg if no black candidates applied). Be sensitive to this issue - adhere to the rules, but a shortlist of five white males or five black females is not representative. Keep this in mind when compiling criteria.

Even though there was no shortage of motivation for shortlisting of only white candidates, sincere efforts were made by all parties concerned to compile an equity friendly shortlist.³⁰⁶ However the newly appointed General Manager showed no sensitivity towards his own employer's employment equity policy.³⁰⁷ Representativity was the most important factor according to him.³⁰⁸ The safety of employees or members of the public never crossed his mind and he accused certain managers as being the cause of the lack of skills and expertise amongst black employees.³⁰⁹

300 2008 29 ILJ 899 (T) 924I.

301 2008 29 ILJ 899 (T) 925A.

302 2008 29 ILJ 899 (T) 925B-E.

303 2008 29 ILJ 899 (T) 925D-E.

304 2008 29 ILJ 899 (T) 926E-F.

305 2008 29 ILJ 899 (T) 926C-D.

306 2008 29 ILJ 899 (T) 926D-E.

307 2008 29 ILJ 899 (T) 926E.

308 2008 29 ILJ 899 (T) 926E.

309 2008 29 ILJ 899 (T) 926E-F.

The court concluded that the EEA had no provision to the effect that non-designated candidates should be excluded altogether.³¹⁰ The aim of the EEA is to “promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment”.³¹¹ Section 15(4) of the EEA further stipulates that a designated employer may not take a decision concerning an employment policy or practice that will establish an absolute barrier to the prospective or continued employment or advancement of people who are not of the designated groups, subject to section 42. It was finally concluded by Prinsloo J that:³¹²

In all these circumstances, I fail to see how I can express approval for actions aimed at achieving (and accelerating) equity transformation at all costs and in disregard of safety considerations. This must be particularly true in the case of a lethal commodity like high voltage electricity. In my view there must be a sensible balance between considerations of employment equity on the one side and safety on the other side.

3.7 The impact of affirmative action

According to Sebola³¹³ the Constitution emphasises that efficient and effective public administration must be achieved through capable and suitable human resource composition of the South African population. However the public administration uses the EEA and its associated affirmative action policies to balance the labour force using the demographic profile of South Africa.³¹⁴ This balancing by way of demographics will often lead to the appointment of poorly qualified and incompetent employees to particular positions and vacancies.³¹⁵ Sebola attributes this problem to the following, namely: political nepotism and the lack of suitable candidates from the designated group.³¹⁶ These two problems disregard the need of constitutionally serving the public efficiently and effectively.³¹⁷ A good argument can be made that thus far the implementation of affirmative action policies in the state departments have been based purely on promoting representativity rather than basing promotions

310 2008 29 ILJ 899 (T) 926I-J.

311 2008 29 ILJ 899 (T) 927A.

312 2008 29 ILJ 899 (T) 927C-D.

313 Sebola 2009 *Journal of Public Administration* 1107.

314 Sebola 2009 *Journal of Public Administration* 1107.

315 Sebola 2009 *Journal of Public Administration* 1107.

316 Sebola 2009 *Journal of Public Administration* 1107.

317 Sebola 2009 *Journal of Public Administration* 1107.

on the abilities of individuals in the public sector.³¹⁸ It is a constitutional contradiction when the public sector emphasises the implementation of employment equity policies solely on the basis of representativity and ignores the promotion of an efficient, economic and effective public administration.³¹⁹

Political nepotism contributes to an inefficient public administration.³²⁰ Political appointments where managers lack expertise, skill and knowledge can be causally linked to a lack of efficient public service delivery.³²¹ In the same breath it must also be noted that previous discriminatory policies created a knowledge gap between black and white South Africans.³²² These practices affected the skills gap in such a negative manner that it will take some time to correct the playing field to the point where designated groups will be equal to their counterparts in knowledge and skills.³²³ Therefore the EEA allows for the retention and development of the skills of designated groups through training measures.³²⁴

