

# What's So Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution

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**ABSTRACT:** While s 15(3) of the Employment Equity Act expressly prohibits the use of quotas as affirmative action measures, it is not clear whether quotas fall outside the scope of permissible affirmative action measures under s 9(2) of the Constitution. In the 2015 High Court judgment, *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & Others* ('SARIPA'), the court found that quotas violate the rights to equality and dignity and are thus impermissible under s 9(2). In 2016, the Supreme Court of Appeal affirmed the High Court's judgment, reasoning that quotas were arbitrary and amounted to caprice and naked preference. When the matter reached the Constitutional Court, Jafta J's majority failed to engage with this question. In contrast, in his dissenting opinion, Madlanga J showed some scepticism towards the lower courts' approach to quotas but did not make a definitive finding. Sharing the scepticism in Madlanga J's dissent, this article argues that while absolute barriers to the advancement of non-beneficiaries may violate the right to dignity and fall outside the scope of s 9(2), quotas, however rigid, do not necessarily have this impact. The article argues that the lower courts' findings in this case and, in particular, their extension of the prohibition of quotas to include a prohibition under s 9(2) of the Constitution, are erroneous for three reasons. First, they are based on a much higher standard of review for affirmative action than that envisaged under the *Van Heerden* test. Second, the courts do not distinguish between quotas and absolute barriers. Third, they are premised on a misunderstanding of the nature of the dignity harm that we are concerned with in the review of affirmative action measures. Ultimately, the article argues that an absolute prohibition of quotas under s 9(2) of the Constitution would have the impact of entrenching patterns of disadvantage, contrary to South Africa's commitment to substantive equality.

**KEYWORDS:** affirmative action, dignity, quotas, substantive equality

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## I INTRODUCTION

Twenty-six years into its constitutional democracy, South Africa is still grappling with eliminating deeply entrenched, systemic and structural inequality. This inequality is primarily rooted in our history of colonial and apartheid racial, gender and other forms of domination and oppression. It is also rooted in the failures of the early policies implemented to redress inequality;<sup>1</sup> global economic forces that have seen an increase in inequality across the globe;<sup>2</sup> and the chronic corruption and maladministration by the democratic governments since 1994.<sup>3</sup> While the legitimacy of the Constitution<sup>4</sup> and the commitment to transforming South African society and redressing past injustice is deeply contested,<sup>5</sup> the Constitution provides several tools to help eliminate this inequality. This includes a justiciable Bill of Rights and the express provision for positive redistributive measures under s 9(2) of the Constitution. This article focuses on the latter, in particular, on the form that positive redistributive measures can legitimately take without violating the rights of those adversely affected thereby.

Section 9(2) of the Constitution empowers the state to take positive redistributive measures, including affirmative action, 'to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.<sup>6</sup> In its first affirmative action decision, *Van Heerden*, the Constitutional Court held that the South African equality right, including s 9(2), heralds the 'start of a credible and abiding process of reparation for past exclusion, dispossession,

<sup>1</sup> See S Terreblanche *A History of Inequality in South Africa: 1652–2002* (2003); J Seekings & N Nattrass *Class, Race, and Inequality in South Africa* (2005); *Policy, Politics and Poverty in South Africa* (2015); V Sulla & P Zikhali, *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018), available at <http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities>.

<sup>2</sup> T Pickety, *Capital and Ideology* (2019).

<sup>3</sup> As Ngcobo CJ has noted, 'Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights', *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC) at para 57.

<sup>4</sup> Constitution of the Republic of South Africa, 1996 ('Constitution').

<sup>5</sup> For emerging critical scholarship on South African Constitutionalism and its failure to deliver radical structural change through the elimination of inequality and reparation for past colonial and apartheid injustice see, M Modiri, 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' [2018] *South African Journal on Human Rights* 300; S Sibanda "'Not Yet Uhuru" — The Usurpation of the Liberation Aspirations of South Africa's Masses by a Commitment to Liberal Constitutional Democracy' 2018 (PhD thesis on file with author); N Dladla 'The Liberation of History and the End of South Africa: Some Notes towards an Azanian Historiography in Africa, South' [2018] 34 *South African Journal on Human Rights* 415; MB Ramose 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996' (2018) 34 *South African Journal on Human Rights* 326; T Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 1 *Stellenbosch Law Review* 123.

<sup>6</sup> In this article, affirmative action refers to laws, policies and other measures which seek to realise the right to equality for disadvantaged groups by, amongst other measures, giving them *preference* or benefits over other groups or to the exclusion of other groups in the context of the allocation of resources such as employment, education or other valued resources. This definition is derived from R Kennedy *For Discrimination: Race, Affirmative Action, and the Law* (2013) 19–21. It is broad enough to include a wide range of affirmative action measures under s 9(2) of the Constitution as well as affirmative action under the Employment Equity Act 55 of 1998 ('EEA'). Section 15(1) of the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.'

and indignity'.<sup>7</sup> Thus, according to the Court, the equality right 'embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality'.<sup>8</sup>

However, there are different forms that affirmative action measures can take — the use of quotas being the most controversial. Most people are familiar with the US Supreme Court's hard-line on the impermissibility of racial quotas under the Fourteenth Amendment.<sup>9</sup> They would thus be surprised to find that India, the oldest and likely the largest affirmative action regime in the world, primarily uses quotas to redress the injustice of caste-based discrimination in higher education admissions and public employment.<sup>10</sup> In South Africa, s 9(2) of the Constitution does not prescribe whether the use of quotas is permissible thereunder. In *Van Heerden*, the Constitutional Court set down the standard that affirmative action measures would have to meet to pass constitutional muster — the *Van Heerden* test. Accordingly, the permissibility of quotas under s 9(2) hinges on whether they can pass this test. The *Van Heerden* test requires that an affirmative action measure must: target persons who have been disadvantaged by unfair discrimination; be designed to advance and protect such persons; and promote the achievement of equality.<sup>11</sup>

The *Van Heerden* test is considerably vague and has not been consistently applied by the South African courts.<sup>12</sup> What is clear about the test is that it was designed to protect s 9(2) measures from the higher standard of review applicable to unfair discrimination claims under

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<sup>7</sup> *Minister of Finance & Other v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC) ('*Van Heerden*') at para 25.

<sup>8</sup> *Ibid* at para 31.

<sup>9</sup> *Richmond v JA Croson Co* 488 US 469 1989 at 507 (O'Connor J invalidated a 30 per cent set-aside/quota for business owned by racial minorities in federal construction contracts for amounting to, inter alia, a form of 'outright racial balancing'). See also *University of California Regents v Bakke* 438 US 265 1978 ('*Bakke*') at 307 (The case concerned the constitutionality of a racial quota of 16 out of 100 for admission into medical school, rejecting the policy as a violation of the Fourteenth Amendment, Powell J, inter alia, held that, 'If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected ... as facially invalid'). See also, *Fisher v University of Texas at Austin* 2016 136 Ct 2198, 2225 (Kennedy J summarises the US Supreme Court's position on quotas).

<sup>10</sup> For an analysis of affirmative action in India see G Bhatia *The Transformative Constitution: A Radical Biography in Nine Acts* (2019) ch 2; A Deshpande *Oxford India Short Introductions: Affirmative Action in India* (2013); V Verma *Non-Discrimination and Equality in India: Contesting Boundaries of Social Justice* (2012); M Galanter *Competing Inequalities* (1984).

<sup>11</sup> *Van Heerden* (note 7 above) at para 37.

<sup>12</sup> In the academic commentary, this has led to different readings of what the test requires see, J Pretorius 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 *South African Law Journal* 398 (Who reads the *Van Heerden* test as having set a low standard of rationality); C Albertyn 'Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act — An Opportunity Missed — *South African Police Service v Solidarity OBO Barnard*' [2015] 132 *South African Law Journal* 711; C McConnachie 'Affirmative Action and Intensity of Review: *South African Police Service v Solidarity Obo Barnard* — Affirmative Action' [2015] 5 *Constitutional Court Review* 163; L Kohn & R Cachalia, 'Restitutionary Measures Properly Understood and the Extension of the Quota Ban — Locating *SARIPA* in the s 9(2) *Van Heerden* Framework' [2017] *Acta Juridica* 146 — these authors read *Van Heerden* as having been set a proportionality standard.

s 9(3) of the Constitution,<sup>13</sup> the *Harksen* test.<sup>14</sup> Thus, the *Van Heerden* test embodies a relatively more deferent standard of review for affirmative action measures, giving flexibility and scope in the design and implementation of these measures. In his majority judgment in *Van Heerden*, Moseneke J specifically held that the judiciary should not ‘second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination’.<sup>15</sup> However, prior to the *SARIPA* CC case,<sup>16</sup> the Court had not had an opportunity to consider whether quotas could pass the relatively deferent threshold set in *Van Heerden*.

In contrast with the lack of clarity on the permissibility of quotas under s 9(2) of the Constitution, the EEA, which was enacted to give effect to the right to equality in the employment context,<sup>17</sup> permits the use of numerical targets but expressly prohibits quotas in affirmative action measures taken thereunder.<sup>18</sup> However, it does not define quotas or provide any guidelines to help distinguish numerical targets from quotas, leaving the task to the courts. In its second affirmative action decision, *Barnard*, the Court, *in obiter*, opined that under the EEA, the difference between permissible numerical targets and prohibited quotas lied in the flexibility of the former. According to the Court, ‘Quotas amount to job reservation’ while numerical targets, ‘serve as a flexible employment guideline’.<sup>19</sup> The flexibility threshold was affirmed in the Court’s third affirmative action decision, *Correctional Services*.<sup>20</sup> However, the majority and concurring judgments in that case disagreed on the requisite standard for determining the flexibility of numerical targets. Writing for the majority, Zondo J took an approach that required numerical targets to allow for deviations that ‘occur in reality’.<sup>21</sup> For example, if deviations from numerical targets were possible to meet operational requirements or to appoint persons with scarce skills,<sup>22</sup> they escaped the classification as quotas — the functional approach. In contrast, Nugent AJ required flexibility in individual decisions when implementing numerical targets.<sup>23</sup> According to Nugent AJ, flexibility required the discretion to take factors like ‘individual experience, application and verve’ into account in every decision,<sup>24</sup> the individualised approach.

Following the decisions in *Van Heerden*, *Barnard* and *Correctional Services*, in *SARIPA* CC, the permissibility of quotas per se under s 9(2) of the Constitution featured for the first time before the Court. The *SARIPA* case concerned a policy drafted by the Minister of Constitutional

<sup>13</sup> Section 9(3) of the Constitution prohibits direct and indirect unfair discrimination on one or more grounds including ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’

<sup>14</sup> The *Harksen* test was established in the landmark *Harksen v Lane NO & Others* 1997 ZACC 12, 1997 11 BCLR 1489 case (*Harksen*) at paras 42–51. The test entails a complex fairness and proportionality standard to determine whether there has been unfair discrimination in a case.

<sup>15</sup> *Van Heerden* (note 7 above) at para 33.

<sup>16</sup> *Minister of Constitutional Development & Another v South African Restructuring and Insolvency Practitioners Association & Others* [2018] ZACC 20; 2018 (5) SA 349 (CC) (*SARIPA* CC’).

<sup>17</sup> *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 6 SA 123 CC (*Barnard*) at para 40. See also, *Solidarity & Others v Department of Correctional Services & Others* [2016] ZACC 18, 2016 (5) SA 594 (CC) (*Correctional Services*’).

<sup>18</sup> Section 15(3), EEA.

<sup>19</sup> *Barnard* (note 17 above) at para 49.

<sup>20</sup> *Correctional Services* (note 17 above) at paras 51 (per Zondo J) and 118 (per Nugent AJ).

<sup>21</sup> *Ibid* at para 53.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid* at para 114.

<sup>24</sup> *Ibid* at para 118.

Development regarding the appointment of provisional trustees to administer insolvent estates pending the appointment of final trustees. The policy sought to redress a disproportionate allocation of work to white males in the insolvency industry and ‘facilitate access to the industry and restore the previously disadvantaged insolvency practitioners’ rights to equality, dignity and ... realise their right to follow their trade, profession or occupation’.<sup>25</sup> The applicants in the case, associations which represented the interests of insolvency practitioners such as provisional trustees challenged the Minister’s policy on several grounds.<sup>26</sup> One of the grounds of the challenge and the focus of this article was the allegation that the policy amounted to a rigid quota and thus fell outside the scope of s 9(2) of the Constitution.<sup>27</sup> The lower courts in the case — the High Court and Supreme Court of Appeal — extended the prohibition of quotas beyond the scope of s 15(3) of the EEA to find that s 9(2) of the Constitution prohibits the use of quotas.<sup>28</sup> On appeal before the Constitutional Court, Jafta J did not challenge the approach taken by the lower courts, nor did he expressly endorse the approach. Instead, he found the impugned policy unconstitutional on other grounds.<sup>29</sup> However, in his dissenting opinion, Madlanga J showed some scepticism towards the lower court’s extension of the prohibition beyond the EEA. While he did not make any definitive findings, he reasoned that ‘before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a “situation-sensitive” manner. It can never be a one-size-fits-all’.<sup>30</sup>

Thus far, some academic commentary has supported and bolstered the approach taken in the lower court judgments.<sup>31</sup> According to Kohn and Cachalia, the inflexibility of the policy in *SARIPA* ‘was offensive to the dignity of those affected in a manner which amounted to “undue harm”’.<sup>32</sup> For Pretorius, rigidity in affirmative action measures in employment frustrates the life chances of non-beneficiaries, ‘causing race or gender-based contests’ that are not in line with an ‘inclusive notion of substantive equality’.<sup>33</sup> Sharing the scepticism in Madlanga J’s dissent, in this article, I disagree with these arguments and argue that quotas can fall within the range of permissible measures to advance and protect disadvantaged groups as envisaged by s 9(2) of the Constitution.

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<sup>25</sup> *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196, 2017 (3) SA 95 (SCA) (*‘SARIPA SCA’*) at para 24.

<sup>26</sup> This includes the argument that the policy unlawfully fettered the Master of the High Court’s discretion; that it was irrational; that it failed the *Van Heerden* test; that it was designed without consultation and was thus procedurally unfair *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC v Minister of Justice and Constitutional Development* [2015] ZAWCHC 1, 2015 (2) SA 430 (WCC) (*‘SARIPA HC’*) at para 65.

<sup>27</sup> *Ibid* at para 137.

<sup>28</sup> *SARIPA HC* (note 26 above) at paras 201–208; *SARIPA SCA* (note 25 above) at paras 29–32.

<sup>29</sup> The policy failed the *Van hereden* test because, inter alia, the classification of its beneficiary groups would have the impact of perpetuating the disadvantage of Black male and female insolvency practitioners who were not citizens at the time of the democratic transition (27 April 1994). *SARIPA CC* (note 16 above) at paras 41–43.

<sup>30</sup> *Ibid* at para 80.

<sup>31</sup> Kohn & Cachalia (note 12 above); AM Louw, ‘Extrapolating “Equality” from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998’ (2006) 18(3) *South African Mercantile Law Journal* 336 (who make this argument in the context of the EEA); J Pretorius ‘The Limitations of Definitional Reasoning Regarding “Quotas” and “Absolute Barriers” in Affirmative Action Jurisprudence as Illustrated by *Solidarity v Department of Correctional Services*’ (2017) 28 *Stellenbosch Law Review* 269.

<sup>32</sup> Kohn & Cachalia (note 12 above) 176.

<sup>33</sup> Pretorius (2017) (note 31 above) 281–282.



Through a close and critical examination of the lower courts' and Constitutional Court judgments in this case, this article will argue that quotas can pass the threshold set by the *Van Heerden* test. The impugned policy in *SARIPA* failed for two reasons. First, the courts, especially the lower courts, applied a much higher standard of review than that envisaged under the *Van Heerden* test. In particular, the courts placed a high evidentiary burden on the Minister to establish that the policy would, *in fact*, achieve its purpose. In instances where there was a dispute in evidence, the courts erred on the side of the applicants in the case — finding the policy arbitrary and irrational for lack of evidence. Second, the lower courts, and accompanying academic commentary, take the position that the mere rigidity of quotas violates the right to dignity of non-beneficiaries and beneficiaries of affirmative action.

With regards to the first argument, this article will argue that the *Van Heerden* test requires a measure of deference to the design of affirmative action measures. This explains why they need only be 'reasonably likely' to achieve their purpose.<sup>34</sup> In addition, they need not be necessary or even the most effective tool to realise their purpose.<sup>35</sup> A part of this deferent approach, and because of the importance of s 9(2) measures, is that the burden of proof lies with parties seeking to challenge measures which genuinely seek to advance disadvantaged groups.<sup>36</sup> This is not the approach taken by the courts. With regards to the second argument, drawing from the Court's own jurisprudence and against the context of prevailing inequality in South Africa, I argue that rigidity per se is not inherently incompatible with the right to dignity. This is because s 9(2) only prohibits measures which demean or create the impression that persons are 'in some way inferior', 'less worthy';<sup>37</sup> or reduce persons to 'an underclass' denigrating their place in society and in the Constitution.<sup>38</sup> While measures which create an absolute barrier for the advancement of non-beneficiary groups and other adversely affected groups will likely have this impact, the use of quotas, however rigid, will not *necessarily* have this impact. Every examination of a quota requires a contextual, 'situation-sensitive' approach.

I have divided the article into five parts. Part II briefly explores the meaning of the commitment to substantive equality and locates affirmative action measures as one of the tools to achieve its goals — fulfilling the realisation of the right to equality and dignity of disadvantaged groups. This part also outlines the appropriate standard of review for affirmative action, a relatively deferential proportionality assessment that, while balancing the competing rights that arise in affirmative action cases, tips the scale in favour of affirming the constitutionality of affirmative action measures.<sup>39</sup> As the core argument against quotas is that they violate the right to dignity, part II interrogates the complex relationship between affirmative action and the right to dignity. On the one hand, affirmative action measures are tools to realise the right to equality and dignity of disadvantaged groups. On the other, their focus on individual characteristics such as race and gender could impair the right to dignity of persons, in particular, the non-beneficiaries. In this regard, part II argues that looking at persons through the lens of a specific characteristic (race, gender, disability status or an

<sup>34</sup> *Van Heerden* (note 7 above) at para 42.

