

# “Affirmative” (measures in) action? Revising the lawfulness of racial quotas (in South African (professional) team sports)

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## SUMMARY

This contribution critically examines the lawfulness of the use of race quotas in the selection of South African (professional) sports teams. These quotas purportedly function as affirmative action measures, and their legitimacy in this light is considered with reference to relevant case law on affirmative action and, more specifically, on the use of quotas in the application of affirmative action (as this has featured in other contexts in the case law to date). In the process, the author evaluates the constitutionality of such quotas (with specific reference to their apparent irrationality in the specific context of (professional) sport and its nature and characteristics). The piece further considers the legitimacy of these quotas at the domestic level in light of the application of the applicable labour legislation (specifically the Employment Equity Act, 1998), and at the international level in light of the applicable rules of international sports governing bodies in the relevant sporting codes. The author concludes that these race quotas are unconstitutional and have no legitimate place in South African sport and in the continuing process of sports transformation, and calls for their abolishment as a matter of urgency.

## 1 Introduction

Twenty-two years into a democratic South Africa, the national cricket governing body, Cricket South Africa (“CSA”), in August 2016 announced the first national team to be selected (officially) in terms of race-based selection criteria, for a Test match series against New Zealand. Media reports recognised that the last national side to be specifically governed

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by racial guidelines was during the 1969/70 home series against Australia, when apartheid precluded the inclusion of any black players.<sup>1</sup> We may appear to have come full circle, although racial quotas in sports teams and developments around “sports transformation” have been a feature of the national discourse for the whole of the young life of this democracy. Maybe not surprisingly, the transformation agenda tends to rear its head especially in election years.

South African rugby has openly (off and on) followed a quota system in some of its competitions for the last few years. The former president of the South African Rugby Union (“SARU”), Oregon Hoskins, was quoted in the media in 2014 saying that rugby “will need to make “radical, drastic, immediate changes” to comply with the pressure being brought upon it by the Sports Ministry after Saru and other federations met with the government regarding the proposed changes, including a possible reintroduction of quotas into the Absa Currie Cup and Vodacom Super Rugby competitions:<sup>2</sup>

“Minister Fikile Mbalula threatened to withhold permission for sporting federations to compete internationally if there was not a 60-40 split between black and white players in future representative teams, saying the pace of transformation was too slow among sporting federations. Hoskins said that rugby ‘doesn’t have a choice but to comply’ and committed all 14 provincial unions and Saru to ‘meet the challenges as rugby and tackle it head on’ to make South Africa proud as a nation. ‘With the amount of pressure that we are under now by the Minister of Sport to change at the highest level, we’ve been told in no uncertain terms that there needs to be a radical, drastic and immediate change,’ Hoskins told supersport.com. ‘The only way we can effect change is to use the quota system even more extensively than we currently do. This is not the optimum way to transform, it a short-term measure and there is no other way to change representation in teams in the immediate short-terms (sic).’ ‘While it may not be perfect, and not be optimum, there is no other way we can meet the demands of the Minister of Sport and seriously implement transformation in the Absa Currie Cup and at franchise level. We’ve been put under serious threat by government, and we don’t really want to have government intervening in sport. It’s not good for the game, so we have no alternative as a federation but to look at quotas in our senior ranks.”<sup>3</sup>

Of course, as has been the experience of sports transformation measures since the dawn of our democracy, the process is often clouded in uncertainty and, specifically, a significant measure of ambiguity in respect of the terminology used by both government spokespersons and sports federations in describing measures as constituting either “targets” or “quotas”. Following Hoskins’s above media statement in 2014,

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- 1 See R Houwing “NZ tests: ‘SA will be quota-based’” (04-08-2016) *Sport24* <http://www.sport24.co.za/Cricket/Proteas/nz-tests-sa-will-be-quota-based-20160804> (accessed 2018-11-12).
  - 2 See report of B Nel “Quotas for Currie Cup, Super Rugby?” (23-04-2014) *Supersport* [http://www.supersport.com/rugby/sa-rugby/news/140423/Quotas\\_for\\_Currie\\_Cup\\_Super\\_Rugby](http://www.supersport.com/rugby/sa-rugby/news/140423/Quotas_for_Currie_Cup_Super_Rugby) (accessed 2018-11-11).
  - 3 B Nel “Quotas for Currie Cup, Super Rugby?” (23-04-2014) *Supersport*.

SARU's *Competition Format 2015*,<sup>4</sup> contained the following regarding rules for teams in respect of "Representation" for the ABSA Currie Cup competition:

"SARU has adopted a comprehensive Transformation Charter that will guide SARU and its Provinces on this critical aspect of the game. Quotas no longer apply to the ABSA Currie Cup Competition. However, it is expected of each Province to take serious cognisance of the issue of representativity of players on the field of play in order to support SARU's broader transformation objectives."<sup>5</sup>

While "quotas" may have no longer applied to the Currie Cup competition at the time, the same document contained the following in respect of "Representation" for the Vodacom Cup competition:

"Each Province shall take serious cognisance of the issue of representivity of players on the field of play, to support SARU's broader transformation objectives. 7 (Seven) players of colour shall be in the squad of 22 (twenty-two) players of whom 2 (two) players shall be forwards. At least 5 (five) players of colour shall be included in the starting line-up."<sup>6</sup>

Even though SA Rugby took the public stance that quotas no longer apply (at least in certain of its competitions, it appears), its strategic transformation plan provides that 50% of the Springbok team must be made up of "players of colour" by 2019. As recently as May 2017 a spokesperson for SA Rugby was quoted as saying that the organisation is willing to defend its "quota stance" in court.<sup>7</sup> Media reports recounted race-based team selection in cricket World Cup matches (in 2007 in the Caribbean), as well as rumoured interference in team selection by cricket administrators (in South Africa's semi-final loss in the 2015 ICC World Cup). Some sports federations, unlike SA Rugby (as per the quoted media statement by Hoskins above) have continued to refer to these largely government-imposed quotas as "targets". However, events in 2016 provided some clarity on the true nature of these measures. At a media briefing on 25 April 2016, upon the occasion of the release of the 2014/15 Eminent Persons Group *Transformation Status Report*, the then Minister of Sport, Fikile Mbalula, made the following announcement:

"I have resolved to revoke the privilege of Athletics South Africa (ASA), Cricket South Africa (CSA), Netball South Africa (NSA) and South African Rugby (Saru) to host and bid for major and mega international tournaments in the Republic

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4 SARU "SARU's Competitions Format and General Rules (2015)" *Supersport* <http://images.supersport.com/content/SARU%27s%20Competitions%20Format%20and%20General%20Rules%202015%20-%20Final%201.pdf> (accessed 2018-12-11).

5 "SARU's Competitions Format and General Rules (2015)" para 1.9.

6 "SARU's Competitions Format and General Rules (2015)" para 2.5.

7 Unknown "SA rugby willing to defend its "quota stance"" (04-05-2017) *Sport24* <https://www.sport24.co.za/Rugby/sa-rugby-willing-to-defend-its-quota-stance-20170504> (accessed 2018-11-11).

of South Africa as a consequence of the aforementioned federations not meeting their own set transformation targets, with immediate effect.”<sup>8</sup>

The Sports Minister’s action was subsequently endorsed by Cabinet,<sup>9</sup> although the legality of the ban is questionable. Along with the ban came threats of non-recognition by government of these sporting codes (with the implication, most notably, of withdrawal or refusal of national colours for athletes participating in such codes, and their resultant non-participation on the international stage for the near future). The reason for the ban, according to the Ministry, was punitive in nature, and had the stated objective of forcing these federations to toe the line in respect of government’s demands regarding race-based transformation. In addition, it is in this that we find an indication of the true nature of these measures. It is generally recognised that targets in affirmative action measures are aspirational, as opposed to quotas, which constitute a set number or percentage of places to be reserved for beneficiaries, at all costs. The difference was succinctly explained in the American context in *Local 28, Sheet Metal Workers’ International Association v EEOC*:<sup>10</sup>

“A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications ... . By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job.”<sup>11</sup>

One aspect or characteristic of a measure that might (in fact, should) tip the scales in favour of determining that it is a quota rather than a target or numerical goal is if some punitive sanction is imposed on the responsible official or employer who fails to reach the set number/percentage of representation of persons from designated groups (under the EEA) or persons previously disadvantaged by past unfair discrimination (under the more general application of section 9(2) of the Bill of Rights). By its nature one cannot punish someone for not reaching an aspirational target – or, at least, one could not do so rationally. And it is here that it seems to become clear that the Sports Minister’s ban of April 2016, *by definition and expressly*, constitutes the imposition of a punitive sanction on the relevant sports federations for their alleged

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8 See ‘Mbalula bans SA from bidding for major rugby, cricket events’ (25-04-2016) Drum <https://www.news24.com/Drum/Archive/mbalula-bans-sa-from-bidding-for-major-rugby-cricket-events-20170728-5> (accessed 2018-11-27)

9 See Anonymous “Cabinet cheers Fikile’s plan” (30-04-2016) *The Citizen* <https://citizen.co.za/news/south-africa/1095316/cabinet-cheers-fikiles-plan/> (accessed 2018-11-11).

10 478 US 421 (1986) 495.

11 As quoted by Katz J in *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 1 All SA 589 (WCC) para 211.

failure to meet a “target”. Clearly these euphemistically-labelled “targets” function as nothing other than quotas.<sup>12</sup>

What has been largely absent from media reports and the sports transformation narrative to date has been an examination of the legality and constitutionality of such efforts at the imposition of race as a criterion for selection of professional sports teams on both the global and domestic stage. I have in the past written (rather extensively) on various aspects of race-based sports transformation policies and measures,<sup>13</sup> and feel that the time is ripe for yet another analysis of the legal implications. At the heart of this analysis is the realisation that race-based team selection is, at least purportedly, a rather atypical species of the application of affirmative action. Once one accepts this it is imperative to examine the constitutional and legislative parameters of lawful affirmative action, and to determine whether cricket or rugby quotas in fact make the grade in terms of the law. Here we must be guided by the latest jurisprudence on affirmative action in the employment and other contexts, including judgments of the Constitutional Court handed down in the past four years. However, the legal analysis must be much broader, in recognition of the fact that sports transformation in South Africa is not just a political hot potato on the domestic stage. The application of racial quotas in representative national teams and at other levels (for example, professional franchise teams) occur within a significantly globalised professional sports industry. It implicates fundamental principles of international (sports) law, and the South African government and domestic sports federations are not operating within a vacuum, even if they (especially government) might seem to believe so.

