

# The Impact of Minority Status in the Application of Affirmative Action: *NAIDOO v MINISTER of SAFETY and SECURITY* 2013 5 BLLR 490 (LC)

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## Abstract

Affirmative action measures within the workplace seek to ensure equal employment opportunities and create a workforce that is representative of South African society. Accordingly, employers need to ensure that the substantive goal of equality is achieved when implementing affirmative action. One of the challenges faced by employers is the choice of beneficiary from designated groups which is diverse and unequal within itself. This paper seeks to address this challenge by looking at the definition given to beneficiaries of affirmative action and the concept of multi layered disadvantage within the *Employment Equity Act*. The paper will focus on the decision in *Naidoo v Minister of Safety and Security and National Commissioner of the South African Police Service* which is an example of the disadvantages experienced by members of the designated groups who are also part of a minority group within the designated groups. Particular focus will be placed on the disadvantages experienced by a black female who is also part of a minority. This paper highlights the multi-layered nature of disadvantage experienced by such members of the designated groups and the need to ensure that new forms of disadvantage are not created in the implementation of affirmative action policies by using a situation sensitive approach. It argues that affirmative action as a means to an end needs to evolve with the understanding that it functions within an ever changing social and economic environment. If such changes are ignored the true beneficiaries of affirmative action will not be given recognition and the desired end of creating a workforce representative of South African society together with the goal of substantive equality cannot be realised.

## Keywords

Affirmative action; minority group; multi layered disadvantage; situation sensitive; designated groups; equality; employment equity.

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## 1 Introduction

The *Constitution of the Republic of South Africa*<sup>1</sup> through section 23 paved the way towards addressing the inequality and discrimination that exists in the South African labour market. This is in addition to the overarching right in section 9 guaranteeing equality for all South Africans. This right is a powerful and robust right which takes cognisance of the inequalities of the past and makes provision for positive State action<sup>2</sup> as a necessary constitutional tool towards advancing equality.<sup>3</sup>

The *Employment Equity Act*<sup>4</sup> was formulated to give meaning and content to the right to equality within the private sphere of the workplace.<sup>5</sup> To achieve equality, the EEA seeks to break down barriers to employment experienced by members of the designated groups,<sup>6</sup> to create a representative workforce,<sup>7</sup> and to transform the workplace into an area governed by principles of equality through the application of affirmative action. In terms of section 15 of the EEA, affirmative action measures are

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

In terms of section 1 a designated employer includes an employer who employs 50 or more employees, or has a total annual turnover as reflected in Schedule 4 of the Act, and also municipalities and organs of state.

Part of the process of implementing affirmative action measures requires a designated employer to identify beneficiaries of affirmative action, which section 1 of the EEA defines as members of the designated groups, comprised of either black people or women or people with disabilities. "Black people" are defined as Africans, Coloureds, Indians and (a more recent addition) those of Chinese descent.<sup>8</sup>

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<sup>1</sup> *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*).

<sup>2</sup> *Constitution* s 9(2).

<sup>3</sup> Albertyn and Goldblatt "Equality" 35-1.

<sup>4</sup> *Employment Equity Act* 55 of 1998 (hereinafter EEA).

<sup>5</sup> McGregor 2005 *Codicillus* 2.

<sup>6</sup> EEA s 5.

<sup>7</sup> EEA s 42(a).

<sup>8</sup> *Chinese Association v Minister of Labour* (TPD) unreported case number 59251/2007 of 18 June 2008.

Equality implies equal treatment of all persons who would also theoretically be on the same footing.<sup>9</sup> However, because of the particular historical inequalities experienced by the designated groups generally, and within the labour market, the goal of "equality" will not be realised with "identical treatment in all circumstances".<sup>10</sup> This is particularly relevant to the members of the designated groups, who, although identified as beneficiaries of employment equity, are not on an equal footing amongst themselves, a fact which gives rise to the notion of "compounded or multiple discrimination" as referred to by McGregor.<sup>11</sup>

The EEA, however, fails to acknowledge that there may be intersections between the members of the groups, in that a member may be disadvantaged on more than one of the specified grounds at the same time.<sup>12</sup> For example, women, as members of one of the designated groups, could experience disadvantage in equality on the basis of race, socio-economic status, or minority status in addition to gender. Thus, although the designated group includes both white and black women, black women in this case are not on an equal footing with white women, because in addition to the gender disadvantage, black women are also disadvantaged by virtue of race.<sup>13</sup> The classification of the "designated groups" suggests that gender and race are treated as if they are "mutually exclusive",<sup>14</sup> and there is no overt contemplation that the two areas of disadvantage may apply to the same person.<sup>15</sup> Therefore, in the situation of black women, their disadvantage should not only be seen from the singular perspective of gender or race, but rather as a combination of the two.<sup>16</sup> This intersection between race and gender creates a dual disadvantage that is a unique and complex type of inequality, and one which is not easily dismantled.<sup>17</sup> If there is lack of recognition of these intersections and the disadvantages that follow, then in the current example discrimination on the basis of race would be viewed from a black male perspective and discrimination on the basis of gender from a white female perspective, leaving black females to enjoy protection only if their interests are aligned with one of the two perspectives.<sup>18</sup>

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<sup>9</sup> Pretorius 2001 *Max Planck-Institut* 404.

<sup>10</sup> Pretorius 2001 *Max Planck-Institut* 404.

<sup>11</sup> McGregor 2005 *Codicillus* 5.

<sup>12</sup> Dupper 2008 *SAJHR* 425, 426.

<sup>13</sup> Dupper 2008 *SAJHR* 426.

<sup>14</sup> Crenshaw 1989 *U Chi Legal F* 139.

<sup>15</sup> Crenshaw 1989 *U Chi Legal F* 139.

<sup>16</sup> Crenshaw 1989 *U Chi Legal F* 140.

<sup>17</sup> Albertyn and Goldblatt "Equality" 35-2.

<sup>18</sup> Crenshaw 1989 *U Chi Legal F* 143.