Token appointments also compromise the whole motive behind an efficient public service delivery and administration.³²⁵ In these situations candidates, with a total different set of skills, are appointed to positions that do not require their knowledge or experience.³²⁶ If candidates are considered for positions because they have the potential to be developed, and not due to political nepotism, an efficient and effective public administration may be guaranteed.³²⁷ Therefore, it can be morally correct to appoint candidates from the designated groups and to allow them to perform in their respective positions if they are groomed through proper training that will develop

318 Sebola 2009 *Journal of Public Administration* 1107.

319 Sebola 2009 *Journal of Public Administration* 1107. See also Wessels JS "Transforming the public service to serve a diverse society: can representativeness be the most decisive criterion?" 2008 *Politeia* 21-36 where it was concluded that equality and equal opportunities cannot be achieved for all members of the diverse South African society if representativeness is regarded as a sufficient condition for public service employment.

320 Sebola 2009 *Journal of Public Administration* 1108.

321 Sebola 2009 *Journal of Public Administration* 1108.

322 Sebola 2009 *Journal of Public Administration* 1108.

323 Sebola 2009 *Journal of Public Administration* 1108.

324 Sebola 2009 *Journal of Public Administration* 1108. For a discussion on skills development see Kroukamp H "Skills training: A prerequisite for the changing position and status of public servants in South Africa" 2002 *Journal of Public Administration* 453-474.

325 Sebola 2009 *Journal of Public Administration* 1108.

326 Sebola 2009 *Journal of Public Administration* 1108.

327 Sebola 2009 *Journal of Public Administration* 1108.

their respective skills.³²⁸ This will promote reconciliation and effective public administration.³²⁹ It must also be stated and understood that members of the non-designated groups who are affected by affirmative action appointments, feel emotionally alienated in their workplaces.³³⁰ This results in the demoralisation of workers who are not benefiting from employment equity policies and will thus contribute to an inefficient public service delivery due to the lack of loyalty by the affected employees.³³¹

By implementing affirmative action policies with the sole purpose of balancing the demographics, this will inevitably lead to political nepotism and revenge.³³² Affirmative action policies will then be used to settle political scores instead of addressing the imbalances of the past.³³³ In principle there is nothing wrong in addressing the past inequalities, but if economic realities are ignored in favour of a vote-winning social tinkering, then affirmative action policies cannot be justified.³³⁴ If the South African labour force demographics are balanced with incompetent affirmative action candidates the development and progress of the South African society together with its democracy will be in shambles.³³⁵

4 Conclusion and recommendations

This mini-dissertation was tasked with the objective to determine whether the enforcement of employment equity goals in government is supporting the constitutional imperative of an efficient public service delivery. It is clear in terms of the Constitution section 9(2), the EEA, the WPTPS, the *White Paper on Human Resources Management in the Public Sector* and the WPAAPS that government is committed to ensure that the public service workforce is representative of the demographic profile of the country. Affirmative action policies in South Africa are a

328 Sebola 2009 *Journal of Public Administration* 1108.

329 Sebola 2009 *Journal of Public Administration* 1108.

330 Sebola 2009 *Journal of Public Administration* 1109.

331 Sebola 2009 *Journal of Public Administration* 1109.

332 Sebola 2009 *Journal of Public Administration* 1108.

333 Sebola 2009 *Journal of Public Administration* 1108.

334 Sebola 2009 *Journal of Public Administration* 1109.

335 Sebola 2009 *Journal of Public Administration* 1109.

mixture of a representative bureaucracy and an attempt to address inequalities.³³⁶ While the affirmative action policies have a strong focus on passive representation and targets, the discussions surrounding affirmative action have now shifted to empowerment.³³⁷ It is now argued that broader empowerment is needed rather than a passive representative bureaucracy.³³⁸ Some politicians state that the majority of the population has to be empowered to ensure economic freedom, while others declare that affirmative action is not a number issue, but about creating opportunities.³³⁹