<sup>35</sup> *Ibid* at para 43.

<sup>36</sup> *Ibid* at paras 33–35.

<sup>37</sup> *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* 2004 ZACC 11, 2004 (6) SA 505 CC ('*Khosa*') at para 74.

<sup>38</sup> *Barnard* (note 17 above) at para 180 (per Van der Westhuizen J).

<sup>39</sup> This approach is based on Albertyn's assessment and 'best reading' of the s 9(2) *Van Heerden* test, see, Albertyn (2015) (note 12 above) at 729–731.

intersection of these) and redistributing resources (jobs, promotions, admissions) based on these characteristics, and for purposes of redressing group-based disadvantage does not necessarily violate the right to dignity. The question that should be asked is whether a specific affirmative action measure has the impact of (i) entrenching or creating new patterns of disadvantage; (ii) treating or creating the perception that persons or groups are inferior, or form part of an ‘underclass’; (iii) demeaning such persons or groups.

The argument that quotas fall outside the range of permissible s 9(2) measures is drawn from the prohibition of quotas under the EEA. Thus, part III explores how the Court has defined quotas under the EEA. This part shows that on the one hand, the Court had no problem with affirmative action measures which allow for the preferential treatment of beneficiaries of affirmative action under the EEA — women, Black people (defined as African, Indian, Coloured and Chinese people) and people with disabilities.<sup>40</sup> At the same time, it defined quotas in such a way that such measures are required to retain a measure of flexibility. One approach to this flexibility, Nugent AJ’s individualised approach, contradicts the very purpose of affirmative action measures under the EEA.

In part IV I explore the expansion of the prohibition of quotas in Mathopo J and Katz AJ’s reasoning in the lower court judgments and juxtapose this approach with Madlanga J’s dissenting opinion in the Court’s judgment. Part IV illustrates the way in which the lower court judges’ reasoning and conclusions draw from the EEA’s flawed jurisprudence, and find that affirmative action measures must be flexible in taking the individual characteristics, skills, expertise and experience of persons into account; failing which they are rigid quotas. Without a contextual and ‘situation sensitive’ inquiry, this rigidity is erroneously presumed arbitrary, irrational and as a violation of the right to dignity.

Using the *SARIPA* case and correctly applying the *Van Heerden* test, part V makes a positive case for the permissibility of quotas. Part V argues that, while there were gaps in the statistical evidence relied on by the Minister, inconsistencies and a lack of clarity about how the impugned policy in *SARIPA* would be implemented, neither this nor the rigidity of the policy should have been the linchpin for finding that the policy failed the section-9(2) threshold test.<sup>41</sup>

Part VI concludes with the argument that, while hidden behind the protection of the right to dignity, the argument that rigidity, defined as the failure to take individual merit, skills and expertise into account, undermines the commitment to substantive equality.

## II SUBSTANTIVE EQUALITY AND THE VAN HEERDEN INQUIRY

### A Unpacking s 9(2) of the Constitution

Before an analysis of the standard set in *Van Heerden*, it is important to understand the structure of the equality right in s 9 of the Constitution. There are three key sections to the equality right. The first, s 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(1) prohibits differentiation that is arbitrary and irrational.<sup>42</sup> As noted in the introduction, s 9(2) provides that, when promoting

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<sup>40</sup> These are the designated beneficiary groups under s 1 of the EEA.

<sup>41</sup> *SARIPA* CC (note 16 above) at para 80.

<sup>42</sup> *Prinsloo v Van der Linde & Another* 1997 ZACC 5, 1997 3 SA 1012 (*Prinsloo*); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1998 ZACC 18, 1999 2 SA 1; *Van der Merwe v Road Accident Fund & Another* 2006 ZACC 4 2006 4 SA 230 CC; C Albertyn & B Goldblatt ‘Equality’ in S Woolman (ed), *Constitutional Law of South Africa* (2nd ed, 2008) ch 35-3 (For a critical analysis of s 9(1) of the Constitution).



the achievement of equality, 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' Section 9(3) of the Constitution prohibits direct and indirect unfair discrimination on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin. Another relevant section is s 9(5); this provision provides that unfair discrimination on a listed ground in s 9(3) is presumed to be unfair.

In *Van Heerden*, the Court had to consider the constitutionality of a pension scheme that required higher employer contributions for new members of the post-1994 democratic Parliament, than for those who had been in Parliament under the apartheid dispensation.<sup>43</sup> The majority of the new parliamentarians and thus, the beneficiaries of the higher contributions were Black persons. The purpose of the policy was to distribute pension benefits on an equitable basis and thus diminish the inequality between privileged and disadvantaged parliamentarians.<sup>44</sup> The applicant in the case argued that the scheme unfairly discriminated against the old parliamentarians, the majority of whom were white, based on their race.<sup>45</sup> In particular, he argued that affirmative action measures under s 9(2), if based on a listed ground in s 9(3), should be presumed to be unfair and the party seeking to defend such measure carried the onus to show that they were fair.<sup>46</sup> The state defended the claim as a valid affirmative action measure under s 9(2) of the Constitution. A key issue for the Court was whether affirmative action measures should be subject to the unfair discrimination analysis under s 9(3) of the Constitution, the *Harksen* test.<sup>47</sup>

In light of our history of predominantly race and gender based domination and oppression, the *Harksen* case rightly set a high threshold for defending s 9(3) unfair discrimination claims. The test is a two-stage evaluation of unfair discrimination. In the first stage, the court must determine if a differentiation amounts to discrimination.<sup>48</sup> Having established that a measure is discriminatory, the second leg of the inquiry requires the court to determine whether the discrimination is unfair.<sup>49</sup> According to s 9(5), discrimination on a specified ground in s 9(3) is presumed to be unfair. If it is not on a specified ground, the complainant bears the onus to prove the unfairness of the discrimination. This is a value judgment which focusses on the impact of the discrimination on the complainant and his or her group, in particular, their right to dignity.<sup>50</sup>

An important feature of the *Harksen* test is the centrality of dignity in the inquiry. As Goldstone J noted, 'The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity, or which affect people adversely in a comparably serious manner'.<sup>51</sup> Dignity operates at two levels in the *Harksen* test. First, it is used to differentiate between mere differentiation and discrimination. Whether or not there

<sup>43</sup> *Van Heerden* (note 7 above) at paras 10–11.

<sup>44</sup> *Ibid* at paras 17 and 52.

<sup>45</sup> *Ibid* at para 19.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* at para 45.

<sup>49</sup> *Ibid* at para 51.

<sup>50</sup> *Ibid*; *President of the Republic of South Africa & Another v Hugo* 1997 ZACC 4, 1997 4 SA 1 ('Hugo') at paras 41–43; *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* [1998] ZACC 15, 1999 (1) SA 6 ('National Coalition') at para 19.

<sup>51</sup> *Harksen* (note 14 above) at para 50.

is discrimination depends on whether ‘the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings’.<sup>52</sup> Second, it is the most important factor taken into account when determining whether discrimination is unfair.<sup>53</sup>

A significant overlap between the *Harksen* test and s 9(2) measures is that the analysis of the impact that a measure has on the complainant in s 9(3) claims takes a range of factors into account, including the nature of the provision or power and the purpose sought to be achieved by it.<sup>54</sup> That a measure serves the purposes of furthering the achievement of equality has ‘a significant bearing on the question whether complainants have in fact suffered the impairment in question’.<sup>55</sup> Thus, affirmative action measures can pass the *Harksen* test.<sup>56</sup>

In *Van Heerden*, the High Court judgment had applied the *Harksen* test.<sup>57</sup> Applying that high threshold, it found the pension scheme unconstitutional.<sup>58</sup> On appeal to the Constitutional Court, the Court began by asserting its commitment to substantive equality.<sup>59</sup> Substantive equality is a complex concept. Rooted in critical approaches to law and politics, it seeks to challenge the ‘classic liberal ideal’ of formal equality of treatment, exposing that approach as entrenching and perpetuating inequality.<sup>60</sup> Formal equality is rooted in the idea that ‘likes should be treated alike’.<sup>61</sup> Under a formal conception of equality, all forms of unequal treatment are arbitrary and irrational. Accordingly, a formal conception of equality would prohibit positive measures (including affirmative action) to advance disadvantaged groups. Proponents of substantive equality, on the other hand, have exposed the way in which formal equality’s abstract individualism and legal neutrality have masked the complex reality of inequality in which people have unequal access to resources or lack ‘sufficient power to control or value their own lives’.<sup>62</sup> In contrast, substantive equality has embraced unequal treatment,<sup>63</sup> recognising that the goals of equality cannot be achieved by insisting on identical treatment

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<sup>52</sup> *Ibid* at para 46. In *Hoffmann v South African Airways* 2000 ZACC 17, 2001 1 SA 1 (HIV status) and in *Khosa* (note 37 above) (Citizenship).

<sup>53</sup> *Harksen* (note 14 above) at para 51.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Solidariteit Helpende Hand NPC & Another v Minister of Basic Education & Others* 2017 ZAGPPHC 1220. (An example of a purported section-9(2) measure fails the threshold in *Van Heerden* but passes muster under s 9(3).)

<sup>57</sup> *Ibid* at paras 12–13.

<sup>58</sup> *Ibid* at para 15.

<sup>59</sup> *Van Heerden* (note 7 above) at para 31.

<sup>60</sup> For an analysis of the core features of ‘classic liberalism’ — rationality, autonomy, individualism, equality before the law, an abstentionist neutral state, and the shift towards a more structural/substantive understanding of inequality and disadvantage, see S Fredman *Women and the Law* (1997) ch 1. C Albertyn ‘Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice’ (2018) 34 *South African Journal on Human Rights* 441 for an analysis of different roots of substantive equality in the different liberation struggles in South Africa. See also C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *South African Journal on Human Rights* 248; C Albertyn & J Kentridge, ‘Introducing the Right to Equality in the Interim Constitution’ (1994) 10 *South African Journal on Human Rights* 149 for an early mapping of the substantive approach to equality in predominantly American feminist and critical literature.

<sup>61</sup> S Fredman *Discrimination Law* (2nd ed, 2011) 8; Albertyn & Goldblatt (2008) (note 42 above) ch 35-1(c).

<sup>62</sup> Albertyn & Goldblatt (1998) (note 60 above) 251.

<sup>63</sup> *National Coalition* (note 50 above) at paras 60–62.

in all circumstances.<sup>64</sup> A commitment to substantive equality is a positive commitment to progressively eradicate 'socially constructed barriers to equality and to root out systematic or institutionalised under-privilege'.<sup>65</sup> Affirmative action measures, in their preference for and intention to 'advance and protect' disadvantaged groups are a core 'statement of substantive equality'.<sup>66</sup>

In line with the commitment to substantive equality, Moseneke J held that affirmative action measures under s 9(2) were not a derogation from the right to equality, and did not amount to unfair discrimination.<sup>67</sup> Instead, he held that they were a substantive part of the commitment to realising the right to equality.<sup>68</sup> Practically, this meant that affirmative action measures which met the requirements of s 9(2) of the Constitution did not violate the guarantee of equal protection and benefit of the law in s 9(1). Further, the *Harksen* test did not apply to s 9(2) measures. Thus, even when based on a listed ground in s 9(3), they did not attract the presumption of unfairness in s 9(5) and were not a form of unfair discrimination. According to the Court, s 9(2) was a defence in unfair discrimination claims under s 9(3)–(5).<sup>69</sup> However, if a measure failed to meet the threshold in s 9(2), it could still be saved if it was shown to be fair under s 9(3)–(5).<sup>70</sup>

Moseneke J's majority judgment in *Van Heerden* gave three strong, value-based reasons for rejecting the application of the *Harksen* test to s 9(2) measures. First, he held that subjecting affirmative action measures to the s 9(3) inquiry would mean that the provisions in the equality right were internally inconsistent or that s 9(2) was 'a mere interpretative aid or even surplusage'.<sup>71</sup> As Mokgoro J wrote in support, such an approach would mean that:

The whole structure of our equality clause and the important aim of substantive equality would be undermined by an approach which requires the state to show that measures which aim at advancing the substantive notion of equality and fostering a society which no longer resembles that of the South Africa of old are fair. It is an invariable consequence of enacting measures that advance certain groups that other groups will be disadvantaged in that regard, albeit that this would not be the intention of such measures.<sup>72</sup>

The quote above encapsulates the need for more deference than in the context of s 9(3) unfair discrimination cases — a deference rooted in the acknowledgement of the important purpose served by s 9(2) measures — realising the right to equality and dignity of historically disadvantaged groups. It also accepts that these measures may cause harm to other groups, a cost that cannot render them unconstitutional unless the measure constitutes 'an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened'.<sup>73</sup> This is a relatively high benchmark. In a sense, the Court considers these measures to be fair discrimination. Thus, as Sachs J holds in

<sup>64</sup> *Hugo* (note 50 above) at para 41.

<sup>65</sup> *Van Heerden* (note 7 above) at para 31.

<sup>66</sup> Albertyn & Goldblatt (2008) (note 42 above) ch 35-4.

<sup>67</sup> *Van Heerden* (note 7 above) at para 32.

<sup>68</sup> *Ibid.*

<sup>69</sup> According to Jafta J, s 9(2) 'insulates from attack measures adopted to protect or advance people who were disadvantaged by unfair discrimination' *SARIPA CC* (note 16 above) at para 38.

<sup>70</sup> *Van Heerden* (note 7 above) at para 36.

<sup>71</sup> *Ibid* at para 33.

<sup>72</sup> *Ibid* at para 77.

<sup>73</sup> *Ibid* at para 44.

his concurring opinion, in the context of South Africa's 'specific historical and constitutional context' the reviewing court must harmonise the '*fairness inherent in remedial measures* with the fairness expressly required of the state when it adopts measures that discriminate between different sections of the population'.<sup>74</sup>

The second reason for rejecting the *Harksen* approach had to do with the presumption of unfairness. The presumption of unfairness in s 9(5) of the equality right would catch most affirmative action measures as they are likely to be based on a listed ground. In this regard, Moseneke J argued that:

I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags section-9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination.<sup>75</sup>

This quote encapsulates two problems with the presumption. First, as McConachie has argued, it creates the 'expressive harm' that affirmative action measures are unfair.<sup>76</sup> The expressive harm would come from placing the interests of the complainants in affirmative action cases at the core of the analysis and the important purpose (fulfilling the right to equality and dignity of the beneficiaries) secondary, 'suggesting that the benefits of an affirmative action measure for historically disadvantaged groups are only of secondary concern'.<sup>77</sup> In *R v Kapp*, the Canadian Supreme Court noted a similar problem with treating affirmative action measures under s 15(2) as a form of discrimination under s 15(1) of the Canadian Charter of Rights and Freedoms, noting the 'symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1)'.<sup>78</sup> Second, the Court rejected the presumption to err on the side of deference in order to preserve measures which seek to redress unfair discrimination. This is arguably in light of the recognition that the presumption can be difficult to rebut, especially when the impact of affirmative action is not easy to pin down.<sup>79</sup> The implications of this are that the onus in affirmative action cases ordinarily rests with the party seeking to challenge an affirmative action measure.<sup>80</sup>

The third reason for rejecting the *Harksen* test was related to the different focus envisaged in the review of s 9(2) measures. Mokgoro J made it clear that the *Harksen* test's centring of individual dignity was not appropriate for affirmative action measures as it would focus unduly on the impact of the complainant.<sup>81</sup> Contemplating an approach that is focussed on the purposes of the affirmative action measure. For Mokgoro J, s 9(2) is 'forward looking' and requires the review of these measures to be looked at from the perspective of the purpose of promoting the achievement of equality and 'on the group advanced and the mechanism used

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<sup>74</sup> Ibid at para 136 (my emphasis).

<sup>75</sup> Ibid at para 33.

<sup>76</sup> McConachie (note 12 above) at 173.

<sup>77</sup> Ibid at 172.

<sup>78</sup> *R v Kapp* [2008] 2 SCR 483 *Kapp* ('*Kapp*') at para 40.

<sup>79</sup> *Van Heerden* (note 7 above) at para 41 (Moseneke J notes that the 'future is hard to predict').

<sup>80</sup> Ibid at paras 33–35. Also see McConachie (note 12 above) (On the varying intensity of review and the possibility that the onus can shift depending on the facts of a case).

<sup>81</sup> *Van Heerden* (note 7 above) at para 80.

to advance it'.<sup>82</sup> In contrast, s 9(3) focussed on the complainant and the impact of the measure on her and her group.<sup>83</sup>

Having rejected the *Harksen* test, Moseneke J set a more deferent standard for the review of affirmative action — the *Van Heerden* test, I turn to this below.

## B The *Van Heerden* test

As noted in the introduction, the *Van Heerden* test is used to determine whether a measure falls within the scope of s 9(2) of the Constitution. There are three prongs to the *Van Heerden* test. The first requires a measure to target persons or categories of persons who have been disadvantaged by unfair discrimination. The second requires that the measure must be designed to protect or advance such persons or categories of persons. The third requirement is that the measure must promote the achievement of equality.<sup>84</sup> These three requirements are relatively vague, and the test has been subject to different interpretations and criticisms.<sup>85</sup>

Criticising the decision in *Van Heerden* as requiring a mere rational link between an affirmative action measure and its purpose, Pretorius has argued that the *Van Heerden* test, in excluding the fairness and proportionality inquiry applicable to unfair discrimination claims under *Harksen*, 'has the potential to harm core constitutional functions and values. According to Pretorius, the level of deference in *Van Heerden* is an 'instrumentalist attitude towards constitutional adjudication' and an unwillingness to consider how other constitutional values place limits even on the pursuit of important goals.<sup>86</sup> Moreover, he has argued that the standard of review is contrary to the commitment to a culture of justification and public accountability.<sup>87</sup> For Pretorius, without the fairness and proportionality analysis under *Harksen*, 'courts would simply lack the analytical framework and factual focus for a situation-specific contextualisation, which is comprehensive and inclusive enough to bring all competing interests and considerations into the equation'.<sup>88</sup>

Pretorius' critique is based on a reading that the *Van Heerden* test merely requires s 9(2) measures to be rational.<sup>89</sup> As will be shown below, a more substantive reading of the *Van Heerden* test is possible. In his analysis of the *Van Heerden* case, Pretorius also fails to engage with the way in which Moseneke J went about applying the test in *Van Heerden* — an approach which included an analysis of the policy as a whole and the impact it would have on the excluded group, balancing the multiple and competing rights and interests in affirmative action cases. For Pretorius, that Moseneke J undertook an analysis of the impact of the measure and its purpose is a 'contradiction' rather than an indication that the *Van Heerden* test required more

<sup>82</sup> Ibid at para 78.

