A critical analysis of the legality of racial quotas as a tool for transformation in South African professional sport.

Thesis presented in fulfilment of the requirements for the degree of

Master of Laws at the Stellenbosch University

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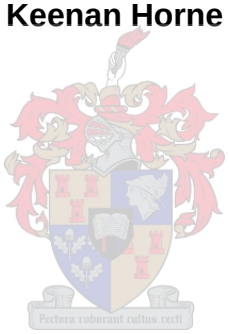

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SUMMARY

South Africa is a country steeped in sport, which is an important part of the culture of large parts of the population. The new political dispensation in South Africa that came into existence in 1994 recognized the inequalities that had negatively affected South Africans in sport and in other areas of their lives, over the span of many years. It prompted government to introduce affirmative action measures in sport as in other areas of the lives of South Africans. After 26 years these affirmative action measures that have been implemented in sport still remain a challenge for sports governing bodies, and are still controversial.

This dissertation aims to delve deeper into these affirmative action measures and, specifically, to critically analyze the legality of racial quotas in professional sport in South Africa as a tool to accelerate transformation. The dissertation will focus on the fact that sport provides an atypical context for the application of affirmative action, but one that is still subject to laws. It will be shown that professional athletes in South Africa qualify as employees under labour legislation, and are consequently protected by the same rules as more traditional employees.

This raises an interesting question for legal analysis. South African labour legislation expressly prohibits the use of racial quotas in the application of affirmative action. Despite this, South African sporting codes have for a number of years employed racial quotas for the composition of representative teams (examples of which will be mentioned and examined). Because of the applicable constitutional and legislative framework for the application of affirmative action, the dissertation analyses the use of racial quotas through evaluation of the jurisprudence on affirmative action outside the sporting context in South Africa, in order to draw conclusions regarding the lawfulness of the use of such quotas in sport. There is a relative dearth of case law specifically on the issue of racial quotas. As a result, a comparative analysis is undertaken in respect of the United States of America, a jurisdiction which has grappled with the legitimacy of racial quotas for much longer than South Africa, and which has developed legal precedent on the issue.

The dissertation also deals with the concept of ‘representivity’ within the context of the transformation of South African sport. This is a term that has become synonymous

with transformation, both in sport and in society more generally. The dissertation focuses on the concept of 'equitable representation', which is the express objective of affirmative action under the Employment Equity Act. Equitable representation, ostensibly, means to pursue the achievement of a level of representation in workplaces which mirrors the national or regional racial demographic profile of the population. In the context of professional sports teams, when affirmative action measures are applied the aim is therefore to select a team which is representative of the racial demographic profile of the South African population. The dissertation investigates this concept and its role in transformation in South Africa, as well as its legitimacy in the context of professional sport.

Apart from the above-mentioned analysis of domestic law, the dissertation also examines the legitimacy of the application of racial quotas in the broader context of international sports governance. It considers the legitimacy of transformation measures as applied by South African sports governing bodies within the parameters of the relevant rules, principles and regulations of international sports governing bodies. This analysis highlights the anomalous nature of racial quotas in professional sport, both in the domestic and international contexts. South African sports governing bodies are contractually obliged to govern their respective sporting codes in a manner that complies with the rules of international bodies, and the dissertation also focuses on the potential danger of pushback from international sports governing bodies against domestic transformation measures which flout international rules.

Finally, the dissertation investigates potential justification for racial quotas in professional sport in South Africa. It briefly evaluates the role that sport plays as a tool for nation- building and reconciliation, and then considers whether racial quotas could be justified as a means to remove inequalities and to create equal opportunities for all races in professional sport.

ACKNOWLEDGEMENTS

Writing this dissertation has been both a challenging and enjoyable experience. It would not have been possible without the support and assistance of a number of individuals. I would first and foremost like to thank my Heavenly Father for his blessings and for guiding me through this experience. Through prayer and petition I have overcome countless challenges along the way. Secondly, I would like to thank my supervisor, Professor André M Louw for his patience and guidance throughout the process. With so much experience in this field, it was certainly a joy to have his support and knowledge to draw from.

A special mention goes out to my parents, Henry and Debbie, my brothers Jordan and Hagan as well as Kendra Hudson. They have shown me tremendous support throughout this journey and it would not have been possible without their patience and love. Thank you for believing in me and encouraging me.

Keenan Horne, 2020

TABLE OF ABBREVIATIONS

ANC	African National Congress
ASA	Athletics South Africa
CRA	Civil Rights Act of 1964
CSA	Cricket South Africa
EEA	Employment Equity Act 55 of 1998
EPG	Eminent Persons Group
FIFA	Fédération Internationale de Football Associations
ICC	International Cricket Council
IOC	International Olympic Committee
LRA	Labour Relations Act 66 of 1995
NOC	National Olympic Committees
NRSAA	Nationals Sports and Recreation Amendment Act 18 of 2007
NSA	Netball South Africa
NSRA	National Sports and Recreation Act 110 of 1996
NSRAA	National Sports and Recreation Amendment Act 18 of 2007
OCOG	Organising Committee of the Olympic Games
SAIRR	South African Institute of Race Relations
SANOC	South African National Olympic Committee
SARU	South African Rugby
SASCOC	South African Sports Confederation and Olympic Committee
UN	United Nations

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CHAPTER 1: INTRODUCTION

1 1 Problem identification

Former South African Rugby Union ("SARU") president, Oregan Hoskins, was quoted as follows on the implementation of racial transformation in rugby:

> "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. 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 is a short-term measure and there is no other way to change representation in teams in the immediate short-terms."[1]

Considering the above quote, this dissertation will set out to examine a very specific issue, namely the application of race-based quotas in the selection of professional sports teams in South Africa. The objective of the study is to determine the legality and constitutionality of this practice in light of current South African (and selected aspects of international) law.

Racial quotas are employed in professional sports teams in the name of transformation and in an attempt to address the history of segregated sport under apartheid as well as its continued effects on our current sporting landscape.[2] Addressing historical and social inequalities as stated in the Constitution of the Republic of South Africa of 1996 (the "Constitution") applies to sport too, since sport represents a microcosm of our society.[3] The Constitution empowers government to promote and fulfil the constitutional rights in the form of legislation and government policies. The sports transformation agenda is, therefore, one aimed at addressing the impact of historically unfair discrimination against athletes of colour, as well as for the

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[1] B Nel "Quotas for currie cup, S15" (23-04-2014) *Sports24* <http://www.sport24.co.za/rugby/quotas-for-currie-cup-s15-20140423> (accessed 02-11-2020).

[2] Mr. Mbeki stated the following regarding the inclusion of quotas of "players of colour" in sports teams, from a speech at the South African Sports Awards, March 2002: "For two to three years let's not mind losing international competitions because we are bringing our people into these teams."

[3] R Cloete *Introduction to sports law in South Africa* (2005) 153.

achievement of racially representative sports teams through affirmative action measures. As such, these quotas purport to be a form of affirmative action.

A number of sporting codes in South Africa have furthermore implemented race-based quotas to effect transformation. One such sport is rugby, where quotas have been implemented in various competitions, including in the erstwhile domestic Vodacom Cup.[4] Provisions that include racial quotas in team selection take forms such as the following:

> "Teams will be *forced* to field seven players of colour in their 22-man squads, with at least five players in the starting team. At least two of the seven will also have to be among the forwards".[5]

Government officials have in the past shown a willingness to ensure that professional sports teams conform to race-based selection. Prior to Team South Africa participating in the Beijing Olympics in 2008, Mr Khaya Majeka told the parliamentary sport portfolio committee on 18 June 2007 that South African sports codes that do not have at least a 50-50 "Black-White ratio" of participants may not be allowed to send its teams to the Olympics.[6] At the same committee meeting, the chairperson, Mr Butana Komphela of the African National Congress ("ANC"), was quoted as saying "[t]here would be measures to punish any federation moving in the wrong direction".[7] Earlier, Komphela also threatened to consult the Ministry of Home Affairs in order to withdraw the passports of the Springboks rugby players before the Rugby World Cup in 2007 because of his displeasure with the racial composition of the team.[8]

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[4] Anonymous "New race quotas for SA rugby" (14-08-2013) *Sports24* <http://www.sport24.co.za/rugby/new-race-quotas-for-sa-rugby-20130814> (accessed 02-11-2020).

[5] Anonymous "New race quotas for SA rugby" (14-08-2013) *Sports24* [emphasis added].

[6] Mr Khaya Majeka was the South African Sports Confederation and Olympic Committee's manager of team preparation for international competitions. PMG "Beijing Olympics Team Preparation: Input by SASCOC and SRSA; SABC Siyanqoba Campaign; SA Football Supporters Association" (18-06-2007) *PMG* <www.pmg.org.za/committee-meeting/9997/> (accessed 02-11-2020).

[7] PMG "Beijing Olympics Team Preparation" (18-06-2007) *PMG*.

[8] Komphela warned that: "this worst case scenario would be necessary if there were not at least six black players in the World Cup squad." See M Thesbjerg "Chairman of South African sports committee puts race over sporting abilities" (07-05-2007) *Play the game*

More recently, former Minister of Sport, Fikile Mbalula, similarly threatened to punish federations for not adhering to the transformation targets set by the federations themselves. He stated that:

> "I may suspend or withdraw government's funding to the said federation due to non-compliance; I may withdraw government's recognition of the particular federation as a National Federation".[9]

Specifically addressing transformation in rugby, Mbalula stated that he cannot interfere directly with team selection, as the "National Sport and Recreation Act contains no empowering provisions to enable the Minister to interfere",[10] but he indicated that there are ways to speed up transformation.[11] It is clear that the types of repercussions for not implementing "aggressive targets" could have a crippling effect on professional sports teams.[12]

Government has played a leading role in promoting racial quota systems throughout South African sport. However, the implementation of a quota system is often met with suspicion. The reason why uncertainty regarding the implementation of racial quotas in professional sport in South Africa persists is twofold. Firstly, the Employment Equity Act 55 of 1998 (as amended) ("EEA") explicitly prohibits the use of quotas in the application of affirmative action. This is widely accepted in the traditional employment sphere but, when one considers the promotion of the application of racial quotas in the (professional) sporting context, it does not seem to apply to professional athletes –

<http://www.playthegame.org/news/news-articles/2007/chairman-of-south-african-sports-committee-puts-race-over-sporting-abilities/> (accessed 02-11-2020).

[9] F Mbalula "Sports codes will be punished for missing race targets" (25-04-2016) *Politics Web* <http://www.politicsweb.co.za/news-and-analysis/fikile-mbalula-punishes-sports-codes-for-missing-r> (accessed 02-11-2020).

[10]Anonymous "Mbalula: Saru Transformation 'On Track'" (29-08-2015) *Rugby365* <www.rugby365.com/countries/south-africa/68355> (accessed 02-11-2020).

[11] These punitive measures include among others to revoke SARU's authority to host and bid for major and mega international rugby tournaments in the Republic as well as the withdrawal of SARU's opportunity to awarded national colours via SASCOC to rugby players who participate in rugby under the auspices of SARU in order to represent the Republic internationally and nationally: Refer to n9.

[12] In the same breath, Mbalula threatened to "revoke the privilege of a federation to host and bid for major and mega International tournaments in the Republic and withdraw recognition of the said federation".

even though such persons are “employees” covered by the same labour legislation. This is extremely odd, and recently the trade union, Solidarity, attempted to officially challenge this *status quo* through litigation.

Secondly, international sports law does not allow any form of discrimination in respect of participation, and it appears that South African sports federations may be in breach of these regulations through the application of race-based quotas.

Therefore, to assess the legality of racial quotas, this dissertation will examine the applicable legal framework of affirmative action in South Africa. This will require a consideration of the relevant constitutional provisions that authorise the application of affirmative action, including the judicial interpretation of such provisions. It will further require a consideration of the relevant labour legislation on this subject. As mentioned above and as the research will indicate, labour legislation indeed covers professional athletes in South African team sports. Accordingly, the application of the affirmative action provisions of the EEA will need to be analysed.

The dissertation will, however, not embark on a broad discourse of the various aspects of affirmative action and unfair discrimination law or of labour law, more generally. The focus will be on the specific purported affirmative action measures of racial quotas, in order to determine its legitimacy.

During the study, a measure of comparative analysis will be undertaken. This will focus on:

a) The use of (racial) quotas as a form of affirmative action measure, which is controversial both under the South African Constitution as well as the EEA. The EEA specifically allows the use of numerical goals or targets in the application of affirmative action, but expressly prohibits the use of quotas. Accordingly, it will be necessary to examine the differences between targets and quotas. In light of the fact that South Africa has seen limited jurisprudence on this topic, the treatment of quotas in affirmative action in the United States of America (“USA”), a jurisdiction that has grappled with this issue for much longer, will be examined.

b) The fact that the South African professional sports industry is subject to the rules of international sports governing bodies and the fundamental principles of international sports law. The study will also engage with the legitimacy of racial quotas as a form of artificial engineering in the selection of teams in terms of

the rules and principles of the applicable sporting code as set down by international sports governing bodies. These bodies include World Rugby (formerly the International Rugby Board), the International Cricket Council ("ICC"), World Athletics (formerly the International Amateur Athletics Federation) and the International Olympic Committee ("IOC").

1 2 Background: The aim of South African sports transformation

To the outside world, racially segregated sport was a divisive embodiment of the ugly face of apartheid which resulted in one of the major driving forces for sanctions and sport boycotts against South Africa from the international community.[13] Prowess at sport represented a right to rule and sport was inevitably rationed according to race, and recreational facilities were dominated by the white race.[14] While the law stated nothing about recreation, the Group Areas Act 41 of 1950 ("Group Areas Act") defined areas of residence and business, and this also affected sport and recreation.[15] The ruling party during apartheid, the National Party, recognised that "performance in sport was a quick way to the sort of publicity and acclaim that would make nonsense of racial division and even, ultimately, facilitate contested ideas of race."[16] However, once the ANC gained political power, then-President Nelson Mandela recognised the impact that sport can have on a nation, and coined the following iconic statement:

> "Sport has the power to change the world … It has the power to inspire. It has the power to unite people in a way that little else does. It speaks to youth in a language they understand. Sport can create hope where once there was only despair. It is more powerful than government in breaking down racial barriers."[17]

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[13] M Corrigall "International Boycott of Apartheid Sport" *South African History Online* <http://www.sahistory.org.za/archive/international-boycott-apartheid-sport-mary-corrigall> (accessed 02-11-2020).

[14] C Merrett, C Tatz & D Adair "History and its racial legacies: Quotas in South African rugby and cricket" (2011) 14 *Sport in Society Cultures, Commerce, Media, Politics* 753.

[15] 757.

[16] 767.

[17] J Busbee "Nelson Mandela: 'Sport has the power to change the world'" (05-12-2013) *Sports Yahoo* <https://sports.yahoo.com/blogs/the-turnstile/nelson-mandela-sport-power-change-world-215933270.html> (accessed 20-01-2018).