Milne³⁴⁰ argues that there “appears to be a contradiction between the language of the policies of affirmative action, that of passive representative bureaucracy and the notion of affirmative action as an empowerment tool which goes beyond numbers.” The use of targets as a means to measure the success of affirmative action, while the justification for affirmative action lies in the notion of empowering the people, is seen as the contradiction.³⁴¹ The following two questions thus beg to be answered:³⁴² Can representativity lead to empowerment? Can numbers equate to the empowerment of people? Milne states that some do indeed argue that passive representation, the meeting of targets, can lead to active representation that will be viewed as a form of empowerment.³⁴³ The equity target of 2% set for people with disabilities provides an example where policy making is shifted to the empowerment of people with disabilities.³⁴⁴ The legal and regulatory framework that specifies the numbers required for the representation of the disabled is seen as insufficient to attain these targets.³⁴⁵ A broader approach is needed to obtain these objectives and to move beyond simply setting the targets.³⁴⁶ Designated employers must now consider how to achieve these targets and more importantly, how to adapt the

336 Milne 2009 *Journal of Public Administration* 987.

337 Milne 2009 *Journal of Public Administration* 987-988.

338 Milne 2009 *Journal of Public Administration* 986.

339 Milne 2009 *Journal of Public Administration* 986.

340 Milne 2009 *Journal of Public Administration* 986.

341 Milne 2009 *Journal of Public Administration* 986.

342 Milne 2009 *Journal of Public Administration* 986.

343 Milne 2009 *Journal of Public Administration* 986.

344 Milne 2009 *Journal of Public Administration* 987.

345 Milne 2009 *Journal of Public Administration* 987.

346 Milne 2009 *Journal of Public Administration* 987.

working environment to make it more conducive for people with disabilities, to ensure the appointment of the disabled.³⁴⁷

It is evident that the current government promulgated legislation, policies and regulations to ensure that a representative bureaucracy is created in a post-1994 democratic South Africa. This was done within the idea that the population would be more responsive to a public service that is more representative. This will also consequently lead to a bureaucracy that has greater legitimacy in the eyes of the citizens. According to Milne³⁴⁸ a more representative bureaucracy has been created where the citizens can identify with the public servants due to the greater understanding of the population and their concerns. The example is given where the public servants can communicate with the citizens in their mother tongue.³⁴⁹ This ensures that problems are addressed in a quicker and more effective manner.

When the statistics, as given by Milne, are interpreted it can be safely assumed that the public service has undergone quite a dramatic transformation. The government has reached its goal to relatively quickly reflect the demographics of the population within the public service workforce. While the government has strongly focused on the constitutional imperative of creating a public service workforce that will reflect the demographics of the country, other constitutional imperatives such as efficiency was occasionally left unattended to and in the background. This is evident from the judgments as discussed above.

However, these judgments laid down some essential principles to take into account when employment equity plans are implemented within the public service workforce. The following can be seen as the most important: An employment equity plan must be drawn up to establish the basis on which there can be discriminated against non-designated groups; Employment equity plans must be created within the scope of the EEA and must complement the ideals and imperatives as set out in the Constitution; These constitutional imperatives must be balanced against each other; A haphazard, random or over hasty constructed employment equity policy can never

347 Milne 2009 *Journal of Public Administration* 987.

348 Milne 2009 *Journal of Public Administration* 986.

349 Milne 2009 *Journal of Public Administration* 986.

be described as a designed “measure” to achieve anything; The rights and interests of those who are currently discriminated against must also be taken into account; Affirmative action measures cannot be achieved overnight and time is needed to implement these policies in a rational manner; Representativity is not a mathematical percentage, but rather an ideal where communities are represented on a broad basis; If a conflict between efficiency and representativity exists, a rational balance must be struck between these two ideals; Efficiency and representativity must not be seen as two separate competing and opposing arms, but rather as measures which are interdependent; Affirmative measures cannot only be implemented where candidates have the same qualifications, merits and experience and whereby nothing else differentiates them from each other because the constitutional ideal of equality will not be advanced; Rationality still remains and the appointment of candidates in responsible positions who are wholly unqualified or less than suitably qualified cannot and will never be justified; Employment equity plans will be inadequate by simply referring to numerical goals – it is too strict and due regard must be paid to the individuals who are adversely affected by these policies; As a matter of substance and procedure, employment equity plans must have due regard for an affected individual’s right to equality and dignity; Lastly, when a position cannot be filled by an applicant from an underrepresented category, because a suitable candidate cannot be found, the promotion of a suitable candidate from another group cannot be denied without a clear and satisfactory explanation. Former President Thabo Mbeki stated that:³⁵⁰

Clearly, the matter of service delivery is central to our freedom because we cannot enjoy this freedom while our fellow South Africans have no clean water, have no sanitation and are still using the bucket system. We cannot enjoy this freedom while many among us still have no electricity and other basic services. It is therefore very important that all spheres of government combine their efforts to ensure speedy implementation of programmes around these basic services.