<sup>83</sup> Ibid at para 79.

<sup>84</sup> *Van Heerden* (note 7 above) at para 37.

<sup>85</sup> Pretorius (2009) (note 12 above); Jan Pretorius, 'Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: Solidarity Obo Barnard v South African Police Services' (2013) 130 *South African Law Journal* 32; 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence' (2010) 26 *South African Journal on Human Rights* 536 (in which he has consistently argued that the test is too low a threshold for affirmative action measures).

<sup>86</sup> Pretorius (2010) (note 85 above) at 553.

<sup>87</sup> Pretorius (2013) (note 85 above).

<sup>88</sup> Pretorius (2010) (note 85 above) at 555.

<sup>89</sup> Pretorius (2009) (note 12 above) at 414.

than just rationality review.<sup>90</sup> As Albertyn has argued, this is an ‘impoverished interpretation’ of *Van Heerden*.<sup>91</sup>

Contrary to the argument made by Pretorius, the move away from the *Harksen* test is not a derogation from the commitment to a culture of justification and accountability, nor is an indispensable balancing only possible within the confines of *Harksen*. The Court is still required to enquire into the reasons underlying the affirmative action measure and its impact on the beneficiaries and those adversely affected thereby. In *Van Heerden*, for example, Moseneke J held that the scheme had to be reviewed as a whole, looking at the ‘history of transition from the old to the new 1994 Parliament; the duration, nature and purpose of the scheme; the position of the complainant and the impact of the disfavour on the respondent and his class’.<sup>92</sup> Based on the discussion above, the approach in *Van Heerden* should be seen in the context of a Court rejecting too high a standard for the review of affirmative action. The best reading, (in the sense that it coheres with the commitment to substantive equality) of the *Van Heerden* test is that it is a deferent species of proportionality analysis.<sup>93</sup> It allows for what Kohn and Cachalia call a ‘light-touch form’ of proportionality, or ‘proportionality simpliciter’,<sup>94</sup> a standard higher than rationality but lower and different from the *Harksen* test.<sup>95</sup>

### 1 *Van Heerden test as a species of proportionality*

Proportionality is ‘a tool of practical reasoning that is applied whenever we deliberate about the correct course of action in the face of competing rights and scarce resources’.<sup>96</sup> In the affirmative action context, proportionality can be used to resolve the tension between the important purpose served by affirmative action — promoting the achievement of equality for the disadvantaged groups who are beneficiaries under these measures — and the rights of those adversely affected thereby. In contrast with rationality review, proportionality ‘can generate insights into the nature and structure of inequality that might otherwise elude judges’ when resolving the conflict that arises in equality cases.<sup>97</sup> In addition, ‘It can be a tool for revealing invidious motivation and a useful framework for more fine-grained, contextual analyses of the governmental interests asserted and for more transparent consideration of competing constitutional values and governmental interests’.<sup>98</sup> Requiring proportionality ensures that the purpose of a measure does not excessively overdetermine the constitutionality of an affirmative action measure.<sup>99</sup> This allows the courts to tease out the impact that the measure has on the intended beneficiary class as well as the non-beneficiaries.

There is no single approach to proportionality analysis. In South Africa, proportionality is encapsulated in the s 36(1) limitations clause. Section 36(1) of the Constitution provides that

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<sup>90</sup> Pretorius (2009) (note 12 above) at 418–419.

<sup>91</sup> Albertyn (2015) (note 12 above) at 729.

<sup>92</sup> *Van Heerden* (note 7 above) at para 45.

<sup>93</sup> A Barak *Constitutional Rights and Their Limitations* (2012) (On different kinds of proportionality assessment).

<sup>94</sup> Kohn & Cachalia (note 12 above) 160.

<sup>95</sup> Albertyn (2015) (note 12 above) at 729–730.

<sup>96</sup> McConnachie (note 12 above) 188.

<sup>97</sup> V Jackson, ‘Proportionality and Equality’ in V Jackson & M Tushnet (eds) *Proportionality: New Frontiers, New Challenges* (2017) at 171–172.

<sup>98</sup> *Ibid*, 171–172.

<sup>99</sup> J McGill, ‘Section 15(2), Ameliorative Programs and Proportionality Review’ [2013] *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 521 at 544.



the right in the Bill of Rights may be limited by a law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. To determine this, a range of factors have to be taken into account, including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve the purpose. In *Manamela*, the Court held that the different factors to be taken into account were not an exhaustive list, they were factors to be considered 'in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society'.<sup>100</sup> The approach to proportionality in South Africa entails a balancing exercise 'to arrive at a global judgment on proportionality ... the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected'.<sup>101</sup>

In other jurisdictions, proportionality usually entails four distinct stages.<sup>102</sup> The first stage of the inquiry examines whether the law or action serves a legitimate purpose (legitimacy or proper purpose).<sup>103</sup> The second leg requires there to be a rational connection between the purpose and the means (suitability).<sup>104</sup> The third leg is an analysis of whether the measure is the least restrictive means to achieve a legitimate purpose (necessity).<sup>105</sup> The last leg of the proportionality inquiry is an assessment of whether, on balance, the attainment of the purpose outweighs the cost — the greater the degree of infringement of a right, the greater the justification that must be given (balancing or proportionality *stricto sensu*).<sup>106</sup>

While Moseneke J's majority judgment in *Van Heerden* did not expressly state that the *Van Heerden* test set a proportionality standard, 'proportionality' was expressly mentioned in Sachs J's concurring opinion. Sachs J held that measures which seek to 'destroy the caste-like character of our society and to enable people historically held back by patterns of subordination to break through into hitherto excluded terrain' are not a form of unfair discrimination.<sup>107</sup> Similarly, he expressed the need for a measure of deference in affirmative action cases, noting that 'Courts must be reluctant to interfere with such measures, and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way'.<sup>108</sup> For Sachs J, s 9(2) did not extend to measures which

<sup>100</sup> *S v Manamela & Another (Director-General of Justice Intervening)* [2000] ZACC 5, 2000 3 SA ('*Manamela*') at para 32.

<sup>101</sup> *Ibid.*

<sup>102</sup> Jackson (2015) (note 97 above) (For a general analysis of proportionality review and a positive argument for its use in the US context); P Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265 (for an analysis of proportionality review under European Union law); D Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' [2007] 64 *The University of Toronto Law Journal* 383 (for an analysis of proportionality in the German and Canadian context).

<sup>103</sup> For a detailed analysis of this leg, see Barak (note 93 above) ch 9.

<sup>104</sup> *Ibid.* 10.

<sup>105</sup> *Ibid.* 11.

<sup>106</sup> *Ibid.* 12.

<sup>107</sup> *Van Heerden* (note 7 above) at para 152.

<sup>108</sup> *Ibid.*

were ‘manifestly overbalanced’ and ‘disproportionate’.<sup>109</sup> Gesturing towards a proportionality analysis that is ‘heavily weighted in favour of opening opportunities for the disadvantaged’.<sup>110</sup>

McConachie has attempted to map the ‘traditional questions’ in the proportionality inquiry onto the *Van Heerden* test.<sup>111</sup> While the assessment that the first two legs of the *Van Heerden* test are akin to the suitability and legitimacy legs accord with Moseneke J’s application of the test in *Van Heerden*, Moseneke J rejected the necessity requirement. To the extent that necessity means ‘that no other alternative must be available that can equally realise the purpose and be less invasive of the right in question’,<sup>112</sup> it is too high a threshold for affirmative action. A strict necessity requirement would allow very few affirmative action measures to pass muster. As judges would be required to consider all possible alternatives to realise the objective and be less restrictive to the rights and interests of those adversely affected by these measures, a strict approach to necessity would go against the need for deference in affirmative action cases. This is because the choice of measure taken involves a wide range of factors, ‘costs, practical implementation, the prioritisation of social demands and the needs’.<sup>113</sup> A strict application of necessity may ‘prevent limitations from passing constitutional muster that are indeed normatively justified when the balance of reasons is considered’.<sup>114</sup>

In light of the high threshold set by necessity, Moseneke J held that ‘The provisions of section 9(2) do not prescribe such a necessity test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity ... and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved’.<sup>115</sup> McConachie argues that this should be read as merely stating that the presence of alternative ways should not be determinative of whether an affirmative action measure is proportionate, it should merely be one of the factors taken into account.<sup>116</sup> I disagree with McConachie’s argument.

The exclusion of necessity need not take us outside of the realm of proportionality analysis. As Barak notes, some jurisdictions use a ‘softer approach to proportionality’, requiring a focus on ‘proper purpose, rational connection, and a proper relation between the fulfilment of the purpose and the damage to the constitutional right’.<sup>117</sup> This ‘softer’ approach or what Albertyn characterises as ‘higher than rationality, but perhaps lower than (and different from) the fairness threshold of s 9(3)’,<sup>118</sup> is arguably what Moseneke J envisaged. This is a relatively deferent standard of proportionality. This deference captures the important purposes served by s 9(2) and the need to realise the egalitarian vision of the Constitution.<sup>119</sup> However, because we have multiple groups who benefit from affirmative action, whose rights and interests may come

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<sup>109</sup> Ibid.

<sup>110</sup> Ibid.

<sup>111</sup> McConachie (note 12 above) at 189.

<sup>112</sup> D Bilchitz, ‘Necessity and Proportionality: Towards A Balanced Approach?’ in L Lazarus, C McCrudden & Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (2014) 43.

<sup>113</sup> *Manamela* (note 100 above) at para 34 (per majority) and 95 (per minority).

<sup>114</sup> Bilchitz (note 112 above) at 44.

<sup>115</sup> *Van Heerden* (note 7 above) at para 45.

<sup>116</sup> McConachie (note 12 above) at 190.

<sup>117</sup> Barak (note 93 above) at 132.

<sup>118</sup> Albertyn (2015) (note 12 above) 729–730.

<sup>119</sup> *Van Heerden* (note 7 above) at para 33 (explaining why the presumption of unfairness should not be applicable to s 9(3), Moseneke J notes that such a presumption would unduly require the courts to second guess the legislature and executive concerning the appropriate measures to overcome the effect of unfair discrimination).

into conflict, the level of deference exercised in each case should vary.<sup>120</sup> In cases brought by historically disadvantaged groups who have been adversely affected by affirmative action, the courts should heighten the intensity of review and exercise less deference.<sup>121</sup>

Against this background, in part V of the article, I draw from Moseneke J's analysis in *Van Heerden* and unpack each leg of the *Van Heerden* test and apply it to *SARIPA*. However, before moving onto part VI, there is one important issue to consider — the relationship between section-9(2) measures and the section-10 right to dignity. There are different rights and interests that have to be balanced when determining whether a measure passes s 9(2). The most important for this article is the s 10 right to dignity. As will be seen in the discussion below, the right to and value of dignity plays an important role in equality cases. It is particularly salient in the affirmative action context because affirmative action measures focus on attributes such as race, gender or disability to redistribute resources, this focus could be seen as the kind of 'substantial undue harm' prohibited in the third leg of the *Van Heerden* test.<sup>122</sup> As will be seen later in the article, this is the argument made against quotas. It is thus important to critically discuss the role of dignity in the *Van Heerden* analysis. I turn to this below.

## 2 Dignity and affirmative action

As a justiciable right and value, dignity permeates South African constitutional jurisprudence. As a value, dignity sits alongside the value of equality and freedom as foundational to the new democratic South Africa.<sup>123</sup> The right to dignity is protected in s 10 of the Constitution; it provides that every person 'has inherent dignity and the right to have their dignity respected and protected.' The value and right to human dignity have played an important role in the Court's jurisprudence.<sup>124</sup> As noted previously, dignity sits at the core of the *Harksen* test, so central that some consider it the 'lodestar'<sup>125</sup> or 'organising principle'<sup>126</sup> of the right to equality.

The *Harksen* test's focus on dignity has been subject to much criticism.<sup>127</sup> The strongest charge being that it has subsumed substantive equality's focus on redressing group based-disadvantage with an 'evaluation of impairment of individual dignity as equal moral

<sup>120</sup> McConnell (note 12 above) at 190.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Van Heerden* (note 7 above) at para 44.

<sup>123</sup> Constitution, s 1 (Dignity as a founding value); s 36(1) (The limitation of rights must be reasonable and justifiable in an open and democratic society, based on the values of dignity, equality and freedom); s 7(1) (Dignity is one of three democratic values, the other two being equality and freedom). See also, *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 ZACC 8 2000, 3 SA 936 ('*Dawood*') at para 35 (On the value and importance of dignity).

<sup>124</sup> For an analysis of the role that dignity has played in the Court's jurisprudence, see D Cornell (ed) *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (2013).

<sup>125</sup> L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013).

<sup>126</sup> S Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *South African Journal on Human Rights* 34, 34.

<sup>127</sup> See, Albertyn & Goldblatt (1998) (note 60 above); D Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *South African Law Journal* 398; H Botha, 'Equality, Plurality and Structural Power' (2009) 25 *South African Journal on Human Rights* 1; C Albertyn & S Fredman, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments' (2015) *Acta Juridica* 430.

worth'.<sup>128</sup> In the affirmative action context, the question which arises is, as Albertyn puts it 'how do you justify positive measures that seek to redress collective disadvantage but also affect individual members of other, usually more privileged groups?'<sup>129</sup> Rather than repeat the already well-argued point that focusing on the Court's largely individualised conception of the right to dignity in affirmative action cases will leave very little space to justify measures which seek to redress group-based disadvantage,<sup>130</sup> the paragraph that follows will attempt to suggest a way to harmonise the right to dignity with affirmative action measures.

aa Individual and collective dimensions of dignity

The Court has broadly defined dignity as encompassing equal concern and respect for the inherent worth of all persons.<sup>131</sup> The commitment to this conception of dignity can be seen in the Court's description of human dignity as 'intrinsic human worth' in *Dawood*,<sup>132</sup> and in *National Coalition* — 'the value and worth of all individuals';<sup>133</sup> requiring that 'law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are'.<sup>134</sup> This conception of dignity is focussed on the individual and is the most prominent conception of dignity in the Court's unfair discrimination jurisprudence, lending itself to the critique noted previously. However, S Woolman argues that there is another 'collective conception' of dignity.<sup>135</sup>

The collective conception of dignity moves away from the focus on the individual and is concerned with the dignity of society as a whole. While not a prominent feature in the Court's equality jurisprudence, the concern with a more collective conception of dignity can be seen in some of the Court's socio-economic-rights cases. These cases recognise that the failure to realise the fulfilment of socio-economic rights does not merely violate the individual dignity of persons; it also demeans society as a whole. In *PE Municipality*, a case concerning the eviction of families from land owned by the Municipality,<sup>136</sup> the Court noted:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.<sup>137</sup>

A similar idea was expressed in *Khosa*, a case for access to social welfare for non-citizen permanent residence. The Court in *Khosa* held that:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being

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<sup>128</sup> Albertyn (2015) (note 12 above) at 724. Cowen (note 126 above) at 50; S Woolman 'Dignity' in S Woolman, T Roux & M Chaskalson (eds), *Constitutional Law of South Africa* (2nd ed, 2008) 68–69 (who argue that the collective conception of dignity adequately encompasses a concern with substantive equality and redressing group-based disadvantage).

<sup>129</sup> Albertyn (2015) (note 12 above) 724.

<sup>130</sup> *Ibid.*

<sup>131</sup> For an analysis of the court's dignity jurisprudence, see Cornell (note 124 above); Ackermann (note 125 above).

<sup>132</sup> *Dawood* (note 123 above) at para 35.

<sup>133</sup> *National Coalition* (note 50 above) at para 28.

<sup>134</sup> *Ibid* at para 135 (per Sachs J).

<sup>135</sup> Woolman (note 128 above) ch 36 at 15 (For an analysis of what Woolman calls the 'collective dimension' of dignity).

<sup>136</sup> *Port Elizabeth Municipality v Various Occupiers* 2004 ZACC 7, 2005 1 SA 217 CC ('*PE Municipality*') at para 1.

<sup>137</sup> *Ibid* at para 18.

of the poor as connected with their personal well-being and the well-being of the community as a whole.<sup>138</sup>

The idea in the quote above is that we can justifiably impose burdens on more privileged members of society to redistribute resources and redress disadvantage — this affirms the dignity of society as a whole. This more collective conception of dignity can be traced to the landmark *Makwanyane* case.<sup>139</sup> In that case, Langa J made a connection between dignity and the African value of Ubuntu. In this regard, he held that the commitment to dignity heralds:

[A] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>140</sup>

The African value of Ubuntu has been used in many judgments by the Court,<sup>141</sup> this 'legal conception' of Ubuntu broadly denotes a concern with community and 'being', combining 'individual rights with a communitarian philosophy'.<sup>142</sup> In *Makwanyane*, Mokgoro J explained:

Generally, ubuntu translates as 'humaneness'. In its most fundamental sense, it translates as personhood and 'morality' ... it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.<sup>143</sup>

While I do not support the idea that the value of dignity as defined by our Courts, even in its collective dimension, can capture the fullness of what this value encompasses;<sup>144</sup> I do think that, to the extent that we accept Ubuntu as 'a unifying motif of the Bill of Rights'<sup>145</sup> or a 'source of law',<sup>146</sup> even its limited legal form supports the argument for a conception of dignity that is not inimical to redistributive measures that impose burdens on some members of the community, in particular, the more privileged, to redress past injustice.