The *Constitution* on the other hand recognises the complexity of disadvantage that results from South Africa's diverse population and that there are intersections within the designated groups, as is evident in section 9 in the phrase "one or more of the following grounds...". Since the focus of the redress is to ensure that members of vulnerable groups are protected and not subjected to further injustice, it would be contrary to the *Constitution* to disregard a situation where a member of a designated group is disadvantaged on two or more fronts. If affirmative action does not consider the multiple disadvantages that some members of the designated groups face, there is a risk that new inequalities may arise.<sup>19</sup> The *Constitution* provides for the achievement of substantive equality,<sup>20</sup> which cannot be achieved without an acknowledgment of the multi-layered disadvantage that could be experienced by members of the designated groups, which impacts on the ability of such persons to compete within the workplace.<sup>21</sup>

A further example of multi-layered disadvantage is the inequality experienced by minority members within the larger disadvantaged groups, which is visible in the case of *Naidoo v Minister of Safety and Security and National Commissioner of the South African Police Service*.<sup>22</sup> This note will focus on the multi-layered disadvantage facing a female member of the designated groups who is also a member of a minority group, specifically from the point of view of an Indian female, working within a male-dominated profession. Further, the inequality that results from the lack of recognition of the multi-layered disadvantage faced by members of the designated groups in the employment setting will be highlighted. The factors an employer needs to consider to avoid the creation of further disadvantage within the designated groups in the application of affirmative action will be discussed, with specific focus on the issues surrounding unfair discrimination in the implementation of the employment equity plan.

## 2 Facts of the case

In April 2009 the South African Police Service (SAPS) advertised various vacancies at national and provincial levels. These included five positions for Cluster Commanders in the Gauteng region. Ms Naidoo (the Applicant) applied for the position of Cluster Commander for Krugersdorp and was shortlisted for the position.<sup>23</sup> After considering her application and performance during a two-day assessment process, the selection panel, at

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<sup>19</sup> Mare 2011 *Transformation* 63.

<sup>20</sup> Pretorius 2001 *Max Planck-Institut* 404.

<sup>21</sup> Albertyn and Goldblatt "Equality" 35-1.

<sup>22</sup> *Naidoo v Minister of Safety and Security and National Commissioner of the South African Police Service* 2013 5 BLLR 490 (LC) (hereafter *Naidoo*).

<sup>23</sup> *Naidoo* paras 2-3.

provincial level, placed the Applicant second in the list of candidates that applied for the post.<sup>24</sup> In June 2009 the provincial panel recommended the promotion of the Applicant based on her score and in line with addressing gender equity goals within the force. The highest scoring candidate, a black male, was recommended for a similar position elsewhere.<sup>25</sup>

Despite the provincial panel's recommendation, however, the Applicant's appointment was not confirmed because it was alleged that her appointment would not enhance employment equity and would not achieve the service delivery objectives of the SAPS. An African male was appointed instead, despite his scoring less than the Applicant.<sup>26</sup> The Applicant averred that the targets in the SAPS' Employment Equity Plan (hereinafter "equity plan") "were arbitrary and therefore unfair" and ensured that she could never be promoted to a higher rank.<sup>27</sup> This was due to the targets formulated by the SAPS on the basis of the national demographics of the economically active population as well as the target for gender representivity.

The Respondents, the Minister of Safety and Security and the National Commissioner of the SAPS, defended their decision by arguing that it had been made in line with affirmative action in terms of the EEA and the inherent requirements of the job, and not only in response to the numeric targets set in the equity plan.<sup>28</sup> The equity plan set out certain numeric targets of 79 per cent for Africans; 9.6 per cent for white; 8.9 per cent for coloured; and 2.5 per cent for Indians.<sup>29</sup> The percentages were prescribed according to the Census Report of 2001, and were derived from national demographics.<sup>30</sup> The gender targets in the plan were not broken down by race, but were set out as 70 per cent male and 30 per cent female, despite the fact that 51 per cent of the population was female according to the Census Report.<sup>31</sup> The court noted that no reason was given as to why the equity plans' target for women was only 30 per cent.<sup>32</sup>

### 3 The court's analysis of the EEA

The court held that although the appointment and promotion of employees fell within the prerogative of employers, they were nevertheless constrained by law. It correctly stated that both the *Labour Relations Act* 66 of 1995 and

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<sup>24</sup> Naidoo para 4.

<sup>25</sup> Naidoo para 5.

<sup>26</sup> Naidoo para 6.

<sup>27</sup> Naidoo para 8.

<sup>28</sup> Naidoo para 9.

<sup>29</sup> Naidoo para 14.

<sup>30</sup> Naidoo paras 14-15.

<sup>31</sup> Naidoo paras 15-17.

<sup>32</sup> Naidoo para 17.

the EEA require that employers treat employees fairly and do not unfairly discriminate on the basis of race and/or gender.<sup>33</sup> The court held further that it would intervene if it found that a decision of an employer was irrational, "capricious or arbitrary, or displayed bias, malice or fraud, or [even if the employer] failed to apply his or her mind, or unfairly discriminated".<sup>34</sup> In addition, it said that affirmative action sought to prefer a member of the designated groups in order to achieve *substantive* (our emphasis) equality, and this goal necessitated a differentiation between people.<sup>35</sup>

#### **4 Respondents' reasons for non-appointment**

The Respondents provided various reasons for not appointing the Applicant to the position applied for. One of them was that the Applicant did not comply with the inherent requirements of the job.<sup>36</sup> The court, however, found that there were no inherent requirements for the position.<sup>37</sup>

The Respondents also questioned the Applicant's capability of ensuring that the Krugersdorp Cluster, under her supervision, would meet their "service delivery objectives".<sup>38</sup> The court found little justification for this statement, considering the qualifications and experience of the Applicant<sup>39</sup> as well as the panel's contention that the Applicant was "competent, experienced and equal to the task".<sup>40</sup>

They further justified the appointment of the male candidate by explaining that the candidate would have made an immediate contribution as opposed to the Applicant who, they said, would "need tutoring".<sup>41</sup> The court also found no basis for this contention, as the experience of both the Applicant and the candidate appointed was similar, even though the appointed candidate had scored slightly higher in that regard.<sup>42</sup>

#### **5 Respondents' argument against unfair discrimination**

The Applicant argued that the failure by the Respondents to appoint her amounted to unfair discrimination.<sup>43</sup> The Respondents' main argument, that

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<sup>33</sup> *Naidoo* paras 68-69.