Mpehle³⁵¹ states that the general feeling among citizens is that public service delivery is improving at a snail’s pace. The majority of the population still live in

350 Mbeki “Address of the President of South Africa”. The speech can be found on www.info.gov.za/speeches.

351 Mpehle 2012 *Department of Public Administration and Management* 218.

circumstances that are totally unacceptable.³⁵² People who have been on a waiting list since 1994 for Reconstruction and Development Plan (RDP) houses are still waiting due to corrupt officials and greedy councillors.³⁵³ In 2006, a Democratic Alliance survey revealed that the ANC-led government had failed the South African citizens miserably concerning service delivery.³⁵⁴ The survey concluded that out of 284 municipalities 71% were unable to provide sanitary services to their residents; 64% failed to remove refuse from 60% of homes; 55% could not provide clean water to 60% properties; 13% could not provide free basic electricity supply as promised; 43% could not provide electricity for 60% of homes; and 41% could not provide housing for 60% of their residents.³⁵⁵ The service delivery challenges identified by the survey included the following:³⁵⁶ gross financial mismanagement; corruption in tender and procurement processes; illiteracy; no proper mechanisms for monitoring service delivery; lack of qualified staff and funds; and a huge backlog of service delivery in informal and rural areas.

Mpehle did his own research concerning efficient service delivery in South Africa, which was conducted within three provinces, and some troubling findings were made.³⁵⁷ He states that one major cause in lack of service delivery can be attributed to inadequate human capacity.³⁵⁸ The common perception from 71% of the respondents in the research was that municipal officials, especially those in key positions, had not been employed or promoted due to their qualifications, competence or experience, but rather on their political affiliation and nepotism.³⁵⁹ President Jacob Zuma has even admitted that the redeployment of cadres into key senior municipal positions has affected the performance of certain municipalities.³⁶⁰

The respondents, about 65% them, further alleged that the officials who were put in charge of the financial management did not have the necessary basic skills and

352 Mpehle 2012 *Department of Public Administration and Management* 218.

353 Mpehle 2012 *Department of Public Administration and Management* 219.

354 Mpehle 2012 *Department of Public Administration and Management* 219.

355 Mpehle 2012 *Department of Public Administration and Management* 219.

356 Mpehle 2012 *Department of Public Administration and Management* 219-220.

357 Mpehle 2012 *Department of Public Administration and Management* 221.

358 Mpehle 2012 *Department of Public Administration and Management* 222.

359 Mpehle 2012 *Department of Public Administration and Management* 222.

360 Mpehle 2012 *Department of Public Administration and Management* 222.

abilities to manage the available resources.³⁶¹ This, Mpehle states, corresponds with the Auditor-General's report of the 2006/2007 and 2007/2008 financial year where only 20% and 23% of the municipalities, respectively, received an unqualified audit report.³⁶² However, this number has improved in the 2011/2012 financial year to 45%.³⁶³

In conclusion, it is evident that the current government has made a remarkable effort in transforming the public service workforce to a more representative bureaucracy. Targets were set in legislation, policies and regulations and most of them have been achieved. However, it can be argued that the government implemented and reached these targets in a quick and arbitrary manner. This is evident as discussed in the judgements above. Research has also shown that a representative bureaucracy does not always have the desired outcome. People in South Africa are losing faith in the public service. Service delivery has been neglected and people are appointed to posts only on the basis of affirmative action.

It is therefore concluded that the enforcement of employment equity targets in the public service is not supporting the constitutional imperative of an efficient public service delivery. The government should decline from being obsessed about reaching employment equity targets and must rather appoint the most suitable qualified persons in the relevant positions. After 18 years of democracy in South Africa, it is now crucial to look beyond a person's skin colour and sex. The best candidate in terms of experience and qualifications should be appointed in every position within the public service to ensure that efficient service delivery can be rendered to every citizen within South Africa.