Seen against the backdrop of a concern with community, collective responsibility and a concern for others, redistributive measures under s 9(2), including affirmative action measures,

<sup>138</sup> *Khosa* (note 37 above) at para 75.

<sup>139</sup> *S v Makwanyane & Another* 1995 ZACC 3, 1995 3 SA 391 ('*Makwanyane*') (In this case, the Court found that the death penalty was unconstitutional).

<sup>140</sup> *Ibid* at para 224.

<sup>141</sup> *Ibid* (The value of Ubuntu is evoked in the different judgments (to support doing away with the death penalty); *PE Municipality* (note 136 above) at para 37; *Dikoko v Mokhatla* 2006 ZACC 10 2006, 6 SA 235 CC at paras 68–69; *Afri-Forum & Another v Malema & Others* 2011 ZAEQC 2, 2011 6 SA 240 EqC ('*Malema*') at para 18.

<sup>142</sup> *PE Municipality* (note 136 above) at para 37.

<sup>143</sup> *Makwanyane* (note 139 above) at para 308.

<sup>144</sup> M Ramose, 'Ubuntu: Affirming a Right and Seeking Remedies in South Africa' in L Praeg & S Magadla (eds) *Ubuntu: Curating the Archive* (2016). Ramose separates the legal idea of Ubuntu from Ubuntu philosophy. He defines the latter as 'the lived and living experience of human beings means that the human dignity of the Bantu-speaking peoples demands recognition, protection, promotion and respect on the basis of equality with all other human beings'. The exclusion of this in the Constitution is for him an exclusion of historically oppressed peoples from the domain of being. In any case, whatever form we give in law to Ubuntu, in my opinion, it will never fully capture according the kind of recognition, protection and promotion of equality that Ubuntu demands.

<sup>145</sup> *PE Municipality* (note 136 above) at para 37.

<sup>146</sup> *Malema* (note 141 above) at para 18.

can be seen as tools to fulfil the right to dignity of the individual beneficiaries of affirmative action. These measures also affirm the dignity of society as a whole. The imperative for such measures is that a commitment to collective dignity cannot justify the subsistence of prevailing inequality. In a society where some groups have a disproportionate share of resources, the collective conception of dignity requires steps to be taken to redress this.

The collective conception of dignity fits well with providing an impetus for affirmative action. But there remains a tension between realising the right to equality and dignity through affirmative action and the impact that these measures can have on non-beneficiaries' individual right to dignity.<sup>147</sup> Describing the last leg of the *Van Heerden* test (the overall analysis of whether a measure promotes the achievement of equality), Moseneke J held that affirmative action measures should not 'constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened'.<sup>148</sup> Reiterating this in *Barnard*, he held that 'Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned'.<sup>149</sup> At the same time, the Court acknowledged how affirmative action measures, in redressing group-based disadvantage, affirm the dignity of historically disadvantaged groups,<sup>150</sup> and of society as a whole, even those adversely affected by these measures.<sup>151</sup> Van der Westhuizen J thus noted:

The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.<sup>152</sup>

However, it is still unclear how to resolve the apparent tension between the collective dimension of dignity and the individual conception of dignity. Two possible approaches can be seen in Van der Westhuizen J's concurring opinion in *Barnard*, one more promising than the other.

#### bb Resolving the tension

The first approach is to say that the individual conception of dignity should yield to the collective conception. In this regard, Van der Westhuizen J in *Barnard* reasoned that the right to dignity is not absolute, 'Aspects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages'.<sup>153</sup> However, in his analysis, it is not clear how to go about finding when individual dignity should yield to collective dignity or vice versa. It is also not clear what the basis for this approach would be. Confusingly, referring to the apparent tension between the claimant in that case's right to dignity and the pursuit of dignity underlying the impugned affirmative action decision, Van der Westhuizen J held that:

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<sup>147</sup> *Van Heerden* (note 7 above) at para 44; *Barnard* (note 17 above) at para 30.

<sup>148</sup> *Van Heerden* (note 7 above) at para 44.

<sup>149</sup> *Barnard* (note 17 above) at para 30.

<sup>150</sup> *Ibid* at para 89.

<sup>151</sup> *Ibid* at para 175.

<sup>152</sup> *Ibid*.

<sup>153</sup> *Ibid* at para 169.



[T]he dignity of millions of black people who were victims of apartheid's discrimination and who are still suffering its consequences can also not be weighed against the dignity of one white woman. The calculation required to restore the dignity of many after decades of unfair discrimination and the possible cost to the interests of individuals like Ms Barnard, was done when the Constitution was agreed on. Apartheid was a violation of human dignity, indeed a crime against humanity.<sup>154</sup>

The quote above starts with the idea that individual and collective dignity cannot be weighed against each other. Van der Westhuizen J then seems to suggest that the calculation had already been made, creating a hierarchy between individual and collective dignity — the latter taking precedence. But he did not provide a basis for this approach and thus did not really resolve the tension.

The second approach is to focus on the nature of the harms that both the collective and individual conceptions of dignity seek to protect. Under this approach, the evaluation of whether there has been a violation of the right to dignity should respond to the context of our history of domination and oppression, a history which provides context for why dignity is important to us. In *Dawood*, the Court held that:

The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.<sup>155</sup>

The quote above makes clear that the importance of the value and the right to dignity is in the fact that it contradicts domination, subordination and oppression. This is a past in which Black people were 'treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity'.<sup>156</sup> Accordingly, having experienced 'the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law, the majority committed this country to particularly generous constitutional protections for all South Africans'.<sup>157</sup>

Seen from this perspective, the collective and individual conceptions of dignity should be seen as bulwarks against measures which entrench or create new patterns of disadvantage, mark individuals and groups as inferior, mark them with a 'badge of inferiority', 'demean' them. Thus, measures which entrench or create new patterns of disadvantage, marking some groups as inferior and part of an 'under-class' should not pass the s 9(2) threshold. Writing in the context of s 9(2), in particular on the relationship between s 9(2) and dignity, Ackerman J captures this approach, noting that 'Remedies are not justified which would result in turning the white "category of persons" into an underclass'.<sup>158</sup> This is the most coherent approach to grappling with the tension between individual and collective dignity. It takes us away from asking whether collective dignity trumps individual dignity to a contextualised analysis of the dignity harm.

In relation to quotas, we would have to ask whether looking at persons through the lens of their group membership (race, gender) and placing their merit, capacity, skills, relative experience and expertise within the context of the historical oppression and domination of

<sup>154</sup> Ibid at para 178.

<sup>155</sup> *Dawood* (note 123 above) at para 35.

<sup>156</sup> *Prinsloo* (note 42 above) at para 31.

<sup>157</sup> *Minister of Home Affairs & Another v Fourie & Another* 2005 ZACC 19, 2006 1 SA 524 CC at para 9.

<sup>158</sup> Ackermann (note 125 above) at 359. To be clear, I do not agree with his overall approach to s 9(2) of the Constitution or his likening it to private law unjustified enrichment. However, I share this specific instinct about what falls outside the scope of s 9(2) of the Constitution.

other groups, has the impact described above. My argument is that this approach would allow us to catch measures which would, ‘obliterate’ the opportunities of persons or those which have the impact of ‘permanently disqualifying a person from qualifying or practising a particular career or any other form of employment’.<sup>159</sup> In the language of proportionality, these absolute barriers cannot be said to be a proportionate means of promoting the achievement of equality. As will be shown in part V, quotas, however rigid, do not inherently have this impact, they will in some cases be proportionate.

While not fully capturing the approach suggested, in *Barnard*, Van der Westhuizen J was arguably looking for and could not find this harm to dignity, neither could any of the judges in that case. Having held that ‘An atomistic approach to individuals, self-worth and identity’ is not appropriate in the affirmative action context,<sup>160</sup> he analysed the impact of the measure on the dignity of the complainant, within the context outlined above. First, he asked whether the claimant had been treated as a means to achieve an *end in the sense that it reduced her ‘to a member of an underclass to the extent that her place in society and in the Constitution is denigrated.’*<sup>161</sup> Second, he asked whether the measure created an *absolute barrier to her advancement, obliterating* her chances to career advancement.<sup>162</sup> He found that the impact on the dignity of the claimant was not severely restrictive.<sup>163</sup> He reached this finding based on the fact that by the time claimant in the case appeared before the Court; she had been promoted to another position.<sup>164</sup> From this we can draw the principle that affirmative action measures which treat persons or groups as second class, marking them with a badge of inferiority, as ‘underclass’, and which obliterate the chances of admission and advancement, creating an absolute barrier, violate the right to dignity – they are a disproportionate means of promoting the achievement of equality.

This approach can also be seen in Moseneke J’s assessment in *Van Heerden*. In *Van Heerden*, Moseneke J acknowledged that the measure in that case would mean that the non-beneficiary class would receive less pension contributions than the beneficiary class of the affirmative action measure. However, that impact was not sufficient to give rise to a finding that their right to dignity had been violated, a part of this reasoning was that the claimants in *Van Heerden* were not a vulnerable or marginalized class, they belonged to a class that was more socio-economically advantaged than the intended beneficiary class and would remain so even with the impugned policy in that case.<sup>165</sup> Under these circumstances, that they would lose out on a monetary benefit could not rise to a finding that their right to dignity had been infringed.

In the last part of this article, I will apply the *Van Heerden* test and dignity as understood in this part to argue against the prohibition of quotas under s 9(2) of the Constitution and in favour of a contextual and ‘situation-sensitive’ approach. In parts III and IV, however, I turn to consider how the Court has defined quotas and the reasons it has offered to explain why they are prohibited — starting with the affirmative action jurisprudence under the EEA.

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<sup>159</sup> *Ibid* at 361.

<sup>160</sup> *Barnard* (note 17 above) at para 174.

<sup>161</sup> *Ibid* at para 180 (own emphasis).

<sup>162</sup> *Ibid* (own emphasis).

<sup>163</sup> *Ibid* at para 183.

<sup>164</sup> *Ibid* at para 181.

<sup>165</sup> *Van Heerden* (note 7 above) at paras 53–54.

### III THE 'LOOK, FLAVOUR AND CHARACTERISTICS OF QUINTESSENTIAL QUOTAS' IN SOUTH AFRICA

As already mentioned, the EEA expressly prohibits the use of quotas.<sup>166</sup> Unfortunately, it does not define quotas, or provide any guidelines on how they differ from permissible numerical targets — this task was left to the courts. As will be seen in the analysis below, one of the Court's approaches to defining quotas, the individualised approach, does not fit with the other provisions in the EEA. More problematically, it contradicts the very purpose of affirmative action under this statute.

To understand the Court's definition of quotas, we have to take a close look at the affirmative action provisions in the EEA. Section 15(1) of the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce.' The EEA offers a very wide definition of 'suitably qualified'. According to s 20(3), a person may be suitably qualified for a job as a result of any of, or a combination of the person's formal qualifications, prior learning, relevant experience or the capacity to acquire, within a reasonable time, the ability to do the job. Further, when determining suitable qualification, s 20(5) prohibits employers from unfairly discriminating against a person on the grounds of his or her relevant experience.<sup>167</sup> This wide and generous definition of suitable qualification is designed to move away from a decontextualized centring of individual merit. Cognisant of past and persisting barriers to access equal educational opportunities and access to jobs, this definition makes clear the connection between the privilege of some groups, in particular, white males, and their ability to amass skills, experience and expertise. Referring to the over-representation of white persons in the South African Police Services' senior positions Mlambo JP in the Labour Appeal Court decision in *Barnard* captures this connection when he noted:

The over representivity of white males and females is itself a powerful demonstration of the insidious consequences of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks.<sup>168</sup>

The leading criterion to determine equitable representation has been whether the workplace, at each occupational level, reflects the national and regional demographics of the economically active population.<sup>169</sup> Another important provision is s 15(4). Section 15(4) prohibits measures which create an absolute barrier to 'the prospective or continued employment or advancement of people who are not from designated groups'.<sup>170</sup> In its jurisprudence, the Court, in *Barnard*, has held that the core difference between quotas and numerical targets is the flexibility of the latter and rigidity of the former. Numerical targets are 'inclusive'<sup>171</sup> and 'flexible employment guidelines' while quotas are 'rigid' and amount to 'job reservations'.<sup>172</sup> This definition is

<sup>166</sup> EEA, s 15(3).

<sup>167</sup> IM Young *Justice and the Politics of Difference* (1990) ch 7 (Argues that there is no 'objective' ideal of what merit entails. It is largely defined to reflect the position and values of dominant groups in society).

<sup>168</sup> *South African Police Services v Solidarity obo Barnard* 2012 ZALAC 31, 2013 1 BLLR 1 LAC at para 38.

<sup>169</sup> EEA, s 42(a), in *Correctional Services* CC (note 17 above), the numerical targets in this case relied on national demographics. The Court held that both national and regional demographics had to be taken into account.

<sup>170</sup> *Barnard* (note 17 above) at para 42.

<sup>171</sup> *Ibid* at para 54.

<sup>172</sup> *Ibid*. This approach was affirmed in *Correctional Services* CC (note 17 above) at para 51.

based on a reading of ss 15(3) and (4) of the EEA. According to the Court, the design or implementation of numerical targets in a manner that creates *an absolute barrier* converts permissible numerical targets into quotas. There must be a measure of flexibility. However, the requirement of flexibility is vague, giving rise to two key questions. First, in relation to what and for whom are affirmative action measures required to be flexible? Second, what purpose does flexibility serve?

### A Flexibility in relation to *what* and for *whom*?

In response to the first question, two diverging approaches have emerged. The first approach, individualised flexibility, requires an assessment of the individual merit, skills, expertise and experience of persons beyond the suitable qualification threshold.<sup>173</sup> The second approach is more general; flexibility for operational needs of the employer or the public interest is sufficient, the functional approach. As will be shown below, the former approach cannot be reconciled with the express provision for appointing suitably, rather than equally qualified candidates and the prohibition of discrimination based on a lack of experience. In fact, it seems to contradict these provisions.

#### 1 *The individualised approach: individual merit, skills and expertise*

The first approach requires individualised flexibility. According to this approach, affirmative action measures which view persons through the lens of their group membership (based on status such as race, gender etc.) and fail to take individual merit, skills, expertise and experience are rigid quotas. This approach can be seen in two of the four judgments in *Barnard*. In Moseneke ACJ's *obiter* remarks on whether the numerical targets, in that case, were flexible, he found that they were because there was an overrepresentation of white women at the salary level for which the applicant in that case applied and because of the fact that, by the time the case was heard by the Court, she had been promoted.<sup>174</sup> For Moseneke ACJ, this was an indication that the employer had looked beyond its numerical targets and had not created an absolute barrier for the advancement of white women.<sup>175</sup> In their concurring opinion in the case, Cameron et al. JJ provide a clearer picture of this flexibility requirement — the judges required the implementation of affirmative action measures to 'at a minimum' take account of 'the relevant aspects of a candidate's identity ... To do otherwise would be to sanction rigidity that would convert the numerical targets specified in the Plan into impermissible quotas'.<sup>176</sup>

Under the EEA, this approach is confusing because, on the one hand, the Court sanctions the suitable qualification standard, on the other, it requires individual merit to still be a factor in making decisions. While the Court explained the flexibility requirement as being aligned with the prohibition of an *absolute barrier* against non-beneficiaries appointment or advancement, these are two different things. Making 'rigid' appointment or promotion decisions based on numerical targets and without an assessment of individual merit beyond suitable qualification

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<sup>173</sup> Pretorius (2017) (note 31 above) argues in favour of this approach as it reflects, at least for him, the commitment to non-racialism and non-sexism.

<sup>174</sup> *Barnard* (note 17 above) at paras 66–67.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid* at paras 118–119.

is not the same as barring the development of those adversely affected by such appointment or promotion. The difference between these can be seen in the actual findings in *Barnard*.

In *Barnard*, despite her better performance and score in the interview, the claimant was not appointed because of an over-representation of white women at the position for which she applied.<sup>177</sup> While the judges took very different approaches, they all agreed that in light of the over-representation of white women for the position which Ms Barnard applied, the decision not to appoint her was justified.<sup>178</sup> Arguably, while there is a pull towards the individualist approach, especially in Moseneke ACJ and Cameron et al.'s judgments, the judges were not able to reconcile this with the reality of the over-representation of white women. Thus, they all concluded that the lack of individualised flexibility, in this case, had been justified. This reflects some acknowledgement of the real impact of individualised flexibility — it would entitle adversely affected persons, even when they are over-represented, to an individual assessment of merit, skills and expertise that may lead to and justify their continued over-representation. That creating an absolute bar for appointments and promotions is different from a lack of individualised flexibility can more clearly be seen in Van der Westhuizen J's concurring opinion in the case, he held:

Ms Barnard failed to secure appointment because there was over-representation of people from her designated group. Had this over-representation not been present, the policy would not be a bar — let alone an absolute one — to her (or any other similarly qualified white woman's) appointment.<sup>179</sup>

The quote above can be read as saying that the rigid application of numerical targets alone is not prohibited; it is the absolute barrier which is prohibited. Seen against the background of the right to dignity, creating an *absolute barrier* to the advancement of a group will likely be a disproportionate means of promoting the achievement of equality. However, rigidity, in the sense discussed above, does not per se create an absolute barrier to the advancement of non-beneficiaries. Otherwise, the decision not to appoint the claimant in *Barnard* would not have passed constitutional muster. But it did, even under the more rigorous 'fairness' standard applied by Cameron et al. JJ in that case.<sup>180</sup>

## 2 *The functional approach: operational and other requirements*

The second approach accepts that flexibility is not related to the individual. In terms of this approach, the possibility of deviation for operational requirements is sufficient. This approach comes out of the Court's second affirmative action case under the EEA, *Correctional Services*. In this case, Zondo J (writing for the majority) and Nugent AJ (concurring opinion) took different approaches to the kind of flexibility required to protect numerical targets from the damning label of 'quota'. In this case, the impugned policy contained numerical targets and expressly provided for circumstances in which deviations from the numerical targets could be made. According to the policy, the National Correctional Services Commissioner (the Commissioner) could deviate from the numerical targets and appoint persons from non-beneficiary groups in the context of scarce skills and where there was no suitably qualified candidate from the beneficiary group.<sup>181</sup> The measure also created sanctions for managers who failed to meet

<sup>177</sup> Ibid at para 15.