<sup>34</sup> *Naidoo* para 70.

<sup>35</sup> *Naidoo* para 72.

<sup>36</sup> *Naidoo* para 74.

<sup>37</sup> *Naidoo* paras 78-79.

<sup>38</sup> *Naidoo* para 107.

<sup>39</sup> *Naidoo* para 110.

<sup>40</sup> *Naidoo* para 101.

<sup>41</sup> *Naidoo* para 36.

<sup>42</sup> *Naidoo* para 81.

<sup>43</sup> *Naidoo* para 8.

the Applicant's non-appointment was not unfair discrimination, was articulated in their submission that

... it was not about [her] and her abilities or experience but about the employment equity profile that was "dictating" the decisions to be made at the time.<sup>44</sup>

The Respondents contended that the appointment of an African male fell squarely into the equity plan as at the time there were not enough Africans represented in the SAPS, whereas Indian females were "ideally" represented. Due to the calculations used to identify the representivity of Indian females required, with the target of 30 per cent females in the SAPS, the ideal was for zero Indian females to be appointed. It was clear that the Respondents were thinking primarily of filling numerical quotas without consideration of the impact that their decision would have on a member of the designated groups such as the Applicant, who was also part of a minority group.<sup>45</sup>

To address this contention, the court turned to the legislative provisions in terms of section 9 of the *Constitution* and section 6 of the EEA.<sup>46</sup> The court also referred to the Constitutional Court case of *Minister of Finance v Frederick Jacobus van Heerden*,<sup>47</sup> where it was held that in an evolving democratic society it is important that the application of affirmative action should be fair.<sup>48</sup> The court recognised that besides the categories of race, gender and class differentiation there are further categories of differentiation that prevail and lead to new "patterns of disadvantage".<sup>49</sup> Thus, in order to prevent this further discrimination a "situation-sensitive" approach should be applied.<sup>50</sup> This will be discussed in more detail later in the paper.

The court provided that, in terms of *Van Heerden*, it must first be determined "whether a measure targets persons or categories of persons who have been disadvantaged by unfair discrimination";<sup>51</sup> second, whether the measure will achieve the protection or advancement of these persons; and third, whether the measure promotes equality.<sup>52</sup> The court further pointed out that not only does the EEA preclude unfair discrimination, but it also

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<sup>44</sup> *Naidoo* para 110.

<sup>45</sup> *Naidoo* para 35.

<sup>46</sup> *Naidoo* paras 113-114.

<sup>47</sup> *Minister of Finance v Frederick Jacobus Van Heerden* 2004 12 BLLR 1181 (CC) (hereafter *Van Heerden*).

<sup>48</sup> *Naidoo* para 116.

<sup>49</sup> *Naidoo* para 116.

<sup>50</sup> *Naidoo* para 116.

<sup>51</sup> *Naidoo* para 116.

<sup>52</sup> *Naidoo* para 116.

seeks to advance the constitutional values of non-racialism and non-sexism.<sup>53</sup>

Shaik J further held:

... it is important in analysing an affirmative action measure to examine the measure from the perspective of the group to be advantaged. An analysis from the vantage of the group to be disadvantaged is to miss the point of affirmative action and give undue focus to the rights and interests of this group.<sup>54</sup>

He noted that in the circumstances of the case, focusing on the interests of the larger designated groups could exclude minority groups within the designated groups.<sup>55</sup> In applying the requirements in the *Van Heerden* to the case, the court held that the SAPS equity plan did seek to promote the employment of persons who were previously disadvantaged within the designated groups<sup>56</sup> in terms of the EEA, but no consideration was being given to the differences present within the designated groups. The court then considered whether the measures were designed to protect or advance such persons.<sup>57</sup> The court held that the equity plan had not been designed to achieve a diverse workforce "broadly representative of the South African community",<sup>58</sup> as the gender division of 70 per cent male and 30 per cent female favoured men over women and was not representative of the nationally and regionally economically active population in terms of s 42(a)(i) of the EEA.<sup>59</sup> (This was especially noteworthy in the context of the fact that females constitute the majority of the population.<sup>60</sup>) Its effect was in fact exclusionary.<sup>61</sup> In terms of race, the quota of 2.5 per cent for Indians, fed into the gender formula, gave zero as the target for the employment of Indian females, thereby excluding the Applicant from the designated groups so that she would never be appointed beyond her existing rank. The existence of this target was the respondents' reason for not appointing her.<sup>62</sup>

Shaik J held that the "very purpose of employment equity is to redress the effect of past discrimination suffered by members of the designated group" and that "its purpose is not to create new *de facto* barriers of employment".<sup>63</sup> The judge further held that the EEA did not provide for disparate treatment of members of the designated groups on the basis of *degrees* (our

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<sup>53</sup> *Naidoo* para 117.

<sup>54</sup> *Naidoo* para 121.

<sup>55</sup> *Naidoo* para 121.

<sup>56</sup> *Naidoo* para 127.

<sup>57</sup> *Naidoo* para 128.

<sup>58</sup> *Naidoo* para 132.

<sup>59</sup> *Naidoo* para 133.

<sup>60</sup> *Naidoo* paras 180-181.

<sup>61</sup> *Naidoo* para 140.

<sup>62</sup> *Naidoo* paras 135, 147.