361 Mpehle 2012 *Department of Public Administration and Management* 222.

362 Mpehle 2012 *Department of Public Administration and Management* 222-223.

363 Anon 2012 <http://www.fin24.com>.

BIBLIOGRAPHY

Literature

Dupper 2008 *SAJHR*

Dupper O "Affirmative action: Who, how and how long?" 2008 *SAJHR* 425-444

Grogan *Employment Rights*

Grogan J *Employment Rights* (Juta Cape Town 2010)

Kroukamp 2002 *Journal of Public Administration*

Kroukamp H "Skills training: A prerequisite for the changing position and status of public servants in South Africa" 2002 *Journal of Public Administration* 453-474

McGregor 2003 *Juta's Business Law*

McGregor M "Affirmative action and "efficiency" in the public service" 2003 *Juta's Business Law* 25-33

Milne 2009 *Journal of Public Administration*

Milne C "Affirmative Action in South Africa: From Targets to Empowerment" 2009 *Journal of Public Administration* 969-990

Mpehle 2012 *Department of Public Administration and Management*

Mpehle Z "Are service delivery protests justifiable in the democratic South Africa" 2012 *Department of Public Administration and Management* 213-227

Pretorius 2010 *SAJHR*

Pretorius JL "Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence" 2010 *SAJHR* 536-570

Sebola 2009 *Journal of Public Administration*

Sebola M "Affirmative action policy: The administrative efficiency and socio-cultural impact on the South African society" 2009 *Journal of Public Administration* 1102-1113

Wessels 2008 *Politeia*

Wessels JS "Transforming the public service to serve a diverse society: can representativeness be the most decisive criterion?" 2008 *Politeia* 21-36

Case Law

Coetzer and others v Minister of Safety and Security and another 2003 24 ILJ 163 (LC)

Engineering Council of SA and another v City of Tshwane Metropolitan Municipality and another 2008 29 ILJ 899 (T)

Gordon v Department of Health: KwaZulu-Natal 2008 29 ILJ 2535 (SCA)

Public Servants Association of SA and others v Minister of Justice and others 1997 18 ILJ 241 (T)

Solidarity on behalf of Barnard v SA Police Service 2010 31 ILJ 742 (LC)

Stoman v Minister of Safety and Security and others 2002 3 SA 468 (T)

Van Eden and SA Police Service and another 2010 31 ILJ 1286 (BCA)

Legislation and government publications

Code of Good Practice: Preparation, Implementation and monitoring of Employment Equity Plans, GN R1394 in GG 20626 of November 1999

Constitution of the Republic of South Africa, 200 of 1993

Constitution of the Republic of South Africa, 1996

Employment Equity Act, 55 of 1998

General Machinery Regulations, GN R1521 in GG 11443 of 5 August 1988

Occupational Health and Safety Act, 85 of 1993

Public Services Act, 103 of 1994

Labour Relations Act, 66 of 1995

Public Service Laws Amendment Act, 47 of 1997

Public Service Labour Relations Act, 105 of 1994

The Department of Labour 2012 *Commission for employment equity: Annual Report 2011-2012* www.labour.gov.za

White Paper on Affirmative Action in the Public Service, Gen Not 564 in GG 18800 of 23 April 1998

White Paper on Human Resource Management in the Public Service, Gen Not 2011 in GG 18594 of 31 December 1997

White Paper on Reconstruction and Development, Gen Not 1954 in GG 16085 of 23 November 1994

White Paper on the Transformation of the Public Service, Gen Not 1227 in GG 16838 of 24 November 1995

Conference contributions

Mbeki "Address of the President of South Africa"

Mbeki T "Address of the President of South Africa, Thabo Mbeki" (Unpublished speech delivered at the national Freedom Day celebrations at Galeshewe Stadium, Kimberley 27 April 2006 Kimberley)

Internet sources

Anonymous 2012 *Most municipalities fail audit test* <http://www.fin24.com> [date of use 23 Sept 2012]

Legalbrief Today 2012 *Affirmative action test heading to ConCourt* <http://www.legalbrief.co.za> [date of use 15 November 2012]