Mandela recognised sport as more than contesting ideas of race but instead used sport as a method to dismantle the system of institutionalised racism.[18] The South African transformation mission aims to transform a deeply divided society (economically, socially, and racially), to one comprised of equals. Transformation specific to sport can be described as managing "change in a way that will eliminate crude references to race in sport yet promote the ideals of harmonious co-existence, working together and playing together".[19]

In this regard, the equality clause is considered to embody one of the most fundamental rights in our Constitution and one of the primary aims of the Constitution is to serve as a vehicle with which to minimise or eradicate the inequalities of the past.[20] The equality clause has to be interpreted in light of the history of discrimination. Therefore, the courts have accepted that section 9, the equality clause in the Bill of Rights, is to be interpreted substantively.[21] Section 9(2) states that legislative and other measures may be taken to promote the achievement of equality. This provides the constitutional basis for the implementation of affirmative action measures.[22] Through affirmative action measures, there is an attempt to truly transform the sports sector in harmony with the equality principle of the Constitution. Sachs J described the aim of affirmative action as follows:

> "We long for the day when colour is completely irrelevant in our society, when we are all just human beings, South Africans, with a common love for this country, and possessing an equal chance of enjoying its riches, the moment when skin colour is not even noticed, let alone referred to."[23]

In South Africa, affirmative action measures can be described as steps that are taken to attain substantive equality.[24] The EEA regulates the implementation of

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[18] Busbee "Nelson Mandela: 'Sport has the power to change the world'" (05-12-2013) *Sports Yahoo*.

[19] Cloete *Introduction to Sports Law* 153.

[20] 304.

[21] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC); see also See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) paras 26-27.

[22] South Africa recognises the substantive notion of equality. See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26.

[23] J Rabe *Equality, Affirmative Action, and Justice* (2001) 340.

[24] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 35.

affirmative action measures in the workplace.[25] Section 2 states that one of the purposes of the Act is to implement affirmative action measures to redress past disadvantages in the workplace, in order to achieve equitable representation of persons from designated groups. Therefore, under the EEA, affirmative action is defined differently, as section 15(1) of the EEA states:

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

Affirmative action in the employment context aims to provide preferential employment opportunities for the previously disadvantaged (even though it is notable that the EEA, unlike section 9(2) of the Bill of Rights, does not expressly utilise the concept of disadvantage in designating the potential beneficiaries of affirmative action, opting instead for the categorisation of beneficiaries on the grounds of race, sex or disability). It is arguable, therefore, that the use of racial quotas in professional sports teams that aim to achieve equality, in fact amounts to an (purported) affirmative action measure.

Despite the introduction of affirmative action, South African sports teams are seemingly still not transforming swiftly enough (as will be illustrated by the statements of various government spokespersons). As a result, and since the dawn of democracy, racial quotas have been introduced, albeit on an on-and-off basis, even though they are explicitly prohibited under the EEA. In addition, government spokespersons introduced the term "representivity" when discussing transformation. Representivity has become a focal point in the transformation mission. The aim of transformation has now shifted to ensuring that national teams are representative of South Africa's racial demographics. Penrose stated that there are strong pragmatic reasons to develop the potential non-white talent participation, as they make up more than 90% of the

[25] Section 15(1):

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

nation.[26] Logic dictates that this pool of untapped talent can improve our sports teams, but questions linger whether reserving places for non-whites using racial quotas is the way to do it. If demographic representivity is now the yardstick in these policies, it is at odds with the equality clause in the Constitution, as the Constitution does not refer to demographic representivity as a yardstick or indicator for the achievement of equality.

Despite the above-mentioned problematic nature of the use of racial quotas, one cannot overlook the importance of sport in South Africa as a possible justification for the use of such measures. Sport is not only important for entertainment, leisure and national integration but also, in light of our (sporting) past, especially relevant in the context of redressing past discrimination as experienced in the racial segregation of sport. Transformation in sport is therefore specifically relevant and may be one of the driving forces in upholding democracy. The continuing echo of apartheid emphasises the need for transformation in sport and may be able to provide a lens through which to evaluate the success or failure of transformation in society, more generally.

However, at this stage what is clear is that according to labour legislation, quotas are prohibited. Many observers also deem quotas to be inherently unfair, as quotas do away with merit-based selection, and as a result, players are purely selected based on their race and the benchmark of demographic representation. This situation may not be unique in the world, but it does create challenges for professional sport in South Africa and as a result, it makes for an important study as to the legality of these racial quota systems.

1 3 Research aim

The proposed aim of this research is to critically evaluate the legality of the use of a race-based quota system in professional team sports in South Africa. In doing so, the following will be evaluated and analysed:

- The various legal mechanisms used to apply affirmative action more generally, which includes section 9(2) of the Bill of Rights and Chapter III (the affirmative action chapter) of the EEA. In the process, consideration will also be given to the

[26] B Penrose "'The right thing to do?' Transformation in South African sport" (2017) 36 *SAJP* 377 378.

judicial test for evaluating the constitutionality of affirmative action under the Constitution and the legality of affirmative action applied in terms of the EEA.

- That professional players in team sports are considered "employees" for purposes of labour legislation, and in this context, it calls for special consideration of the legality of the use of racial quotas. This will involve a consideration of the EEA's prohibition on quotas (in section 15(3) of the Act) and on absolute barriers to the employment and advancements of persons from non-designated groups (in section 15(4) of the Act), as well as of the objective of affirmative action under the same Act.
- Whether the role and importance of sport in South African society, more generally, justify the use of racial quotas in professional team sports. In essence, and considering the legislative prohibition of quotas, the question will be asked whether sport may be a seen as a "special case" where the use of an otherwise legislatively prohibited (and probably unconstitutional) measure such as a racial quota might be justifiable in light of historical, contextual, or other reasons.
- The legality of racial quotas in sport in the context of international sports law, in particular the applicable rules of the relevant international sports governing bodies, and also whether South Africa's sports transformation experience complies with such rules (including consideration of the implications if it is found to not comply).

1 4 Structure of the chapters

Chapter 2 will set out the legal framework of affirmative action which will establish that quotas purport to be a form of affirmative action measure. This will be followed by a discussion of affirmative action in terms of South African jurisprudence. This will include a discussion of section 9(2) of the Bill of Rights, the *Van Heerden* test for the constitutionality of an affirmative action measure, as well as the fact that we have special regulation of affirmative action in the employment context, in the form of the EEA. It will be shown that the purpose of affirmative action under the EEA differs from that of the purpose of affirmative action under the Constitution. Furthermore, there will be an examination of whether there exist different standards of review for the implementation of affirmative action measures under the EEA and the Constitution.

Chapter 3 will show that the EEA applies in this context as professional athletes in team sports are considered "employees" under the Act, and their employers generally

qualify as “designated employers” for purposes of the affirmative action chapter. Once it has been established that the EEA applies, and also that it prohibits quotas but allows numerical goals, the analysis will shift to determining the legitimacy of the use of quotas, specifically as opposed to numerical goals. The difference between quotas and goals will, therefore, be examined. Moreover, there will be an analysis of the adjudication of quotas by the Constitutional Court and other courts. The aim here will be to determine whether quotas, currently, are viewed as legitimate and constitutional affirmative action measures in the pursuit of substantive equality. Furthermore, the terms “equitable representation” and “representivity” will be examined. Representivity is of particular concern as it is not a term mentioned anywhere in the Constitution (nor in any dictionary) yet it plays a pivotal role in the application of affirmative action in South African sport.

In chapter 4, a comparative analysis of the legitimacy of quotas in affirmative action will be undertaken. Because there has been little in-depth engagement with the issue of quotas in South Africa (also in case law), there is a need to undertake an examination of the jurisprudence on quotas as an affirmative action measure in the USA, a jurisdiction that has grappled with this specific issue for quite some time.

Chapter 5 will examine the legality of racial quotas in sport in the context of international sports law (especially the rules of international sports governing bodies). It will consider how South Africa’s race-based sports transformation agenda compares with the standards and rules of sports governing bodies in respect of the condemnation of unfair discrimination in sport.

Chapter 6 will confirm that this type of affirmative action measure, and in this particular context, is highly anomalous, pointing out three specific elements: That the measure is outlawed in all other industries and contexts for transformation; that these are affirmative action measures that have been imposed by (designated) employers under direct pressure from government (what critics often refer to as “government interference”); and that they are also unique in the world of sport. In light of these anomalies as well as the fact that there has, to date, been very little reasoned legal criticism of or legal challenge to the use of sports quotas, it will be considered whether there might exist some special justification for the use of these highly contentious measures in this specific context: Is sport special in some way, in order to justify the use of such a controversial and problematic affirmative action measure?

The final chapter will conclude with a reasoned conclusion on the constitutionality and legality of racial quotas in professional team sports, in both the domestic and international contexts.

CHAPTER 2: THE LEGAL FRAMEWORK OF AFFIRMATIVE ACTION IN SOUTH AFRICA

2 1 Introduction

The principle of equality is a core foundational value of the Constitution of the Republic of South Africa, 1996 ("Constitution").[27] In fact, the supreme law of South Africa says more about equality than any other comparable Constitution, and as such, the importance of equality cannot be over-emphasised.[28] However, this also entails that our quest to achieve equality must occur within the discipline of our Constitution.[29] It is now trite that our interpretation of equality is one of substantive and not formal equality.[30] As Moseneke J stated:

> "[W]hat is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality."[31]

Formal equality does not take into account actual social and economic disparities between groups and individuals,[32] and it does not allow for legislation to be implemented that would discriminate between categories of persons. Treating everyone the same would, therefore, not remedy the past injustices as the previous systematic discrimination would persist. Substantive equality, on the other hand, is an understanding of the historical context of persons, and the systemic discrimination which has affected the human and social development of groups or categories of persons. Therefore, substantive equality requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.[33]

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[27] Section 1(a).

[28] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 24.

[29] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 30.

[30] Para 28: "But, unlike other constitutions, ours was designed to do more than record or confer formal equality."

[31] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 31.

[32] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 213.

[33] 213.

2 2 The fundamental right to equality

Section 9 of the Constitution is the first right listed in the Bill of Rights and protects the right to equality. Section 9(1) guarantees everyone equality before the law. However, as mentioned above, the meaning of equality is not to be understood in the literal sense, as denoting equal treatment for all. Section 9(3) prohibits the state from unfairly discriminating against anyone in any form (on the basis of certain listed grounds of discrimination) and section 9(4), in turn, ensures that the legislature enacts national legislation that will prevent or prohibit unfair discrimination. The equality clause has a dual character which suggests that it must not simply eliminate existing inequalities in society but it must equally retain its character of protecting individuals in society.[34] This is the challenging part of the notion of substantive equality, as some individuals' rights may need to be advanced to the detriment of others. The measures of eliminating existing inequalities are referred to as restitutionary measures or affirmative action measures. These measures are regulated by section 9(2) which encapsulates a transformative dimension and states that:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

Dupper described the constitutional right to equality and the existing labour legislation as having envisioned a two-pronged strategy to achieve substantive equality, by "(i) eliminating existing discrimination, and (ii) implementing a number of positive measures designed to protect and advance those people disadvantaged by past discrimination".[35] It is clear that section 9(2) provides the constitutional basis for affirmative action measures. However, affirmative action measures are not an exception to equality but serve as a means to achieve equality understood in its restitutionary sense.[36] President John F. Kennedy coined the term "affirmative action" in 1961.[37] He meant an affirmative effort to assure equality of opportunity to all

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[34] Rabe *Equality, Affirmative Action, and Justice* 289.

[35] O Dupper "In defence of affirmative action in South Africa" (2004) 121 *SALJ* 187 189.

[36] Currie & De Waal *The Bill of Rights Handbook* 241. See also *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 95.

[37] Executive Order No 10925, dated 6 March 1961.

Americans and to end discrimination against members of groups that had historically been exposed to much discrimination.[38] Various authors have since attempted to define affirmative action: Carol Lee Bacchi defines affirmative action as "a range of programs directed towards targeted groups to redress their inequality".[39] Duncan Innes describes affirmative action as "a set of procedures aimed at proactively addressing the disadvantages experienced by sections of the community in the past".[40] Affirmative action may also be loosely defined as actions or programmes which provide opportunities or other benefits to persons based on their membership of a specific group or groups.[41]

It is no secret that apartheid left a legacy of inequality by favouring certain groups and unfairly discriminating against others. The Constitution, therefore, seeks to dismantle the disparities of the past and through the equality clause (section 9(2)), the legislature is actively placing a positive obligation on the state to develop and protect previously disadvantaged persons through affirmative action measures. This notion is echoed throughout various cases. For example, Ackerman J refers to equality as "remedial or restitutionary equality",[42] while in *Minister of Finance v Van Heerden* ("*Van Heerden*"),[43] Moseneke J stated that:

> "Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality."[44]

This analysis derives from the premise of the Constitution having a transformative mission and allows the state to take steps to eradicate past injustices.[45] Affirmative

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[38] T Weisskopf *Affirmative Action in the United States and India: A comparative perspective* (2004) 3.

[39] C Bacchi *The Politics of Affirmative action: 'Women', Equality and Category politics* (1996) 15.

[40] D Innes; M Kentridge & H Perold *Reversing discrimination: Affirmative action in the workplace* (1993) 4.

[41] Rabe *Equality, Affirmative Action, and Justice* 73.

[42] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

[43] 2004 (6) SA 121 (CC).

[44] Para 32; see also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 76.

[45] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 78.

action may, therefore, be justified by its consequences. In other words, a measure that favours a relatively disadvantaged group at the expense of those who have been previously advantaged would not be deemed discriminatory, provided the consequences of the measure are, in the long run, intended to provide for a more equal society.[46]

The courts, however, still have the power to interrogate whether the measure constitutes a legitimate restitutionary measure within the scope of section 9(2).[47] These guidelines were formulated in *Van Heerden* where the court set out a three-pronged analysis, more commonly referred to as "the *Van Heerden* test". The purpose of the test is to determine whether a measure falls within the ambit of section 9(2). The *Van Heerden* test includes asking whether the measure:

(a) targets persons or categories of persons who have been disadvantaged by past unfair discrimination;
(b) is designed to protect or advance such persons or categories of persons; and
(c) promotes the achievement of equality.[48]

If these remedial measures pass muster under section 9(2), it is not construed as unfair discrimination.[49] If the remedial measure does not pass the test, and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test[50] to determine whether the measure falls within the anti-discrimination prohibition in section 9(3).[51] The court further stated that if "measures are arbitrary,

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[46] Currie & De Waal *The Bill of Rights Handbook* 242.

[47] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 37.

[48] Para 37.

[49] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 36:

"If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3)."

[50] *Harksen v Lane* NO 1998 1 SA 300 (CC) para 53.

[51] Section 9(3) of the EEA:

"The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin,

capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end".[52]

2 3 National legislation: The Employment Equity Act

The EEA is a form of national legislation which gives effect to section 9(2) by promoting the implementation of affirmative action in the workplace. The EEA was passed by Parliament to "address disparities in access to jobs, skills and education".[53] Similarly to section 9, which provides that affirmative action measures are not unfairly discriminatory, section 6(2)(a) of the EEA explicitly states that adopting affirmative action measures "which are consistent with the purpose of the Act"[54] do not amount to unfair discrimination. The Explanatory Memorandum to the Employment Equity Bill,[55] states that the legislation is aimed at advancing those groups who have been disadvantaged as a result of discriminatory laws and social practices.[56] Nevertheless, the purpose of the EEA differs somewhat from the equality clause in the Constitution. The Constitution sets out to promote the achievement of equality and authorises measures which may be taken to assist in achieving equality, while the EEA aims to not only eliminate unfair discrimination and promote equality, but also to ensure "equitable representation" of beneficiaries in the workplace through the

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colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth."