<sup>63</sup> *Naidoo* para 158.

emphasis) of disadvantage suffered in the past, within and between members of the designated groups.<sup>64</sup> The EEA also did not recognise the notion of multiple disadvantages, which is presently the condition of South African women such as the Applicant, who had suffered disadvantage on the basis of race, gender and minority status.<sup>65</sup>

The court nevertheless considered the situation where:

... to achieve substantive equality and "equitable representation" for a group within the designated group to be advanced whilst another [is] disadvantaged. The disadvantage to be endured by the latter group is incidental to the purpose of promoting substantive equality. The disadvantage suffered is in pursuit of a higher purpose and to the extent that the higher purpose is realised, the disadvantaged group also benefits. Thus advantage and disadvantage cannot be seen in a narrow context bound by the moment. A situation-sensitive approach is required.<sup>66</sup>

Shaik J then provided that the SAPS plan based on numeric targets was not broadly representative of the South African workforce and was in fact creating a barrier that would create a new path of discrimination for minorities within the designated groups.<sup>67</sup> This was indicated in the situation in which the Applicant found herself. She would be disadvantaged on the basis of both her race and her gender<sup>68</sup> because the plan itself created "degrees of disadvantage", something not envisioned by the goal of employment equity.<sup>69</sup> The equity plan effectively barred her from further advancement. It was for this reason that the court provided for a situation-sensitive approach.

Shaik J concluded his judgement by stating:

... whilst the impugned affirmative action measure is indeed designed to protect and advance members of the designated group, it has as its focus a much too narrow definition of the designated group and it is a feature of the flawed design that it is exclusionary rather than inclusive to a significant degree for the case of women; and in the case of Indians and Indian females it excludes them entirely and in doing so sets up an employment barrier.<sup>70</sup>

The court, took a situation-sensitive approach by looking at the specific circumstances of the SAPS, its historical context and the position of the Applicant as a member of a minority group and a female.<sup>71</sup> The SAPS' traditionally male-dominated workforce was part and parcel of what the

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<sup>64</sup> *Naidoo* para 159.

<sup>65</sup> *Naidoo* para 142.

<sup>66</sup> *Naidoo* para 160.

<sup>67</sup> *Naidoo* paras 164-165.

<sup>68</sup> *Naidoo* para 164.

<sup>69</sup> *Naidoo* para 165.

<sup>70</sup> *Naidoo* para 209.

<sup>71</sup> *Naidoo* para 172.

affirmative action policies were trying to redress.<sup>72</sup> The appointment of a male candidate where a female candidate from the designated groups was not only on par but better qualified, in terms of the scores achieved on the assessments highlighted the tendency to create new paths of discrimination.<sup>73</sup> A closer look at the situation showed that the overall goal of affirmative action might be achieved on the surface but the substantive reason for affirmative action was ignored.<sup>74</sup>

## 6 Analysis of the decision

In the analysis of the decision, focus is placed on the issues discussed by the court which have an impact on the implementation of affirmative action by designated employers.

### 6.1 Constitutional standard to affirmative action

In analysing affirmative action plans, the question that must always be asked is whether the impact of the plan "furthers the constitutional goal of equality or not".<sup>75</sup> This implies that there must be a standard against which affirmative action plans must be measured. However, the decision as to what constitutional standard must be used has been the subject of debate.<sup>76</sup> McGregor discusses the controversy around the application of different tests in the relationship between the right to equality and the application of affirmative action by employers, and further analyses three tests, namely the fairness, rationality and proportionality tests.<sup>77</sup> In an in-depth analysis of the recent Constitutional Court judgement of *South African Police Services v Solidarity obo Barnard*,<sup>78</sup> Albertyn notes that the court failed to develop "a common understanding for evaluating employment-related affirmative action" under the EEA and within the context of the established provisions of substantive equality within the *Constitution*.<sup>79</sup> Each test is briefly considered separately.

The fairness test focuses on section 9(3) of the *Constitution* and requires a "flexible but situation-sensitive approach to the allegation of unfair discrimination",<sup>80</sup> which McGregor argues is necessary in order to prevent the creation of new disadvantages.<sup>81</sup> The fairness of an action of redress

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<sup>72</sup> Naidoo para 171.

<sup>73</sup> Naidoo para 184.

<sup>74</sup> Naidoo para 175.

<sup>75</sup> Pretorius 2001 *Max Planck-Institut* 405.

<sup>76</sup> McGregor 2013 *TSAR* 650; Albertyn 2015 *SALJ* 711.

<sup>77</sup> McGregor 2013 *TSAR* 650.

<sup>78</sup> *SAPS v Solidarity obo Barnard* 2014 6 SA 123 (CC) (hereafter *Barnard* (CC)).

<sup>79</sup> Albertyn 2015 *SALJ* 711.

<sup>80</sup> McGregor 2013 *TSAR* 652.

<sup>81</sup> McGregor 2013 *TSAR* 652; and Pretorius 2001 *Max Planck-Institut* 405.

such as affirmative action is held to be measured by the impact of the action on the complainant who claims unfair discrimination, and the employer has the onus of proving that the application is fair.<sup>82</sup> Determining fairness involves a "balancing act" of the historic and social context of the inequality suffered, its impact on the complainant in terms of his or her particular history and vulnerability in the context of the "nature and purpose of the discriminatory practice", and whether the practice "ameliorates or adds to group disadvantage in a real life context" in the light of the values of the *Constitution*.<sup>83</sup> Fairness in the context of the application of affirmative action is needed to avoid the creation of new inequalities, and such action should not be exercised in an arbitrary and unfair manner.<sup>84</sup> In addition to considering the complainants position:

[p]rocesses of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage.<sup>85</sup>

An unnecessarily unreasonable impact on the rights of non-designated groups could render affirmative action unfair or unjustifiable.<sup>86</sup>

In the *Naidoo* case the SAPS rigidly applied affirmative action without taking account of the history and vulnerability of members of the designated groups within the specific workforce. In applying their affirmative action plan the SAPS did not consider the "real life" context of the SAPS and the various members of the designated groups within that context as outlined by McGregor. Considering the impact of affirmative action on the complainant, in the *Naidoo* case the Applicant because of her minority status encountered "new pattern[s] of disadvantage and discrimination"<sup>87</sup> which effectively barred her from further advancement in the workplace. Thus substantive equality was not achieved because of the disregard for the Applicant's particular context. The *Naidoo* case thus presents the dynamic of two different members of the designated groups each competing for a position, but each coming from different vantage points of inequality.