In the section that follows (section 2) I will briefly examine the legal framework for lawful affirmative action in terms of the Constitution of the Republic of South Africa, 1996 (“Constitution”) and in terms of our

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- 12 For further discussion of this point, see the text to part 4 below. It should be noted that the language of the Minister’s ban in no way indicates an intention to sanction designated (professional sports) employers for a failure to, for example, address and remove employment barriers for players from designated groups (which they are obliged to do under the EEA). The ban as a sanction appears to relate to nothing other than a response to such employers’ failure to meet the relevant demographic “targets”.
- 13 See AM Louw “Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 1)” (2004) 15 *Stell LR* 119; AM Louw “Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 2)” (2004) 15 *Stell LR* 225; AM Louw “Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (part 1)” (2004) 15 *Stell LR* 409; AM Louw “Transforming South African Professional Sport: Some Observations on Recent Developments” (2005) 9 *Law, Democracy & Development* 193-218; AM Louw “Evaluating Recent Developments in the Governance and Regulation of South African Sport: Some Thoughts and Concerns for the Future” (2006) 1-2 *International Sports Law Journal* 48; AM Louw “Extrapolating ‘equality’ from the letter of the law: The limits of affirmative action under the Employment Equity Act” (2006) 18 *SA Merc LJ* 336-354.

labour legislation. I will focus specifically on the law's treatment of the use of race-based quotas as opposed to racial targets, with reference to the most recent jurisprudence on this issue. In section 3, I will briefly examine the experience of the continued and persistent application of race quotas in our sport, after briefly considering the application of the relevant legislation in this context, and then I will consider the international implications. In section 4(1) will briefly consider currently ongoing litigation on sports quotas in a pending case before the Labour Court. Section 5 will conclude.

## 2 The legality of quotas in the application of affirmative action, more generally

Recent years have seen increasing calls from the African National Congress ("ANC")-led government to (re)institute race-based quotas in (professional) sports teams, to ensure that teams are demographically representative of the South African people. I have written elsewhere about the role and place of "demographic representivity" in the application of affirmative action, and have expressed my view that representivity has very little to do with equality and that the pursuit of demographic representivity as a prime objective of the application of affirmative action (as it is done in terms of the Employment Equity Act 55 of 1998 ("EEA")) does not conform with the parameters for lawful affirmative action in terms of section 9(2) of the Bill of Rights.<sup>14</sup> I will not address those issues again here, but wish to revisit one specific aspect of the sports transformation debate, which is particularly problematic in the context of our jurisprudence on affirmative action, namely the use of (racial) quotas.

The late 1990s and most of the 2000s saw a measure of ambivalence in South African law on affirmative action in respect of the distinction between affirmative action quotas and targets (or numerical goals), and their respective legitimacy. The EEA contains a rather ambiguously worded prohibition on the use of quotas in affirmative action programmes implemented under the Act. Section 15 of the Act describes "affirmative action measures" as including "measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce",<sup>15</sup> but section 15(3) provides that such measures "include preferential treatment and numerical goals, but exclude quotas". This weakly worded prohibition on quotas led to a measure of uncertainty as to the legitimacy of the use of

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14 See AM Louw "*I am not a number, I am a free man!*" The Employment Equity Act, 1998 (and other myths about 'equality', 'equity' and 'dignity' in post-apartheid South Africa (Part 1)) (2015) 18 *PELJ* 594-667; and AM Louw "*I am not a number, I am a free man!*" The Employment Equity Act, 1998 (and other myths about 'equality', 'equity' and 'dignity' in post-apartheid South Africa (Part 2)) (2015) 18 *PELJ*.

15 S 15(2)(d) as amended by the Employment Equity Amendment Act 47 of 2013.

quotas. It prompted me, in 2006, to examine the differences between targets and quotas (and to argue for the illegality of the use of quotas as opposed to targets).<sup>16</sup> Now, more than ten years later, we are probably not much more enlightened as to the exact meaning of what constitutes a “quota”, mainly because the majority of the Constitutional Court in *South African Police Service v Solidarity obo Barnard* (“*Barnard*”),<sup>17</sup> by way of Moseneke J, expressly refrained from defining quotas in this context.<sup>18</sup> While heeding Pretorius’s call for a normative rather than definitional approach to determining the legality of numerical goals in an affirmative action programme which may function as quotas,<sup>19</sup> one does have to consider what actually constitutes a quota, and how it differs from a numerical target. I have attempted to do so elsewhere.<sup>20</sup> However, I would suggest that we are at the current point in time, at least somewhat more enlightened regarding the constitutionality of quotas in the application of affirmative action.

In *Barnard* we find Moseneke J expressly condemning quotas, by observing that “the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]”.<sup>21</sup> A number of the judges in that case referred to the use of quotas and appeared to reject their constitutionality.<sup>22</sup> In subsequent cases, following on *Barnard*, we find other courts also engaging with the issue and apparently holding that quotas are unconstitutional,<sup>23</sup> including the

16 In Louw (2006) *SA Merc LJ* 336-354.

17 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC).

18 *South African Police Service v Solidarity obo Barnard* para 42.

19 JL 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 *Stell LR* 269.

20 If I may be allowed to quote my own, rather simplistic, distinction between these two concepts as contained in an earlier article: “Goals [or targets] represent a preconceived target or objective of what is rationally capable of achievement in the light of the expected impact of external factors. Quotas, on the other hand, function as an end in themselves by providing a ‘target’ that is non-negotiable, fixed and removed from the reality of factors that determine the achievability of a true goal. Accordingly (in the context of transformation), while ‘goals’ represent objectives, a quota functions as a measure in itself.” See, Louw (2005) *Law, Democracy & Development* 207.

21 *South African Police Service v Solidarity obo Barnard* para 54.

22 *South African Police Service v Solidarity obo Barnard* paras 42 and 54 per Moseneke ACJ (and, by implication, in paras 65 and 66); Cameron J, Froneman J and Majiedt AJ in para 87 (and by implication, in paras 91, 96, 119, 123); and Van der Westhuizen J (by implication in footnote 132 to the text of para 127). It is interesting that Jafta J, who apparently expressly approved of race-based job reservation (in para 227), made no mention of the issue of quotas, as legitimate or otherwise.

23 See Davis JA in *South African Police Service v Public Service Association of South Africa* 2015 36 ILJ 1828 (LAC) para 41; see Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 49 and paras 53-54; see Katz AJ in *South African Restructuring And Insolvency Practitioners Association v Minister of Justice And Constitutional Development; In Re: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice And Constitutional Development* 2015 2 SA 430 (WCC) paras 203-217.

Constitutional Court itself.<sup>24</sup> In fact, the courts have on occasion displayed a willingness, following *Barnard*, to be quite direct and to the point in roundly condemning quotas:

“Racial or gender quotas as applied within the workplace as indicated in *Barnard* equate to job reservation, and furthermore attract negative connotations and for good reasons. Not only are they inherently and irrationally discriminatory, they are also demeaning in implementation in that they fail to acknowledge an individual’s worth. In most instances, and unwittingly so, they promote mediocrity and incompetence, and instil a false sense of entitlement. Invariably and whether rightly or wrongly, beneficiaries of the quota system will always be viewed as inferior and incompetent, as the assumption will always be that they got recognition or appointment simply to make up the numbers rather than based on their suitability or competencies. In a society such as ours and in our workplaces, where we are still battling the demons of racial polarisation and tensions, the use of quotas adds fuel to those tensions and creates further suspicions and resentment. Any affirmative action measure based on quotas is inherently ‘arbitrary, capricious and displays naked preference’, and would accordingly not pass [the] constitutional test [for lawful affirmative action] as stated in *Van Heerden and Barnard*.”<sup>25</sup>

I am buoyed by signs of an apparent, impending about-turn in the jurisprudence – even if evident thus far mostly in minority judgments,<sup>26</sup> – regarding both the rationality and fairness of the EEA’s “numbers game” when it comes to its affirmative action scheme. I have argued previously that rigid demographics-based target-setting inevitably turns constitutionally legitimate targets into illegitimate quotas.<sup>27</sup> Briefly, the argument goes thus: The EEA requires affirmative action measures to be taken in order to achieve “equitable representation” or groups in the workplace. A designated employer must take such measures once it is found that a group or groups are “under-represented”. Such employer may then set targets for the achievement of equitable representation. When demographic statistics are used – especially if they are used as

24 As per Zondo J (writing the majority judgment) in *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) paras 50-51; and Nugent J (writing for the minority) paras 109-111; paras 114-115 and para 118.

25 Per Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 54.

26 One never knows what the impact of such minority judgments may be in future. As Franny Rabkin observes: “Judges must disagree sometimes – dissenting judgments are crucial. As the late justice Ismail Mahomed famously said: ‘The orthodoxy of yesterday often becomes the heresy of tomorrow. The most famous example of the importance of dissenting judgments is the lone dissent in the US Supreme Court’s *Plessy vs Ferguson* ruling on segregation laws, which years later laid the basis for *Brown vs Board of Education*, which repudiated the doctrine of separate but equal. As the late chief justice Pius Langa also said in 2007, dissent makes judicial deliberation stronger: ‘If people speak up, the group as a whole is more likely to reach the correct outcome.’” From F Rabkin “Judges’ claws come out in Pretoria street name case” (02-08-2016) *BDLive* <http://www.bdlive.co.za/opinion/columnists/2016/08/02/law-matters-judges-claws-come-out-in-pretoria-street-name-case> (accessed 2018-11-18).