[52] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 41.

[53] U Archibong & O Adejumo "Affirmative Action in South Africa, Are We Creating New Casualties?" (2013) 3 *Journal of Psychological Issues in Organizational Culture* 14 16.

[54] Section 6(2)(a) of the EEA:

"[I]t is not unfair discrimination to – take affirmative action measures consistent with the purpose of the Act."

[55] Explanatory Memorandum to the Employment Equity Bill GN 1840 in *GG* 18481 of 1 December 1997.

[56] Introduction on page 5:

''Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.''.

implementation of affirmative action measures.[57] Moseneke J similarly stated that the purpose of the Act consists of redressing "the effects of past discrimination to achieve a diverse workforce representative of our people."[58] The EEA recognises that, due to apartheid, there are disparities which exist in the employment sector in South Africa that need to be overcome.[59] The Act is therefore understandably more specific in its approach, as set out in section 15(1):

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

However, it is important to note that the Act must still be interpreted in accordance with the Constitution,[60] as the Act not only takes its cue from the Constitution but also gives effect to the protection of the fundamental rights to dignity and equality enshrined in the Constitution.[61]

An affirmative action programme would, therefore, typically require a member of a disadvantaged group to be preferred for the distribution of some benefit over someone who is not a member of that group.[62] Affirmative action measures apply to all designated employers[63] as stated in section 4(2)[64] of the EEA, while beneficiaries of

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[57] Section 2(b):

> "implementing affirmative action measures to redress disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace."

[58] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 40.

[59] M McGregor "Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplace" (2011) 8 *De Jure* 111 117.

[60] Section 3(a) of the EEA:

> "The Act must be interpreted – in compliance with the constitution."

[61] M McGregor "Affirmative action on trial – determining the legitimacy and fair application of remedial measures" (2013) *SALJ* 650 659.

[62] Currie & De Waal *The Bill of Rights Handbook* 241.

[63] Section 1 of the EEA:

> "'designated employer' – means a) an employer who employs 50 or more employees; b) an employer who employs 50 or fewer employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of schedule 4 to this Act."

[64] Section 4(2):

affirmative action are referred to as "suitably qualified"[65] persons from a "designated group".[66] The Act further allows affirmative action measures to make provision for preferential treatment and allows a designated employer to use numerical goals in order to pursue the achievement of equitable representation of persons from designated groups, but it prohibits quotas.[67] The Act, however, is not very clear on the distinction between quotas and numerical goals, but the rigid enforcement of a numerical goal may in fact amount to a quota.[68] This view is supported by various judges, including Zondo J, who stated that in order for a claimant to show that a numerical goal amounts to a quota, "they need to first show that they were rigid."[69] Katz J concludes that "what is impermissible is rigidity – however it is named".[70] Furthermore, Moseneke J stated the following:

> "Let it suffice to observe 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 Act."[71]

Therefore, the implementation of numerical targets and the methods used to enforce them must be examined to determine whether a measure is a target or a quota.[72] The courts' views on the use of quotas will be examined later in this dissertation.

"Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups."

[65] Section 20(3):
"[A] person may be suitably qualified for a job as a result of any one of or any combination of that person's – a) formal qualifications; b) prior learnings; c) relevant experience; or d) a capacity to acquire, within a reasonable time, the ability to do the job."

[66] Section 1:
"'designated groups' means black people, women and people with disabilities; 'Black people' is a generic term which means Africans, Coloureds and Indians."

[67] Section 15(3).

[68] Rabe *Equality, Affirmative Action, and Justice* 376.

[69] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 51.

[70] *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development; In Re: Concerned Insolvency Practitioners Association v Minister of Justice And Constitutional Development* 2015 2 SA 430 (WCC) para 214.

[71] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 54.

[72] Rabe *Equality, Affirmative Action, and Justice* 377.

The EEA prohibits unfair discrimination in section 6. Specifically, section 6(1) provides that no person may unfairly discriminate against an employee on one or more of the listed grounds, which include *inter alia* race, gender, sex and disability. Affirmative action may seem like a form of discrimination, but it is a necessary and allowable form of discrimination, and the courts have consistently confirmed that genuine affirmative action is not unfair discrimination. Furthermore, neither the Constitution nor the EEA prohibit discrimination *per se*, but both prohibit unfair discrimination.[73] Section 6(2) of the EEA permits affirmative action measures that are consistent with the purpose of the Act. As such, Basson et al state that the purpose of affirmative action "overrides the actual means to achieve it – provided … the employer acted rationally in pursuing it".[74]

This raises the question, what is the purpose of the EEA when it comes to affirmative action? Upon a reading of section 2(b), the purpose of the Act, in the context of the application of affirmative action, is ultimately to achieve equitable representation of persons from designated groups.[75] This raises further questions, especially since "equitable representation" is not used in the section 9 equality clause but in reality amounts to one of the central objectives of the EEA, which refers to it as one of its "purposes". It should be borne in mind that the EEA was passed specifically in terms of the constitutional instruction to actively promote "equality", and not necessarily to promote "equitable representation".[76] Therefore, rather strangely, equitable representation is not defined, but section 42 (the assessment of compliance section) does provide some guidance to determine whether designated employers have complied with their affirmative action mandate. The original wording of section 42 of the Act provided the Director-General with a number of factors that "must" be taken into account when determining whether a designated employer has complied with Chapter III of the Act in order to achieve the equitable representation of persons from designated groups. However, section 42 has since been amended and the

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[73] A Basson, M Christianson, A Dekker, C Garbers, P le Roux, C Mischke & E Strydom *Essential Labour Law* 5 ed (2009) 218.

[74] 222.

[75] See ss 2 and 15 of the EEA.

[76] AM Louw ""I am not a number! I am a free man!" The Employment Equity Act, 1998 (And Other Myths about The Pursuit of "Equality", "Equity" and "Dignity" In Post-Apartheid South Africa) Part 1" (2015) 18 *PELJ* 593 610.

wording has changed significantly. It now reads that these factors "may" be taken into account as opposed to "must", which implies that it is optional. Furthermore, a number of factors under section 42(1)(a), which relates to the representation of suitably qualified people from amongst the designated groups, have been removed. These factors included taking into account the pool of suitability qualified people from designated groups from which the employer is expected to appoint or promote; the present and anticipated financial circumstances of the employer; the number of present and planned vacancies which exist, and the relevant economic situation of the employer.[77] Section 42(1)(a) now merely reads as follows:

> "In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:
>
> a) The extent to which suitable qualified people from and amongst the different designated groups are equitably represented within each occupational level in the employer's workforce in relation to the demographic profile of the national and regional economically active population."[78]

No reason was provided for this amendment, but what is certain is that the EEA strives for "equitable representation", and apparently at any cost. Although demographics are important, Cameron J, Froneman J and Majiedt J believe that the EEA also requires a consideration of the operational needs and realities of employers.[79] Employers, therefore, cannot simply rely on a broad and unsophisticated notion of demographic representivity across the whole workforce.[80] The EEA is aware

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[77] Section 42 of the EEA.

[78] Section 42(1) (a) of the EEAA.

[79] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 107. See also Basson et al *Essential Labour Law* 237; *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 54.

[80] Basson et al *Essential Labour Law* 237; See also McGregor (2013) *SALJ* n 147:

> "Solidarity, however, argued that affirmative action was not a bludgeon aimed at halting all promotions of members of over-represented groups until ideal targets were reached: if that were the case, the employment equity plan would constitute a quota system and a perpetual and absolute barrier to the advancement of certain groups inconsistent with the Employment Equity Act. Moreover, affirmative action was not intended to elevate demographics into "dogma" or to eclipse B's rights by putting in place "preordained"

of the need for competency and efficiency in the workplace, and therefore any beneficiary of affirmative action must be suitably qualified.

There remain many unanswered questions about what can only be described as the EEA's apparent obsession with "equitable representation", and the fact that this does not appear to derive from any constitutional provision or objective, which will be addressed in more detail later in this dissertation.

2 3 1 The uncertainty surrounding the standard of review

One of the major uncertainties regarding the application of affirmative action measures under the EEA is the applicable standard of review to determine compliance with the legislative and constitutional framework(s). This may be due to the dearth of case law on the validity and implementation of affirmative action under the EEA, particularly deriving from the Constitutional Court (which has, to date, heard only two cases where the EEA applied to the relevant affirmative action policy). While it is by no means the purpose of this thesis to recommend a standard of review, the uncertainty which is created due to the lack of consensus on the most appropriate standard does require some discussion if one is to critically analyse the application of affirmative action measures. The judicial system has a duty to provide certainty to anyone who is questioning the validity of affirmative action measures, and currently, this uncertainty surrounding the applicable standard of review does not provide that. Therefore, this remains a debate which has not been sufficiently concluded.

The leading case in this regard remains *South African Police Service v Solidarity obo Barnard* ("*Barnard*").[81] As mentioned above, the test for the validity of a measure under the Constitution is found in *Van Heerden,* which is the three-pronged "rationality test". In *Barnard*, Moseneke J interpreted the standard to not only test the rationality of the design of a measure but also to test the implementation of a measure.[82]

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demographic targets: this could suffice only if it were accepted that the proper implementation of affirmative action entailed disregarding "entirely" the rights of members of certain groups to apply and compete for vacant posts until demographic targets were reached and if the national commissioner possessed an "unfettered" authority to decide whether and when exceptions should be allowed."

[81] 2014 6 SA 123 (CC).

[82] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 143:

Moseneke J in the majority judgment found that the rationality standard as recognised in *Van Heerden*, is indeed the accepted standard.[83] However, due to differing opinions in the minority judgments in *Barnard*, the most appropriate standard of review continues to be uncertain. Cameron J, Froneman J and Majiedt J consider the relevant standard to be one of fairness,[84] while Van der Westhuizen J deems a proportionality analysis as the appropriate standard of review.[85] The suggestion of a new standard (different from that set out in *Van Heerden*) may be due to the fact that these judges and several legal commentators do not view rationality as an adequate standard of review. Likewise, the majority of the court in *Barnard* considered the standard of rationality to be the "bare minimum" and stated that these "minimum requirements do not define the standard finally".[86] This opens the door to the possibility of a stricter standard being applied in future. As a result, Rautenbach poses the question whether the judges in *Barnard* clarified or changed the affirmative action requirements as set out under *Van Heerden*.[87] Moseneke J provided some guidance on the constitutional requirements for affirmative action in the *Barnard* case, including formulating measures with "due care not to invade unduly the dignity of all concerned"[88] and being "careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals".[89] The closest the EEA comes to mirroring these points is in section 15(2)(b), which states that measures must be "based on equal dignity and respect for all people", and in section 15(4), which prohibits affirmative action measures which establish absolute barriers to the continued employment or advancement of persons from non-designated groups. However, there remains a

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"The first two prongs test whether the measure itself, in its design, is rationally connected to the end it aims to achieve…The focus of the third prong is somewhat different. It is on the measure, but also on its implementation."

[83] Para 39:

"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…Therefore, implementation of corrective measures must be rational".

[84] Para 76.

[85] Para 165.

[86] Para 39.

[87] IM Rautenbach "Requirements for affirmative action and requirements for the limitation of rights" (2015) *SALJ* 431 432

[88] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 30.

[89] Para 31.

possibility that the EEA sets an additional standard of review to that of section 9(2) of the Constitution,[90] as their purposes appear to be different (whether this is constitutionally permissible, of course, is another question).

The recognition of an adequate and appropriate standard of review is essential because of the tensions which are invariably created by affirmative action measures. On the one hand, the Constitution commits us to recognise and redress the realities of the past, while on the other hand, it is committed to establishing a non-racial, non-sexist and socially inclusive society. Tension also exists between the equality entitlement of an individual and the equality of society as a whole.[91] As a result of these tensions, a more exacting level of scrutiny may be required.[92] The concurring judgments in the *Barnard* case allow for a discussion on the balancing of these rights as it is the foremost judgment in respect of the different standards of review. Two of the minority judgments recognise that because of the nature of the rights involved and the fact that the seriousness of the effects must be taken into account, there will be circumstances where the effects of the measure would not be justified by merely relying on the importance of the purpose.[93] As has been observed, the choice of standard of review determines the degree of justification for governmental action and signifies the judicial sensitivity and commitment to the fundamental constitutional principles of accountability and fairness.[94]

2 3 1 1 The criticised rationality standard of review

McGregor, in a discussion on the legitimacy and application of remedial measures,[95] states that "rationality implies that actions should be endowed with reason, to be sensible, sane, commonsensical and moderate, and not foolish, absurd

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[90] The minority judgment in *Barnard* of Cameron J, Froneman J and Majiedt AJ, by implication suggested that the EEA might call for a specific standard of review – see para 75 – and also expressly – see para 95 in *Barnard*.

[91] Para 77.

[92] Para 95 see also para 96.

[93] Rautenbach (2015) *SALJ* 438.

[94] 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 37.

[95] McGregor (2013) *SALJ* 650-675.

or extreme".[96] Moseneke J in *Van Heerden* stated that if a measure complies with the internal requirements of section 9(2), even if it is based on any of the grounds of discrimination enumerated in section 9(3), it would not constitute discrimination and would not be presumptively unfair.[97] As a result, it would not need to comply with the fairness standard (section 9(3)) or the proportionality standard of section 36.[98] Moseneke J considered it contradictory that our Constitution would authorise measures aimed at redressing past inequalities while simultaneously labelling them presumptively unfair. This would reduce the provisions of section 9(2) to a "mere interpretive aid or surplusage".[99]

The *Van Heerden* "rationality test" is criticised for being restrictive and too deferential in nature.[100] It allows the courts to avoid having to provide reasons for their decisions and so evade the development of a judicial standard which corresponds with the "demands of the principles of openness and accountability, implicit in the section 36 norms of an open and democratic society".[101] Rautenbach argues that the development of an applicable standard needs to take cognisance of the limitation by affirmative action on the rights of those other than the beneficiaries of the measure.[102] McGregor enforces the idea that compared to the alternative potential tests of fairness and proportionality, rationality calls for a lesser degree of accountability and it does not require that the state show a reasoned assessment of competing rights.[103] When considering the majority judgment in *Van Heerden*, the court does mention that some form of balancing needs to be done.[104] Therefore, it may be deemed quite disappointing that the court settles on a low standard such as rationality. Pretorius, in discussing the accountability and understanding of an adequate standard of review,[105] similarly states that:

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[96] 660.

[97] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 33.

[98] Pretorius (2013) *SALJ* 36.

[99] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 33.

[100] Pretorius (2013) *SALJ* 31, see also JL Pretorius "Fairness in transformation: a critique of the constitutional court's affirmative action jurisprudence" (2010) 26 *SAJHR* 536.