It should be noted that the fairness test was rejected by Van der Westhuizen<sup>88</sup> in *Barnard*, who argued:

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<sup>82</sup> Pretorius 2001 *Max Planck-Institut* 415.

<sup>83</sup> McGregor 2013 *TSAR* 652-654.

<sup>84</sup> Pretorius 2001 *Max Planck-Institut* 415.

<sup>85</sup> *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 123; also see Pretorius 2001 *Max Planck-Institut* 415.

<sup>86</sup> Pretorius 2001 *Max Planck-Institut* 415.

<sup>87</sup> *Naidoo* para 186.

<sup>88</sup> *Barnard* (CC) paras 157-158.

I am somewhat sceptical of a fairness standard when dealing with the constitutional validity of the implementation of section 9(2) measures. If "fairness" here relates to the unfair discrimination prohibition in section 9(3), relying on it with regard to affirmative measures under section 9(2) may risk internal inconsistency.<sup>89</sup>

This is due to the fact that in terms of the precedent set by *Van Heerden*, section 9(2) provides a clear defence against unfair discrimination. The Judge notes that he would rather look at:

... whether the impact of the implementation of a section 9(2) measure on other rights is more severe than is necessary to achieve its purpose.<sup>90</sup>

The second test is the proportionality test. This focuses on the limitation of rights and how to deal with rights within constitutional transformation where it requires "more than good reasons for state actions in the abstract".<sup>91</sup> It is about the legitimate justification by the state where there is limitation of rights, which is to be done in a "contextually sensitive" manner.<sup>92</sup> In *Barnard*<sup>93</sup> it was held that proportionality involves a "case-sensitive and concrete assessment of competing rights" in which a "right or value is not compromised more than is necessary, in the context of a constitutional state founded on dignity, equality and freedom in which government has positive duties to uphold such values".<sup>94</sup> In *Naidoo* the SAPS' affirmative action plan would fail the proportionality test since the facts show that the decision not to appoint the Applicant was not "contextually sensitive" and had the appearance of a token affirmative action measure instead of achieving substantive equality.

The third test is the rationality test established by the court in *Van Heerden*, and also referred to in *Naidoo*. The test assists in determining whether the measures undertaken to achieve substantive equality are within the parameters of section 9(2).<sup>95</sup> The test first determines if the affirmative action measures "target persons or categories of persons who have been disadvantaged by unfair discrimination", then it asks "whether the measure is designed to protect or advance such persons or categories of persons" and also "whether the measure promotes the achievement of equality".<sup>96</sup> In this regard, as McGregor points out, the test requires a logical link between the measures taken and the goals of substantive equality, as well as addressing the unfair discrimination of the past. However, McGregor further

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<sup>89</sup> *Barnard* (CC) paras 157-158.

<sup>90</sup> *Barnard* (CC) para 164.

<sup>91</sup> McGregor 2013 TSAR 653.

<sup>92</sup> McGregor 2013 TSAR 653.

<sup>93</sup> *Barnard* (CC).

<sup>94</sup> *Barnard* (CC) para 166.

<sup>95</sup> McGregor 2013 TSAR 654-655.

<sup>96</sup> *Van Heerden* para 37; also see McGregor 2013 TSAR 655.

argues that this is not flexible enough to allow a true measurement in determining substantive equality. She states that the test does not account for the "balancing" needed in terms of a consideration of (among other things) the particular context, diversity within the designated groups as well as representation and efficiency.<sup>97</sup>

In *Naidoo* the SAPS affirmative action plan would probably comply with the rationality test on the surface but since the plan did not in fact achieve substantive equality it highlighted the shortcomings of this test as pointed out by McGregor. In this instance the SAPS target for employment together with the actual appointment are considered for the test. First, the measures adopted did target persons or categories of persons who had previously been disadvantaged, as it targeted members of the designated groups. The plan was designed to promote affirmative action and the appointment of a black male achieved the promotion of equality in that it promoted a member of the designated groups. The shortcoming is the failure to place the SAPS' particular circumstances in context and to act accordingly. The failure to appoint the Applicant, who was fully qualified, did not take into account the current male-dominated structure, or the fact that the targets set specifically excluded the Applicant from furthering her career and in fact created a barrier for advancement because her minority status was ignored.

In *Public Servants Association of South Africa v Minister of Justice*,<sup>98</sup> Swart J held that affirmative action "measures must be designed to *achieve* something. This denotes ... a causal connection between the designed measures and the objectives". Moseneke J disagreed and said that "it is sufficient if the measure carries a reasonable likelihood of meeting the end".<sup>99</sup> However, as can be seen from *Naidoo* something more is needed than a reasonable likelihood of achieving the end in order to actually achieve this end. An appointment from the designated groups alone would achieve this but it would not achieve substantive equality because there was no consideration of the specific context. Pretorius has argued that an affirmative action measure can satisfy constitutional muster if it meets the requirements of substantive equality by complying with the rationality and fairness requirements of section 9 of the *Constitution* as well as the justifiability requirements of section 36 of the *Constitution*.<sup>100</sup> This approach would certainly go a long way towards achieving the end goal. If the SAPS' affirmative action plan had applied the fairness test then it would have been clear that the Applicant was the correct choice for promotion.

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<sup>97</sup> McGregor 2013 *TSAR* 654-655.

<sup>98</sup> *Public Servants Association of South Africa v Minister of Justice* 1997 3 SA 925 (T) 989A-B.

<sup>99</sup> *Van Heerden* para 47.

<sup>100</sup> Pretorius 2001 *Journal for Juridical Science* 19.

The lack of clarity in the standard to be applied in affirmative action cases is unfortunate. This can be attributed in part to the contested nature of substantive equality.<sup>101</sup> However, in applying an affirmative action policy an employer can be guided by various factors which will be discussed in more detail below, in an attempt to avoid further disadvantaging members of the designated groups.