27 See Louw (2015) *PELJ* (Part 1) 594-667.



rigidly as they were by the DCS in *Solidarity v Department of Correctional Services* (“*Solidarity*”), with reference to the actual demographic representation of each racial group in the national population – any level of representation of a specific group which falls below the demographic representation of the relevant group would mean that such group is under-represented, and that such demographic target must be pursued until such time as the relevant percentage representation for the group has been reached. This percentage is then, clearly, no longer a “target”, and the requisite percentage representation of the group has inevitably come to function as a rigid quota.<sup>28</sup> Nugent J (with Cameron J concurring) expressed clear and forceful reservations about the “fundamental malaise” inherent in such a numbers game, in *Solidarity*:<sup>29</sup>

“The passages from judgments of [the Constitutional Court] ... all recognise that reconciling the redress the Constitution demands with the constitutional protection afforded the dignity of others is profoundly difficult. That goal is capable of being achieved only by a visionary and textured employment equity plan that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. It is only in that way that the constitutional tensions referred to in *Barnard* are harmonised. And it is in that way that the Constitution’s demand for a public service that is “broadly representative of the South African people” will be realised. Ours are a vibrantly diversified people. It does the cause of transformation no good to render them as ciphers reflected in an arid ratio having no normative content.”<sup>30</sup>

One can only hope that what these last two judges refer to as the “cold and impersonal arithmetic” approach to affirmative action,<sup>31</sup> will soon be a thing of the past.<sup>32</sup> There are indications that this may be the case, as I will discuss below.

Fundamental to the problem with quotas is the fact that they are a very blunt instrument, which fail dismally to harmonise or even address the “constitutional tensions referred to in *Barnard*”. They are insensitive to context and by definition apathetic towards their impact on beneficiaries

28 See also Pretorius (2017) *Stell LR* 284-285

29 *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 133.

30 *Solidarity v Department of Correctional Services* Para 133.

31 *Solidarity v Department of Correctional Services* Para 102.

32 De Vos has also expressed reservations about the approach of the majority in the *Solidarity* judgment: “The majority judgment, in my view, is a text of its time and goes further than previous Constitutional Court judgments in insulating redress measures from constitutional attack. The judgment would make it difficult to invalidate employment equity measures unless they allow for the appointment of unqualified candidates or are implemented in a corrupt or nepotistic manner. In this sense, it may well be far less of a victory for the litigants than they might at first have thought.” P de Vos “Constitutional Court: Addressing redress” (20-07-2016) *Daily Maverick* [http://www.dailymaverick.co.za/opinionista/2016-07-20-constitutional-court-addressing-redress/?utm\\_source=Daily+Maverick+First+Thing&utm\\_campaign=08901ae808-Afternoon\\_Thing\\_28+June&utm\\_medium=email&utm\\_term=0\\_c81900545f-08901ae808-127639953#V7HR1E0w\\_IX](http://www.dailymaverick.co.za/opinionista/2016-07-20-constitutional-court-addressing-redress/?utm_source=Daily+Maverick+First+Thing&utm_campaign=08901ae808-Afternoon_Thing_28+June&utm_medium=email&utm_term=0_c81900545f-08901ae808-127639953#V7HR1E0w_IX) (accessed 2018-11-11).

and non-beneficiaries alike. In addition, Pretorius succinctly explains why (what he calls) the “definitional approach”<sup>33</sup> of the courts (as opposed to a normative approach) to assessing the legality of quotas or the rigid application of numerical goals is lacking in constitutional legitimacy:

“[T]he ultimate marker to distinguish acceptable numerical targets from unlawful quotas or barriers is not whether an employment equity plan contains a deviation clause as such, but whether the flexibility that such a clause makes provision for can accommodate all the implicit considerations of an inclusive notion of substantive equality, along with all the constitutionally protected interests, rights and values inherent in such disputes. Thus, the narrow deviation clause in [Department of Correctional Services] arbitrarily diminished the contextual factors that should have steered the design and implementation of the numerical employment equity targets in line with an inclusive notion of substantive equality and a holistic reading of the Constitution (or, in Sachs J’s words ... “the fundamental constitutional values called into play by the situation.”).<sup>34</sup> One struggles to comprehend how a plan that omits considerations that could very well be intimately related to the substantive equality ideal of realising the equal worth and dignity of all can be called “flexible” in any constitutionally normative sense, and claim to promote the purpose of the substantive equality right.”<sup>35</sup>

I would suggest that such definitional approach also loses sight of the express wording of the first sentence in section 9(2) of the Bill of Rights, which calls for recognition of substantive equality embracing the “full and equal enjoyment of all rights and freedoms”. Focusing on deviations from otherwise rigid numerical goals would seem to limit constitutional scrutiny to a generally narrow class of (frequently, minority designated group) potential beneficiaries (where such deviation clauses are, by definition, the exception rather than the rule). In addition, as Malan observes, in stressing the importance of the first sentence of section 9(2) in the context of an inter-textual reading of the equality clause as a whole and section 9(2), specifically:

“The restitutionary measures authorised in the second sentence of section 9(2), that is, the “... legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination ...” are in fact authorised to promote, in the words of the first sentence of section 9(2) “... the full and equal enjoyment of all rights and freedoms”. Restitutionary measures may therefore quite obviously not create new inequalities. If so, they unjustifiably go beyond the aim of such measures and are incompatible with the above quoted first provision of section 9(2).

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33 Pretorius refers to the courts’ apparent preference for focusing on deviation provisions in policies that constitute otherwise rigid numerical goals in order to distinguish between legitimate numerical goals and illegitimate quotas – see, generally, Pretorius (2017) *Stell LR* 269.

34 In *Minister of Finance & Another v Van Heerden* 2004 25 *ILJ* 1593 (CC) para 140.

35 Pretorius (2017) *Stell LR* 281.

They are provided for in order to enable full and equal enjoyment of all rights and freedoms, not only for some categories of persons but for all.”<sup>36</sup>

More recently, in respect of the constitutionality of quotas, the following view was expressed by Mathopo JA in the Supreme Court of Appeal in *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association (“SARIPA”)*:<sup>37</sup>

“[R]emedial measures must not ... encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular, as stressed by Moseneke J in para 41 of Van Heerden, when dealing with remedial measures, it is not sufficient that they may work to the benefit of the previously disadvantaged. They must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota.”<sup>38</sup>

Sadly, in the Constitutional Court in *SARIPA*,<sup>39</sup> Madlanga AJ (Kollapen AJ and Froneman J concurring) once again showed a disinclination on the part of a Constitutional Court judge to engage directly with the constitutionality of quotas, by expressly refraining from examining the issue.<sup>40</sup> I have elsewhere observed that Jaftha J’s apparent endorsement of race-based job reservation in *Barnard*,<sup>41</sup> – and this in the face of Moseneke J’s observation in the majority judgement in that case that “[q]uotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]”<sup>42</sup> – is extremely troubling. In addition, it would seem that Madlanga AJ in *SARIPA* (CC) shares this world view, when he states, “I see no irrationality in distributing work in a way that uses the demographic make-up of South Africa as a point of departure in order to promote equality”.<sup>43</sup> I previously lamented the lack of clarity in

36 K Malan “Constitutional Perspectives on the Judgments of the Labour Appeal Court and the Supreme Court of Appeal in *Solidarity (acting on behalf of Barnard) v South African Police Services*” (2014) *De Jure* 118-140 139. See also Louw (2015) *PELJ* (Part 2) 672-673.

37 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 3 SA 95 (SCA).

38 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 32.

39 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* CC [2018] ZACC 20.

40 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* Saying the following (at para 79): “This Court has in the past pointed towards the possibility of the use of quotas being constitutionally impermissible under certain legislation. I do not find it necessary to engage in a debate whether – under section 9(2) – quotas are similarly outlawed.”

41 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 227 in that judgment.

42 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 54.

43 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* para 98.

the Constitutional Court on (or even just real engagement with) the purported link between demographic statistics and the pursuit of substantive equality in terms of our Constitution and the empowering legislation,<sup>44</sup> and this statement by Madlanga AJ is another example of somewhat fluffy reasoning – with quite far-reaching implications – not backed up by proper explanation or reasons. Race-based job reservation based on the “cold and impersonal arithmetic” of rigid recourse to population statistics may in some way be rational (although not to my mind),<sup>45</sup> but one wonders whether it can be proportional and fair in the context of the constitutional purpose (and, importantly, the limits) of remedial and restitutionary measures. Unfortunately, and I would suggest, shockingly, our highest court may appear not to be the forum we should expect clear answers from in this regard in the foreseeable future.

Help may, however, soon be forthcoming from other quarters. The South African Human Rights Commission (“SAHRC”), in its *Equality Report 2017/18* released on 12 July 2018, remarked that the Constitutional Court in its judgments regarding the application of affirmative action in certain government departments (see *Barnard* and *Solidarity*) is “sharply divided” in its determination of whether purported numerical targets amount to rigid quotas. In addition, this it condemns:

“However, the Constitutional Court has been sharply divided in determining whether the implementation of purported numerical targets by certain government departments amounts to rigid quotas. Moreover, the Court has inadvertently created the risk that members of designated groups – and especially those individuals who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances arising.”<sup>46</sup>

The SAHRC condemns Zondo J’s extension (in *Solidarity*) of the “*Barnard* principle”<sup>47</sup> to apply also to other designated groups (African, coloured and Indian persons and to different genders):

“This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman. The latter application of the *Barnard* principle therefore conflicts with the [United Nations Committee for the Elimination of Racial Discrimination’s] requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach

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44 In Louw (2015) *PELJ* (Part 2) 669-733.

45 See Louw (2015) *PELJ* (Part 1) 624-633.

46 South African Human Rights Commission *Equality Report 2017/18: Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa* 35-36.

47 Namely, that where members of a designated group (in *Barnard*, white females) are over-represented in the workplace, they may be denied the benefits of advancement under an affirmative action policy by a designated employer.

reflected in the National Development Plan, whereby preference should be accorded on the basis of race ‘for at least the next decade’ when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are ‘designed’ to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and ‘token’ affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered.”<sup>48</sup>

Ultimately, the SAHRC found (in its 2nd finding regarding the compliance of South Africa with international obligations in respect of affirmative action or special measures) that the EEA’s current affirmative action scheme is likely unconstitutional. In addition, it condemned the use of quotas:

“It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous peoples and people with disabilities, the [Department of Labour], in collaboration with the [Commission for Employment Equity] and in consultation with National Treasury, undertakes a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas.”<sup>49</sup>

It is significant that the SAHRC has suggested substantial amendments to the EEA,<sup>50</sup> in order to move away from the current identification and classification of “designated groups” – a move away from the EEA’s demographics-based “numbers game” and its absolute preference for race, to a needs-based system that would place socio-economic circumstances and disadvantage much higher on the totem pole. It is submitted that such legislative amendments, if effected, would ultimately sound the death knell for (race-based) quotas. As our courts have confirmed, quotas are essentially not context-sensitive, and seeing that it would be impossible to formulate a one size-fits-all classification based on (what would have to be imaginary) uniform socio-economic circumstances calculated along racial lines, race-based quotas would be impossible to both formulate and implement. And this should also, to my mind, require adaptation if not the wholesale removal of the demographic representivity yardstick from section 42 of the EEA (although, as I previously observed, it might deserve retention as one potential means of *benchmarking* designated employers’ progress in

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48 SAHRC *Equality Report 2017/18* 36.