[101] Pretorius (2013) *SALJ* 39.

[102] Rautenbach (2015) *SALJ* 439.

[103] McGregor (2013) *SALJ* 656.

[104] Para 44.

[105] Pretorius (2013) *SALJ* 31-44.

> "[T]his reduction of equality to rationality restricts the normative reach of the notion of substantive equality, since it is effectively deprived of the comparative contextual setting necessary to be able to function as an inclusive fairness-based standard for the assessment, evaluation and integration of competing equality claims."[106]

The test is not equipped to deal with situations where there should be a recognition of the validity of competing rights of both the advantaged and the disadvantaged. Respect for the democratic process requires greater, not less, attention to the duty to account and explain.[107] These commentators view rationality as very restrictive in terms of the rational relationship between a given end and the means chosen to achieve it.

2 3 1 2 Fairness as a standard of review

The second standard that has been suggested is that of fairness. Fairness entails actions being "just, equitable, impartial, unbiased, unprejudiced, nonpartisan and even-handed."[108] This standard was raised in the minority judgment by Cameron J, Froneman J and Majiedt AJ in *Barnard*. Cameron J et al state that the EEA "imposes a standard different from, and additional to, rationality."[109] Cameron J et al state that the *Barnard* case was the first case dealing "with the standard to be applied in assessing the lawfulness of the individual implementation of constitutionally compliant restitutionary measures".[110] According to Cameron J et al, this seems to indicate that the affirmative action programme had already passed constitutional muster, and now one would need to test the implementation of the programme against the more specific provisions of the EEA. Therefore, Cameron J et al appeared not only to believe that the standard of review should be that of fairness but also indicated that a standard of review under the EEA is additional to the standard under section 9(2) of the Constitution. Furthermore, Cameron J et al stated:

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[106] 42.

[107] 39.

[108] M McGregor "Affirmative action and the constitutional requirement of 'efficiency' for the public service" (2003) 15 *SA Merc LJ* 82 93.

[109] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 95.

[110] Para 75.

> "It is a cause of action that arises directly from the Act, which prohibits unfair discrimination by an employer against an employee or applicant for employment. This Court's task is therefore to mediate the tension between that prohibition and the Act's recognition that affirmative action measures are justified, and to formulate a suitably robust, constitutionally compliant standard by which to adjudicate Ms Barnard's claim."[111]

The basis for the suggestion of fairness as the appropriate standard is said to be found in the Act, and Cameron J et al set out several factors to support this claim.[112] Considering the purpose of the Act in section 2(b) it is to achieve "*equitable* representation" (my emphasis). Louw defined both "equitable" and "equity" using their ordinary meaning as found in Dictionary.com.[113] "Equitable" is defined as being "characterised by equity or fairness; just and right; fair", while "equity" is defined as the "quality of being fair or impartial; fairness"[114] – fairness being the keyword in both definitions. If the Act centres around equity (since it also forms part of the title of the Act), the Act may impose a standard in addition to the section 9(2) standard. Therefore, the EEA attempts to achieve equitable representation in the workforce and it will then make sense to have a standard of fairness. Cameron et al further sum up the possibility of an additional standard by stating that:

> "Assessing the fairness of the individual implementation of affirmative action measures is different to deciding whether those measures amount to unfair discrimination. The latter enquiry is at the general level of determining whether the formulation and content of a restitutionary measure are constitutionally compliant. The former enquiry examines whether a specific implementation of a measure that is constitutionally compliant in its general form is nevertheless in conflict with the provisions of the Act. We must insist that the specific implementation as well as the general formulation of remedial measures be fair."[115]

This not only suggests that an additional standard may exist separate from that of the rationality standard under *Van Heerden*, but it also implies that the legislature has

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[111] Para 82.

[112] Para 87-98.

[113] Louw (2015) *PELJ* 638.

[114] 638.

[115] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 101.

potentially opted to set a different standard under the Act, which may be the standard of fairness.

Furthermore, the judges acknowledged that the EEA does not determine when a restitutionary measure is permitted, but it does provide clues.[116] One of the important clues identified is that the Act insists on affirmative action which is "based on equal dignity and respect of all people".[117] Dignity is recognised as a fundamentally important right and an underlying value which needs to be taken into consideration when the Act is being interpreted. Affirmative action measures advancing previously disadvantaged persons may mark the promotion of equal dignity for all, while those negatively affected by such measures may find their dignity undermined. It is clear that according to Cameron J et al, dignity must be taken into account and thus balancing of the different rights is fundamental to the fairness test. As stated in *S v Makwanyane*,[118] the balancing process entails an assessment of:

> "The nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society."[119]

Cameron J et al state that the test should be applied when "making a decision that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by section 9(3) of the Constitution".[120] Cameron J et al further assert that, unlike rationality, the fairness standard would allow the court to "interrogate properly a decision-maker's balancing of the multiple designated groups, or of their interests against those adversely affected by the restitutionary measures".[121]

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[116] Para 87; see also s 15 of the EEA.

[117] Section 15(2)(b). See also *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 87-88:

> "First, it makes plain that the Act does not sanction affirmative action measures that are overly rigid … the Act does not countenance employment decisions "that would establish an absolute barrier" to the employment or advancement of those not from designated groups … In addition, the Act aims to advance several different "designated groups"".

[118] 1995 3 SA 391 (CC).

[119] Para 104.

[120] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 96.

[121] Para 96.

McGregor believes that it is in this manner that the fairness test provides for a wider scope of inclusive adjudicative reasoning and coming to a balance.[122]

However, the standard of fairness does not go without its share of detractors. The judges themselves raise a couple of objections to the fairness standard. Firstly, they state that it may be too vague, but they believe it will become more certain as precedent builds up.[123] Secondly, it may be internally inconsistent where the resitutionary measure has already passed constitutional muster and thus does not constitute unfair discrimination.[124] Van der Westhuizen J agreed with both these objections. He states that fairness is too vague and may not be applicable in this context when dealing with measures under section 9(2).[125] However, fairness as a standard under section 9(2) likewise receives criticism, as Mokgoro J in *Van Heerden* stated that the main focus of section 9(2) is "on the group advanced and the mechanism used to advance it."[126] Measures should, therefore, be assessed from the perspective of the goal intended to be advanced.[127] Pretorius opines that fairness would, therefore, be out of place, as undue attention would be paid to those persons disadvantaged by the measure.[128] However, Mokgoro J's interpretation could be contested as we cannot apply these measures blindly and completely ignore third parties.[129] If Cameron J et al are believed to be correct, namely that there exists a separate standard under the EEA, then the comments by Mokgoro J would not be applicable under these circumstances, as these concerns are specific to the standard of review under section 9(2) and not the EEA (which Act did not apply to the case before the court in *Van Heerden*).

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[122] McGregor (2013) *SALJ* 657.

[123] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 99.

[124] Para 99.

[125] Para 159.

[126] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 78. It must be noted that Mokgoro J did recognise that even though the focus is on the group advanced, the interests of those not advanced should not be disregarded.

[127] Para 78.

[128] Pretorius (2013) *SALJ* 42.

[129] See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 30-32.

2 3 1 3 Proportionality analysis

The third standard of review that has been suggested is that of a proportionality analysis. Van der Westhuizen J in *Barnard* suggested that the section 36 limitation analysis should be used, and therefore a proportionality standard. But Van der Westhuizen J was of the view that while the implementation of affirmative action measures by an employer is not a limitation of rights by the means of law of general application, "this formula helps with the task of measuring the impact of the enforcement of one right on another".[130] However, Rautenbach disagrees and feels that section 36 also includes conduct in furtherance of or in terms of legislation like the EEA.[131] Furthermore, the limitation analysis is an important part of constitutional democracy and it involves the weighing up and balancing of competing values in the context of the Constitution as a whole.[132] As a result, proportionality analysis focuses on whether state action can be justified in a liberal democracy.[133] Therefore, Van der Westhuizen J states that:

> "[I]nterpreting the ambit and nature of a right restrictively so as to mask the reality that courts are compelled to make difficult choices, the appropriate route is often to interpret rights holistically and robustly and then consider whether intrusions into those rights are reasonable and justifiable in a democracy."[134]

This requires courts to engage in a balancing exercise and not merely to adhere to a checklist as affirmative action measures may influence a number of interests and

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[130] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 164.

[131] Rautenbach (2015) *SALJ* 436:

"Van der Westhuizen J said that to the extent that other rights could be affected in this case, the general limitation clause in section 36 would not be directly applicable "because it [section 36] deals with the limitation of rights by 'law of general application'" (para 162; emphasis added). This statement is incorrect. The general limitation clause in the interim constitution referred to limitation "by" law of general application (s 33 of the Constitution of the Republic of South Africa 200 of 1993), but this was deliberately changed in the final constitution to "in terms of" law of general application. The effect of this change is that every limitation must be authorised by law of general application and not that the general limitation clause cannot be applied to other forms of limiting action."

See also, Currie & De Waal *The Bill of Rights Handbook* 152 and 155-160.

[132] McGregor (2013) *SALJ* 653.

[133] Pretorius (2013) *SALJ* 38.

[134] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 164.

rights of the parties involved, as well as of greater society. Pretorius states that proportionality analysis is "essentially about the assessment of reasons."[135] The requirement of a legitimate aim for state action ensures that the proportionality test facilitates a discussion and contestation of the kind of grounds that can be legitimately invoked in justification of the restriction of fundamental rights.[136]

Rautenbach, in a discussion on the requirements for affirmative action,[137] commends Van der Westhuizen J for identifying a standard which includes principles of the section 36 limitation analysis.[138] However, he states that it cannot merely be done through an exercise of indirect application. Rautenbach states that the appropriate requirements for affirmative action cannot avoid dealing with limitation by affirmative action of the rights of those people who are not the beneficiaries of the measure.[139] The majority judgment in *Van Heerden* similarly recognised that there must not be "substantial and undue harm on those excluded from its benefits".[140] This may indicate that there may be scope to use the requirements which are applied under the general limitations analysis. Van der Westhuizen J, when applying "proportionality analysis", applied provisions of the section 36 limitation clause after initially claiming that it would not be applicable.[141] The Constitution commits itself to a standard which requires all rights-limiting action to be "reasonable and justifiable in an open democratic society based on human dignity, equality and freedom".[142] Therefore, we have a right-limiting standard in our Constitution. It would seem to be unintuitive to not use this standard of review when rights are limited, as may very well be the case for non-beneficiaries in the application of affirmative action.

Furthermore, proportionality analysis filters out the burden on those detrimentally affected by governmental action by ensuring that such measures must also be the result of "a judicious discernment of the facts as they relate to the government

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[135] Pretorius (2013) *SALJ* 31.

[136] 39.

[137] Rautenbach (2015) *SALJ* 431-443.

[138] 438.

[139] 439.

[140] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 44.

[141] See *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 181-182 and paras 184-189.

[142] Section 36(1).

measures and weighing the competing concerns in a contextually sensitive way."[143] Apart from acting like a filter, proportionality also "counters a lack of serious engagement with the realities to which the law applies".[144] Therefore, proportionality requires more than a good reason for state measures in the abstract. More practically, Rautenbach believes that some provisions of the EEA, such as section 15(4), give effect to constitutional proportionality principles. Section 15(4) states that an absolute barrier to the prospective or continued employment of non-designated groups is not permissible. This would mean that the "nature and effect of limitations by affirmative action of the right to trade, occupation and profession of non-designated groups that amount to 'barring' them from employ[ment] outweigh the importance of the purpose of the limitation".[145]

2 4 Conclusion

Due to the systematic unfair discrimination of the past, the South African Constitution is transformative in nature. The right to equality is, therefore, one of the foundational principles and it aims to achieve substantive equality. It is well known that restitutionary measures are not an exception to equality and that it is necessary to achieve substantive equality. The *Van Heerden* test is currently still the accepted standard of review for restitutionary measures to pass constitutional muster. However, the *Barnard* case has created uncertainty regarding the appropriate constitutional standard of review for affirmative action measures, generally, and for such measures implemented under the EEA, more specifically. This may be due to the fact that the EEA has a different aim and objective for the application of affirmative action to that of the Constitution, even though the EEA is a form of national legislation which was enacted to give effect to section 9(2) of the Constitution, in terms of section 9(4) (and the fact that the Act must be interpreted in compliance with the Constitution). The EEA itself must not only comply with the Constitution but the quest to achieve equality must occur within the discipline of the Constitution.

There is a great debate about the most suitable standard of review for affirmative action measures. An appropriate standard of review would go a long way towards

[143] 39.

[144] 39.

[145] Rautenbach (2015) *SALJ* 440.

providing a framework that would permit our constitutional goals to be read harmoniously. The discussion surrounding the standard of review is important because the standard will ensure that affirmative action measures which are implemented do not unduly infringe the dignity of others. Further, an adequate standard will assist the courts in identifying the use of quotas (which are prohibited under the EEA) when they are disguised as targets. However, the standard of review cannot be inappropriately high (like that of the strict scrutiny approach in the United States), as an inappropriately high standard would impede our constitutional objectives, something that the majority in *Van Heerden* pertinently warned against. What is clear is that the standard should be rigorous enough to ensure that the implementation of an affirmative action measure under the EEA is consistent with not only the purposes of the Act but also the constitutional requirements.[146] As was illustrated, the EEA takes its cue from section 9(2) of the Constitution. This would, therefore, entail balancing the interests of the various designated groups as well as avoiding undue harm on those excluded from its benefits that would result in our long-term constitutional goal being threatened.[147] The general consensus (at least amongst academic commentators) is that rationality does not provide this, as rationality is too deferential. Compared to a fairness or proportionality inquiry, rationality does not require a high degree of democratic accountability concerning rights-limiting measures and it does not demand an explanation for the disproportional or unfair invasion of rights.[148] As a result of the competing fundamental rights claims and public interests that are invariably involved in affirmative action disputes, rationality would be deemed to be too low a hurdle to be used to adequately test the legality of affirmative action measures.[149]

It is believed that rationality gives far too much attention to the aim or objective of affirmative action measures, as this is deemed to be the primary component of the standard.[150] This low standard would mean that by merely calling something an

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[146] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 97; refer also to s 15(4) of the EEA.

[147] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 44. See also *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 148.

[148] Pretorius (2013) *SALJ* 40.

[149] 44: McGregor (2013) *SALJ* 656.

[150] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 78.

affirmative action measure, you would be able to show it is rational if it is only aimed at advancing the designated group. The stricter standards of fairness and proportionality are said to be required to give effect to the constitutional principles of accountability, openness and inclusivity. Under the proportionality analysis, the aim of a measure is but one of the factors that must be taken into account.

The idea posed by Cameron J et al that there may exist a separate and additional standard under the EEA must also be given due consideration. It is a valid proposition when one considers the fact that the EEA and section 9(2) have two seemingly different purposes (although, as mentioned earlier, it remains questionable whether it is constitutionally permissible for the EEA to depart from the purpose of affirmative action as stipulated in section 9(2) of the Bill of Rights).