## 6.2 Representivity

Since the goal of affirmative action is to "promote equal opportunity and fair treatment"<sup>102</sup> and to "implement affirmative action measures to redress the disadvantage in employment experienced by designated groups"<sup>103</sup> so that South Africa's diverse population is equitably represented in employment,<sup>104</sup> a closer look at the application of the SAPS' equity plan is warranted. The role of the employer is to ensure the development of the skills of the designated groups.<sup>105</sup> In *Naidoo* the Applicant's promotion would ensure her advancement into management and create an opening for further skills development for other members of the designated groups, a measure necessary in the case of black females like the Applicant.<sup>106</sup>

The issue of representivity in the application of affirmative action will always be part of the management prerogative. Management is better placed to identify its employment equity needs and formulate a plan which objectively promotes gender, race and disability representivity.<sup>107</sup> However, management's prerogative still needs to be exercised in a manner that is fair and rational, failing which its actions will be scrutinised by the courts.<sup>108</sup> This therefore calls for a balance between representivity and skills efficiency, particularly where a member of the designated groups is less qualified.<sup>109</sup> Having a plan with set targets provides an employer with just reasons for its choice of candidates who fall within the designated groups and where some may be more suitable than others.<sup>110</sup> The process of distinguishing among members of the designated groups is influenced by the way in which the employer views these members, even though the EEA

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<sup>101</sup> Albertyn 2015 SALJ 723.

<sup>102</sup> EEA s 2(a).

<sup>103</sup> EEA s 2(b).

<sup>104</sup> EEA s 2(b).

<sup>105</sup> EEA s 15(2)(d)(ii).

<sup>106</sup> McGregor 2005 *Codicillus* 11; also see *Naidoo* paras 184, 194; and *Solidarity obo Barnard v SAPS* 2014 2 SA 1 (SCA) (hereinafter *Barnard* (SCA)).

<sup>107</sup> Dupper and Garber *et al Essential Employment Discrimination Law* 260.

<sup>108</sup> *Solidarity obo Barnard v SAPS* 2010 5 BLLR 561 (LC) (hereafter *Barnard* (LC)); see also *Naidoo*.

<sup>109</sup> McGregor 2003 *SA Merc LJ* 82, 85.

<sup>110</sup> *Samuels v SAPS* 2003 24 ILJ 1189 (BCA) 1196.

does not provide for this.<sup>111</sup> Therefore it is the responsibility of the employer to recognise the difference in disadvantage of the designated groups and its impact on their representivity within the workforce, in order to achieve the ideal.<sup>112</sup> The implementation of the equality right must consider "the underlying values of the Constitution" and must be something more than "formal equality".<sup>113</sup> A strict reliance on "numbers" without consideration of the desirability of having a diversified workforce will achieve this token affirmative action.<sup>114</sup> Therefore, in giving effect to the true purpose of affirmative action an employer must take into account that individuals and/or minorities could be overlooked and thereby prejudiced.<sup>115</sup>

The equity plan's target of "zero" Indian females resulted in an (albeit unintentional)<sup>116</sup> token affirmative action plan, because it did not account for the impact on minorities such as the Applicant, who fell within the designated groups.<sup>117</sup> The plan succeeded in creating an artificial barrier for this minority group within the designated groups, and did not promote adequate representation of the diverse population of South Africa.<sup>118</sup> Allowing an Indian female to move into higher ranks where Indian females are underrepresented would have promoted this representation.

### **6.3 Multi-layered nature of disadvantage**

The nature of the disadvantage suffered by the designated groups also needs to be understood within the historical context of South Africa.<sup>119</sup> Inequality is still with us and is clearly visible between racial and gender groups<sup>120</sup> and across minority groups. Despite this, the EEA limits the definition of disadvantage to race, gender and disability without taking into consideration multi-layered disadvantage, including factors such as socio-economic inequality.<sup>121</sup> The various nature of disadvantage was given recognition in the *Barnard* SCA judgement, where it was held that in the particular case of Captain Barnard, who was a white woman in a male-dominated profession, and who "sit[s] at the intersection of privileged and under-privileged identities", the disadvantage that Barnard was vulnerable to meant that:

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<sup>111</sup> McGregor 2005 *Codicillus* 9.

<sup>112</sup> McGregor 2005 *Codicillus* 9; also see *Solidarity v Department of Correctional Services* 2015 ZALAC 6 (10 April 2015) (hereafter *Solidarity* [2015]).

<sup>113</sup> *Barnard* (SCA) para 26.

<sup>114</sup> *Naidoo* paras 184, 192.

<sup>115</sup> Mushariwa 2011 *Obiter* 439, 441.

<sup>116</sup> *Naidoo* para 190.

<sup>117</sup> *Naidoo* paras 184, 192.

<sup>118</sup> *Barnard* (SCA) para 19.

<sup>119</sup> Albertyn and Goldblatt "Equality" 35-1; also see McGregor 2006 *Fundamina* 87.

<sup>120</sup> Mokgoro 2003/2004 *Alb L Rev* 565.

<sup>121</sup> McGregor 2005 *Codicillus* 9.

... she might suffer harm in unique ways compared to members of other groups, designated or not. A woman in her position had probably not suffered the unfair discrimination that black women did, but had also not enjoyed the privilege of white men. Her position and history of privilege are undeniably different from that of a black man and may require more promotion in some contexts and less in others.<sup>122</sup>

More recently in the same case the Constitutional Court in *South African Police Service v Solidarity obo Barnard* illustrated the role that multi-layered disadvantage can play in determining whether or not substantive equality is achieved. In Barnard's case the complainant was a white female who despite being fully qualified for the position she applied for<sup>123</sup> and being the most suitable candidate by far<sup>124</sup> was not offered the position.<sup>125</sup> Ms Barnard as a female is a member of the designated groups, but because she is white she is also a member of the group privileged on the basis of race.<sup>126</sup> In her particular circumstance the court found it equitable that she should not be appointed because of the degree of over representation of white females in that position.<sup>127</sup> In her case, however, in contrast to that of Ms Naidoo, she was not barred from further promotion.<sup>128</sup>

Pretorius argues that ranking different forms of disadvantage is not the best course of action when dealing with intersections within the designated groups.<sup>129</sup> Nevertheless, considering the multi-layered disadvantage of members is still relevant in individual cases.<sup>130</sup> For example in *Motala v University of Natal*<sup>131</sup> multi-layered disadvantage played a role in determining the constitutionality of the exclusion of a member of the designated groups from admission to the medical school of the University of Natal. Here the court looked at multi-layered disadvantage in education between Indian and black students. Pretorius' argument for "appropriate contextualised consideration of different degrees of [in this case] educational disadvantage"<sup>132</sup> accords with the court's approval of the decision not to appoint Ms Barnard and its disapproval of the non-appointment of the Applicant in *Naidoo*.