<sup>178</sup> Ibid at paras 66 (per Moseneke ACJ), 123 (per Cameron et al), 181 (per Van der Westhuizen J), 230 (per Jafta J).

<sup>179</sup> Ibid at para 181.

<sup>180</sup> Ibid at paras 76, 93–98.

<sup>181</sup> *Correctional Services CC* (note 17 above) at para 7.

the numerical targets.<sup>182</sup> One of the issues that the Court had to decide on was whether the possibility of deviation from the numerical targets in the circumstances above was enough to render the numerical targets sufficiently ‘flexible’ not to amount to impermissible quotas.<sup>183</sup>

Before the Court, Zondo J held that the numerical targets were sufficiently flexible to not constitute quotas.<sup>184</sup> For Zondo J, the possibility of deviation was not remote; deviations could happen in situations that ‘occur in reality’.<sup>185</sup> In this case, he found the possibility of deviation for operational requirements as constituting a wide power of discretion.<sup>186</sup> That deviations could only be made by the Corrections Commissioner, or that managers could be sanctioned for failing to implement the numerical targets was also not sufficient to convert the numerical targets into quotas.<sup>187</sup>

In contrast, Nugent AJ adopted the individualist approach to flexibility. For Nugent AJ, affirmative action measures had to reach an appropriate balance between the interests of all those affected by them; they had to be ‘thoughtful, empathetic, and textured’.<sup>188</sup> The plan in this case was ‘only cold and impersonal arithmetic’,<sup>189</sup> it had the ‘look, flavour and characteristics of quintessential quotas’.<sup>190</sup> Following the argument in *Barnard*, the ‘look and flavour’ of quotas was the failure to take the individual circumstances of persons into account. For Nugent AJ, the possibility of deviation was separate from questions of the flexibility of the policy in individual cases, beyond the context of scarce skills or operational requirements.<sup>191</sup> On Nugent AJ’s definition, a flexible plan required flexibility in all individual appointments. There had to be discretion in the individual implementation of the numerical targets. This discretion was tied to the ‘individual experience, application and verve’ of applicants.<sup>192</sup>

Returning to the question considered in this paragraph, ‘in relation to what and for whom do we need flexibility?’ According to the Court, we should either be concerned with the individual circumstances, merit and skills of a person adversely affected by an affirmative action measure or with the operational requirements of an employer. As I have shown in the discussion above, the individualist approach does not fit with the other provisions in the EEA and, in practice, it could undermine the purpose of affirmative action measures under the EEA. Specifically, it renders the very purpose of preferential treatment and the threshold of suitable qualification under the EEA redundant. Zondo J’s functional approach kept these intact — allowing a deviation for operational requirements and prioritising advancing and protecting disadvantaged groups who meet the suitably qualified threshold in order to achieve the goals of the EEA. This is done without compromising the prohibition of measures which create an absolute barrier for the advancement of non-beneficiaries. Unfortunately, as the analysis of the lower court decisions in *SARIPA* will illustrate, the individualist approach was adopted and transplanted to s 9(2) of the Constitution.

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<sup>182</sup> Ibid at para 16.

<sup>183</sup> Ibid at para 50.

<sup>184</sup> Ibid at paras 50–64.

<sup>185</sup> Ibid at para 53.

<sup>186</sup> Ibid at paras 54, 60.

<sup>187</sup> Ibid at paras 61–63.

<sup>188</sup> Ibid at para 102.

<sup>189</sup> Ibid at para 101.

<sup>190</sup> Ibid at para 108.

<sup>191</sup> Ibid at para 113.

<sup>192</sup> Ibid at para 118.



## B Flexibility for what purpose?

The second question that arises concerns the rationale behind the flexibility requirement. Under the individualist approach to flexibility, the argument seems to be that the lack of flexibility in quotas, in particular, the failure to take individual merit, skills and characteristics beyond suitable qualification and group membership into account violates the right of non-beneficiaries to dignity and is a form of unfair discrimination.<sup>193</sup> Agreeing with this assessment, Pretorius criticises Zondo J's 'definitional approach' and argues that the failure to take individual characteristics into account gives 'insufficient regard to the nature of the impact of the exceptions on the dignity of those affected',<sup>194</sup> this, according to Pretorius, does not accommodate 'all the implicit considerations of an inclusive notion of substantive equality'.<sup>195</sup> The core of this argument appears to be that more than other forms of affirmative action, quotas disregard the individual rights of non-beneficiaries, leading to the foreclosure of opportunities for the innocent individual.

In addition to the argument that quotas cause harm to the non-beneficiaries or adversely affected disadvantaged groups, the 'quota candidates' are said to experience harm because when affirmative action measures are applied rigidly, they are disadvantaged by the 'invidious and usually false inference' that they have been appointed because of their membership of a disadvantaged group and not on account of their individual merit.<sup>196</sup>

In this part of the article, I have hopefully illustrated how the individualist definition of quotas and the reasons underlying their prohibition is based on the assumption that quotas necessarily create an absolute barrier — which violates the right to dignity. However, this need not be the case. There is a difference between rigidly applying numerical targets to achieve a specific outcome and measures which exclude and create an absolute barrier. As will be argued in the context of s 9(2) of the Constitution, rather than protect the right to dignity, the real effect of the individualist approach to quotas and their absolute prohibition under the EEA is that the effect opens the possibility of subordinating the purpose of redressing group-based disadvantage and fulfilling the rights to equality and dignity of disadvantaged groups with individual merit. That this contradicts the definition of suitably qualified in the EEA and the purpose of this statute is something that the Court will have to resolve. My focus in this article is on s 9(2) of the Constitution and the transplanting of the arguments under the EEA to prohibit quotas under s 9(2). Before making a positive argument to explain why quotas can be permissible affirmative action measures under s 9(2), the next part of this article closely examines the judgments in the *SARIPA* case.

## IV EXTENDING THE PROHIBITION OF QUOTAS TO S 9(2) OF THE CONSTITUTION

The question whether quotas are permissible under s 9(2) of the Constitution came to the fore in the *SARIPA* case. The High Court and Supreme Court of Appeal (SCA) answered this in the affirmative, both courts extended the prohibition of quotas in the EEA to s 9(2) of the Constitution. Before the Court, the majority judgment did not engage with the lower court's

<sup>193</sup> *Ibid* at paras 117, 133 (per Nugent J).

<sup>194</sup> Pretorius (2017) (note 31 above) at 282.

<sup>195</sup> *Ibid* 281.

<sup>196</sup> *Barnard* (note 17 above) at para 80.

findings on the impermissibility of quotas. As will be seen below, while Madlanga J's dissent cast some doubt on the lower court findings, he did not make any definitive findings on the permissibility of quotas under s 9(2) either.

### A The salient facts of *SARIPA*

The *SARIPA* case concerned a policy which sought to regulate the appointment of provisional trustees<sup>197</sup> to control and administer insolvent estates and commercial entities before the appointment of the final trustees at a meeting of the creditors.<sup>198</sup> The case was rooted in an apparent conflict between two provisions of the Insolvency Act, 1936 (the Insolvency Act), ss 18 and 158(2). Section 18 of the Insolvency Act empowers the Master of the High Court (the Master) to appoint a provisional trustee in terms of a policy determined by the Minister under s 158(2) of the same legislation.

Under the impugned s 158(2) policy, the Master would have to appoint *suitably qualified* insolvency practitioners using an alphabetised list. The list created four categories in accordance with race, gender and date of citizenship. The policy ranked the different beneficiaries in four categories:

- i. Category A of the Minister's policy consisted of Black women who became South African citizens before 27 April 1994;
- ii. Category B consisted of Black men who became South African citizens before 27 April 1994;
- iii. Category C consisted of white women who became South African citizens before 27 April 1994 and;
- iv. Category D consisted of Black men and women, white women, who became South African citizens on or after 27 April 1994 and white males regardless of when they became citizens.<sup>199</sup>

Based on the four categories, the policy required appointments to be made in the ratio A4: B3: C2: D1. The letters represented the racial and gender categories, while the numbers represented the number of practitioners who should be appointed in each category.<sup>200</sup> The list also separated junior and senior practitioners based on their relative experience.<sup>201</sup> The date of citizenship is significant because it marks the beginning of the democratic dispensation. In separating the groups based on the date of citizenship, the policy prioritised Black women and men as well as white women (in that order) who were citizens before the democratic transition but treated all Black persons who were citizens after this date, the same as *all* white males.

The policy allowed for a deviation from the list system where the complexity of the matter and the suitability of the insolvency practitioner next in line required the joint appointment of a senior insolvency practitioner and the next junior or senior practitioner from the list.<sup>202</sup> It was thus possible for the Master to appoint a person other than the next practitioner on the list. Thus, similar to the *Correctional Services* case, the deviation from the list for operational needs of the estate was possible.

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<sup>197</sup> *SARIPA* HC (note 26 above) at para 45. I use the term insolvency practitioners to refer to trustees, liquidators as well as other practitioners under different statutes regulating insolvency.

<sup>198</sup> *Ibid* at paras 30–43 (For a summary of the relevant statutes).

<sup>199</sup> *SARIPA* CC (note 16 above) at para 20.

<sup>200</sup> *Ibid* at para 23.

<sup>201</sup> *SARIPA* HC (note 26 above) at para 55.

<sup>202</sup> *SARIPA* CC (note 16 above) at para 25.

Before its implementation, the policy was challenged in two High Courts. Before the Western Cape High Court, the South African Restructuring and Insolvency Practitioners Association, an organisation acting on behalf of insolvency and business rescue practitioners (SARIPA), brought two applications against the Minister and the Chief Master of the High Court of South Africa.<sup>203</sup> Part A of the application sought an interdict to the implementation of the policy. Part B was a review of the policy's constitutionality. The Association for Black Business Rescue and Insolvency Practitioners of South Africa intervened in this application and took part in the hearing of Part A, seeking the opposite relief to SARIPA.<sup>204</sup> The Western Cape High Court granted the interdict pending the determination of Part B.<sup>205</sup> Before the North Gauteng High Court, the Concerned Insolvency Practitioners Association (CIPA), a voluntary organisation of practising insolvency practitioners, brought a challenge seeking a declaratory order to the effect that the policy is unconstitutional.<sup>206</sup> The National Association of Managing Agents and the trade union solidarity intervened in this application.<sup>207</sup> By agreement, Part B of the SARIPA application and the CIPA application (the Applicants) were heard together by the Western Cape High Court.<sup>208</sup>

The Applicants challenged the impugned policy on several grounds, including, that the Minister had exceeded his powers in fettering the Masters' discretion; that it violated the right to equality; and that it was arbitrary and irrational.<sup>209</sup> In support of the policy, the Minister argued that it was an affirmative action measure in line with s 9(2) of the Constitution and that it complied with Moseneke J's three-pronged test in *Van Heerden*.<sup>210</sup> According to the Minister, the policy 'would facilitate access to the industry and restore the previously disadvantaged insolvency practitioners' rights to equality, dignity and would also realise their right to follow their trade, profession or occupation'.<sup>211</sup> There were several findings made by the different courts in this case. For purposes of this article, I focus on the findings that the policy violated the right to equality and dignity and was arbitrary and irrational *because it was* a rigid quota, starting with Katz AJ's Western Cape High Court judgment.

## B The High Court judgment

It will be recalled that the *Van Heerden* test is a three-pronged inquiry into the validity of affirmative action measures. The first leg of the test requires the measure to target persons or categories of persons disadvantaged by unfair discrimination. The second requires the measure to be designed to promote and advance the intended beneficiaries and prohibits irrational and arbitrary measures. The last leg requires the measure to further the achievement of equality. The policy passed the first leg of inquiry, with Katz AJ finding that there was a need to transform the insolvency industry and that the policy targeted a class that has been disadvantaged by unfair discrimination.<sup>212</sup> In the second leg of the inquiry, he held that the

<sup>203</sup> SARIPA HC (note 26 above) at para 12.

<sup>204</sup> Ibid at para 15.

<sup>205</sup> Ibid at para 16.

<sup>206</sup> SARIPA HC (note 26 above) at para 17.

<sup>207</sup> Ibid at paras 19 and 20.

<sup>208</sup> Ibid at para 22.

<sup>209</sup> Ibid at para 7.

<sup>210</sup> Ibid at para 71.

<sup>211</sup> SARIPA SCA (note 25 above) at para 24.

<sup>212</sup> SARIPA HC (note 26 above) at para 138.

court had to determine whether the policy was rationally related to its purpose, improving the position of historically disadvantaged groups.<sup>213</sup>

The Minister argued that the policy was rationally related to its purpose because, by intervening in the provisional appointment of insolvency practitioners, the policy would ensure that disadvantaged persons had exposure, enabling them to develop the skill and reputation necessary to build successful practices. According to the Minister, given the opportunity to demonstrate their skill at the provisional stage, the creditors would ultimately appoint them at the final stage, gradually transforming the insolvency industry.<sup>214</sup> In response, the Applicants argued that the policy prevented the Master from having regard to the skills, knowledge and expertise of practitioners, which would lead to the appointment of unsuitable candidates and the entrenchment of current patterns of exclusion as creditors would not want to nominate the ‘unsuitable’ provisional practitioners.<sup>215</sup> Essentially, the Applicants rejected the suitable qualification standard set by the Minister and offered a definition that required ‘a proper match between the sector specific expertise of an individual practitioner and the estate’.<sup>216</sup> They also argued that the list system was a rigid quota.<sup>217</sup> Deciding in favour of the Applicants, Katz AJ provided three reasons to explain why the policy was arbitrary and irrational.

First, he held that there was insufficient evidence to show that the policy would lead to an increase in the appointment of disadvantaged groups. In this regard, he held that a policy seeking to transform the insolvency industry had to do more than increase numbers, there had to be a match between ‘individual skill and the requirements of the role’.<sup>218</sup> Katz AJ buttressed the need for a higher threshold of suitable qualification by pointing at the harm the policy would cause to the qualified disadvantaged persons ‘who have managed to establish themselves in the industry’.<sup>219</sup> This group, according to the court, would lose out from being rewarded for their excellence.<sup>220</sup> Instead, he preferred ‘progressive’ measures that would incrementally increase the skill and expertise of disadvantaged practitioners.<sup>221</sup> Further, he held that because there was no time limit to the policy, it was difficult to determine whether the policy was likely to achieve its outcome.<sup>222</sup> Another basis for the lack of evidence was that, according to Katz AJ, the Minister had not adduced evidence to show that the ‘mechanical appointments *can*, in fact, change nomination behaviour by creditors’.<sup>223</sup> He characterised the policy as a ‘hope’ rather than a reasonable likelihood.<sup>224</sup> He also argued that there were too few insolvency practitioners from disadvantaged groups to populate the Master’s list.<sup>225</sup>

Second, he rejected the statistical evidence that the Minister relied on to underlie the policy. The Applicants disputed the accuracy of the evidence relied on to found the policy.<sup>226</sup> Because

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<sup>213</sup> Ibid at para 144.

<sup>214</sup> Ibid at para 149.

<sup>215</sup> Ibid at para 154.

<sup>216</sup> Ibid at para 155.

<sup>217</sup> Ibid at para 137.

<sup>218</sup> Ibid at para 156.

<sup>219</sup> Ibid at para 157.

<sup>220</sup> Ibid at para 158.

<sup>221</sup> Ibid at para 160.

<sup>222</sup> Ibid at para 161.

<sup>223</sup> Ibid at para 162 (own emphasis).

<sup>224</sup> Ibid.

<sup>225</sup> Ibid at para 163.

<sup>226</sup> Ibid at paras 166–176.

of 'significant gaps'<sup>227</sup> and 'inaccurate information'<sup>228</sup> relied on by the Minister, especially in relation to the lists that would be used by the Master,<sup>229</sup> he held that the discrepancies in the list diminished the likelihood of the policy achieving its purpose.<sup>230</sup>

Third, he held that the policy amounted to a rigid quota. The Applicants made this argument in two parts. The first was a challenge to the use of the status of race and gender as proxies for disadvantage.<sup>231</sup> The second was that even if the classifications were valid, they were rigid in form and their implementation.<sup>232</sup> Concerning the first argument, the Applicants challenged the use of racial classifications as proxies for disadvantage, arguing that these classifications amounted to 'racial norming' rather than act as 'flexible proxies for disadvantage'.<sup>233</sup> In response to this argument, Katz AJ held that 'divorced from other contextual factors' the use of racial classifications was 'an arbitrary threat to the dignity and autonomy of individuals'.<sup>234</sup> However, he dismissed the argument on the basis that these classifications were also used under black economic empowerment and employment equity legislation, concluding that it was not open for the court to determine whether the categories used were themselves arbitrary and irrational.<sup>235</sup> However, he found the measure to amount to 'an inflexible and rigid roster system' which had the effect of arbitrarily redistributing work.<sup>236</sup> This finding was based on two reasons: first, he held that quotas were contrary to the goal of achieving equality and second, he held that the rigidity of quotas violated the right to dignity of the non-beneficiaries of affirmative action. In relation to the first argument, Katz AJ found that there was a tension between achieving the goals of equality and the use of quotas as they do not allow for competition in the insolvency industry, he thus noted:

As a matter of logic, all practitioners operating in the insolvency environment should ultimately be able *to obtain work on an equitable basis* (which must, in the long term be related to the requirements of the work and the nomination practices of creditors). For a measure to effectively *assist all practitioners in equitably competing* for appointment requires something more than inflexible allocations.<sup>237</sup>

Second, similar to the approach under the EEA, Katz AJ held that the rigid implementation of the policy's ratios did not leave scope for considering the skills, knowledge, expertise and experience' of individual candidates.<sup>238</sup> Accordingly, it violated the dignity of both the beneficiaries of the measure and the excluded groups, specifically the white males in Category D.<sup>239</sup> According to Katz AJ:

Such harm to the core value and right of dignity is the product of a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place. A scheme of this nature does violence to the notion of

<sup>227</sup> Ibid at para 177.