The current understanding is that the *Van Heerden* test still determines the constitutionality of an affirmative action programme or measure. That does not imply that the standard to test the individual "implementation" of that programme should also be that of rationality. However, despite the differing opinions regarding the most appropriate test, what is certain is that affirmative action under the EEA aims to achieve an equitable level of representation of beneficiaries and equality of opportunity in the workplace. The judiciary requires that both the measure and the implementation of such measure must be lawful and proper, but it seems that the confusion mainly exists under which standard of review the implementation must be tested. As a result of this uncertainty, one has to question how this would impact future affirmative action cases, especially those that may present in the context of sports (transformation), as we will see that affirmative action is becoming more and more synonymous with the pursuit of the achievement of demographic representivity. Nevertheless, the current internal requirements of section 9(2) remain the only constitutional hurdle which affirmative action measures need to overcome.

CHAPTER 3: THE ROLE OF THE EMPLOYMENT EQUITY ACT IN RACE-BASED SPORTS TRANSFORMATION

3 1 Introduction

Chapter 2 above set out the legal framework of the EEA in the context of affirmative action under the Constitution, and the next step is to not only determine whether Chapter III of the EEA applies to professional athletes in sports teams, but also what constitutes a quota in the context of affirmative action. Furthermore, the discussion will delve deeper into the true purpose of the EEA and how that creates grey areas in the law of affirmative action.

3 2 The Applicability of the Employment Equity Act in the professional sports context

For the EEA to be applicable in this context, it needs to be demonstrated that professional athletes in team sports in South Africa are "employees" as defined by the Act. The EEA, Labour Relations Act 66 of 1995 ("LRA") and Basic Conditions of Employment Act 75 of 1997 ("BCEA") all define an employee in similar terms:

> "[E]mployee means any person other than an independent contractor who –
> (a) works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
> (b) in any manner assists in carrying on or conducting the business of an employer."[151]

The courts have likewise formulated a number of tests to distinguish between an employee and an independent contractor. The first of these tests is the control test. The control test was formulated in *Colonial Mutual Life Assurance Society Ltd v Macdonald*,[152] and it is argued that the right to control is more extensive in the

[151] Section 1 of the EEA; see also s 1 of the BCEA and s 213 of the LRA.

[152] 1931 AD 412 (at 434-435):
"one thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence if the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workplace what work has to be done, but also the manner in which such work has to be done".

employment contract than in an agency contract.[153] The second test is the organisation test. The organisation test was summarised in the case of *SABC v McKenzie*,[154] in which the Labour Appeal Court stated:

> "The second [test] is the organisation test: a person is an employee if he is "part and parcel of the organisation"…, whereas the work of an independent contractor "although done for the business, is not integrated into it but is only accessory to it"."[155]

Basson et al summarise the position by stating that "if a person is incorporated or related sufficiently to the organisation of the employer that person will be regarded as an employee or worker even though the employer might exercise little actual control".[156] The final test is the dominant impression test. This test is often the standard test employed by our courts and it uses several factors to ascertain whether or not the contract in question is a contract of service.[157]

However more recently the case of *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[158] stated that three primary criteria exist to determine the existence of an employment relationship. These criteria are the "employer's right to supervision and control, whether the employee forms an integral part of the organisation with the employer and the extent to which the employee was economically dependent on the employer".[159]

Furthermore, a more recent test has emerged, which is referred to as the reality test. In *Denel (Pty) Ltd v Gerber*[160] the court stated that "whether or not a person is or was an employee of another is a question that must be decided on the basis of realities – on the basis of substance and not form or labels".[161] The case of *Uber SA*

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[153] Basson et al *Essential Labour Law* (2009) 26.

[154] 1999 1 BLLR 1 (LAC).

[155] Para 5.

[156] Basson et al *Essential Labour Law* (2009) 27.

[157] 27: These factors would include the following: The right to supervision, the extent to which the worker depends on the employer in the performance of his duties, whether the employer is allowed to work for another, whether the worker is paid according to a fixed rate or by commission.

[158] 2008 29 ILJ 2234 (LAC).

[159] Para 12.

[160] 2005 26 ILJ 1256 (LAC).

[161] Para 22.

Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers[162] stated that:

> "[T]he 'reality test' is no more than the assertion that where parties have concluded an agreement to structure the relationship between [them] in a particular form, that does not preclude the court from enquiring into the substance of the arrangement and to determine that despite the terms of the contract, an employment relationship exists when one in fact exists … It is no more than a measure to be applied to combat disguised employment relationships where contractual arrangements between the parties serve to conceal what is in truth an employment relationship, and thus deprive an employee of the statutory protection that is his or her due."[163]

The court, however, found that the dominant impression test remains intact and that the reality test "was used to combat bogus arrangements designed to conceal true employment relationships".[164]

Section 200A of the LRA also provides for a presumption which provides guidelines when someone is an employee (applicable to workers earning under the earnings threshold set in the Act). The effect of this presumption is that if one or more of the listed factors is present, the person is rebuttably presumed to be an employee. Section 200A (1) states:

> "Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
> (a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or direction of another person
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> (e) the person is economically dependent on the other person for whom he or she works or renders services;
> (f) the person is provided with tools of trade or work equipment by the other person; or

[162] 2018 39 ILJ 903 (LC).

[163] Para 75.

[164] J Grogan, P Maserumule, A Govindjee "Juta's Annual Labour Law Update 2018" (2018) *Juta* 14-15.

(g) the person only works for or renders services to one person."[165]

This provision virtually summarises the principles laid down by the courts.

Mould states that it is clear that when considering the above factors, "professional sportsmen and sportswomen can be classified as 'employees' governed by 'contracts of employment'".[166] When you take into consideration the relationship between a professional sportsperson and their employer and apply it against the aforementioned legislative definition of an employee, the tests under the common law and the factors included in the legislative presumption, professional sportspersons would be classified as employees. Therefore, the question of whether professional athletes in team sporting codes are employees as opposed to independent contractors is no longer contested.[167] This position is further endorsed by the fact that disputes involving professional sportspersons and their employers are being adjudicated by the Commission for Conciliation, Mediation and Arbitration ("CCMA") and Labour Courts, which focus on legal rules and principles which govern employer-employee relationships. In the case of *SA Rugby Players Association on behalf of Bands v SA Rugby (Pty) Ltd* (*Bands*),[168] which centred around an unfair dismissal dispute of three rugby players, it was confirmed that professional rugby players are covered by the labour legislation of South Africa:

> "Our labour courts have established the principle that equity and fairness are paramount to the employment relationship. Irrespective of whether employees are factory workers or professional rugby players they have a right to be treated fairly. This principle is also enshrined in our Constitution."[169]

The South African Rugby Players Association (SARPA) CEO, Piet Heymans, commented on the judgment saying:

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[165] Section 200A (1) of the LRA.

[166] K Mould *"The Suitability of the Remedy of Specific Performance to Breach of a "Player's Contract" With Specific Reference To The Mapoe And Santos Cases*" (2011) 4 *PER* 189 192.

[167] S Smailes *"Sports Law and Labour Law in the Age of (Rugby) Professionalism: Collective Power, Collective Strength"* (2007) 28 *ILJ* 57 59.

[168] 2005 26 ILJ 176 (CCMA).

[169] Para 1.2.

> "It also confirms that professional rugby players are covered by the labour laws of South Africa and that despite the sometimes unique employment environment, all labour-law principles are applicable when dealing with professional rugby players."[170]

In *Cronje v United Cricket Board of SA*,[171] it was further stated that:

> "The respondent [the then United Cricket Board of South Africa] contracts players to play international cricket. The relationship with the contracted players is a direct employer-employee relationship and is governed by the terms of their contracts of employment."[172]

Sport is a specialist endeavour and the employment contracts for professional sportspersons differ somewhat, and sometimes significantly, from other contracts of employment. These unique features include the fact that the contract is for a fixed period, or it may include clauses pertaining to the physical condition and fitness of the athlete.[173] The courts have recognised these differences and in *McCarthy v Sundowns Football Club* the court stated the following:

> "[T]he employment contract of professional footballers differs substantially from the contracts of other employees. In particular, a professional footballer cannot resign during the period of his contract of employment and take up employment with another club without the agreement of his old club. If a professional footballer leaves a club after the period of his contract of employment, he cannot begin playing for another club unless and until he is provided with a clearance certificate."

Despite the *sui generis* employment relationship which sport creates, labour law and the labour legislation apply to these relationships.

Having determined that professional athletes in team sports are "employees" and thus covered by the labour legislation, the next question is whether national sports governing bodies such as SARU, Cricket South Africa ("CSA") or provincial unions and franchises are "designated employers" for purposes of affirmative action measures

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[170] J Van Der Westhuyzen "Landmark victory for Straeuli's Boks" (10-12-2004) *IOL* <https://www.iol.co.za/capeargus/sport/landmark-victory-for-straeulis-boks-540466> (accessed 02-11-2020).

[171] 2001 4 SA 1361 (T).

[172] 1367J: see also *McCarthy v Sundowns Football Club* 2003 2 BLLR 193 (LC) and *Santos Professional Football Club (Pty) Ltd v Igesund* 2002 23 ILJ 405.

[173] Smailes (2007) *ILJ* 60.

under the EEA. It is these designated employers who are tasked with implementing affirmative action measures in terms of the Act. A designated employer is defined as:

> "a) an employer who employs 50 or more employees;
> b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 to this Act".[174]

It is clear from the annual reports of both SARU and CSA that not only do their annual turnovers exceed the annual turnovers of a small business in terms of Schedule 4 of the EEA,[175] but they also employ 50 or more employees.[176] These sports bodies and their members are responsible for not only the employment of the various players in the national teams but also their administrative structures, team selections and management sectors.[177] Furthermore, the Solidarity trade union has submitted an affidavit to the Labour Court in which the trade union argued convincingly that the various sports bodies such as SARU and CSA, to name just two, are in fact "designated employers" in terms of section 1 of the EEA.[178]

3 3 The mystery of targets and quotas

It is now clear that the EEA applies to professional athletes in team sports and that their employers generally qualify as "designated employers" for the purposes of the affirmative action chapter. As a result, the applicability of the use of racial quota

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[174] Section 1 of the EEA; Note that the Employment Equity Amendment Bill in GG 43535 of 20 July 2020 which was tabled in Parliament aims to repeal schedule 4 in the principal Act.

[175] Schedule 4 of the EEA states that the annual turnover threshold for community, special and personal services amounts to R15million.

[176] South African Rugby Union *SA Rugby Annual Report 2017* 49 and *Cricket South Africa Integrated Report 2017/*2018 23-25.

[177] AM Louw "'Should the Playing Fields be Levelled?' Revisiting Affirmative Action in Professional Sport – Part 1: The Background and the Context" (2004) 15 *Stell LR* 135, stated that these sports bodies must undoubtedly be designated employers. Furthermore, that each of these bodies not only employ more than 50 persons, they also have substantial annual turnovers well in excess of the statutory limit for small businesses set in Schedule 4 of the Act as mentioned above.

[178] *Solidarity v South African Rugby Union* LC Founding Affidavit 18.2 <https://cdn.24.co.za/files/Cms/General/d/5205/9b29b0cb5acb4bcf9c00a885d30b67e5.pdf> (accessed 16-11-2020).

systems in the implementation of affirmative action measures should come under scrutiny. As identified, racial quotas may amount to job reservation, and it appears to be implemented in professional sports teams to speed up transformation. This view corresponds with what the former Minister of Sport and Recreation stated:

> "If it was not for a barbaric nonsensical apartheid system that privileged them, we could not have implemented quota system to normalise an otherwise abnormal system."[179]

The use of racial quotas results in previously disadvantaged members of society having reserved positions in the workplace or, in this instance, in professional sports teams. This contrasts with the affirmative action provisions in the EEA, which provide for preferential treatment for persons from designated groups in the workplace as opposed to the use of quotas. This results in complete and apparently blatant, systemic disregard for section 15(3) of the EEA, which explicitly prohibits the use of quotas (which prohibition was approved of by Moseneke SCJ in *Barnard* (CC) on the grounds that "quotas amount to job reservation") in the professional sports industry.[180] The use of racial quotas in the composition of professional sports teams would, therefore, appear to amount to an atypical form of affirmative action, and one which, at least at first glance, appears to offend directly against the provisions of the Act as well as the judicial conception of what constitutes constitutionally permissible affirmative action.

Having sketched the applicable law, it is clear that in terms of the EEA numerical targets or goals are allowed but quotas are explicitly prohibited. The term "quota" has not specifically been defined by various judges in recent cases, but it is rather frequently compared and contrasted to that of a numerical target, as will be illustrated later. Dictionary.com defines a quota as "a proportional part or share of a fixed total amount or quantity".[181] It essentially translates into an allotment or an allocation of a specific amount. The difference between numerical targets and quotas would need to

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[179] J Gerber "Sports Minister stands by her statement on Willemse on-air incident" (22-05-2018) *News24* <https://www.news24.com/SouthAfrica/News/sports-minister-stands-by-her-statement-on-willemse-on-air-incident-20180522> (accessed 02-11-2020).

[180] 2014 6 SA 123 (CC) para 54.

[181] Dictionary.com <https://www.dictionary.com/browse/quota?s=t> (accessed 02-11-2020).

be established as it is clear that quotas are prohibited while numerical targets and goals are permitted, and their use indeed encouraged under the EEA.

3 3 1 The difference between numerical targets and quotas

It may seem easy to define quotas or numerical targets in the context of affirmative action, yet neither the EEA nor several judges who adjudicated matters in this regard have expressly defined these terms.[182] However, in some cases, judges have attempted to set out what would make a measure qualify as a numerical target as opposed to a quota. Moseneke J states that "the primary distinction between numerical targets and quotas lies in the flexibility of the standard".[183] Nugent J similarly stated that the only way to avoid unduly infringing another person's dignity is by allowing for flexibility in the application of an affirmative action measure.[184] In the case of *Solidarity v Department of Correctional Services* (*Correctional Services*),[185] the majority of the court stated that numerical targets that envisage designated groups filling specified percentages of the workforce, but which allow for deviations, are legally permissible.[186] 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* ("*SARIPA*"),[187] Katz J stated the following:

> "[S]ome flexibility of approach is required. This is expressly articulated by Cameron J, Froneman J and Majiedt AJ in stating that 'over-rigidity … risks disadvantaging not only those who are not selected for a job, but also those who are'. This is because it can create the impression that appointments are due only to race and exclusive of merit. Further, when considering implementation of a measure 'a decision-maker cannot simply apply the numerical targets by rote'."[188]

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[182] See *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 42.
[183] Para 54.
[184] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 117.
[185] 2015 36 *ILJ* 1848 (LAC).
[186] Para 41.
[187] 2015 2 SA 430 (WCC).
[188] Para 205.