49 SAHRC *Equality Report* 39.

50 The report recommends that the Department of Justice and Constitutional Development, the Department of Labour and the Commission for Employment Equity “must jointly report to the Commission within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations”, including the suggested amendments to the EEA.

implementing affirmative action, rather than – as it currently functions – as the ultimate *objective* of affirmative action under the Act).<sup>51</sup> It could likely be replaced with a mechanism or mechanisms similar to the NSFAS student loan system (where students whose parents earn more than R600 000 per year, do not qualify for assistance).<sup>52</sup> Classification of potential beneficiaries of affirmative action would proceed divorced from the use of the invidious apartheid-era racial classifications, which has so blighted the EEA since its inception. In addition, this would be a positive development, if only to curb the unintended consequences of the EEA's current obsession with race and with demographics and representivity. As Dupper points out:

“[I]n order for affirmative action policies to have more than a “remote distributive effect”, a tight fit between status and disadvantage is required. If not, it invites the familiar objection that affirmative action is both over- and under-inclusive. To put it succinctly: if the aim of affirmative action measures is to address socio-economic disadvantage, then a group demarcated by status, such as race or gender, might, for example, be over-inclusive by including wealthier black or female people, and under-inclusive, by excluding poor white men.”<sup>53</sup>

A needs-based system of classification of beneficiaries based on socio-economic circumstances and lived disadvantage would avoid the current EEA scheme's major shortcoming, whereby “affirmative” action under the Act “[i]nstead of promoting non-racialism ... promotes ... for the want of a better phrase – perverse race rivalry- and instead of embracing non-sexism it proffers tokenism. Instead of promoting harmony, peace and stability it holds potential for considerable inter group contestation, conflict and protests amongst the designated groups. This undermines the pursuit of non-racialism and non-sexism”.<sup>54</sup>

It is ironic, however, that if the suggested amendments to the EEA are effected in order to bring the Act's affirmative action scheme in line with the Constitution, the impetus for such process would not have come from our highest court. Instead, and somewhat reminiscent of the process of the demise of apartheid, it would come ultimately from international pressure in terms of South Africa's commitments under international law (by means of the SAHRC's obligations to comply with United Nations obligations regarding the eradication of racial discrimination).

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51 See Louw (2015) *PELJ* (Part 1) 627-629.

52 This example is referred to in an article on the SAHRC Equality Report by T Eloff “The SAHRC Equality Report: Light at the end of the tunnel for minorities?” (11-09-2018) *FW De Klerk* <http://www.fwdeklerk.org/index.php/en/latest/news/805-article-the-sahrc-equality-report-light-at-the-end-of-the-tunnel-for-minorities> (accessed 2018-11-20).

53 O Dupper “Affirmative action in comparative perspective” in O Dupper & K Sankaran (eds) *Affirmative Action: A View from the Global South* (2014) 21-22.

54 In the words of Shaik AJ in *Naidoo v Minister of Safety and Security* 2013 3 SA 486 (LC) paras 177 and 188 (in condemning an employment equity plan applied in terms of the EEA).

It would seem (and it is hoped) that the above development, albeit snail-paced, of jurisprudence on the illegality of quotas may augur the imminent demise of such measures in the application of affirmative action in employment. But will this translate to its demise in (professional) sport?

### 3 Why race-based quotas in sports teams are illegal

Mention was made earlier of the frequent demands from government for the implementation of racial quotas in a number of prominent sporting codes. Such demands have now translated into actual and aggressive punitive measures imposed by government on sports federations (such as the ministerial ban on bidding for and hosting of future international events, as mentioned in the introduction above). Such demands have been successful, and they translated into actual implementation of such policies – in rugby, 2014 saw the introduction of racial quotas in the Currie Cup and Vodacom Cup competitions, and, in 2016, CSA announced the first official race-based quota selection policy for the national team in the democratic era. The following, from a September 2014 media report, illustrates the level of the quota rot in South African rugby as planned for implementation at that time:

“By 2019, half the players in all these teams – at national, Super Rugby, Currie Cup and Vodacom Cup levels – must be black. Under the targets set for next year:

Seven out of the 23 players in all the Super Rugby teams must be black and five black players must be on the field at all times.

Eight out of the 23 players in Western Province’s Currie Cup team must be black and a minimum of six black players must be on the field at all times. Saru has set quota systems for all teams right down to U-18 Craven Week and the amateur teams. These teams have to abide by the quotas before September 2015.

Southern union teams have higher quota requirements than unions up north. In the Western Province, 35 percent of players must be black while the Lions and Bulls have to have 30 percent black players. Saru president Oregan Hoskins said yesterday the quotas were higher for southern unions because there were more black players playing the game in this union.

Saru also aims to increase the number of rugby players at primary, high school and community leagues - and to train more referees and coaches. The plan says that in future 80 percent of all players recruited for Saru academies must be black.”<sup>55</sup>

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55 C Coetzee “SARU stands by rugby quota plan” (08-09-2015) *IOL* <https://www.iol.co.za/capetimes/news/saru-stands-by-rugby-quota-plan-1747229> (accessed 2018-11-20).

What baffles the mind, in light of the above examination of the constitutionality of quotas as reflected in the recent jurisprudence emanating from our courts, is how those in power in government and in these sporting codes have managed to get away with this, virtually scot-free (if not in the public discourse, then in the courts). To my knowledge, just one case has been brought before a court to challenge the legality of this form of “sports transformation”, to date (a matter that is currently pending before the Labour Court, which will be discussed briefly in part 4 in the text below). I find the lack of litigation in this context over the past two decades truly puzzling. As an academic lacking direct *locus standi*, however, I can only lament the state of affairs and explain here why I find it so puzzling and troubling.

### **3 1 The applicability of the relevant domestic legislation and the South African Constitution**

The National Sports and Recreation Act 110 of 1998 (as amended),<sup>56</sup> (the “NSRA”) provides for the application of affirmative action in sport. Section 4(2)(g) and (h) of the Act state specifically that the national policy on sport as determined by the Minister of Sport may relate *inter alia* to “help in cementing the sports unification process; and instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process”. Section 13A (inserted in the Act in 2007) provides that “[t]he Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation”. Furthermore, the catch-all provision in section 14(k) of the Act provides the Minister with the power to make regulations “generally, as to any other matter in respect of which the Minister may deem it necessary or expedient to make regulations in order to achieve the objects of this Act”. Section 13(5)(a)(ii) of the Act empowers the Minister to intervene in any non-compliance with guidelines or policies issued in terms of section 13A or any measures taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution, by referring the matter for mediation or issuing a directive, as the case may be”. Apart from these provisions, it is unclear what “instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process” entails, exactly. The NSRAA did curb the Minister’s powers in this regard in respect of the issuing of directives, quite significantly. Section 13(5)(b)(ii) provides as follows:

“The Minister may not interfere in matters relating to selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport and recreation body”.<sup>57</sup>

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56 By the National Sport and Recreation Amendment Act 18 of 2007 (“NSRAA”).

57 This provision, of course, seems to directly prohibit the former Minister of Sport’s ministerial ban on the hosting of events of April 2016, as referred to in the introduction above. This is a saga for another day.



Generally speaking, the NSRA provides little guidance on the exact meaning of “affirmative action” in the context of sport (and recreation). As such, it provides no discrete source of legislative authority for some special form of affirmative action (as the EEA does, which diverges significantly from the constitutional license for affirmative action contained in section 9(2) of the Bill of Rights).<sup>58</sup>

The NSRA does not appear to be a legislative measure that pertinently regulates the application of affirmative action in terms of section 9(2) (as referred to in section 9(4) of the Bill of Rights). Also, unlike section 5(3) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“PEPUDA”),<sup>59</sup> the NSRA does not qualify its application to sport in any way *vis a vis* other legislation – particularly labour legislation. Accordingly, like all legislation, it must comply with the Constitution and its parameters for constitutionally legitimate affirmative action. Moreover, accordingly, what was said above about the use of racial quotas as affirmative action measures, generally, must hold true in the context of sport as regulated under the Act.

When it comes to the application of employment laws in the professional sports industry, our courts and the Commission for Conciliation, Mediation and Arbitration (“CCMA”) have on a number of occasions held, quite clearly, that professional athletes in team sports such as rugby, cricket and football, are “employees” as defined by our labour legislation. As employees, such players are covered by such legislation.<sup>60</sup> This includes the Labour Relations Act 66 of 1995 and notably for present purposes, the EEA. Accordingly, the above-mentioned prohibition (in section 15(3) of the EEA) on the application of

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58 As explained in more detail in Louw (2015) *PELJ* (Part 1) 594-667.