<sup>228</sup> Ibid at para 180.

<sup>229</sup> Ibid at para 81.

<sup>230</sup> Ibid at para 182.

<sup>231</sup> Ibid at para 192.

<sup>232</sup> Ibid at para 191.

<sup>233</sup> Ibid at paras 192–193.

<sup>234</sup> Ibid at para 194.

<sup>235</sup> Ibid at para 195.

<sup>236</sup> Ibid at para 180.

<sup>237</sup> Ibid at para 199 (own emphasis).

<sup>238</sup> Ibid at para 215.

<sup>239</sup> Ibid.

transformation from a racist, racialised, sexist and gendered past to a non-racial and non-sexist future.<sup>240</sup>

For Katz AJ, the commitment to non-racialism and non-sexism required individual skill and expertise to be approached from a neutral perspective. The context within which individual skills and expertise was amassed was not relevant to whether and the extent to which, beyond suitable qualification, it should matter. Thus, in relation to the white males, Katz AJ argued that the ratios implicated their right to work and inherent dignity.<sup>241</sup> Essentially, what separates a permissible numerical target from an impermissible quota under s 9(2) of the Constitution, as under the EEA, was flexibility, individualised flexibility. The policy in *SARIPA*, according to Katz J, used race and gender categories which created silos ‘which overly privilege[s] race and sex at the expense of all other relevant characteristics’.<sup>242</sup> In addition to dignity harm to the non-beneficiary class, Katz AJ also found that the use of quotas could cause harm to the interests of the intended beneficiaries of affirmative action. He reasoned that quotas create ‘the impression that appointments are due only to race and exclusive of merit’.<sup>243</sup>

Katz AJ concluded his judgment with the observation that, in light of the history of ‘state-sponsored racism and sexism, race and gender will always be significant factors when considering the right to equality’.<sup>244</sup> However, as will be apparent later in the article, his judgment did the exact opposite. Katz J’s judgment ushered in a refocus on individual merit that will only have the consequence of entrenching existing patterns of disadvantage in favour of historically privileged groups — albeit in the name of preserving dignity.

## C No refuge for quotas: The Supreme Court of Appeal and Constitutional Court judgments

### 1 *The Supreme Court of Appeal judgment*

Mathopo J’s majority opinion in the SCA affirmed Katz AJ’s findings on the impermissibility of quotas under s 9(2) of the Constitution. According to Mathopo J, advancing employment equity and transformation required flexibility and inclusiveness.<sup>245</sup> ‘Rigidity in the application of the policy which has the effect of establishing a barrier to the future advancement of such previously advantaged insolvency practitioners is frowned upon and runs contrary to s 9(2) of the Constitution.’<sup>246</sup> This was because quotas are a form of arbitrariness or naked preference that was prohibited under the second leg of the *Van Heerden* test.<sup>247</sup> Further, he held that quotas unjustifiably encroach ‘upon the human dignity of those affected by them’.<sup>248</sup>

Dismissing the argument that the policy allowed for deviations and was thus flexible enough to escape the classification as an impermissible quota, Mathopo J began by acknowledging that the policy in this case, ‘was almost identical’ to the policy in the *Correctional Services* case.<sup>249</sup>

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<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid at para 216.

<sup>243</sup> Ibid at para 205.

<sup>244</sup> Ibid at para 228.

<sup>245</sup> *SARIPA* SCA (note 25 above) at para 29.

<sup>246</sup> Ibid.

<sup>247</sup> Ibid at para 32.

<sup>248</sup> Ibid.

<sup>249</sup> Ibid at para 35.



However, he distinguished the policy in *Correctional Services* from the policy in the present case by holding that the discretion to deviate from the plan in *Correctional Services* was 'general' and allowed for some discretion, in this case, it was not.<sup>250</sup> It is not clear why the assessment of whether an estate is so complex that the next insolvency practitioner in line is not suitable, is not 'general' discretion. There is no difference between the nature of the deviation in *SARIPA* and the policy in *Correctional Services* — it is pretty clear that the real issue lay with the kind of deviation possible in this case — one not related to individual skills, merit and expertise. Accordingly, while Mathopo J purported to endorse Zondo J's approach in *Correctional Services*, he, in fact, aligned with the individualised approach, the policy was too rigid because it failed to take the individual circumstances of insolvency practitioners into account.

As further proof that the policy was arbitrary and irrational, Mathopo J found that the policy was capricious because it was formulated without reference to its impact. In this regard, he argued that because there were more white males in the insolvency practice than all the other groups', white males (who would receive one of every ten appointments) would prejudice this group and young practitioners.<sup>251</sup> In addition, Mathopo J pointed at the fact that the policy had no mechanism to allow a practitioner to refuse an appointment. Given the few practitioners in Category A, who would be allocated 40 per cent of the work, he worried that it was unclear what they would do if they were too busy to take on work.<sup>252</sup> He thus concluded that the likely effect of the policy would 'be to force many insolvency practitioners in category D, or category C, out of the profession and deter others, especially the young, from entering it.'<sup>253</sup>

## 2 *The Constitutional Court judgments*

The majority decision in the Court did not engage with whether quotas were impermissible under s 9(2) of the Constitution.<sup>254</sup> Instead, applying the *Van Heerden* test, Jafta J found the policy unconstitutional for failing the second leg of *Van Heerden*. In contrast, Madlanga J's dissent casts some doubt on this absolute prohibition. It takes a markedly different approach to the analysis of the impact that the measure has on the non-beneficiaries of affirmative action.

### aa The majority judgment

Similar to Katz AJ's finding in the High Court, Jafta J held that the policy failed the second leg of the test because 'from the information on record' the policy was not likely to transform the insolvency industry.<sup>255</sup> This was because it was not clear whether there was a single list or how it would be applied by the Masters in each court or if they would have their own list. Because of this 'paucity of information' in relation to the implementation of the policy, it could not be said that the policy was likely to achieve the stated goal.<sup>256</sup> Further, Jafta J held that the most 'serious defect' was in relation to Category D which lumped Black males and females who became citizens on or after 27 April 1994 with all white males and white females born on or after 27 April. Because white males would be the majority of this group the allocation of

<sup>250</sup> Ibid.

<sup>251</sup> Ibid at para 36.

<sup>252</sup> Ibid at para 37.

<sup>253</sup> Ibid.

<sup>254</sup> Jafta J simply summarises the findings in the lower court judgments, *SARIPA* CC (note 16 above) at paras 10–14.

<sup>255</sup> Ibid at para 40.

<sup>256</sup> Ibid.

one appointment would disadvantage the ‘young’ in favour of white males and the status quo would be retained as most appointments would go to them.<sup>257</sup> Thus, he held that the policy perpetuated the disadvantage it purported to eradicate, discriminating against races on the basis of when they obtained their nationality, specifically those who fell under the groups that s 9(2) sought to advantage.<sup>258</sup> In relation to the third leg of the *Van Heerden* test, Jafta J seemed to confuse the second and third leg, holding that the second leg was also concerned with ‘the reasonable likelihood that the restitutionary measure concerned would achieve the purpose of equality’.<sup>259</sup> But then he alluded to this leg being about the impact that the measure has on those adversely affected, noting that ‘it is inevitable that those who were previously advantaged would be affected adversely. This is the price demanded by the Constitution to remedy the injustices of the past order and to attain social justice’.<sup>260</sup>

Overall, Jafta J concluded that, under s 9(2), the facts on record did not show that the policy was likely to achieve equality.<sup>261</sup> It is disappointing that Jafta J missed the opportunity to bring clarity on whether quotas fell within the scope of permissible s 9(2) measures. In contrast, while he did not make any definitive findings, Madlanga J’s dissenting judgment cast doubt on the constitutional impermissibility of quotas. Further, his overall analysis gave more deference to the Minister and placed the impact that the measure would have on white male insolvency practitioners in context. In recognition of the adverse impact the policy would have on the ‘younger’ Black insolvency practitioners in Category D, rather than strike down the policy on this basis, he opted for a remedy that would preserve the affirmative action measure and protect against entrenching patterns of disadvantage — severing Category D from the policy.<sup>262</sup>

#### bb The dissenting judgment

Madlanga J began his judgment by noting that the reason why white people continued to be disproportionately better qualified and more experienced was ‘a function of the subjugation of black people and their exclusion from accessing equal opportunities through centuries of colonialism and apartheid’.<sup>263</sup> He characterised the policy as one step ‘in the tortuous, long road towards the attainment of substantive equality’.<sup>264</sup> While agreeing with the majority that the Category D classification was constitutionally invalid, he chose to sever this clause and preserve the impugned policy.<sup>265</sup> Of importance to this article is his scepticism towards the need for flexibility; his analysis of the nature of the impact that the measure had on white males; and the question whether quotas fell outside the scope of s 9(2) of the Constitution.

Responding to the argument that the policy displaced the discretion of the Master, he reasoned that the preservation of discretion and the need for flexibility worked to preserve the status quo, removing such discretion through policies such as the one in the case eliminated the possibility of unfair and unjustified preference.<sup>266</sup> Essentially, the absence of discretion

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<sup>257</sup> Ibid at para 41.

<sup>258</sup> Ibid at para 42.

<sup>259</sup> Ibid at para 46.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid at para 48.

<sup>262</sup> *SARIPA CC* (note 16 above) at para 70.

<sup>263</sup> Ibid at para 63.

<sup>264</sup> Ibid at para 64.

<sup>265</sup> Ibid at para 70.

<sup>266</sup> Ibid at para 77.

could further the purpose of redressing group-based disadvantage. Moreover, he pointed out that the 'flexibility' standard required something more than the requirement of the suitable qualification. If this approach was accepted, he reasoned that the fact that white people, in particular, white males were more likely, as a 'function of previous naked racist preferences and exclusion of other groups from acquiring skills and opportunities' to meet the threshold beyond suitable qualification meant that the flexibility standard was designed to preserve their interests.<sup>267</sup> Accordingly, he argued that if redressing the unequal redistribution of work was taken seriously; there was no need to leave room for the appointment of the more than just 'suitably qualified' candidate.<sup>268</sup>

Under the heading 'Quotas, impermissible rigidity and arbitrariness', Madlanga J expressed a measure of reservation about Mathopo J's finding that rigid quotas were constitutionally impermissible. While he found it unnecessary to engage in a debate on whether 'under section 9(2) — quotas are similarly outlawed',<sup>269</sup> he held that 'before invalidating a measure meant to achieve substantive equality for being rigid, it must be looked at in context or in a "situation-sensitive" manner. It can never be a one-size-fits-all'.<sup>270</sup> As an example of such an approach, he considered *Van Heerden* and *Correctional Services* as cases in which rigidity could have completely foreclosed the possibilities and opportunities for the disgruntled applicants in those cases. In the *SARIPA* case, he argued that the policy had been limited in its application to provisional appointments, while elsewhere, white males would continue to dominate the insolvency industry.<sup>271</sup>

In response to the argument that the policy would lead to the closure of the practices of white insolvency practitioners, he referred to the impact that maintaining the status quo had on disadvantaged practitioners. They 'cannot even begin truly to make a living in this area of practice' and those excluded from entry because of the dominance of white practitioners.<sup>272</sup> Further, he held that the policy did not unduly invade the human dignity of those affected by them because they continued to benefit at the final stage of appointment. In this regard, he critiqued the failure to consider the 'indisputable reality of the domination of the final stage by white practitioners', for him the disadvantage caused by the policy was compensated in that the industry remained unaffected at the final stage of appointment.<sup>273</sup>

Referring to *Van Heerden*, he reiterated that just because a measure had an adverse impact on a non-beneficiary group did not mean that it was unconstitutional.<sup>274</sup> Madlanga J questioned not only the extent of the adverse impact on white male insolvency practitioners but also the fact of the existence of a disadvantage in this case. Thus he explained his use of 'perceived disadvantage' as a reference to the fact that there is no 'justification for white people, a small minority, to disproportionately dominate most professions and industries, including insolvency practice' as did in South Africa.<sup>275</sup> In this regard, he held that the goals of achieving equality

<sup>267</sup> Ibid at para 78.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid at para 79.

<sup>270</sup> Ibid at para 80.

<sup>271</sup> Ibid.

<sup>272</sup> Ibid at para 83.

<sup>273</sup> Ibid at para 81.

<sup>274</sup> Ibid at paras 83–84.

<sup>275</sup> Ibid at para 81.

would move at a snail pace if the focus was on the disadvantaged caused to those affected.<sup>276</sup> Thus, he held:

If, for the practices of white insolvency practitioners to continue in existence, it is necessary that white people as a group must not only continue to disproportionately dominate insolvency practice at the final stage but must also derive more benefit than what the policy has given them, then tough luck.<sup>277</sup>

Referring to the majority's finding that the measure failed the second and third leg of the *Van Heerden* test because of the paucity of information on whether there would be one list or different lists applied by each Master, he held the opposite, finding that:

Manifestly in time the measure must, and will, transform the insolvency industry. It affords section 9(2) beneficiaries significant advantage, albeit in varying degrees. Properly applied I do not see how that significant advantage cannot eventually uplift these beneficiaries to a point where the industry will be transformed. That to me is so plain as to require no explanation from the applicants.<sup>278</sup>

The quote above is a gesture that the majority had applied a higher threshold than the 'reasonable likelihood' standard required under the *Van Heerden* test. He thus notes:

The future cannot always be predicted with precision; and that is an understatement. As *Van Heerden* tells us, 'the future is hard to predict'. And '[t]o require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn and defeat the objective of section 9(2).' Courts must exercise caution before knocking down measures calculated to redress the inequality of the past.<sup>279</sup>

In all the judgments in this case, Madlanga J's dissenting opinion was the only judgment which did not accept the argument for the absolute impermissibility of quotas. While he did not explore this, it is clear from his reasoning that he did not consider rigidity to necessarily violate the right to dignity of non-beneficiaries of affirmative action. Unlike the other judgments in the case, he placed the policy and its impact within the context of past and persisting inequalities — something almost absent in the other judgments. The paragraph below takes the baton from Madlanga J and argues that quotas, however rigid, can pass the s 9(2) threshold in the Constitution, in particular, they do not necessarily violate the dignity of the beneficiaries and non-beneficiaries of affirmative action.

## V NOT ALL QUOTAS: A SITUATION-SENSITIVE APPROACH TO QUOTAS

So far in the article, I have reiterated the relatively non-controversial point that s 9(2) permits positive redistributive measures that realise the right to equality and dignity of historically disadvantaged groups, including affirmative action. These measures are a part of the guarantee of equal protection and benefit of the law in s 9(1); they do not attract the presumption of unfairness in s 9(5); they need not be shown to be fair discrimination under s 9(3) as per the *Harksen* test. However, taking into account the adverse impact that these measures could have on the rights, in particular the right to dignity of those adversely affected, these measures must meet the internal threshold in s 9(2), the *Van Heerden* test.

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<sup>276</sup> Ibid at para 82.

<sup>277</sup> Ibid at para 83.

<sup>278</sup> Ibid at para 89.

<sup>279</sup> Ibid at para 90.

I have argued that the *Van Heerden* test is a species of proportionality assessment designed to fit the context of affirmative action. The proportionality assessment under s 9(2) is relatively more deferent than 'traditional' proportionality assessment. In addition, unlike the fairness assessment under *Harksen*, the focus is on the important purpose served by these measures.<sup>280</sup> The balancing under this test is concerned with questions of unequal power and relative advantage and disadvantage between affected groups, as Albertyn summarises, it 'is a contextual enquiry that looks at the issue holistically and should comprehend the structures of advantage and disadvantage that underpin the measure or decision'.<sup>281</sup> Thus, when balancing the competing rights that arise in affirmative action cases, in particular, the right to dignity, these rights must be understood in context. In relation to the right to dignity, I argued that both the collective and individual conceptions of dignity have to be understood against the context of past racial and other forms of subordination, domination and oppression. From this, I have argued that measures which create or entrench patterns of disadvantage, which demean or treat persons as a part of an 'underclass' or mark them as inferior, cannot pass the s 9(2) threshold. This is a high threshold, one which fully aligns with the prohibition of measures which 'impose such substantial and undue harm on those excluded from its benefits that the long-term constitutional goal would be threatened'.<sup>282</sup> In the employment context, I noted that one example of 'substantial and undue harm' is a measure which creates an absolute barrier or excludes persons from entering into, or advancing in a profession or trade.

I then explored the definition of and prohibition of quotas under the EEA. In this regard, I showed that the individualised approach to quotas contradicts and undermines provisions in the EEA. In particular, provisions which permit the preference of *suitably*, rather than *equally* qualified persons. Nevertheless, in the previous section, I explored the *SARIPA* case and showed that, drawing on the EEA jurisprudence, the lower courts in *SARIPA* have adopted the individualised approach. The analysis of the case law and accompanying academic commentary revealed that the rationale for the prohibition of quotas is that they are arbitrary and irrational and that they violate the right to dignity of the beneficiaries and non-beneficiaries of affirmative action.

In this part of the article, I argue that quotas can pass muster as permissible affirmative action measures under s 9(2) of the Constitution. In particular, I argue that quotas which target disadvantaged groups, advancing and protecting these groups through their preference in the allocation of resources, are not inherently irrational, arbitrary, or capricious and do not necessarily violate the dignity of the beneficiaries and non-beneficiaries of affirmative action. Essentially, there is scope for the permissible use of quotas under s 9(2) of the Constitution.

As a point of departure, the arguments that follow rest on the assumption that, accepting the individualised definition of quotas extensively discussed in the preceding two sections, the impugned policy in *SARIPA* was a quota under the individualised approach. The policy required the appointment of the next suitably qualified candidate on the list using the ratio of A:4; B:3; C:2 and D:1. Deviations were only allowed to meet the needs of specific estates. While allowing for flexibility, this flexibility was not tied to the skills, experience and expertise of individual insolvency practitioners in each case. These only became relevant in relation to

<sup>280</sup> Albertyn (2015) (note 12 above) at 731.