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<sup>122</sup> *Barnard* (SCA) para 153.

<sup>123</sup> *Barnard* (CC) para 8.

<sup>124</sup> *Barnard* (CC) para 11.

<sup>125</sup> *Barnard* (CC) para 16.

<sup>126</sup> *Barnard* (CC) para 153.

<sup>127</sup> *Barnard* (CC) para 112.

<sup>128</sup> *Barnard* (CC) para 67.

<sup>129</sup> Pretorius 2001 *Max Planck-Institut* 434.

<sup>130</sup> Pretorius 2001 *Max Planck-Institut* 434.

<sup>131</sup> *Motala v University of Natal* 1995 3 BCLR 374 (D) para 838 B-F (hereafter *Motala*); see also Pretorius 2001 *Max Planck-Institut* 435.

<sup>132</sup> Pretorius 2001 *Journal for Juridical Science* 24.

#### 6.4 Gender discrimination

In addition to the Applicant's race she experienced further disadvantage based on her gender, particularly in a male-dominated profession.<sup>133</sup> Gender discrimination in the male-dominated police force is well documented.<sup>134</sup> Women within the police force face various challenges as a result of their gender.<sup>135</sup> The disadvantages include male police officers not accepting the authority of female officers, evidence of beliefs that female officers are incompetent, and the stereotyping of women, all of which result in an "intimidating working environment" for women.<sup>136</sup> These attitudes are founded on the perception that it is not appropriate for women to work in a "man's environment".<sup>137</sup> The supposition is that women are not biologically or socially equipped to perform traditionally male jobs in areas such as policing and firefighting.<sup>138</sup>

A reflection of the continuation of the male dominance in the workforce is apparent in this case in the promotion of a male candidate over the Applicant, despite there being no actual female representation of that particular minority from the designated groups.<sup>139</sup> The black male candidate's promotion was based on targets that inaccurately reflected the demographics of the population,<sup>140</sup> and also on the perception that she was less equipped to fill the position even though she had scored higher overall than the male candidate in the assessments.<sup>141</sup> This is an apt example of the barriers that females would face even as part of the disadvantaged groups as a whole.<sup>142</sup> A truly representative workforce will reflect the goals of affirmative action together with individuals' right to be treated fairly. An employment equity plan must therefore be flexible enough to accommodate this.<sup>143</sup>

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<sup>133</sup> McGregor 2005 *Codicillus* 5.

<sup>134</sup> See Bezuidenhout and Theron 2000 *Acta Criminologica* 19; also see Morrison 2002 *Annual Journal of South African Association of Women Graduates* 24.

<sup>135</sup> Morrison 2005 *Acta Criminologica* 20.

<sup>136</sup> Morrison 2005 *Acta Criminologica* 20.

<sup>137</sup> Morrison 2005 *Acta Criminologica* 22.

<sup>138</sup> Morrison 2005 *Acta Criminologica* 21.

<sup>139</sup> *Naidoo* para 191.

<sup>140</sup> *Naidoo* paras 183, 204.

<sup>141</sup> *Naidoo* paras 36, 107.

<sup>142</sup> *Naidoo* para 209.

<sup>143</sup> Mushariwa 2011 *Obiter* 443; also see *Du Preez v Minister of Justice and Constitutional Development* 2006 5 SA 592 (E) para 30; and *Barnard* (CC) para 100.

### **6.5 Minority status within the designated groups as a type of disadvantage**

Minority status within the designated groups, for which there is no uniform, agreed definition, is another factor not accounted for by the EEA.<sup>144</sup> Minority groups "can be defined in terms of age, sexuality, sexual preference, gender, religion, culture, race, or ethnicity".<sup>145</sup> Such a group is held to be a distinct group within a larger society.<sup>146</sup> A minority group is also "numerically inferior to the rest of the population of a state and, therefore, in a non-dominant position".<sup>147</sup> It is noted, however, that "minority status is not always based on number and is sometimes based on inferior social and political position".<sup>148</sup> Using the national statistics on the demographics of the economically-active population, Indians are clearly in the minority in the larger designated group of blacks.

Due to the manner in which the equity plan of the SAPS was applied, it can be argued that the applicant suffered multiple layers of disadvantage: first, by virtue of her race; second, by virtue of her gender, particularly in such a male-dominated profession; and third, due to her membership of a minority group within the designated groups. The lack of recognition of the possibility of multi-layered disadvantage being experienced by some members of designated groups resulted in the setting of a "zero" target for Indian females for the position applied for by the Applicant.<sup>149</sup>

It is thus necessary to consider inequality on broad and narrow grounds alike such as from the group perspective, and "individual and community" inequality within the group or community.<sup>150</sup> The position of Indians and more specifically Indian females as a minority group within the larger designated groups needs to be considered carefully within the SAPS specifically, so that potential candidates are not discouraged from joining the profession.<sup>151</sup>

It is apparent that the issue of representivity in the case of minority groups within the designated groups must be considered in more specific terms as opposed to the broader terms currently employed. A recent illustration of this is to be found in the case of *Solidarity v the Department of Correctional*

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<sup>144</sup> Moosa 2002 *Codicillus* 41.

<sup>145</sup> Mochwanaesi, Steyn and Van der Walt 2005 *SAJE* 287.

<sup>146</sup> Mochwanaesi, Steyn and Van der Walt 2005 *SAJE* 287; also see Moosa 2002 *Codicillus* 41.

<sup>147</sup> Mochwanaesi, Steyn and Van der Walt 2005 *SAJE* 287.