Thlothlalemaje J provided the most comprehensive evaluation of the use of quotas by including various judges and legal commentators' remarks on the difference between a quota and a numerical goal or target, which will be quoted extensively here:

> "The terms *'quota'* and *'numerical goals'* found elucidation in *Munsamy v The Minister of Safety and Security.* Katz AJ in *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and constitutional Development and Others; In Re: Concerned Insolvency Practitioners Association NPC and Others v Minister of Justice and Constitutional Development and Others ("SARIPA")* explored further meaning to the terms and held that:
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> *"Some guidance as to the distinction between targets and quotas can be obtained from American jurisprudence. In Local 28, Sheet Metal Workers' International Association v EEOC, quotas and targets were distinguished as follows:*
>
> *'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.'*
>
> *In the South African context, Klinck & Ngwena state:*
>
> *'"Quotas" refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups. This may be achieved through the setting aside of a specific number of positions for designated groups or by making designated group status the only or dominant criterion for eligibility for employment opportunities.'*
>
> *According to Andre M Louw, quotas in the employment equity context are 'mandatory and represent a fixed number to be achieved, apparently at any cost', whilst targets are non-mandatory guidelines to achieve representation from designated groups in the workforce. Further, he argues that application of quotas is 'generally divorced from reality and the circumstances of the specific situation in which they are applied'. Louw argues that a target or numerical goal established in an Employment Equity Plan will only be legitimate if regard is had to the factors listed in s 42 of the Employment Equity Act. An element of such goal-setting is that it must be realistic in context.*
>
> *What is clear, is that what is impermissible is rigidity – however it is named*." (Citations and references omitted)

> The drafters of the EEA were careful to use the word *"numerical goals"* rather than *"quotas"*. The difference in the use of these terms is not semantic, and flowing from the distinction made in *Barnard* and other authorities referred to above, it is useful to add that *"numerical goals"* or *"targets"* within the context of employment equity plans are often voluntarily agreed between parties to set objectives and guidelines. Parties by agreement can adjust these numerical goals, and the EEA does not make provision for parties to be sanctioned when they do not meet those numerical goals. To the extent that it might be argued that Schedule 1 of section 65 of the EEA imposes fines in the event of its contravention, these fines are in respect of specific contraventions identified in the Schedule, being sections 16, 19, 20, 21, 22 and 23 of the EEA. None of these provisions, however, speak of *"quotas"*.
>
> "'*Quotas'* on the other hand 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. They denote a *limitation*; a *fixed amount; or a maximum* of something related to a number, quantity, share, allocation or value, which an individual, individual group or entity is permitted or entitled to. 'Quotas' are an end in themselves, as they do not permit flexibility unless there is a change to the tool that enforces them.
>
> 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 constitutional test as stated in *Van Heerden* and *Barnard*."(Citations and references omitted)[189]

Therefore, quotas can be described as rigid, a fixed number or percentage which must be attained, and a reservation of places, and quotas do not permit flexibility. The most common characteristic seems to be that quotas do not allow deviation or some sort of flexibility in their (by definition, rigid) application. However, Nugent AJ states that the fact that a plan makes provision for a deviation is not enough to determine whether it is a quota system or not. Nugent AJ stated, on the facts of the *Correctional*

[189] *Solidarity v SA Police Services* 2015 7 BLLR 708 (LC) paras 51-54

Services case, that one should not enquire "whether there are special cases that are excepted from the Plan, but instead whether there is scope for flexibility when the Plan is applied to non-excepted posts".[190] Nugent AJ concurs with Moseneke J, that numerical targets should be understood as guidelines and therefore it allows for a scope of deviation in their application.[191] The discretion is important to avoid unduly infringing the dignity of the applicants of all posts,[192] and without such a discretion, an absolute barrier to employment would exist and the targets would, therefore, be construed as a quota.[193] According to Pretorius the "distinction between acceptable numerical targets and unacceptable quotas or absolute barriers must not be reduced to the definitional element of whether or not an authorisation exists to deviate from the prescribed targets as such".[194] Pretorius explains it as follows:

> "Therefore, the 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 [the *Correctional Services* case] 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.'). 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."[195]

Louw agrees that the definitional approach lacks constitutional legitimacy as it loses sight of the "wording of the first sentence in section 9(2) of the Bill of Rights, which

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[190] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 113.

[191] Para 117.

[192] Para 117.

[193] 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* 269 278.

[194] 280.

[195] 281.

calls for recognition of substantive equality embracing the 'full and equal enjoyment of all rights and freedoms'".[196]

However, the exercise of determining the existence of quotas is not limited to whether flexibility exists, as it is also suggested that if sanctions are imposed for not meeting a target, it amounts to a quota. On more than one occasion the former Minister of Sport, Fikile Mbalula, had threatened to punish federations for not meeting their transformation "targets". In April 2016 he revoked the privileges of CSA, Athletics South Africa ("ASA"), the SARU and Netball South Africa ("NSA") from bidding to stage and host major international events as a result of their perceived failure to meet their "own" transformation targets.[197] The Minister does not have the power to intervene in team selections, as stated in section 13(5)(b)(ii) of the National Sports and Recreation Act 110 of 1996 ("NSRA").[198] The targets by the unions were not met, and the Minister proceeded to penalise the unions. Innes too described a quota as something which is externally imposed,[199] and the case above would appear to be a perfect example of the Minister imposing a sanction on the different sports bodies. This would appear to make a nonsense of the nature of these "targets" of the federations; at least, the imposition by government of a sanction for failing to meet such targets would appear to show that they may be nothing other than quotas.

3 3 2 The courts' views on quotas

The EEA states that quotas are prohibited, therefore it is only logical that the courts should stand by this prohibition. This has been the case in various judgments. Judges have openly stated their stance against the use of quotas in affirmative action measures. The Constitutional Court in *Barnard* accepted that the EEA does not allow

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[196] AM Louw "'Affirmative' (measures in) action? Revising the lawfulness of racial quotas (in South African (professional team) sports)" (2019) *De Jure* 389 380-414.

[197] African News Agency "Mbalula bans Saru, CSA, ASA and Netball SA from hosting world events" (25-04-2016) *ENCA* <https://www.enca.com/sport/mbalula-bans-rugby-cricket-hosting-major-world-events> (accessed 02-11-2020).

[198] Section 13(5)(b)(ii):

> "The Minister may not- interfere in the matters relating to the selection of teams, administration of sport and appointment of, or termination of the services of, the executive members of the sport or recreation body."

[199] D Innes, M Kentridge, H Perold & Innes Labour Brief: *Reversing discrimination: affirmative action in the workplace* (1993) 17.

for the enforcement of quotas, but did allow for numerical targets in the implementation of employment equity plans, and as such the implementation of quotas would be impermissible.[200] In *Van Heerden*, it is stated that measures should not be "arbitrary, capricious or display naked preference".[201] If measures do display these characteristics, it would not achieve its constitutionally authorised end. In *Minister of Justice v The South African Restructuring & Insolvency Practitioners Association* ("*SARIPA II*"),[202] Mathopo JA, Mpati P, Wallis, Swain and Van der Merwe JJA agreed with this view and stated that implementing a measure in that manner would amount to a quota system.[203]

In *SARIPA*, the court recognised that a rigid approach cannot be sensitive to the achievement of substantive equality, whether that is in the context of employment or in a broader setting,[204] and as such would not pass muster under section 9(2) of the Constitution.[205] Quotas create an absolute barrier to the future or continued employment of persons from non-designated groups,[206] which infringes on their

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[200] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 42; see also para 87:

> "the Act does not sanction affirmative action measures that are overly rigid … this is because affirmative action measures "include preferential treatment and numerical goals, but exclude quotas".

[201] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 41.

[202] 2018 5 SA 349 (CC).

[203] *Minister of Justice v The South African Restructuring & Insolvency Practitioners Association* 2018 5 SA 349 (CC) para 32:

> "[R]emedial measures must not, however, 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."

[204] *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 2 SA 430 (WCC) para 208.

[205] Para 217.

[206] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 42.

section 22 constitutional right to pursue their choice of career, trade and profession.[207] But that is not the only potential infringement that may be at stake when a quota is applied. In *SARIPA II* the court stated that such remedial measures must not trump the rights of previously advantaged persons. Katz J stated that when using quotas, it harms the core values and right to dignity as a result of "a measure which elevates race and gender as absolute categories without any regard to individual characteristics or the context in which appointments must take place."[208] Tlhotlhalemaje J further stated that quotas are not only "inherently and irrationally discriminatory, they are also demeaning in implementation in that they fail to acknowledge an individual's worth".[209]

Despite all of this, quotas remain a common theme in the application of affirmative action measures in sport. Even though we have Ministers past and present saying that it is necessary, it is prohibited in the EEA for good reasons, and reasons endorsed by various judges. Quotas would infringe on the core rights of those individuals who do not form part of the previously disadvantaged groups in society, the non-beneficiaries of team selection or the contest for franchise contracts in the relevant sporting code.

In chapter 2 above it was identified that equitable representation is one of the key objectives of the EEA, and it would, therefore, be interesting to understand the relationship between equitable representation and the use of quotas. It is important to note that the EEA endorses (in fact, prescribes) equitable representation, and surely this would result in limited "flexibility" when implementing a measure despite the factors listed in section 42 which may justify the failure of the employer to meet targets? It is therefore valuable to look at the role equitable representation plays in government's transformative scheme in the South African workforce.

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[207] See *Minister of Justice v The SA Restructuring & Insolvency Practitioners Association* (693/15) [2016] ZASCA 196 para 29:

> "Rigidity in the application of the policy or which has the effect of establishing a barrier to the future advancement of such previously advantaged insolvency practitioners, is frowned upon and runs contrary to s 9(2) of the Constitution".

[208] Para 215.

[209] *Solidarity v South African Police Service* 2015 7 BLLR 708 (LC) para 54.

3 4 The EEA's obsession with "equitable representation"/representivity

> "South Africans want to see more "representivity" among executives running businesses in the country … People are tired of businesses being run by minorities."[210]

This is merely just one of the occasions that the government and President Cyril Ramaphosa used the term "representivity" when referring to transformation. Louw notes that the word "representivity" is not part of the English language and that wordnik.com gives ten examples of its use, all by the ANC in official documents and media statements, which seems to suggest that the ANC in fact coined the term.[211] The term's exact date of "creation" is not stated but it has certainly become part of the South African vocabulary. So much so that it is a word which may now be used interchangeably with "equitable representation" as found in the EEA. As Malan observes, "representivity is the principal instrument for achieving transformation".[212]

Malan describes representivity as "the norm in terms of which institutions and organised spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population."[213] Therefore, it is implied that the workforce of each employer must be organised according to the racial composition of the entire South African population.[214] To measure representivity, at least in terms of the EEA, one must look at the national and regional demographics of the economically active population, which according to recent figures currently stands at 78.5% Africans, 9.6% Coloureds, 9.1% Whites and 2.8% Indian/Asian.[215] Nugent AJ described this as an exercise of "cold and impersonal arithmetic."[216] Malan pointed out that the "[EEA] is therefore substantively aimed

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[210] African News Agency (ANA) "Representivity in business required, says Ramaphosa" (08-07-2018) *Pressreader* 1 <https://www.pressreader.com/south-africa/sunday-tribune/20180708/281496457042040> (05-10-2018).

[211] Louw (2015) *PELJ* 611 n 47.

[212] K Malan "Observations on Representivity, Democracy and Homogenisation" (2010) *J S Afr L* 427.

[213] 427.

[214] 430.

[215] G Watkins "National and Regional Economically Active Populations Profiles - Cee Report 2018" (30/09/2018) *Work Info* <www.workinfo.org/index.php/articles/item/1994-national-and-regional-economically-active-population-cee-2018> (accessed 02-11-2020).

[216] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 102.

towards the achievement and maintenance of quotas (euphemistically phrased as equitable representation) in the workforce."[217] Louw has on numerous occasions stated that applying rigid race-based demographic targets turns constitutionally legitimate targets into illegitimate quotas.[218] More specifically, Louw explains:

> "The EEA requires affirmative action measures to be taken in order to achieve "equitable representation" of 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 rigidly as they were by the DCS in *Solidarity v Department of Correctional Services* … 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."

As mentioned earlier, Tlhotlhalemaje J observed that a characteristic of a quota is a reference to fixed numbers according to race or gender to populate the ranks.[219] The idea of populating ranks sounds similar to the description of representivity when one considers it in the context of using racial demographics as the benchmark for target-setting in the employment sphere. It is therefore interesting to consider how these terms relate to achieving equality, which is the ultimate constitutional objective of any affirmative action policy or measure (as confirmed also in the third leg of the *Van Heerden* test).

3 4 1 The strange concepts of "equitable representation" and "representivity"

As previously mentioned, "equitable representation" is a foreign term introduced into the legal objectives of affirmative action by the EEA. In *Van Heerden,* it was stated that the objective of affirmative action measures under section 9(2) of the Bill of Rights is to promote the achievement of equality by redressing disadvantage caused by past

[217] Malan (2010) *J S Afr L* 431.
[218] Louw (2019) *De Jure* 387.
[219] *Solidarity v South African Police Service* 2015 7 BLLR 708 (LC) para 58.

unfair discrimination. It was expressly stated in the majority judgment that the purpose of affirmative action under the Constitution is "remedial and restitutionary". Interestingly, the expressly stated purpose of the EEA is to redress past disadvantage – which is in line with the constitutional purpose as set out in *Van Heerden* – but the Act says this must be done "in order to ensure equitable representation" of persons from designated groups in all levels of the workforce.[220] According to Louw, section 2 of the EEA clearly indicates that redressing past disadvantage is merely just a "means to another end", as the true aim is to ensure equitable representation of members of designated groups in the workplace.[221] The EEA is an example of legislation passed specifically to actively promote equality of outcome.[222] Nevertheless, it appears that most of the focus of the Act's affirmative action chapter is on equitable representation, which would imply that there is a link between substantive equality and equitable representation; or that there must somehow be. McGregor disputes this and states that:

> "Further, whether the notion of 'equality' may be equated to 'equitable representation' is debatable. One can argue that 'equitable representivity' may be equated with substantive equality, since both notions are outcomes-based. I contend, however, that 'absolute' demographic representivity cannot be a mandatory rule required from the Constitution."[223]

Louw furthermore sets out reasons why imposing equitable representation is odd: firstly, equitable representation is not named/mentioned anywhere in the constitutional equality guarantee. McGregor concurs and states that:

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[220] Section 2(b) of the EEA.

[221] Louw (2015) *PELJ* 612.

[222] See s 9(4) of the EEA; see also Louw (2015) *PELJ* 639: "Equality of outcomes, on the other hand, embodies a substantive reading of the concept of equality, and opens the door to measures and policies for the advancement of designated groups that may in fact infringe or impact negatively on the equality rights of other persons, notably physically able white males or members of other minority groups.".

[223] M McGregor "Blowing the whistle on affirmative action: The future of affirmative action in South Africa (Part 2)" (2014) 21 *SA Merc LJ* 60-92 89.

> "The Constitution does not use the notions 'equitably represented', 'equitable representation', or 'designated groups'; these are used only in the EEA and defined not by disadvantage, but by race, sex and disability in the EEA."[224]

If the EEA is an example of legislation promoting equality, it should be strange that the important part of the Act which deals with affirmative action is so fundamentally centred on the concept of equitable representation, if this concept does not feature in the Constitution itself. The concepts of diversity and equitable representation appear very frequently in the Act, especially in Chapter III, which deals with affirmative action. These concepts are pivotal parts of the Act and act as justificatory grounds for affirmative action measures. An example of this is set out in section 6(2) of the Act. As Louw points out, "an employer may defend a claim of unfair discrimination under the prohibition of unfair discrimination contained in section 6(1) by showing that differential treatment occurred in terms of affirmative action "consistent with the purpose of this Act".[225] As mentioned, the purpose of implementing affirmative action is evidently to ensure equitable representation – this is expressly provided in section 2(b) of the Act – not necessarily (or, at least, nominally) the redressing of past disadvantage.