<sup>281</sup> *Ibid* at 730.

<sup>282</sup> *Van Heerden* (note 7 above) at para 44.

the needs of a complex estate and where the next eligible practitioner, in the opinion of the Master, could not be said to meet to suitable qualification threshold.

This article is inspired by Madlanga J's dissent and suggests how he could have argued the case for the permissibility of quotas, including the impugned policy in *SARIPA*. It attempts the contextual, 'situation-sensitive approach' he alludes to in his dissent. Thus, in making the argument for quotas, the paragraphs that follow examine the *SARIPA* case under all three legs of the *Van Heerden* test — illustrating problems with the way in which the judges approached this case in their incorrect application of the *Van Heerden* test and their assumption that the rigidity of quotas are necessarily arbitrary, irrational, capricious and destructive towards the right to dignity.

### A Does the measure target disadvantaged groups?

The first leg of the *Van Heerden* inquiry is concerned with the demarcation of the beneficiaries of these measures and requires 'a comparison between affected classes', the beneficiary class and the excluded class.<sup>283</sup> While this is one of the most contested questions in the academic literature on affirmative action,<sup>284</sup> under s 9(2) of the Constitution, this leg of the test has not been a significant hurdle in the court's affirmative action jurisprudence. Because of the history of racial and patriarchal domination and oppression in South Africa, race and gender are salient classifications; but they are not the only possible markers of disadvantage.<sup>285</sup> Under the EEA, the beneficiary groups are classified using race, gender and disability status.

This leg of the test does not require that all disadvantaged groups should be advanced or even that all disadvantaged groups should be advanced in the same manner.<sup>286</sup> However, there must be sufficient basis to show why a specific group is being advanced; this is particularly the case when there is an overlap in the nature of the disadvantage that s 9(2) seeks to redress between different groups.

The classification in *SARIPA* was based on race, gender and citizenship. The policy prioritised Black women who were citizens at the time of the democratic transition, they

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<sup>283</sup> *Ibid* at para 39.

<sup>284</sup> O Dupper 'Affirmative Action: Who, How and How Long?' (2008) 24 *South African Journal on Human Rights* 425; Marie Mc Gregor, 'Categorisation to Determine Beneficiaries of Affirmative Action: Advantages and Deficiencies' 46 *Codicillus* (Dupper & McGregor argue for the inclusion of class criteria); H Papacostantis & M Mushariwa, 'The Impact of Minority Status in the Application of Affirmative Action: *Naidoo v Minister of Safety and Security* 2013 5 BLLR 490 (LC)' (2016) 19 *Potchefstroom Electronic Law Journal* 1; M Mushariwa, 'Who Are the True Beneficiaries of Affirmative Action? — *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC)' (2011) 32 *Obiter* 439 (The authors call for an intersectional approach in the demarcation of beneficiary groups); M Brassey, 'The More Things Change: Multiracialism in Contemporary South Africa' (2019) *Constitutional Court Review* 44. (For a critique of race as a classification).

<sup>285</sup> *Barnard* (note 17 above) Moseneke ACJ identifies race, gender and class as markers of disadvantage and division in South Africa noting that, 'At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class' at para 27; and Cameron et al JJ who note that 'For reasons of history, racial and gender disadvantage are the most prominent. But they are not the only. They do not exclude other signifiers of disadvantage, like social origin or birth' at para 76.

<sup>286</sup> See *Motala & Another v University of Natal* 1995 3 BCLR 374, 1995 SACLR 256 (The court upheld a measure which targeted and preferred African as opposed to Indian persons for medical school admissions. The court accepted the relative educational disadvantage of Africans when compared to Indians as a basis for the specific targeting of Africans for admission).



would receive four of every ten allocations by the Master.<sup>287</sup> On the evidence provided by the Minister, the race and gender classifications were based on the level of under-representation of each group in the allocation of work.<sup>288</sup> Overall, the race and gender classification easily met this threshold. None of the judgments rightly disputed this fact.<sup>289</sup> The problem was with the use of citizenship as a classification. The question being whether the classification was under-inclusive for excluding 'young' insolvency practitioners from the first three classes of beneficiaries, leaving them to 'compete' with all white males in Category D. The different courts dealt with this question in the second leg of the inquiry.<sup>290</sup>

## B Does the measure protect and advance disadvantaged groups?

The second leg of the *Van Heerden* test requires that measures be designed to advance and protect disadvantaged groups. Under this leg, there must be a rational connection between the affirmative action measure and its purpose. This is a low threshold, affirmative action measures must not be 'arbitrary, capricious or display naked preference'.<sup>291</sup> So long as there is a degree of fit between the group sought to be advanced, the measure and its remedial purpose, this leg will be met.<sup>292</sup> This reading is supported by Moseneke J's statement that, 'The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end'.<sup>293</sup>

The low threshold gives room for experimentation in the design and implementation of affirmative action measures because, as the Court acknowledged, affirmative action measures are directed at a future outcome, a future that is hard to predict.<sup>294</sup> Thus, 'To require a sponsor of a remedial measure to establish a precise prediction of a future outcome ... would render the remedial measure stillborn and defeat the objective of section 9(2)'.<sup>295</sup>

Applying this to *SARIPA*, the approach taken in the lower courts, and Jafta J's majority before the Court, was not in line with this threshold. In particular, there are two problems in the application of this leg in *SARIPA*. First, the courts ask for a much tighter fit between the policy and its effects on the intended beneficiaries, much more than a reasonable likelihood of success. Second, as further proof of irrationality and arbitrariness, Katz AJ makes a flawed assumption about the stigmatic harm of the measure to its intended beneficiaries. I turn to these below.

### 1 *More than reasonable likelihood*

In the High Court, Katz AJ required a much higher standard than rationality at this leg and placed a very high evidentiary burden on the Minister to show that the policy would in fact have the impact of advancing the beneficiaries of the impugned policy. While he began the

<sup>287</sup> *SARIPA* CC (note 16 above) at para 20.

<sup>288</sup> *SARIPA* HC (note 26 above) at para 167.

<sup>289</sup> *Ibid* at para 138.

<sup>290</sup> *SARIPA* CC (note 16 above) at paras 40–42; *SARIPA* SCA (note 25 above) at paras 36–37.

<sup>291</sup> *Van Heerden* (note 1 above) at para 41.

<sup>292</sup> C Albertyn, 'Getting It Right in Equality Cases: The Evaluation of Positive Measures, Groups and Subsidiarity' (2018) 135 *South African Law Journal* 403, at 409.

<sup>293</sup> *Van Heerden* (note 7 above) at para 42.

<sup>294</sup> *Ibid* at para 41.

<sup>295</sup> *Ibid* at para 42.

assessment by noting that what needed to be shown was whether the policy adopted a rational formulation which was capable of meeting the impugned policy's objectives and promoting the achievement of equality,<sup>296</sup> his analysis required much more. Further, Katz AJ *assumes* stigmatic harm on the intended beneficiaries of the impugned policy.

First, Katz AJ found that there was insufficient evidence to show that there was a rational link between the policy and its purpose by suggesting that the only kind of policy which would be able to achieve this purpose was a policy which matched individual skill and expertise with the needs of an estate, thus he held:

Insofar as the Policy aims to make the insolvency industry accessible to previously disadvantaged individuals, it needs to do more than increase numbers, but ensure that there can be a match between individual skill and the requirements of the role within the system provided for by legislation.<sup>297</sup>

There are two problems with this analysis. First, the quote above is not an inquiry into whether there is a rational link between the policy and its purpose or whether the policy is reasonably likely to achieve its purpose — it is a comparison between the impugned policy and what Katz AJ contemplates would have been a better policy. As argued earlier in the article, while it is a species of proportionality, the *Van Heerden* test does not require an enquiry into whether there is a less restrictive means to achieve the goal of the affirmative action measure. Second, Katz AJ's requirement of a link between the individual skill of a practitioner and an estate misses the point of the policy. Most of the practitioners with skill and expertise would belong to the historically privileged group in this field, white males. Thus, his suggested policy is one which would likely entrench rather than redress the unequal distribution of work, completely undermining what the impugned policy sought to achieve.

The second factor that he relied on to justify a lack of evidence that the policy was rational was that it did not have a time-limit.<sup>298</sup> There is no requirement that measures under s 9(2) should have an express time-limit. As Madlanga J found in his dissenting opinion before the Court, when the goals of the impugned policy have been achieved, there will be no need to retain the policy and 'any person adversely affected by the continued application of the policy may well be entitled to bring an equality challenge to invalidate the policy. None of this affects the validity of the policy today'.<sup>299</sup>

The third fact relied on by Katz AJ, that the impugned policy would not change creditor behaviour provides an even clearer example that his inquiry fell far beyond the scope of the second leg of the *Van Heerden* test. Recall that the Minister argued that the policy would, by intervening at the provisional stage and allowing historically disadvantaged insolvency practitioners to develop their skills, expertise and build a reputation in the industry, lead to an increase in confidence in their competence and increase the likelihood of their appointment by the creditors.<sup>300</sup> Katz AJ found that the Minister had not 'adduced any evidence to demonstrate

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<sup>296</sup> *SARIPA* HC (note 26 above) at para 139.

<sup>297</sup> *Ibid* at para 156.

<sup>298</sup> *Ibid* at paras 160–161.

<sup>299</sup> *SARIPA* CC (note 16 above) at para 89; See *UNISA v Reynhardt* 2010 12 BLLR 1272 (LAC) (The court held that once numerical targets have been achieved, an employer cannot rely on an affirmative action measure for future appointments); M Mushariwa, 'UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?' [2012] *Potchefstroom Electronic Law Journal* 66 (Mushariwa argues that once numerical targets have been attained, the employer has to ensure that they are maintained).

<sup>300</sup> *SARIPA* HC (note 26 above) at para 149.

the basis for their assumption that mechanical appointments can, *in fact*, change nomination behaviour by creditors.<sup>301</sup> This finding is not what is required under this leg. Katz AJ moved from the position that the burden on the Minister had been to show that the measure would have the desired impact. In *Van Heerden*, Moseneke J made it clear that because the future was 'hard to predict', a measure would not pass constitutional muster if it was clear that the measure was 'not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination'.<sup>302</sup> Whatever little faith Katz AJ had in the behaviour of creditors in South Africa, and their lack of confidence in Black and female practitioners, there was no basis for Katz AJ's finding that there was no reasonable likelihood that the Minister's intended benefit would accrue.

In all three judgments, there was a dispute about whether the list could work practically and whether the Minister had relied on the correct statistics to show the need for such a policy.<sup>303</sup> Thus, for Mathopo J, the real problem with the policy was 'the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners'.<sup>304</sup> Absent these, he held that one could not 'say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups'.<sup>305</sup> For Jafta J, one of the reasons that the policy failed this leg of the inquiry was that it was not clear whether the policy would require a single list or whether each Master would have his own list.<sup>306</sup> In the context of the Minister's testimony that work was underway to 'clean-up' the lists,<sup>307</sup> it is not clear what more information could have been offered to establish the reasonable likelihood that appointing more persons belonging to disadvantaged groups would achieve the goals of transforming the insolvency industry. As Madlanga J reasoned in his dissent, a policy such as the one impugned in this case would, in time, transform the insolvency industry as it affords s 9(2) beneficiaries an advantage, a fact 'so plain as to require no explanation'.<sup>308</sup> Again, what the lower courts and Jafta J were asking for was beyond the standard of showing 'reasonable likelihood'.<sup>309</sup>

A common finding in the Court's and SCA's majority judgments is that the policy was irrational because of the citizenship classification. Thus, Mathopo J found that 'The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice an insolvency practitioner, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy'.<sup>310</sup> For Jafta J, 'A section 9(2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance'.<sup>311</sup> I agree with the judge's assessment that absent reasons for the use of citizenship, the classification cannot be said to be a rational one. Of course, the Minister

<sup>301</sup> Ibid at para 162.

<sup>302</sup> *Van Heerden* (note 7 above) at para 41.

<sup>303</sup> *SARIPA* HC (note 26 above) at paras 166-182; *SARIPA* SCA (note 25 above) at paras 46-50.

<sup>304</sup> *SARIPA* SCA (note 25 above) at para 47.

<sup>305</sup> Ibid.

<sup>306</sup> *SARIPA* CC (note 16 above) at para 40.

<sup>307</sup> *SARIPA* HC (note 26 above) at para 180.

<sup>308</sup> *SARIPA* CC (note 16 above) at para 89.

<sup>309</sup> *Van Heerden* (note 7 above) at para 41.

<sup>310</sup> *SARIPA* SCA (note 25 above) at para 36.

<sup>311</sup> *SARIPA* CC (note 16 above) at para 42.

could have provided evidence that older practitioners were more disadvantaged than the young practitioners or that parity had been reached in the allocation of work between white males and *all* other young insolvency practitioners. Absent such reasons, the classification cannot be said to be rational. Even while agreeing with the Court's assessment, the approach taken by Madlanga J, severing Category D from the rest of the policy accords with the commitment to preserving measures which genuinely seek to advance and protect disadvantaged groups.

## 2 *Illusive stigmatic harm*

Another flawed finding under this leg is Katz AJ's argument that the impugned policy would cause harm to the intended beneficiaries as it did not allow the 'excellent' within the beneficiary group to thrive.<sup>312</sup> Drawing from Cameron et al's finding in *Barnard* that 'over-rigidity' risks disadvantaging the intended beneficiaries of affirmative action by creating 'the impression that appointments are due only to race and exclusive of merit',<sup>313</sup> Katz AJ suggested that rigidity, in the sense of not taking individual merit, expertise and experience into account, violates the right to dignity of the intended beneficiaries of affirmative action. This is a common argument made against affirmative action, often, including in this case, without offering sufficient evidence of this harm or proof that the harm outweighs the benefit of these measures.<sup>314</sup>

Stigmatic harm is said to manifest in two ways. First, it gives rise to stigma and prejudice towards the beneficiaries of affirmative action because of the perception that they are unqualified quota candidates. This is what Onwuachi-Willig, Hough and Campbell call 'external stigma' — the burden of others' (the privileged or dominant group) resentment or doubt about the qualifications of the beneficiaries of affirmative action.<sup>315</sup> In *Barnard*, Cameron et al JJ warned against allowing race to be the decisive factor in employment decisions as it could, 'suggest the invidious and usually false inference that the person who gets the job has not done so because of merit but only because of race'.<sup>316</sup> Second, it 'burdens' the exceptional candidates within the beneficiary group. Thus, these measures cause an 'internal stigma' for those branded as affirmative action candidates.<sup>317</sup> Katz AJ was referring to this internal stigma, reasoning that the policy was arbitrary for its failure to 'reward excellence'.<sup>318</sup>

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<sup>312</sup> *SARIPA* HC (note 26 above) at paras 157–158, 205.

<sup>313</sup> *Ibid* at para 205, referring to Cameron et al's argument in *Barnard* (note 17 above) that 'over-rigidity' risks disadvantaging not only those who are not selected for a job, but also those who are' at para 80.

<sup>314</sup> A Onwuachi-Willig, E Houh & M Campbell, 'Cracking the Egg: Which Came First: Stigma or Affirmative Action?' [2008] 96 *California Law Review* 1299; A Hibbett, 'The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education' (2005) 21 *Harvard Black Letter Law Journal* 75; RA Lenhardt, 'Understanding the Mark: Race, Stigma, and Equality in Context' (2004) 79(3) *New York University Law Review* 803; A Halaby & S McAllister, 'An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases' (1997) 2 *Michigan Journal of Race and Law* 235; Kennedy (note 6 above) 116–126 (For an analysis of these arguments in the American context).

<sup>315</sup> *SARIPA* HC (note 26 above) at para 158.

<sup>316</sup> *Barnard* (note 17 above) at para 80.

<sup>317</sup> Onwuachi-Willig, Hough & Campbell (note 314 above) 1301; S Carter, *Reflections of an Affirmative Action Baby* (1991) (who argues that the mark of being an affirmative action candidate makes light of the individual achievements of its beneficiaries).

<sup>318</sup> *SARIPA* HC (note 26 above) at para 158.

The stigma (both internal and external) argument has been particularly successful before the US Supreme Court.<sup>319</sup> Capturing this stigma argument, in *Bakke*, Powell J argued that:

Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.<sup>320</sup>

There are two reasons why the stigma argument is not entirely persuasive, especially not for disqualifying a measure under the second leg of the test. First, the suggestion that persons belonging to groups that are beneficiaries of affirmative action are likely to be perceived as unqualified, incompetent, lacking in experience does not necessarily arise from being a beneficiary of affirmative action. It will often be rooted in past and persisting entrenched stereotypes and prejudices against specific groups. In a study of internal and external stigma in higher education admissions in the United States, Onwuachi-Willig, Hough and Campbell concluded that it could not be shown that the observed stigma on beneficiaries was as a result of being a beneficiary of affirmative action. Focussing specifically on race, the authors argued that stigma is rooted in institutional racism, it is not a by-product of affirmative action.<sup>321</sup> This conclusion was based on their finding that there was no difference in the experience of stigma between institutions that had affirmative action policies in place and those that did not.<sup>322</sup>

Second, the stigma argument is unpersuasive because there is insufficient empirical evidence to show that the harms of internal stigma (accepting that there are) outweigh the benefits of affirmative action. In a famous empirical study on affirmative action in higher education in the United States, Bok and Bowen argued that, if the charge that the stigmatic impact of affirmative action outweighed the benefits, ‘those who suffered from stigma would presumably be the ones most likely to feel its effects’.<sup>323</sup> However, the empirical evidence did not support this, thus they concluded: ‘In the eyes of those best positioned to know, any punitive costs of race-based policies have been overwhelmed by the benefits gained through enhanced access’.<sup>324</sup> Katz AJ problematically assumed this harm on behalf of all the intended beneficiaries.