<sup>148</sup> Moosa 2002 *Codicillus* 41.

<sup>149</sup> *Naidoo* paras 135, 187.

<sup>150</sup> *Albertyn* 2011 *Stell LR* 591, 595.

<sup>151</sup> *Nthuli* 2015.

*Services*,<sup>152</sup> where the court found that the employer's focus on national demographics, without considering the uniquely different demographics within the Western Cape, resulted in unfair discrimination against coloured applicants within the department. The regional demographics were significantly different from the national demographics. Thus the court held that in the context of the Western Cape the department needed to consider both national and regional demographics.<sup>153</sup> This judgement is due to have the greatest impact within provinces like the Western Cape where the regional demographics differ from the national demographics within the black group.<sup>154</sup> According to the Department of Labour, 51 per cent of the economically-active population of the Western Cape is coloured, with the African population comprising 33.9 per cent, followed by the white population with 14.8 per cent and lastly the Indian population with 0.3 per cent.<sup>155</sup>

Both Solidarity and the Department of Correctional Services appealed the decisions for varying reasons.<sup>156</sup> Solidarity appealed the decision in order to get substantive relief for the employees, whereas the Correctional Services Department appealed the decision as to whether they were mandated to consider both national and regional demographics in the implementation of their employment equity policy. Focusing on this particular issue, the court dismissed the Correctional Services Departments' appeal, holding that "in the construction of a non-racial and non-sexist nation, the relationship between regional and national demographics requires nuance and flexibility".<sup>157</sup> This could be applied to the Applicant's situation, considering the absence of Indian females in high-ranking positions and their generally low representation within the SAPS.

## **6.6 A situation-sensitive approach to affirmative action**

The diversity of the population and diversity within the workplace necessitate that each case be judged in terms of its own specific facts. This case, thus, demonstrates the need for employers to seriously consider the impact of their decisions in implementing affirmative action not just on members of the designated groups but more so on the minority members

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<sup>152</sup> *Solidarity v Department of Correctional Services* 2014 35 ILJ 504 (hereafter *Solidarity* (2014)).

<sup>153</sup> *Solidarity* (2014) paras 45-46.

<sup>154</sup> *Solidarity* (2014) para 46.

<sup>155</sup> Department of Labour 2013 <http://www.labour.gov.za>.

<sup>156</sup> *Solidarity* [2015].

<sup>157</sup> *Solidarity* [2015] para 72.

within.<sup>158</sup> There cannot be "naked preference"<sup>159</sup> of some members of the designated groups to the exclusion of others. Taking a situation-sensitive approach to affirmative action would also ensure that the employer recognises the different disadvantages experienced by members of the designated groups, some which are historical but others of which are current experiences of disadvantage created by the institutional culture of an organisation or a badly drafted employment equity plan.<sup>160</sup>

Such an approach is surely within the ambit of the *Constitution* and would go a long way towards addressing the discrimination of the past and placing all South Africans on an "equal footing". The courts are increasingly following the "situation-sensitive" approach in scrutinising the facts of each case particularly in their decisions about unfair discrimination. This approach is evident in the decision of *Barnard* (SCA), which favoured a "flexible but situation-sensitive approach" towards affirmative action to ensure fairness.<sup>161</sup>

In addition, in adopting a situation-sensitive approach, the impact of the action taken (or not taken) in relation to the aggrieved party is also a factor to be considered by the employer.<sup>162</sup> In *Barnard* (SCA) the court found that the employer's over-emphasis on representivity on the basis of race effectively excluded Captain Barnard, even though she was a member of the designated groups due to her gender, resulting in unfair discrimination against her. The court thus highlighted that "a situation-sensitive approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society".<sup>163</sup> Even though *Barnard* (CC) has reversed this decision, the court's approach in recognising the multi-layered disadvantage that can be suffered by members of the designated groups is in itself practising a "situation-sensitive" approach.

It is now 15 years since the inception of the EEA, and progress in affirmative action is slow or non-existent.<sup>164</sup> Focus cannot be only on inclusion of the designated groups but also on the creation of a workforce that is transformed by breaking down both visible and invisible barriers to equality

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<sup>158</sup> *Naidoo* para 116.

<sup>159</sup> *Naidoo* para 64.

<sup>160</sup> *Naidoo* para 116.

<sup>161</sup> *Barnard* (SCA) paras 1, 58.

<sup>162</sup> *Barnard* (SCA) para 77.

<sup>163</sup> *Barnard* (SCA) para 54.

<sup>164</sup> Commission for Employment Equity 2012-2013 <https://www.labour.gov.za/downloads/documents/annual-reports/employment-equity/commission-for-employment-equity-annual-report-2012-2013/cee13report.pdf>.

in the workplace, as well as creating an enabling environment for members of the designated groups to reach their full potential within the workplace.<sup>165</sup>

## 7 Conclusion

It is clear that the identified beneficiaries of affirmative action are not equally placed in relation to one another in their ability to compete for employment or promotion within the workforce in a situation where employment equity plans do not employ a "situation-sensitive" approach. The EEA does not adequately account for these differences in the experience of disadvantage. It is important that an employer, when implementing employment equity, does not reinforce existing inequality within and across the groups. The implementation of affirmative action without consideration of these factors can effectively bar the advancement of minority groups within the designated groups and create new barriers to advancement, as effectively shown in the *Naidoo* case.

To fully achieve the aims of affirmative action, to break down the barriers to employment still affecting members of the designated groups, to achieve a fully representative workforce, and to transform the workplace into an area governed by principles of substantive equality calls for employers to adopt a situation-sensitive approach. The consideration of the context and all of the factors discussed in this note, together with recognition of the existence of multi-layered disadvantage, is called for in order to achieve substantial equality in the labour context.

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<sup>165</sup> Albertyn 2011 *Stell LR* 606.

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### **List of Abbreviations**

Alb L Rev

EEA

SA Merc LJ

Albany Law Review

Employment Equity Act

South African Mercantile Law Journal

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SAJE	South African Journal of Education
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPS	South African Police Service
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Chi Legal F	University of Chicago Legal Forum