59 Section 5(3) of PEPUDA provides that: “This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998) applies”.

60 The EEA and Labour Relations Act take precedence over any other conflicting statute such as the National Sport and Recreation Act that may purport to regulate the employment relationship. For recognition of the employment status of players, see generally R le Roux “Under Starters Orders: Law, Labour Law and Sport” (2002) 23 *ILJ* 1195; Jordaan in JAA Basson & MM Loubser *Sport and the Law in South Africa* (2000) ch 8–1; MW Prinsloo “Enkele Opmerkinge oor Spelerskontrakte in Professionele Spansport” (2000) *TSAR* 229 229-230; A van Niekerk “Labour Law in Sport: a Few Curved Balls” (1997) 6 *Contemporary Labour Law* 91; S Smailes “Sports law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength” (2007) 28 *ILJ* 57; and in the case law *McCarthy v Sundowns Football Club* 2003 2 *BLLR* 193 (LC); *Augustine and Ajax Football Club* 2002 23 *ILJ* 405 (CCMA) (where the CCMA assumed jurisdiction over an unfair dismissal dispute between a professional footballer and his club, although preferring to refer such dispute to private arbitration as agreed between the parties in the employment contract); *Smith v United Cricket Board* 2003 5 *BALR* 605 (CCMA); *SARPA obo Bands / SA Rugby (Pty) Ltd* 2005 2 *BALR* 209 (CCMA); *SA Rugby (Pty) Ltd v CCMA* 2006 1 *BLLR* 27 (LC); *Botha v The Blue Bulls Co* case no JR1965/2005 of 27-06-2008; and most recently at the time of writing *SA Football Players Union v Free State Stars Football Club (Pty) Ltd* 2017 38 *ILJ* 1111 (LAC).

quotas in an affirmative action policy or programme implemented under the EEA applies to sports employers (professional franchises or clubs, provincial unions and the relevant national federation as employer of nationally contracted players) as designated employers under the EEA. Even though the provisions of section 42 of the Act (as amended) still allow designated sports employers to consider national and regional demographics in setting targets for the equitable representation of employees (including professional athletes), the use of quotas is prohibited.<sup>61</sup>

It bears mentioning that even absent the EEA's prohibition on quotas, the above-mentioned jurisprudence from the courts has, in any event, to a significant extent condemned the legitimacy of quotas, and such condemnation should even apply to affirmative action outside the corners of the EEA, as being constitutionally non-compliant with the prescripts of section 9(2) of the Bill of Rights. Accordingly, the use of race-based quotas in amateur sport would also fall foul of the Constitution.

In a nutshell, therefore, there is nothing contained in the applicable legislation, which allows for the use of racial quotas in professional sports teams, and, in fact, the applicable labour legislation (the EEA) *expressly* prohibits its use. In contexts where the labour legislation does not apply, such as amateur sport, the apparent unconstitutionality of (racial) quotas in terms of the evolving jurisprudence on the issue must also be taken to be an absolute bar to its application.

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61 Some proponents of the use of race-based quotas in professional sports teams may argue that the context should be distinguished from the application of affirmative action in more run-of-the-mill employment scenarios, where, in the latter case, affirmative action is applied primarily in recruitment and selection processes while, in the former case, affirmative action is applied only in the selection of players to compete in matches (and thus would not necessarily affect the actual employment of non-selected players). This loses sight of the fact that the EEA provides that affirmative action in line with the purposes of the Act may provide justification for an employer for what would otherwise amount to unfair discrimination (section 6(2)), and that the Act prohibits unfair discrimination in "any employment policy or practice" (which is very broadly defined in the Act). Also, it would lose sight of the fact that race-based quotas may very likely determine hiring decisions; a franchise or club faced with the necessity to select a fixed number of players of colour in a team would likely tailor its squad of players to contract for the upcoming season in order to enable it to select the requisite number of players of colour (ie fewer white players would be contracted). Also, I have argued before that professional sport is characterised by its nature as an entertainment industry, coupled with player sponsorships and endorsement contracts. Non-selection of white players based on a race-based quota could significantly impact such contracted players' future employment prospects and secondary streams of revenue (ie non-exposure in matches would mean that even a contracted white player, who still receives a salary under the playing contract, would potentially miss out on sponsorship and endorsement deals as a result of non-exposure, not to mention match bonuses). The implications of the application of affirmative action in team selections for non-beneficiaries are very similar to its application in other employment contexts.

### 3 2 While the cat's away ... the practical experience of sports quotas

At its heart, race-based quotas in sport, as a transformation measure, stumble very early on in the race, at the hurdle of rationality. There is probably no better context than sporting competition to illustrate the arbitrary and capricious nature of such application of what purports to be constitutionally mandated affirmative action but is nothing of the sort. In addition, post-apartheid South Africa, of course, has the shameful distinction of being rather unique in the world in terms of the levels of foolishness reached. I have written previously about Netball South Africa's ("NSA") racial quota system. In 2007 it was reported that NSA had devised a system to reward teams that comply with the required racial quotas; instead of docking points from teams that do not meet the quota (which had been the previous practice), any team that had the required five-two ratio on court at all times would receive an additional six goals. NSA regulations required teams to field a ratio of five to two on court at all times – either five white and two black players, or five black and two whites. In the past, teams such as Zululand and other rural areas, who have no white players, were consistently docked points, and in some cases, failed to win their section even after winning all their matches. NSA's president was quoted at the time as explaining, "In the past, some teams were docked so many points that they went into negative territory".<sup>62</sup> Really?

Alternatively, let's consider the more recent tragic-comic events that transpired in a Highveld Lions franchise cricket match in Johannesburg. In a match against the Titans in February 2016, the Lions fell foul of CSA's race quota, which requires teams to field six players of colour, of which three must be Black African. African leg-spinner, Eddie Leie, was injured during the pre-match warm-ups. The Lions had arrived at the venue with only 12 squad members, and they had no choice but to phone CSA and to obtain permission to include a white opening batsman (which CSA agreed to). The problems did not end there, though. When one of the opening bowlers was injured a couple of overs into the match, the Lions were forced to include their (Black African) coach, Geoffrey Toyana, who had retired from professional cricket in 2011. Toyana had to do some fielding, until the Lions managed to rope in a spectator, a young white student, who then took to the field in Leie's kit. Probably the best thing that happened on that fateful day was that the match rained out and there was no official result after all these shenanigans.

In a nutshell, it appears to require very little more explanation why racial quotas in national (or other) sports teams, both professional and amateur, are not only clearly unlawful in terms of South African law but also so irrational that they are making a mockery of our sport in the eyes

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62 From a media report entitled "Rewards for racial quotas" (07-08-2007) [http://www.news24.com/News24/Sport/More\\_Sport/0,,2-9-32\\_2159954,00.html](http://www.news24.com/News24/Sport/More_Sport/0,,2-9-32_2159954,00.html) (accessed 2018-11-19).

of the world. Much has been written in criticism of the very low standard for the adjudication of the constitutionality of affirmative action as set in *Minster of Finance v Van Heerden* (“*Van Heerden*”),<sup>63</sup> and confirmed in *Barnard*, namely that of rationality.<sup>64</sup> I would suggest that the above (and other examples) of the innate irrationality and arbitrariness of the application of racial quotas in sports teams – and the sometimes farcical implementation of such policies – would disqualify such measures as being constitutional even in terms of this very low bar. If we apply the words of Moseneke J in *Barnard* to racial sports quotas as purported restitutionary measures under section 9(2) of the Bill of Rights (and, in that case, within the context of the application of affirmative action in terms of the EEA), their unconstitutionality is starkly on display:

“The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be, yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose. As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally.”<sup>65</sup>

If the legitimate governmental purpose of special measures is to facilitate the racial transformation of a sporting code, it is highly doubtful that the cosmetic window-dressing exercise of implementing a racial quota which changes only the complexion of the relevant team (and does so in terms of a measure that ignores or significantly devalues sporting merit and the competition principle in sport) is rationally connected to such purpose. The measure itself, our courts are starting to say (and the EEA expressly says), is illegal. If irrational conduct in implementing a lawful measure attracts unlawfulness, irrational conduct in implementing an unlawful measure should be even more readily earmarked as being unlawful.

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63 2004 6 SA 121 (CC). For further discussion of the *Van Heerden* test and its aftermath, see Albertyn “Adjudicating affirmative action within the normative framework of substantive equality and the Employment Equity Act – An opportunity missed? *South African Police Service v Solidarity obo Barnard*” 132(4) *SALJ* (2015) 711.

64 M McGregor “Affirmative action on trial – determining the legitimacy and fair application of remedial measures” (2013) *TSAR* 650-675; JL Pretorius “Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*” (2013) 130 *SALJ* 31-44; IM Rautenbach “Requirements for affirmative action and requirements for the limitation of rights” (2015) *TSAR* 431-443.

65 *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 38-39.

While it appears trite to say that these racial quotas are a (rather atypical and internationally unique) form of application of affirmative action, it bears consideration whether such quotas as applied to professional sports teams, in fact, make the grade as “affirmative action measures” under the EEA (which, as mentioned above, applies to designated employers and player employees in this context). The Johannesburg Labour Court recently had occasion to consider whether a somewhat similar employment policy in fact constitutes an affirmative action measure. In *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality*,<sup>66</sup> the Court confirmed that a legitimate affirmative action measure must pass the three-pronged test from *Van Heerden*, and that the sticking point in many cases will be whether such a measure passes the third leg of this test, namely whether the measure promotes the achievement of (substantive) equality. It held:

“The EEA clearly envisages a structured approach to the implementation of affirmative action measures. The measures must be such that, amongst others, there are targets, numerical goals and objectives that can be monitored and measured. The Staffing Policy lacks this. In the absence of measurable numerical targets and properly formulated measures, it would be impossible for an applicant who is excluded from promotion or an appointment to challenge the process and to uphold his or her human dignity.”<sup>67</sup>

The staffing policy in this case made no provision for numerical goals and objectives based on an analysis of under-representation of designated groups. The court held that this policy was not an affirmative action measure. The acting human resources director of the respondent had conditionally approved the shortlisting (which was later nullified) of the applicant, a white male, subject to the condition that only candidates from designated groups should be shortlisted. This decision to impose a condition was based solely on workplace profile statistics reflected on the form submitted to the director for approval:

“His only consideration was the numbers in a table on the form. Those numbers gave him the impression that there were ‘too many’ white males reflected in the group. He conceded that there were no numbers or numerical targets against which he could compare the white male representation.”<sup>68</sup>

In the circumstances, the court held that the relevant policy was not an affirmative action measure under the Act and that the respondent’s conduct constituted unfair discrimination against the applicant. The race quotas applied in professional sport are quite similar. There is no indication that sports employers have set rational numerical goals in respect of an objective to achieve equitable representation of players

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66 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* 2016 37 ILJ 2144 (LC).

67 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* paras 84-85 of the judgment.