The stigma argument is troubling for another reason, it is often based on the erroneous assumption that affirmative action measures necessarily allow for the appointment or promotion of unqualified or unskilled candidates — persons whose appointment attracts the stigma and prejudice related to their lack of capability, skill and expertise. This is because, so the argument goes, once appointed or promoted, the affirmative action beneficiaries will fail to perform their jobs, entrenching or creating a basis for prejudice and stereotyping against their group. This need not be the case. Under the EEA, the beneficiaries are suitably qualified, they just need not be *as* qualified as persons belonging to the non-beneficiary groups. Thus, in *Barnard*, Moseneke J rightly noted that affirmative action measures are not a refuge for the

<sup>319</sup> Kennedy (note 6 above) at 115–127; Onwuachi-Willig, Hough & Campbell (note 314 above); Halaby & McAllister (note 314 above); Hibbett (note 319 above).

<sup>320</sup> *Bakke* (note 9 above) at 298.

<sup>321</sup> Onwuachi-Willig, Hough & Campbell (note 314 above) 1321.

<sup>322</sup> *Ibid* 1332.

<sup>323</sup> W Bowen & D Bok, *The Shape of the River: Long-Term Consequences of Considering Race and in College and University Admissions* (1998) at 265; Kennedy (note 6 above) at 125–127 (who makes the argument that the stigma argument is often an exaggeration).

<sup>324</sup> Bowen & Bok (note 323 above) 265.

mediocre or incompetent.<sup>325</sup> Seen in the context of the requirement of suitable qualification in *SARIPA*, and the fact that the impugned policy allowed for deviation in cases where an estate was a complex one and the next-in-line practitioner does not have the requisite skill, the stigma argument was not persuasive in this case.

### C Does the measure promote the overall achievement of equality?

The last leg of the *Van Heerden* test requires that the measure, in the long run, promote the achievement of equality.<sup>326</sup> This leg of the test requires the exercise of a value judgment, taking into account the multiple, complex and seemingly conflicting rights and values that arise in affirmative action cases.<sup>327</sup> It is an examination of ‘the effects of the measure in the context of our broader society’.<sup>328</sup> Thus, while the first two legs of the test are focussed on the group intended to be advanced and the purposes of affirmative action, in the language of the proportionality, the legitimacy of purpose and rationality of the measure, the third leg requires a broader analysis of the impact that the measure will have, including on the rights of those adversely affected by it.<sup>329</sup>

Because the measure fails the second leg of the test, very little analysis of this third prong occurs. In fact, as noted in the discussion of the majority decision before the Court, Jafta J erroneously collapsed the second and third legs of the *Van Heerden* test.<sup>330</sup> However, the core argument against quotas is that they violate the right to dignity of non-beneficiaries. Following on the argument made by Kohn and Cachalia, the question whether quotas violate the dignity of non-beneficiaries properly falls under the third leg of the *Van Heerden* test.<sup>331</sup> Kohn and Cachalia argue that the impugned policy violated the right to dignity of persons in Category D, white males and youth, because their right to work would come around so *rarely*, ‘such that the Policy would essentially serve as an absolute barrier to the furtherance of their right to tackle their practice freely’.<sup>332</sup> I have already dealt with severing the inclusion of youth from Category D. The focus now is on the dignity of white males.

The strongest argument that quotas violate the right to dignity of persons is that, in failing to take the individual merit, skills and expertise of individuals, looking at them through the lens of their race and gender, quotas negate the inherent human worth of persons and treat them as a means to an end. Closely related is the argument that rigidity violates the right of persons to practice their trade freely.<sup>333</sup> In this regard, s 22 of the Constitution provides that ‘Every citizen has the right to choose their trade, occupation or profession freely.’ The s 22 right is closely related to the right to dignity in that, as the Court held in *Affordable Medicines*:

Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or

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<sup>325</sup> *Barnard* (note 17 above) at para 41.

<sup>326</sup> *Van Heerden* (note 7 above) at para 44.

<sup>327</sup> P De Vos ‘The Past Is Unpredictable: Race, Redress and Remembrance in the South African Constitution’ 129 *South African Law Journal* 73, at 92.

<sup>328</sup> *Van Heerden* (note 7 above) at para 44.

<sup>329</sup> McConnachie (note 12 above) 172; Albertyn (2015) (note 12 above) at 730.

<sup>330</sup> *SARIPA CC* (note 16 above) at para 46.

<sup>331</sup> Kohn & Cachalia (note 12 above) 168–177.

<sup>332</sup> *Ibid* 177.

<sup>333</sup> *Ibid* 172.



herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole.<sup>334</sup>

The quote above captures what Woolman calls the 'self-actualization' dimension of dignity.<sup>335</sup> This refers to an individual's capacity to create meaning for herself, including through the development of her talent. According to Woolman, this generates 'an entitlement to respect for the unique set of ends that the individual pursues.'<sup>336</sup> Section 22 protects the right to choose a profession and the right to practise a profession.<sup>337</sup> As with the right to dignity, s 22 has to be interpreted within the context of prevailing unequal distribution of work, in this case, against the background of a continued hegemony of white males in the insolvency industry. As Ngcobo J held in *Affordable Medicines*, s 22:

[H]as to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection.<sup>338</sup>

Taking the context outlined in the quote above, it would be ironic to argue that this right prohibits measures simply because they fail to take the individual merit, skills and expertise of persons when furthering the goal of redressing past exclusionary practices. The only way to conclude that quotas violate the right to dignity and the right to practice one's trade is if these rights were interpreted as entitling non-beneficiaries of affirmative action 'to competitions in which people are judged on the basis of individual merit, by which they means skills and accomplishments attributable to themselves'.<sup>339</sup> Such a reading of ss 10 and 22 of the Constitution would render affirmative action measures under s 9(2) superfluous. Sections 10 and 22 do not protect the right to have one's merit, skills and expertise taken into account, nor do they protect a right to a job or promotion.

However, as I argued in the analysis of the relationship between the right to dignity and affirmative action measures, measures which exclude a group from being able to choose a profession or practise their profession, especially on the grounds of race, gender or disability status would likely be found to violate ss 22 and 10 of the Constitution. This is because such measures would 'obliterate' their opportunities and permanently disqualify them from entering or advancing in a particular career.<sup>340</sup> This is the 'substantial and undue harm on those excluded from its benefits' that would threaten our 'long-term constitutional goal'.<sup>341</sup> Such measures could be said to treat such persons as 'underclass'.<sup>342</sup> Thus, the prohibition of absolute barriers to the appointment or promotion of persons from historically privileged groups under

<sup>334</sup> *Affordable Medicines Trust & Others v Minister of Health & Another* 2005 ZACC 3, 2006 3 SA 247 CC (*Affordable Medicines*) at para 59.

<sup>335</sup> Woolman (note 128 above) ch 36-11.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Affordable Medicines* (note 334 above) at para 66.

<sup>338</sup> *Ibid.* at para 58.

<sup>339</sup> Kennedy (note 6 above) 109.

<sup>340</sup> Ackermann (note 125 above) 361; *Barnard* (note 17 above) at para 180.

<sup>341</sup> *Van Heerden* (note 7 above) at para 44.

<sup>342</sup> L Ackermann, 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 *South African Journal on Human Rights* 597, 359.

the EEA and s 9(2) would accord with the respect for ss 22 and 10 of the Constitution. But quotas, however rigid need not have this impact.

Katz AJ, as well as Kohn and Cachalia's argument is based on the premise that rigidity, necessarily creates an 'absolute barrier to the furtherance of their right to practice their trade freely'.<sup>343</sup> But, they are not excluded from practising their profession. The impugned policy sought to limit this particular group's disproportionate share in the market — they have no right to the other nine appointments — neither the right to dignity nor the right to practise one's trade should be understood as protecting such a right. Moreover, as Madlanga J argued in his dissent, to the extent that the policy only affected provisional appointments, it could not be said that the policy created an absolute barrier to their appointment. The question was whether the measure has the impact of obliterating the opportunities of persons adversely affected thereby, creating an absolute barrier to their advancement so that it can be said that they are an 'underclass', being treated as 'inferior' and 'demeaned'. The facts of *SARIPA* do not establish this.

Every quota must be examined on its own merits and in its own context; this is what a 'situation-sensitive' approach demands. There will be cases where rigidity creates an absolute barrier for the advancement of non-beneficiaries or another adversely affected group. There will also be cases where it is clear that a quota will not advance or protect a disadvantaged group. There will be cases where, overall, it cannot be shown that a quota will promote the achievement of equality. However, rigidity alone is not sufficient to reach any of these findings.

An example of an impermissible quota is in *Naidoo*.<sup>344</sup> In *Naidoo*, an Indian woman applied for a position as cluster commander in the South African Police Services (SAPS). She was shortlisted for the position and had the second highest score in the interviews.<sup>345</sup> The interview panel recommended her appointment as it would address gender equity at that occupational level.<sup>346</sup> However, the national panel rejected her appointment in favour of a Black male on the basis that 'Africans were under represented and Indian females had an ideal representation'.<sup>347</sup> This 'ideal representation' for Indian women was zero. The calculation used to determine the race and gender allocation was explained as follows:

19 positions on level 14 are multiplied by the national demographic figure for a specific race group eg 19 positions × 79% Africans = 15 of the 19 posts must be filled by Africans, then 15 × 70% = 11 positions to be filled by African males minus the current status of seven meaning there is a shortage of four African males. For Indian females the calculation is 19 × 2.5% = 0.5 positions to be filled by Indians, then 0.5 × 30% = 0.1 Indian females and that is rounded off to zero. Of the five available positions 0.125 could go to Indians × 30% gender allocation means 0.037 could be allocated to Indian females and that is rounded to zero.<sup>348</sup>

Ms Naidoo argued that she had been unfairly discriminated against on account of both her race and gender.<sup>349</sup> In particular, she argued that the numerical target and the formula described in the quote above constituted an absolute barrier for the appointment of Indian women.<sup>350</sup>

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<sup>343</sup> Kohn & Cachalia (note 12 above) 176.

<sup>344</sup> *Naidoo v Minister of Safety and Security & Another* 2013 ZALCJHB 19, 2013 5 BLLR 490 LC ('*Naidoo*').

<sup>345</sup> *Ibid* at paras 2–4.

<sup>346</sup> *Ibid* at para 5.

<sup>347</sup> *Ibid* at par 35.

<sup>348</sup> *Ibid* at paras 42–43.

<sup>349</sup> *Ibid* at para 8.

<sup>350</sup> *Ibid*.

On evidence before the court, the practice was to prioritise race over gender, regardless of the context.<sup>351</sup> In this case, there was a failure to take into account the fact that women are generally underrepresented in the SAPS and the public sector in general, especially at the high position for which Ms Naidoo applied. Further, without providing reasons, the plan had a gender allocation of 70 per cent male to 30 per cent female.<sup>352</sup> This ratio was used despite a cabinet decision to achieve 50/50 gender representation in the senior management of the public service,<sup>353</sup> and the fact that at the time, national census statistics showed that women were 51 per cent of the national population.<sup>354</sup> Taking all these factors into account, the court rightly concluded that the numerical target had ‘a manifest exclusionary effect’.<sup>355</sup>

The numerical targets in *Naidoo* and their rigid implementation in that case is an example of an impermissible quota. The quota in *Naidoo* completely foreclosed the appointment of Indian women, a member of the intended beneficiaries of affirmative action under the EEA — a fact not lost to the court as it noted: ‘The fact that the barrier is created and results in a person from a designated group suffering discrimination, both on the grounds of her race and gender, is perverse’.<sup>356</sup> The absolute barrier created in this case, creating a complete bar for the advancement of a person belonging to multiple disadvantaged groups and on the basis of numerical targets that express a lack of commitment to the inclusion of women in the SAPS, a group historically excluded from this service, undoubtedly had the impact of entrenching and perpetuating patterns of disadvantage, violating the right to dignity. No reading of the *Naidoo* case could justify the numerical target and its implementation as constitutional. However, as is hopefully clear from the analysis above, the *Naidoo* facts are manifestly different from the facts in *SARIPA*.

## VI CONCLUSION: THE REAL IMPACT OF AN ABSOLUTE PROHIBITION OF QUOTAS

It bears emphasis that though affirmative action measures, including the use of quotas, may narrow the opportunities for non-beneficiaries, this is not the result of ‘an effort to humiliate, ostracize or stigmatize’ them.<sup>357</sup> Moreover, rigidly applying quotas will not always create an absolute barrier for the advancement of non-beneficiaries. The real impact of the extension of the quota-ban in *SARIPA*, is a push towards bringing back individual merit. This will undermine the goal of realising the right to equality and dignity of historically disadvantaged groups through affirmative action measures as defined in this paper.

The prevailing definition of quotas — based on whether there is sufficient flexibility to take individual skill, expertise and circumstances of claimants into account — neither fits the framework under the EEA nor s 9(2) of the Constitution. The EEA and the impugned policy in *SARIPA* were cognisant of the context of past and persisting racial, gender and other forms of domination and oppression which have allowed white males to assume skills, experience and expertise over other groups. As Madlanga J acknowledged in his dissent, white males are

<sup>351</sup> *Ibid* at para 38.

<sup>352</sup> *Ibid* at para 15.

<sup>353</sup> *Ibid* at paras 18–20.

<sup>354</sup> *Ibid* at para 17.

<sup>355</sup> *Ibid* at paras 141–145.

<sup>356</sup> *Ibid* at para 158.

<sup>357</sup> Kennedy (note 6 above) 110.

likely to have more expertise in the insolvency industry. This relative experience and expertise are ‘a function of previous naked racist preferences and the exclusion of other groups from acquiring skills and opportunities’.<sup>358</sup> We can make the same argument across several sectors and institutions. From this perspective, the definition of quotas’ focus on taking individual merit, skills and expertise into account undermines redressing group-based disadvantage.

The affirmative action regime in South Africa allows for and requires preferential treatment. Thus, in the Labour Appeal Court judgment in *Correctional Services*, Rabkin-Naicker J rejected ‘tiebreaker equality of opportunity’. Responding to the argument that ‘equal opportunity’ required the equal treatment of all persons, Rabkin-Naicker made it clear that equality of opportunity could not be interpreted in the narrow sense as meaning ‘that persons from designated groups are treated no differently from persons who are from non-designated groups — the opportunities offered to persons from designated and non-designated groups must, therefore, be the same’.<sup>359</sup> Relying on the conceptual framework in *Van Heerden* as an interpretive tool, she noted:

I reject the notion that the restitutionary measures the EEA promotes amount to equal opportunity for designated groups to compete with the prime beneficiaries of past systemic and institutionalised discrimination. It is noteworthy that no claim was made in the submissions before me that a level playing field had been reached for the enjoyment of these equal opportunities. Of course, no such submission would withstand scrutiny.<sup>360</sup>

Accepting Rabkin-Naicker J’s analysis, the argument that rigidity is contrary to achieving ‘equity’ because ‘it does not provide for any transition from mechanical appointments to a system of equitable competition’<sup>361</sup> does not fit. The very point of affirmative action is to give disadvantaged groups preference, understanding that because of historical and persisting barriers to access to education, training and opportunities to acquire skills and expertise, the market, without positive intervention, would continue to marginalise disadvantaged groups.

Not only is it possible to find quotas to meet the challenge in s 9(2) of the Constitution, in cases where other, more flexible measures have failed, especially in cases where the failure is due to intractable, deeply-entrenched practices of nepotism or prejudice towards historically disadvantaged groups, they may be necessary. In his dissenting opinion in *SARIPA*, Madlanga J notes that we may need a ‘simple, practical formula’ to eliminate the possibility of undue preferences.<sup>362</sup> In eliminating discretion, quotas are a simple and practical tool to prevent against the deep and hidden barriers to the entry of disadvantaged groups into a profession or institution. For example, the alleged corruption, fronting practices and preference for white male insolvency practitioners which the policy in *SARIPA* sought to address.<sup>363</sup> By removing the discretion to take individual characteristics, skills and expertise into account, quotas are a better tool to further the goal of redressing group-based disadvantage and fulfil the right to equality and dignity of disadvantaged groups. This is because ‘flexible’ numerical targets under these conditions, could be used to thwart the purpose of affirmative action measures by giving

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<sup>358</sup> *SARIPA* CC (note 16 above) at para 78.

<sup>359</sup> *Solidarity v Department of Correctional Services & Others; In Re: Solidarity & Others v Department of Correctional Services & Others, Solidarity & Others v Department of Correctional Services & Others* 2013 ZALCCT 38, 2014 1 BLLR 76 LC at para 23.

<sup>360</sup> *Ibid* at para 30.

<sup>361</sup> *SARIPA* HC (note 26 above) at para 160.

<sup>362</sup> *SARIPA* CC (note 16 above) at para 78.

<sup>363</sup> *SARIPA* HC (note 26 above) at paras 49, 79, 164.

decision-makers a defence for why there is an over-representation of privileged groups in an industry. They can simply rely on the relatively better expertise and skills of this group.

In addition, some institutions or professions could be resistant to realising their obligations under the Constitution or in other legislation or the practices and culture that excludes historically disadvantaged groups may be so deeply entrenched that only a hammer, in the form of rigid quotas, can redress existing inequalities. In *SARIPA*, the impugned policy was not the first intervention by the Ministry. The previous policy attempted to redress existing patterns by pairing insolvency practitioners who belong to historically disadvantaged groups with those ordinarily appointed under the requisition system, presumably, the majority of whom would be white males. The Ministry argued that this intervention did not redress the inequitable redistribution of work in the industry. Accepting the policy in *SARIPA* as a rigid quota for failing to take into account the skills, expertise and experience of insolvency practitioners except in those cases where it was necessary to meet the needs of an estate, in light of the failure of past intervention, it could be argued that the use of a quota was necessary in this case.

Therefore, the current misconception that the Constitution requires an absolute ban on quotas is not only a flawed interpretation of constitutional text and principle, but may act as its own barrier to achieving those very same constitutional goals affirmative action measures are intended to achieve. This is due to misunderstanding the relationship between dignity and substantive equality in this area of law. Ironically, it is the lack of a contextual and situation-sensitive approach to quotas that may become an absolute barrier itself to substantive equality and so perpetuate the iniquities of past and present inequality. This paper has shown that, under a proper application of the *Van Heerden* test and in line with the contextual understanding of the right to dignity described above, some quotas can pass constitutional muster.