Furthermore, the Constitution is not completely silent on the need for diversity and representation of the different groups. It contains provisions dealing with the composition of the judiciary,[226] the composition of any commission established under chapter 9,[227] and the public administration.[228] However, these provisions use the term "broadly representative" as opposed to demographic representivity of different groups in line with the national (or, for that matter, regional) demographic statistics along the

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[224] M McGregor "Blowing the Whistle? The Future of Affirmative Action in South Africa (Part 1)" (2014) 26 *SA Merc LJ* 60 76.

[225] Louw (2015) *PELJ* 612.

[226] Section 174(2) of the *Constitution*: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."

[227] Section 193(2) of the *Constitution*: "The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed."

[228] Section 195(1)(i) of the *Constitution*:

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

lines of race and gender. Broadly means generally, and without minor detail.[229] This is a far cry from specific targets as set out in affirmative action measures in certain workplaces – the examples from cases involving the public service that have come before the courts to date are illustrative of this. In *Correctional Services*, Zondo J similarly stated that the workforce or workplace should be broadly representative of the people of South Africa and that it "cannot be achieved with an exclusively segmented workforce".[230] Zondo J further continued to explain his understanding of representivity in the workplace:

> "If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must *broadly accord* (emphasis added) with its level of representation among the people of South Africa."[231]

Again, Zondo J recognised that representation of each group must "broadly accord" with their level of representation among the South African population. According to Zondo J, the reason the workforce should be broadly representative is that upon a proper construction of the EEA read with the Constitution among other relevant acts, that is what is required.[232] Not only does Zondo J recognise that the preamble of the EEA states that it "aims to achieve a diverse workforce, broadly representative of our people",[233] but he also rightly recognises that the EEA like all legislation must be construed consistently with the Constitution.[234] This would be a good time to yet again point out that there is no mention of representivity or national/regional demographic representivity in our Constitution. What turns out to be quite strange is how Zondo J overlooks his previous statements when determining the validity of the relevant employment equity plan. While continuously quoting sections of relevant acts

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[229] Google dictionary.

[230] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 40.

[231] Para 40.

[232] Para 42.

[233] Preamble to the EEA.

[234] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 49:
"Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa."

emphasising “broadly representative”, he not once questioned the words “equitable representation” in the affirmative action section in the EEA. He then stated that equitable representation must be equitable representation “in relation to the demographic profile of the national and regional economically active population”,[235] thus completely ignoring his own previous comments that the purpose of the EEA is to achieve broad representation and not one based specifically on the demographic profile of South Africa. Zondo J went from general representation to very specific demographics-based targets.

The above ambiguity provides a good example of our (case) law concerning the understanding of these somewhat constitutionally suspect concepts, and has become the norm when referring to affirmative action measures in the workplace. It is unclear whether these terms have ever been clearly defined in the Constitutional Court, but as soon as the term equitable representation is mentioned, “racial balancing” appears to become acceptable. And the constitutionality of this is undoubtedly questionable.

Secondly, Louw points out that according to section 3(a) of the EEA, the Act must be interpreted “in compliance with the Constitution”. We have established that the term “equitable representation” is not found in the Constitution. Therefore, upon establishing that the purpose of the Act is to achieve equitable representation, section 3(a) makes for a mystifying reading if it must be interpreted in compliance with the Constitution. It is unclear how the concept of equitable representation found its footing in the Act with no constitutional connection. Therefore, applying equitable representation, rigidly or not, would amount to a deviation from the Constitution as it is a new concept that is introduced, foreign to our constitutional equality guarantee. Furthermore, section 3(a) may imply that the equitable representation standard as employed in the Act would have to be tested in respect of compliance with the objectives of section 9(2) of the Constitution. The Constitutional Court, for one, has not done this to date. Therefore, as discussed in the previous chapter, even if the relatively low standard of rationality would prevail, there would at the very least have to be some demonstrable rational link between “equitable representation” and demographics and the achievement of substantive equality.

Finally, the third reason according to Louw, is that it is unclear how “redressing past disadvantages would/can lead to ensuring equitable representation of groups, or *vice*

[235] Para 74.

versa, in any context".[236] As "there is no apparent link between the representation (demographic representation) of any particular group (be it based on race, or gender) and the redressing of past disadvantage suffered by such group".[237] Louw further states that he cannot see a link between representivity and equality.[238] That could be because they not only mean two very different things but produce two very different outcomes. This could also be the reason why the ANC has introduced the term representivity when discussing transformation. (Substantive) equality would and should never amount to so-called job reservation. However, according to Malan, from a transformative point of view, "representivity and equality are regarded as two sides of the same coin".[239] It is clear that representivity is viewed as a pre-requisite for achieving equality.[240] This has become the norm as illustrated by Madlanga AJ, who stated that "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".[241] This is in stark contrast to what Louw believes. However, this view may carry some weight when one considers that not only does the EEA use representivity as a pivotal instrument for achieving transformation, but it is also evident in statements by a number of government spokespersons in the specific context at hand. Former President Mbeki stated that "[r]epresentivity of South Africa's national sports teams remained first prize, but racial quotas was not the way to do it".[242] Butana Komphela had previously stated that "the ruling party will seek to pass legislation forcing teams to achieve demographic "representivity" right down to the schools level".[243] Furthermore, and in another context, former Minister of Justice and Correctional Services, Michael Masutha stated that:

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[236] Louw (2015) *PERJ* 611 614.

[237] 614.

[238] 614.

[239] Malan (2010) *J S Afr L* 446.

[240] 446.

[241] *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 5 SA 349 (CC) para 98.

[242] A Quintal "No race quotas for sport teams – Mbeki" (09-11-2007) *IOL* <https://www.iol.co.za/capeargus/sport/no-race-quotas-for-sport-teams-mbeki-580899> (accessed 29/06/2018).

[243] D Pressly "Racial bean-counting' damaging SA's sport" (28-01-2005) *M&G* <https://mg.co.za/article/2005-01-28-racial-beancounting-damaging-sas-sport> (accessed 02-11-2020) (Please note that this link has since been removed from the internet).

> "The National Forum on Legal Practice is working on the full implementation of the Legal Practice Act, 2014. As part of this process and in making regulations for the Legal Practice Council, which will be the governing structure for the legal profession, there must be a 50/50 (equal) representation of men and women on the Council, with a 70/30 Black to White representation. This will see the Council achieving both gender and racial representivity in line with what is envisaged in the Legal Practice Act."[244]

The Legal Practice Act 28 of 2014 states that not only must transformation embrace the values underpinning the Constitution, but also that the Council must pursue a legal profession that "broadly reflects the demographic of the Republic".[245] This may be a further example of government not only projecting representivity into legislation but also an example of how representivity can translate into quotas. Representivity has become a goal which appears to be equated with the achievement of equality. Louw and Malan are not the only commentators to recognise this assessment. Others have recognised the abnormality of using representivity in the achievement of equality. Brassey, commenting shortly after the enactment of the EEA, said the following:

> "[The Employment Equity Act's] concern is not with disadvantage, but with racial representativeness, which it uses as its organising concept. Since demographic testing of this sort can find no justification in the Constitution, the Act can be rescued only if representativeness is considered to be a legitimate proxy for past disadvantage."[246]

Also shortly after the enactment of the EEA, Rycroft predicted that the Act would be revisited because of its relationship with the right to equality:

> "It is to be noted that whilst s 9(2) of the Constitution sanctions legislative and other measures designed to protect or advance persons, or categories of persons, *disadvantaged by unfair discrimination*, the target in the Employment Equity Act is not explicitly the concept of disadvantage but "designated groups", defined not by disadvantage

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[244] Anonymous "SA: Michael Masutha: Address by Minister of Justice and Correctional Services, during the Dept Budget Vote 2018/19, Parliament, Cape Town" (10-05-2018) *Polity* <https://www.polity.org.za/article/sa-michael-masutha-address-by-minister-of-justice-and-correctional-services-during-the-dept-budget-vote-201819-parliament-cape-town-10052018-2018-05-10> (accessed 02-11-2020).

[245] Ss 5(i): see also the Preamble to the Legal Practice Act.

[246] M Brassey "The Employment Equity Act: Bad for Employment and Bad for Equity" (1998) *ILJ* 1359-1366 1363.

but by race, gender and disability. There is thus a moot constitutional point as to whether the Employment Equity Act is tailored narrowly enough to meet the declared constitutional purpose that affirmative action measures must be "designed" to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. Whilst an affirmative action policy will ordinarily constitute discrimination, it is saved from being *unfair* discrimination because of the constitutional and legislative mandate. But precisely because these provisions are seen by many as an *exception* to the right to equality and the prohibition against unfair discrimination, they will be revisited many times in the coming years."[247]

Both Louw and Malan are of the view that courts are now being influenced by this foreign concept when adjudicating on affirmative action measures and that the terms representivity and equality are at times used interchangeably.[248] Too often judges are referring to a transformative society which is non-racial and non-sexist, but yet they allow the pursuit of representivity, which could condone the use of quotas and may be promoting a form of systematic inequality. Yet the judges are painting a picture of a transformative mission which requires necessary vigilance. Moseneke ACJ stated:

"Our quest to achieve equality must occur within the discipline of our Constitution.[249] Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves … We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged."[250]

Furthermore, Van der Westhuizen J similarly speaks out against merely pursuing representivity by stating:

"It must be pointed out that equality can certainly mean more than representivity. Affirmative measures seek to address the fact that some candidates were not afforded the same opportunities as their peers, because of past unfair discrimination on various grounds. By

[247] A Rycroft "Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" (1999) *ILJ* 1411 1413-1414.
[248] Malan (2010) *J S Afr L* 447. See also Louw (2015) *PELJ* 609.
[249] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 76.
[250] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 30-31.

> focusing on representivity only, a measure's implementation may thwart other equality concerns."[251]

It is clear that judges appear to be saying all the right things by affirming the need for a balancing of the rights of the various citizens in our country, but yet these words are hollow without any action. It remains to be seen whether judges are taking a strict stance on the issue of racial quotas and the ever-increasing usage of the concept "representivity" (and the apparent elevation of this concept to a non-enumerated constitutional objective or even value). The case law on the topic remains relatively sparse, but clarity is required.

3 4 2 The practical effects

Nugent AJ states that the purpose of the EEA is representivity and employment opportunity, but he feels that all the characteristics of the population that are relevant must be taken into account,[252] and not just race. Nugent AJ indicates the flaws in attempting to achieve representivity blindly, especially with the amendment of section 42 of the EEA; these include the fact that races are not distributed uniformly throughout the country and applying equitable representation in this manner "induces racial migration to accommodate stats"[253] and we would only achieve the objective of equal opportunity if we take into account where applicants for the posts are located.[254] The example set out by Nugent AJ, by looking at the regional demographics of two provinces and applying the national demographics, shows the huge flaw in trying to achieve equal opportunity:

> "The great majority of Coloured people live in the Western and Northern Cape. The 2011 census revealed that Coloured people comprised 48.8% of the population of the Western Cape, and 40.3% of the population of the Northern Cape. In all other provinces except the Eastern Cape, where they comprised 8.3% of the population, their presence was negligible. In Limpopo they made up a mere 0.3%, while 96.7% of the population of that province were what the census calls "Black Africans".

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[251] Para 149.

[252] *Solidarity v Department of Correctional Services* 2016 5 SA 594 (CC) para 122.

[253] Para 125.

[254] Para 125.

> Translating those proportions to numbers, at the time of the 2011 census there were some 16 000 Coloured people in Limpopo and some 5.2 million Black African people. Approximately 2.8 million Coloured people and 1.9 million Black African people lived in the Western Cape.
>
> I see no rationality in restricting almost half the population of the Western Cape to 8.8% of employment opportunities in that province, and simultaneously extending 8.8% of employment opportunities in Limpopo to 0.3% of the population. Of every 100 work opportunities in the Western Cape nine are made accessible to some 2.8 million Coloured people, while in Limpopo nine opportunities are made accessible as well to roughly 16 000 Coloured people. And while in Limpopo nine of every 100 posts are made accessible to roughly 16 000 Coloured people, only 73 are made available to 2.8 million Black African people, denying some 20% of employment opportunities to almost the whole population. Conversely, in the Western Cape nine of each 100 opportunities are made accessible to some 2.8 million Coloured people while 1.9 million Black African people have access to 73.5."[255]

This example sets out the clear job reservation of one racial group over another that may occur through the rigid pursuit of demographic representivity, and it also indicates what happens when only using one characteristic of the population, which is race. The purpose of the EEA is not to reserve jobs for those previously disadvantaged, nor is it the purpose of section 9 of the Constitution to achieve "representivity". These sorts of anomalies will arise when statistics bear no relation to the purpose for which they are used.[256] It does appear that representivity is now being elevated to the same status as equality, and this may be extremely troubling. The following section will attempt to illustrate this in the specific context of the sports transformation exercise.

3 5 Representivity in sport

We have now seen that there are judges who are questioning the use of demographic representivity in the application of affirmative action, but this is yet to happen in respect of racial representation in professional team sports in South Africa. Louw stated that rigid racial demographic targets turn legitimate targets into illegitimate quotas. We have seen that quotas are freely implemented by sports bodies and the term is casually used by government spokespersons. Therefore, we have to question the

[255] Paras 127-129.

[256] Para 130.

difference between quotas, which are being criticised more and more often in more mainstream employment equity cases, and the use of quotas in professional sports teams. Louw points out how the implementation of representivity in the name of equality affects South African sport and sport in general:

> "One of the most troubling aspects of the pursuit of sports transformation is that government has chosen to pursue an agenda whereby equality is measured by means of 'representivity.' The achievement of equality is measured against race demographics. Only if a sports team (or workplace) is demographically representative of all groups in the population and in the proportion of such representation within the population (for example, 80% black African) is such representation deemed to be equitable. In this way a statistical yardstick, which has no link to the achievement of equality (and is nowhere mentioned in the constitutional equality right), has managed to usurp other, more germane factors (such as sporting merit, or the available pool of suitably qualified or talented players) in the determination of equitable treatment of all. Such measures do not, in the meaning of the words of the Constitutional Court, pursue the achievement of redress for the previously disadvantaged, but rather the tokenistic achievement of 'representative sports teams'".[257]

The trade union Solidarity had taken the former Minister of Sport and a number of sporting bodies to court, to challenge the agreed implementation of transformation targets which are viewed as quotas and therefore unlawful and to request an order to invalidate demographic profiling as it appears in the Transformation Charter.[258] We have seen that in the mainstream employment sphere, courts view quotas as being unlawful, and the outcome of this case had the potential to bring significant change in the sports employment sphere. Unfortunately, the case was dismissed due to a legal technicality, which entailed Solidarity not having any athletes as members, which meant that they could not argue on their behalf.[259] Solidarity had submitted the application on the basis that employees (athletes) may or have suffered prejudice as

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[257] AM Louw "Regulations: The return of racial quotas in South African Sport" (2014) *World Sports Law Report* 12. <http://www.supersupporter.net/downloads/AM-Louw-Quotas-in-sport.pdf> (accessed 25-05-2020).