68 *Solidarity on behalf of Pretorius v City of Tshwane Metropolitan Municipality* paras 4-13 of the judgment.

from designated groups.<sup>69</sup> In fact, the relevant transformation policies sometimes expressly call these quotas what they are, inflexible quotas rather than aspirational targets, and there appears to be no evidence that these quotas have followed on analyses regarding under-representation of players from designated groups based on national and regional demographics in respect of the economically active population (as section 42 of the EEA requires). Of course, as I have argued before, the context of sporting competition is probably the supreme example of the inherent irrationality of the implicit assumption that, had it not been for past unfair discrimination, our sports teams would have perfectly or even just closely resembled the national demographics in terms of race. While the role of merit in the affirmative action debate may have become significantly undervalued in recent years (in part because of the EEA's "suitably qualified" provision in section 20 of the Act), it surely must play a special role in the context of (professional) sport, where innate sporting talent, physical characteristics and "big match temperament" are just some of the intangibles which distinguish a Tiger Woods from the weekend golfer. I am again reminded of the trenchant criticism by Thomas Sowell of this mysterious assumption of a natural, demographically equal spread of skills and talent in the human population, which underpins the demographic representivity-based social engineering agenda of the EEA.<sup>70</sup> This reminds one of the words of the counsel for an applicant in another matter: "A target is something to be aspired to because it is based on some scientific data whereas a quota system has no science or law. It is arbitrary."<sup>71</sup> In short, such race quotas are little other than measures that are "arbitrary, capricious or display naked preference", as warned about in *Van Heerden*.

A related issue regarding the lawfulness of such quotas in the professional sports context (under the EEA) is the Act's prohibition on affirmative action measures constituting "absolute barriers" for the employment or advancement of persons not from designated groups, as

69 The rationality of affirmative action measures is to an extent to be determined with reference to whether they are implemented in terms of a carefully crafted and designed employment equity plan – see *Gordon v Department of Health: Kwazulu-Natal* 2008 ZASCA 99; *Munsamy v Minister of Safety and Security and Another* 2013 ZALCD 5.

70 As succinctly explained by Sowell: "The enormous variety of geographic, cultural, demographic, and other variables makes an even, random, or equal distribution of skills, values, and performances virtually impossible. How could mountain peoples be expected to have seafaring skills? How could an industrial revolution have occurred in the Balkans, where there are neither the natural resources required for it nor any economically feasible way of transporting those resources there? How could the indigenous peoples of the Western Hemisphere have transported the large loads that were transported overland for great distances in Europe and Asia, when the Western Hemisphere had no horses, oxen, camels or other comparable beasts of burden?" (T Sowell "Discrimination, Economics and Culture" in A Thernstrom & S Thernstrom (eds) *Beyond the Color Line: New Perspectives on Race and Ethnicity in America* (2002) 167-180, 171)

71 From counsel for the applicant's submissions in *Mgolozeli v Gauteng Department of Finance* 2015 3 BLLR 308 (LC) para 24.

contained in section 15(4) of the Act. I previously wrote about the fact that this “prohibition” is worded in a rather weak manner,<sup>72</sup> but our courts have concurred in condemning measures, which constitute such absolute barriers. In the (professional) sports context, it should be noted that opportunities for athletes to compete at especially the higher levels are limited, and the pool of potentially suitable athletes is relatively small. While evidence may be largely anecdotal (compare the well-known claims by South African-born English Test cricket batsman, Kevin Pietersen, that he left South Africa for greener pastures abroad as a result of non-selection under racial quotas), it is at least likely that a race quota in, for example, the national rugby team might serve to constitute an absolute barrier to the employment of a white player who would in the absence of race-based selection likely have made the team on merit.

Apart from the above-mentioned domestic law implications, racial sports quotas are also clearly not in line with international standards and fundamental principles of international sports law, and international law more broadly. I remarked (in part 2 above) that the impetus for development of our law in respect of the banning of racial quotas as legitimate affirmative action measures appears to be coming from South Africa’s international law obligations. Proponents of racial quotas in sport should likewise take heed of the fact that the domestic sports transformation process does not occur within a vacuum, and that in this context the professional sports industry is a particularly globalised industry within which domestic stakeholders are to a significant degree beholden to the rules and regulations of international sports governing bodies. In that light, let us consider the legitimacy of race quotas in (professional) sports teams in terms of the relevant principles of international sports law.

### **3 3 Race-based quotas and international (sports) law**

In the waning years of apartheid, South Africa was, rightly, banned from fielding its racially-engineered, all-white teams in international sporting competitions. The reason for this is that there were rules about this sort of thing. What may (but should not) surprise the current South African government is that there still are.

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72 S 15(4) does not expressly prohibit absolute barriers, but rather provides that “nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups”. What adds to the uncertainty regarding whether this constitutes a prohibition on the creation of absolute barriers, is the fact that section 15(4) starts with the words ‘Subject to section 42 ...’. Does this mean that employers are, in fact, allowed to create absolute barriers based on demographic representation of designated groups in the economically active population? If this is the case this provision would be unconstitutional, and our courts have condemned the creation of absolute barriers. Case law in recent years appears to have settled the question in favour of the prohibition of such barriers.

The 4th Fundamental Principle of Olympism, as contained in the Olympic Charter,<sup>73</sup> provides that “The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.” The 6th Principle provides that “[t]he enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 of the Constitution,<sup>74</sup> of the International Association of Athletics Federations (“IAAF”) provides that the objects of the IAAF include “To encourage participation in Athletics at all levels throughout the world regardless of age, gender or race”, and “To strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist, or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender, race, religious or political views or any other irrelevant factor”.

Bye-Law 3 of World Rugby (the erstwhile International Rugby Board) describes the objectives and functions of World Rugby, which includes “To prevent discrimination of any kind against a country, private persons or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason”.<sup>75</sup>

Article 12 of the International Cricket Council (or “ICC”)’s Articles of Association (approved by its full council on 22 June 2017) is entitled “Non-discrimination and stance against racism”, and provides as follows:

“Neither the ICC nor any of its Members shall at any time offend, insult, humiliate, threaten, disparage, vilify or unlawfully discriminate against persons based on their race, religion, culture, colour, descent, gender, and/or national or ethnic origin.”

It is clear that, in principle, the imposition of race quotas in any of the relevant sporting codes by a domestic member federation would in all probability fall foul of these provisions. Apart from the uniqueness of such a “transformation policy” in the international sports context, and even bearing in mind that under South African law legitimate affirmative action does not constitute unfair discrimination (as per Moseneke J’s

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73 The current version of the Olympic Charter, in force as from 2 August 2015, is available at [https://stillmed.olympic.org/Documents/olympic\\_charter\\_en.pdf](https://stillmed.olympic.org/Documents/olympic_charter_en.pdf) (accessed 2018-11-11).

74 Current version in force as from 1 November 2015 is available at <https://www.iaaf.org/about-iaaf/documents/constitution> (accessed 2018-11-11).

75 Bye-Law 3(f).



majority judgment in *Van Heerden*),<sup>76</sup> the express prohibition on the use of quotas contained in the EEA (in the professional sports context) and the apparently growing backlash amongst members of the judiciary against the constitutionality of (race) quotas as part of affirmative action (in the amateur sports context) would likely disqualify such quotas as legitimate affirmative action and expose them to unfair discrimination review.

There is another, important, aspect of the international governance of sport, which bears consideration in this context. It is an accepted principle of international sports governance that domestic sports federations, as members of the relevant international governing body and as representative of the relevant sporting code within the domestic territory, must act independent from political and governmental interference in the governance of the sport. The founding documents of international governing bodies invariably contain provisions to this effect, frequently providing such international governing bodies the power to suspend or expel member federations who (or, more accurately, whose governments) transgress in this regard.

Rule 27 of the Olympic Charter, for example, provides as follows in respect of the mission and role of National Olympic Committees (“NOCs”):

“27.5 In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations. However, they shall not associate themselves with any activity, which would be in contradiction with the Olympic Charter. The NOCs may also cooperate with non-governmental bodies.

27.6 The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.”

I have written previously about the strange behaviour of the South African Sports Confederation and Olympic Committee (“SASCOC”), when one considers these provisions of the Charter. SASCOC has for years now been actively involved in pushing the governmental sports transformation agenda, including the enforcement of race-based quotas, and I seriously doubt the legitimacy of such activities in light of the above Charter provisions and fundamental principles of sports governance.<sup>77</sup>

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76 Although, as I have argued before, it appears that Moseneke J’s view might actually just have exempted legitimate affirmative action from the presumption of unfairness contained in sec. 9(5) of the Bill of Rights, rather than providing an automatic and blanket exclusion of affirmative action measures from determination of whether they might, in fact, constitute unfair discrimination in any given case – see Louw (2015) *PELJ* (Part 1) 602.

77 See Louw (2006) *International Sports Law Journal* 48; AM Louw “Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 1: The background and nature of SASCOC” (2007) *De Jure* 257-276;

Other international governing bodies have similar rules. Bye-Law 14(e) of World Rugby (formerly the International Rugby Board) provides that:

“A Union may be expelled from World Rugby membership pursuant to World Rugby Bye-Laws and/or Regulations if state authorities interfere in its affairs in such a manner that

- (i) It may no longer be considered as fully responsible for the organisation of rugby related matters in its territory;
- (ii) In the opinion of Council or the Executive Committee it is no longer in a position to perform its constitutional and regulatory tasks in an appropriate manner.”

When one considers the content of the above-quoted media statement by former SARU president Oregon Hoskins (quoted in the introduction above) regarding governmental pressure to impose race quotas, it is questionable whether SA Rugby would be “considered as fully responsible for the organisation of rugby related matters in its territory” by its international governing body. Article 2.9(B) of the Articles of Association of the International Cricket Council provides as follows:

“Where a government interferes in the administration of cricket by a Member, including but not limited to interference in operational matters, the selection and management of teams, the appointment of coaches or support personnel or the activities of a Member, the Executive Board shall have the power to suspend or refuse to recognise that Member ...”.

The implications of this in the current context are obvious. One such international governing body that has in recent years actively enforced provisions regarding political interference by domestic governments is the Fédération Internationale de Football Association (“FIFA”). The world football governing body has suspended a number of member federations on this basis, in terms of the following provisions of the FIFA Statutes (April 2016 edition):

“Article 15:

Member associations’ statutes must comply with the principles of good governance, and shall in particular contain, at a minimum, provisions relating to the following matters:

- a) to be neutral in matters of politics and religion;
- b) to prohibit all forms of discrimination;
- c) to be independent and avoid any form of political interference;

...”

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AM Louw “Why South African Sport Should Say No to a State-Sanctioned SASCOC Autocracy – Part 2: Questioning the legitimacy of SASCOC” (2008) *De Jure* 16-35.

“Article 19.1:

Each member association shall manage its affairs independently and without undue influence from third parties.”

The repeatedly reported claims of governmental pressure on sports federations to transform, and governmental support for the use of race quotas in this process would probably fall foul of such prohibitions on governmental interference in sport. More specifically, it is submitted that the Minister’s ban on bidding for and hosting future events of April 2016 (as discussed in the introduction above) is just such a form of illegitimate political interference in sports governance. The ban was apparently not imposed in terms of the 2010 Bidding and Hosting Regulations issued in terms of the NSRA (which contain criteria for the evaluation of bidding for events which appear to be in line with a legitimate governmental purpose, namely to protect the fiscus and ensure the public interest is served by hosting the relevant events). The ban was expressly imposed as a punitive measure to punish poor performing federations in respect of race-based transformation (amidst a milieu of governmental pressure on federations to implement racial quotas in representative teams). Of course, one could argue that the transformation of South African sport is a legitimate governmental objective. However, the majority of the Constitutional Court in *Barnard* held that a lawful (affirmative action) measure must also be lawfully implemented.<sup>78</sup> In the same judgment the court held that the use of rigid quotas in the application of affirmative action is probably unconstitutional.<sup>79</sup> Accordingly, it is highly questionable whether the bidding and hosting ban, with its clear objective of enforcing (through a punitive measure) a racial quota contained in the Memorandum of Agreement entered into between government and sports federations<sup>80</sup> constitutes a legitimate implementation of a lawful governmental objective. The accompanying threats by government regarding other potential punitive measures are similarly troubling in this regard, especially the potential to revoke the

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78 *South African Police Service v Solidarity obo Barnard* paras 38-39.

79 *South African Police Service v Solidarity obo Barnard* paras 42 and 54.

80 The former Minister, writing in the foreword to the 2014/15 EPG Transformation Status Report (the “EPG Report”) – the document upon whose findings the Minister ostensibly based his decision to impose the ban – explained that the actual source of the ban is to be found in a Memorandum of Agreement (“MoA”) which the “big five” sports federations had signed – “out of their own volition” – with government’s Department of Sport and Recreation in May 2015. The Minister continued to explain that this MoA provided for punitive measures to be imposed against the respective federations in the event of non-compliance in respect of transformation goals and targets, including the following: “In essence, [to] revoke a federation[’s right] to host and bid for major and mega international tournaments in the Republic in writing in pursuance of the prescripts of the Bidding and Hosting of Major Events Regulations *Gazetted* and Published in line with the National Sports and Recreation Act and also as a result of not recognizing the said federation.’ From the foreword of the EPG Report at vi. A full extract of the text (from pages v-vi): “The findings and recommendations were announced at a public event in May 2015

opportunity for athletes of such federations to obtain national colours for purposes of national or international competitions. Such a punitive measure would not only involve interference in the governance and management of the relevant federation (a voluntary association), but would also implicate the rights of individual athletes to compete at the pinnacle of domestic and international competition (while it would conceivably, in respect of professional athletes, constitute a limitation of their constitutional freedom of trade, occupation and profession as well as their freedom of association, which, I would argue, is not justifiable under law).

Finally, apart from international sports law, racial quotas in sport are probably also inconsistent with international law, more generally. The Solidarity trade union, in August 2016, made submissions in a complaint regarding the alleged illegal use of affirmative action by the South African government before the United Nations Committee on the Elimination of Racial Discrimination (“CERD”).<sup>81</sup> Media reports of the proceedings are scarce. Solidarity’s web site, however, includes the following, which (if an accurate reflection of the proceedings) may provide some indication of the Committee’s views as formulated during the hearings:

“Baron Marc Bossuyt, President-Emeritus of the Belgian Constitutional Court and a member of the committee, responded by mentioning a misunderstanding about special measures (or affirmative action, as it is termed in America). It is generally accepted that merit has to play a role. It seems that, in the political arena, it is implemented in another way. The focus

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where after the five federations, had out of their own volition, signed a Memorandum of Agreement (MoA) with the Department of Sport and Recreation South Africa in 2015. The MoA is premised on the transformation barometer with clear and concrete transformation targets and goals over the next five years. The MoA further delineates roles and responsibilities of each party to the agreement and stipulates punitive measures to be taken in the event of non-compliance. These punitive measures include among others the following:

- (i) Suspending or withdrawal of Government’s funding to the Federation in terms of section 10(3)(a) of the Act in writing, if applicable;
- (ii) Withdrawal of Government’s recognition of the particular federation as a National Federation in terms of section 10(3)(b) the Act in writing where after the Minister may publish such a decision in the Government Gazette;
- (iii) In essence, revoke a federation to host and bid for major and mega international tournaments in the Republic in writing in pursuance of the prescripts of the Bidding and Hosting of Major Events Regulations *Gazetted* and Published in line with the National Sports and Recreation Act and also as a result of not recognizing the said federation;
- (iv) Withdrawal of the federation’s opportunity to be awarded national colours via SASCOC to players who participate under the auspices of that particular federation in order to represent the Republic internationally and nationally;
- (v) Terminate the existing five year agreement in writing due to non-compliance; or
- (vi) Request the Minister in writing to consider issuing a directive in terms of section 13(5)(a) of the Act as SRSA deems fit and appropriate, which may include but not limited to the withdrawal of political support and endorsements for sponsorships.”

81 Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

there is on quantitative rather than on qualitative outcomes. In South Africa, affirmative action is applied too severely by using the national demographics as formula. It could still be justified at certain government entities but rigid measures in the economic and private sector, as well as in sport are absurd, Bossuyt said. "If you want to help people, it should be done on the basis of need and poverty and not on the basis of skin colour. [CERD] wants to eradicate racism. The notion of representivity goes against the Convention. It could lead to a system similar to the former apartheid system. Certain committee members indicated that the criteria for affirmative action are inadmissible under the Convention. The way in which it is being implemented is no less important than the goal. Race as sole criterion is not permissible. Other members of the committee were of the opinion that new forms of discrimination may not be allowed as no form of discrimination was indeed acceptable."<sup>82</sup>

At the very least, these reported observations by members of the Committee do not augur well for future consideration on the international stage of the legitimacy of the South African government's sports transformation agenda, which appears to have for years been so obsessed with racial representivity and the use of the blunt measure of race quotas. Surely "affirmative" measures have a place in the development of sporting talent, short of express and blatant race-based selection. It is expected that pressure may in future be put on international sports governing bodies to address the South African government's agenda regarding the application of such quotas in sport (even if only indirectly, by means of the potential imposition of sanctions against domestic member federations – and, consequently, their athletes – who implement such measures).

#### **4 Sports quotas before the courts: current litigation**

I have previously lamented the fact that, to date, the burning issue of race quotas in sport has not engaged the attention of the judiciary, and I expressed surprise at the lack of litigation on the subject. At the time of writing, however, such a case is currently pending before the Johannesburg Labour Court. While the eventual outcome is, of course, uncertain at this time, it deserves brief attention here.

The Solidarity trade union (a frequent litigator in challenges to the application of affirmative action before the courts) cited SA Rugby, CSA, Athletics South Africa ("ASA"), NSA, the Minister of Sport and SASCOC as respondents.<sup>85</sup> Solidarity is challenging the constitutionality and lawfulness of "the mechanical application of demographic profiling and transformation targets derived from the provisions of the Sport

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82 From a report of Solidariteit: Anonymous "Member of UN committee equates SA government's racial quotas with apartheid" (10-08-2016) *Solidariteit* <https://solidariteit.co.za/en/member-of-un-committee-equates-sa-governments-racial-quotas-with-apartheid/> (accessed 2018-11-24).

83 Johannesburg Labour Court case number J963/17.

Transformation Charter ... read into the [Memorandum of Agreement] entered into between [each of] the first to fourth respondents with the Sports Minister (fifth respondent) and the sixth respondent [SASCOC]”.<sup>84</sup> The applicant is seeking an order that the offending provisions of the Charter and the agreements be declared invalid and of no force and effect, and be set aside; and that the respondents be interdicted and restrained from implementing the offending provisions of the Charter and the agreements insofar as they –

- apply quotas in determining team selection at a national or provincial level; and
- apply quotas in determining the appointment or declining to make appointments within the administration, management and specialised support structures of the first to fourth respondents based purely on such criteria of such quotas.

Solidarity claims that the transformation targets which the relevant federations adopted in their agreements with the Minister and SASCOC function as rigid quotas, and also constitute absolute barriers to the employment and advancement of “persons who are not categorised as generic black or black African”. Solidarity identifies ASA as a “top culprit”, citing its transformation targets which mandate “100% black African as well as 100% generic black representation at the ... levels [of] full time employed staff employees, board members, [and] finance committee members”.<sup>85</sup>

The respondents in this matter filed consolidated heads of argument taking issue with a number of aspects of the applicant’s case. Firstly, the respondents dispute that the applicant has *locus standi* in this matter (mainly because the union’s application was not brought on behalf of a member). Secondly, the respondents claim that the Labour Court does not have jurisdiction, as the matter was not first referred to conciliation before the CCMA, and because the applicants were late in referring the matter for conciliation and has not asked for condonation for such lateness. On the merits, the respondents take issue with the applicant’s allegations that the relevant transformation targets as contained in the Transformation Charter and the memoranda of agreement signed between the first four respondents, on the one hand, and the Minister and SASCOC, on the other, constitute rigid quotas:

“The Transformation Charter and the impugned agreements do not impose inflexible, rigid racial quotas for employment in sport. Instead, the transformation policy adopted by the Respondents is multi-faceted, flexible, context-sensitive, and aims to promote the achievement of equality in the long-term. The Charter and the agreements make it clear that punitive measures do not follow if the number targets are not reached without more. Transformation goals are determined holistically and not based on numerical

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84 From the Applicant’s Heads of Argument, dated 31 May 2018, 4 (copy on file with the author). Regarding the memorandum of agreement referred to, see the text to n 80 above.

85 Applicant’s Heads of Argument, 55.

targets alone: the transformation policies adopted by the Respondents are constitutional redress measures.”<sup>86</sup>

A central pillar of the respondents’ argument addresses the applicant’s claim that the Minister’s punitive ban on the relevant federations regarding bidding for and hosting events (as discussed in the introduction above) constitutes a sanction for non-compliance with the relevant targets, which indicates that such “targets” in fact function as quotas. The respondents deny that the power to sanction non-performance turns a target into a quota, relying on the Constitutional Court judgment in *Solidarity*, where Zondo J held as follows in this regard:

“Section 24(1)(a) [of the EEA] places an obligation on a designated employer to assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan. Section 24(1)(b) obliges a designated employer to provide the managers with “the authority and means to perform their functions”. Obviously, those functions are the functions concerning monitoring and implementing the employer’s employment equity plan. Then section 24(1)(c) obliges a designated employer to “take reasonable steps to ensure that the managers perform their functions”. Managers are employees. An employer is entitled to indicate to an employee that, if he or she fails to perform his or her duties or functions properly, disciplinary steps may be taken against him or her. There is no reason why a provision in an employment equity plan to the effect that managers who fail to perform their duties properly in regard to the monitoring and implementation of the employer’s employment equity plan will be disciplined should be held against the employer or should be said to render numerical targets quotas.”<sup>87</sup>

Of course, this seems to lose sight of the fact that the Minister’s punitive ban in the current context has nothing to do with section 24 of the EEA, or an employer’s authority over its employees in giving effect to an employment equity plan, and it appears that Zondo J’s views in that regard are thus irrelevant. In essence, we have here a sanction imposed upon employers by an outside agency – in respect of transformation “targets” imposed by such employers under pressure from such outside agency – where the sanction was not imposed based on the fact that the EEA allows that “managers who fail to perform their duties properly in regard to the monitoring and implementation of the employer’s employment equity plan will be disciplined”. If we recall the wording of the Minister’s media statement quoted in the introduction above, the Minister resolved to revoke hosting and bidding privileges of the relevant federations “as a consequence of the aforementioned federations not meeting their own set transformation targets”. To my mind, this equates to the clear and unequivocal imposition of a sanction based on the failure

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86 From the Respondents’ Consolidated Heads of Argument, 2 (copy on file with the author).

87 *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) paras 62-63.

to meet a target. That surely means that such alleged “target” is actually a rigidly enforced quota.<sup>88</sup>

In a nutshell, the respondents’ argument is that the relevant transformation “targets” that were challenged form just one part of a multi-faceted, holistic policy to transform sport, and as such cannot be deemed to be rigid quotas that must be achieved at all costs. Along the way, the respondents address the applicant’s above-mentioned challenge regarding, specifically, ASA and the NSAs’ “100% target” in certain posts:

“The Applicant argues that because ASA’s and NSA’s forecasted transformation undertakings for certain positions is 100% black representation, ASA and NSA have undertaken to hire only black people for those positions. This, the Applicant submits, constitutes a quota and an absolute bar to employment. The Applicant’s reading of these forecasts ignores the context within which the undertaking was made. These undertakings and forecasts, as explained above, are a single factor within a multi-faceted measure that holistically transforms sport. ASA and NSA have not undertaken to reach 100% black representation in those positions at all costs. They have simply indicated that on their prediction, certain positions will have 100% black representation by a certain date. The undertaking and the respective contracts between NSA and ASA, on the one hand, and the SRSA, on the other hand, does not require them to fulfil those forecasts rigidly and absolutely. A proper implementation of the Transformation Charter and the EPG Reports does not entail such rigidity.”<sup>89</sup>

I am rather baffled by this. Even if not a target, or even a quota, how does one arrive at a “forecast” that predicts that in future certain positions will eventually be filled by “100% black representation”, unless one is in the process of actively engineering that outcome (through the imposition of quotas, or some otherwise nefarious<sup>90</sup> scheme)? Even if such “undertakings” by federations (if not actual “targets”, nor “quotas”) are just one little cog in a great transformational machine of multi-faceted and holistic measures and policies to transform sport, they surely smack of racial quotas which those making these “predictions” must be well aware of and actively supporting to implement.

I will not comment further on this matter, which is currently before the court, nor on the prospects of the respective parties (based solely on their respective heads of argument). My above discussion might create an impression on the part of the reader of a lack of objectivity on my part. If this is accurate, I can only apologise and say that my views are

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88 Consider the words of Thlothlalemaje AJ in *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) para 53: “Quotas’... are externally imposed, (e.g by way of legislation, policy, regulations or even practice) and the failure to meet them is usually met with a sanction.”

89 Respondents’ Consolidated Heads of Argument, 33-34.

90 I would suggest that, even in the (what I view to be dubious) world of demographics as a proxy for equality, predicting and pursuing 100% representation of any one race group would be unlawful and anathema to the constitutional value of equality.



motivated by sincere excitement at the fact that, at long last and after more than 20 years of similar “sports transformation measures”, a court of law is finally being called upon to assess the legality of what has been going on, blatantly, for so long, and with very little oversight from the legal community to date.

## 5 Conclusion

Fourteen years ago, I wrote an article on sports transformation, which I started with the following quotation:

“The moral position is absolutely clear. Human beings should not be willing partners in perpetuating a system of racial discrimination. Sportsmen have a special duty in this regard in that they should be first to insist that merit. And merit alone, be the criterion for selecting athletes for representative sport.”<sup>91</sup>

When that article was published, we were nearly a decade into our then still new (and exciting) democracy. We were also nearly a decade into the experience of sports transformation measures aimed at turning “lily-white sports teams” into teams more acceptable to the whole of our nation and its diverse conglomeration of people from different ethnic, racial, cultural and social origins.

It is 2019 now. Our country has gone from the excitement of new beginnings and apparently limitless prospects for a brighter future, through the disappointments and frustrations at often corrupt and ineffective political leadership and “state capture”, to a more recent “new dawn” of cautious optimism that SAS South Africa would leave the doldrums and turn its bow towards warmer climes of economic growth, a future of steadily declining poverty and inequality, and prosperity, peace and security for all. During all this time, there appears to have been one constant cause of concern (and frustration for many): frequent and pervasive instances of poor service delivery by government (at all levels, and in all provinces) to its people.

Which brings me to the role of government and of sports federations in ensuring the transformation of sport. Many commentators have lamented the “top down” approach of the imposition of race quotas at the highest levels of competition in certain sporting codes in order to “transform” those codes. This is an artificial exercise, which, apart from its dubious legality and constitutionality, holds little potential for real transformation in the form of the increased development of future talent from disadvantaged communities. It is simply a matter of logic that real transformation can only work (and be sustainable) if talent from disadvantaged groups is nurtured and developed, from a young age. In addition, government (and sports federations) have frequently come

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91 Abdul S Minty, African National Congress (from a paper prepared for the United Nations Unit on Apartheid, 1971), as quoted in Louw (2005) *Law, Democracy & Development* 193-218.

under fire for the failure to promote the achievement of this. The political correctness of organisations such as the Solidarity trade union (and the civil rights organisation Afriforum) is frequently questioned, but these organisations have for years actively engaged in the public debate on sports transformation and have commissioned studies and published reports in this regard, which are publicly available. Compare the following from an undated report (which appears to date from 2017) entitled *Transformation in SA Sport*:

“According to the South African Institute of Race Relations (SAIRR) only 57,8 % of public schools in the country have sporting facilities. The quality of the existing facilities is often substandard and facilities are very unevenly distributed. For instance, whilst 77,5% of public schools in Gauteng and 75,1 % of schools in the Western Cape have sporting facilities, only 40,6% of public schools in the Eastern Cape possess such facilities. If the figures are broken down further, an even more dismal situation emerges. 3 245 out of 5 461 public schools in the Eastern Cape had no sporting facilities in 2015. For the rest, only 1 412 schools had soccer facilities, 164 had cricket facilities, and only 333 had rugby facilities. In KwaZulu-Natal, 3 207 out of 5 861 schools had no sporting facilities. Only 1 591 had soccer facilities and 258 had cricketing facilities; and a mere 111 could boast rugby fields ... While the top sporting schools in the country operate on little or no government assistance and are largely funded and supported by the parents, the dysfunctional schools are held ransom by very limited government budgets, militant unions such as the South African Teachers Union (SATU), and absent and/or unmotivated teachers. Classrooms are overcrowded and the schools try to serve communities plagued by huge socio-economic problems and their attendant social ills, such as drugs, single-parent (or child-led) households and teenage pregnancies.”<sup>92</sup>

If these statistics are accurate they paint a dismal and very disturbing picture for anyone who supports the calls for real transformation of sport in this country (which is a constitutional imperative that may rank rather low on the list of priorities in our attempts to normalise this very broken society, but which remains important).

What illegal and unconstitutional quotas, as tokenistic attempts to create a socially-engineered semblance of normality or of progress in transformation, do is to provide politicians with talking points to stir up emotions and rally political support. In addition, it may serve to hide yet another example of a clear lack of service delivery. It is understandable that government suffers under often-severe capacity constraints, and that sport may (as mentioned above) be relatively low on the list of priorities that face the country. However, race quotas can be nothing but an ostensible quick fix; in fact, they do not fix a thing in the long run or in any real way. They are divisive measures, which offend against our key constitutional objective of the achievement of non-racialism, and

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92 From E Brink & J Nortje “Transformation in SA Sport” (2017) *Solidariteit* 9 <https://solidariteit.co.za/wp-content/uploads/2017/07/Transformation-in-sport-SA-eng.pdf> (accessed 2018-11-24).

they may very well, in fact, be essentially racist in nature.<sup>95</sup> Affirmative action – which complies with our Constitution – does not constitute “reverse discrimination”. However, race quotas in sports teams are not a form of affirmative action, which complies with our Constitution. It is a pernicious form of unfair discrimination based on race. Two wrongs do not make a right. It is scandalous that nearly fifty years after Mr Minty uttered the above-quoted words before the United Nations, we are back to a system of racially discriminatory selection of sports teams. This offends not only our own Constitution, but also both the spirit and the letter of the laws of international sport.

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95 I have previously questioned whether there might be something inherently racist in the view that a sports team can only be “representative” of our people if composed along demographic lines.