[258] *Solidarity v South African Rugby Union* LC Founding Affidavit <https://cdn.24.co.za/files/Cms/General/d/5205/9b29b0cb5acb4bcf9c00a885d30b67e5.pdf> (accessed 16-11-2020).

[259] A Hendricks "Solidarity tackles sports quotas in labour court" (15-04-2019) *M&G* <https://mg.co.za/article/2019-04-15-solidarity-tackles-sports-quotas-in-labour-court/> (accessed 02-11-2020)

a result of the selection policies which are pursued by SARU, ASA, CSA and NSA.[260] Solidarity claimed that the blind pursuit of demographic representivity can never be lawful because under the Constitution it is impermissible to discriminate on grounds such as gender and race and the EEA outlaws unfair discrimination.[261] In 2015, the above-mentioned federations, as well as the South African Sports Confederation and Olympic Committee ("SASCOC"), signed a "Transformation Agreement" with the Department of Sport and Recreation to transform sport along racial and gender lines.[262] The agreement not only set out each sports target that needs to be met but further set out compliance requirements and punitive measures for failure to meet the targets. The punitive measures include:

- "Suspending or withdrawal of Government's funding to a defaulting federation in terms of section 10(3) (a) of the National Sport and Recreation Act;
- Withdrawal of Government's recognition to the National Federation in terms of section 10(3)(b) the Act. Such a decision will mean that the National Federation will be de-registered and that such a decision be published in the Government Gazette;
- Revocation of the National Federation's authority 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 NSRA and also as a result of not recognising the federation:
- Withdrawal of the federation's opportunity to be awarded national colours via SASCOC to players who participate under the auspices of the federation in order to represent the Republic internationally and nationally, in writing;

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[260] These are the same policies as discussed in chapter 2 when the Minister set out punitive punishment for not meeting targets.

[261] *Solidarity v South African Rugby Union* LC Founding Affidavit 52. <https://cdn.24.co.za/files/Cms/General/d/5205/9b29b0cb5acb4bcf9c00a885d30b67e5.pdf> (accessed 16-11-2020).

[262] A Muller "Fikile Mbalula has just banned South Africa from bidding for major sporting events" (25-04-2016) *The South African* <https://www.thesouthafrican.com/sport/cricket/fikile-mbalula-has-just-banned-south-africa-from-bidding-for-major-sporting-events/> (accessed 02-11-2020).

- Terminate the existing five year agreement in writing due to non-compliance; or
- 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 is not limited to the withdrawal of political support and endorsements for sponsorships."[263]

In 2016, the former Minister stated that upon review of the transformation barometer, he had no choice but to implement what he referred to as agreed-upon punitive measures:

> "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 of South Africa as a consequence of the aforementioned federations not meeting their own set transformation targets with immediate effect."[264]

The grounds upon which Solidarity based their claim of unlawfulness have been mentioned in previous chapters. These include the fact that in terms of section 15(3)(b) of the EEA, quotas are prohibited; section 2(b) of the EEA envisages representivity which is broad and equitable; there is no basis laid in the EEA for the employment or selection of a national demographic profile to determine an appropriate composition of the workforce of sports teams; and s 13(5)(b) of the NSRA encourages sport in its purest form.[265] Solidarity alleges that since the conclusion of the transformation agreement between the above-mentioned sports bodies and the Department of Sport

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[263] Sport and Recreation South Africa "Minister Fikile Mbalula: Aftermath of Springbok Campaign in the IRB 2015 World Cup Championships" (05-11-2015) *South African Government* <https://www.gov.za/speeches/minister-sport-and-recreation-south-africa-mr-fikile-mbalula-mp-statement-aftermaths-senior> (accessed 25-05-2020).

[264] A Muller "Fikile Mbalula has just banned South Africa from bidding for major sporting events" (25-04-2016) *The South African* <https://www.thesouthafrican.com/sport/cricket/fikile-mbalula-has-just-banned-south-africa-from-bidding-for-major-sporting-events/> (accessed 13-09-2019).

[265] *Solidarity v South African Rugby Union* LC Founding Affidavit 53 <https://cdn.24.co.za/files/Cms/General/d/5205/9b29b0cb5acb4bcf9c00a885d30b67e5.pdf> (accessed 16-11-2020).

and Recreation, there has been a "weighted emphasis on the enforcement of demographic representation in all aspects of sport – from team selection to administrative support."[266] The multi-dimensional transformation strategy has been implemented by the sports bodies subject to guidance by the Eminent Persons Group ("EPG").[267] Solidarity claims that it is in fact a quota system which is being implemented by the Minister and the sports bodies and this conclusion is derived from the Transformation Charter[268] read with the mandate of the EPG and the obvious terminology used in identifying the transformation targets. The agreement states that the sports bodies must ensure 60% of black representatives in all spheres, and not meeting the numerical targets will ensure that punitive measures would be imposed. As was discussed previously, this does bear a strong resemblance to the definition of a quota system, and it is hard to ignore this fact.

This case would have certainly challenged the status quo and would have contributed to the ongoing debate about the implementation of quotas and representivity. The best idea would always be to revert back to the EEA and the Constitution and what is trying to be achieved, and how. This is exactly what McGregor states in "Affirmative action on trial – determining the legitimacy and fair application of remedial measures":

> "The Employment Equity Act takes its cue from the constitution and gives effect to the protection of the rights to dignity and equality. It seeks to eliminate unfair discrimination and obliges designated employers to implement affirmative action measures consistent with the purpose of the act. Such measures must be designed to further diversity and have to ensure that suitably qualified people from designated groups (blacks, women and the disabled) get equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce by way of numerical goals (but not quotas). In essence, then, affirmative action measures or employment equity plans strive to achieve "equitable representation" in the workplace. This is differently worded from the constitution, which sets out to promote the achievement of equality and authorising measures which may be taken to assist with achieving equality."[269]

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[266] 54.

[267] The Eminent Persons Group is the sports transformation commission appointed to administer transformation; see Sport and Recreation South Africa *Pilot Evaluation Rugby | Cricket | Netball | Athletics | Football: A Transformation Status Report* (2013) 4.

[268] Transformation Charter of South African Sport (2014).

[269] McGregor (2013) *SALJ* 659.

Even here we see that the EEA veers off from the Constitution, but the most alarming thing is the fact that the Act is now being used in a way that results in it being inconsistent with itself. The term representivity attempts to disguise the use of quota systems, but as mentioned by Louw it is possible that instead of disguising quotas, "representivity turns numerical goals into quotas".[270] Again, we have to ask the question, why have these clear quotas, which by definition offend against section 15(3) of the EEA, not been challenged until now?

3 6 Conclusion

It should now be firmly established that quotas in the application of affirmative action are prohibited. In sport, a quota may translate to a set number of places, which are reserved for previously disadvantaged individuals, in the team or match-day squad. It is widely accepted that the distinction between numerical targets and quotas lies in the flexibility of the standard. However, Nugent AJ suggested a different interpretation and stated that allowing flexibility does not necessarily turn an unlawful quota into an acceptable numerical target, as flexibility is not an end in itself. This may be an important part of the analysis in the context of the distinction between quotas and numerical targets, as it challenges the status quo of what determines a quota system. Quotas not only offend against the EEA, but courts also agree with the fact that quotas are prohibited in the Act.

Moreover, if demographic representivity is the aim, it would amount to job reservation and invariably turn numerical targets into quotas. Despite the above, representivity is the principal instrument for achieving transformation in South African sport despite the potential infringement of the rights of non-beneficiaries. The link between striving for a racially representative workforce or sports team and the achievement of equality is yet to be established. Why are African blacks being advanced more than Generic Blacks (to use the terminology of the relevant transformation charters and documents)? Were both groups not disadvantaged by the apartheid system? But here we have a case where instead of "achieving" substantive equality and redressing past injustices, we have one designated group elevated above

[270] Louw (2015) *PELJ* 638.

another based on race (race has clearly become not only a stand-alone factor but a determinative factor). It appears that this whole sports transformation agenda proceeds from the assumption that, because of the gross injustices of the past, our sports teams would have looked a certain way and implementing demographic representivity allows government to achieve that goal. However, Moseneke ACJ stated that "the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged".[271]

Implementing a quota system by definition raises the concern of the proper role of merit-based selection – and this is something that any right-thinking person would consider especially relevant in the context of (professional) sport. This is exactly what section 20(3) of the EEA attempts to avoid, by warning not to promote racial representivity at the expense of merit. That is the reason why section 20(3) requires beneficiaries of affirmative action to be "suitably qualified". Moseneke ACJ emphasised this in *Barnard*, as abiding by this is crucial in order not to compromise competency and efficiency in attempting to achieve transformation.[272] Moseneke ACJ then goes on to say that the Act protects itself against the "hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent".[273] According to the NSRA – is this really promoting sport in its purest form?

The immediate observation is that there remains an apparent lack of consideration of the possibly significant differences between the implementation of affirmative action measures in the traditional workplace and the implementation of affirmative action in the world of sport. The very nature of sport is its inherent grounding in the principle of competition, which brings to the fore the accepted notion that "uncertainty of outcomes" (another inherent characteristic of genuine sporting competition – compare the international sports community's fight against the scourge of match-fixing as a corrupt practice that threatens the very legitimacy of sporting competition) is a crucial component of sport. And this, of course, in turn, brings to the fore the marked importance of merit (and merit selection) in the sporting context. It is suggested that the *legal* debate on the application of affirmative action in sport – and, more

[271] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 31.
[272] Para 41.
[273] Para 41.

specifically, the practice of the application of race-based quotas in team selection – has to date neglected to give due regard for merit in this very specific and special context.

Further, more emphasis needs to be placed on the fact that sportspersons in South Africa are employees just like every other person that pursues an occupation. As such, the EEA should be applied in a manner that resembles that, and not treat a sportsperson differently. However, it is no secret that South Africa has had little in-depth engagement with the issue of quotas. There is, therefore, a need to undertake an examination of the jurisprudence on quotas as an affirmative action measure in the United States, a jurisdiction that has had longer to grapple with the issue. This will be done in the next chapter.

CHAPTER 4: AFFIRMATIVE ACTION AND RACIAL QUOTAS IN THE UNITED STATES

4 1 Introduction

> "You do not take a man who, for years, has been hobbled by chains, liberate him, bring him to the starting line of a race saying, "You are free to compete with all the others," and still believe you have been fair. This is the next and more profound stage of the battle for civil rights. We seek not just freedom of opportunity, not just legal equity, but human ability; not just equality as a right and theory, but equality as a right and result."[274]

These are the words of former American President, Lyndon Johnson, on the need for affirmative action in the United States of America ("USA") in 1965. Although the development of affirmative action in the USA can mainly be ascribed to civil unrest and the race riots at the time, what makes examining affirmative action in the USA compelling is the fact that that jurisdiction has been grappling with racial quotas in affirmative action programmes for a lot longer than South Africa. As we have seen, South African law is still somewhat ambivalent with regard to quotas. Courts were initially shying away from quotas by not declaring whether they are unconstitutional or not, but recent case law seems to confirm that they might in fact be unconstitutional.

The USA has dealt with racial quotas in employment for close to 60 years, and it would be helpful to observe how they have approached it. There are remarkable differences between the Constitution of the United States of America ("US Constitution") and the South African Constitution. This ultimately shapes the implementation of affirmative action in the different jurisdictions, and setting out a brief overview of the development of affirmative action in the USA will contribute to the analysis of the two jurisdictions. This chapter will not only unpack quotas in the USA but further examine racial balancing as a tool used to achieve racial diversity.

4 2 Development of affirmative action

The fact that the original US Constitution[275] did not contain an equality provision is significant, as the basis of the Constitution was to protect the freedom of the

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[274] CM Swain "Affirmative Action: Legislative History, Judicial Interpretations, Public Consensus" in N Smelser, W Wilson & F Mitchell (eds) *America Becoming: Racial Trends and Their Consequences: Volume I* (2001) 318 321.

[275] The Constitution of the United States 1789.

individual.[276] It is believed that the main reason for this was the existence of slavery at the time, as it was viewed as being incompatible with a guarantee of equality. However, the position changed after the American Civil War in the 1860s, and the US Constitution was amended to abolish slavery. This saw the introduction of the Thirteenth Amendment which abolished slavery, the Fourteenth Amendment which contains the equal protection clause and the Fifteenth Amendment which prohibited the denial to vote on account of race. The prohibitions of the Fourteenth Amendment are directed at the state and to a certain degree restrict state authority.[277] Section 1 of the Fourteenth Amendment states that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[278]

But despite this, racial segregation was still held to be constitutional by the Supreme Court.[279] However, the case of *Brown v Board of Education*[280] marked a turning point in the interpretation of equality and it is regarded by Rabe as "the beginning of the modern equality jurisprudence in America".[281] The case consisted of black plaintiffs, who sought admission to schools based on a non-segregated basis, as they were "denied access to white schools under laws permitting or requiring segregation according to race".[282] The court stated that "segregation is a denial of the equal protection of the laws [guaranteed by the Fourteenth Amendment]".[283]

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[276] Rabe Equality *Affirmative Action and Justice* 27.

[277] CE Enemark "Adarand Constructors, Inc. v. Pena: Forcing the Federal Communications Commission into a New Constitutional Regime" (1997) 30 *Colum JL & Soc Probs* 215 219.

[278] The Constitution of the United States, amendment fourteen, s 1.

[279] Rabe Equality *Affirmative Action and Justice* 31.

[280] 347 US 483 (1954).

[281] Rabe Equality *Affirmative Action and Justice* 35.

[282] These laws included the "separate but equal" doctrine.

[283] 347 US 483, 495 (1954).

The constitutional guarantee of equal protection is therefore provided in the Fourteenth Amendment as well as the Fifth Amendment.[284] The American debate recognised that the equal protection provision guarantees equality before the law and must be applied equally to all persons.[285] The provision does not only require that the content of the law itself must be equal but it stems from the belief that all people are morally equal as individuals.[286] In contrast to South African equality jurisprudence, the American interpretation of equality suggests a very formal notion of equality as opposed to a substantive notion of equality.[287]

4 2 1 The introduction of affirmative action

Despite the American Civil War ending in the 1860s, affirmative action only became synonymous with the civil rights movement in the 1960s. It began with the issue of Executive Order 10925, by President John F Kennedy in 1961, which not only created the Committee on Equal Employment Opportunity but also ordered federal contractors to take "affirmative action" to ensure that hiring and employment practises were free from racial bias.[288] However, this did not appear to be sufficient and under the presidency of Lyndon Johnson, the Civil Rights Act of 1964 ("CRA") was signed into law and Executive Order 11246 was issued. Title VI and Title VII of the CRA are the significant sections in terms of the connection between civil rights enforcement and affirmative action. Title VII did not provide for preferential treatment and it was originally interpreted to prohibit employers from discriminating based on race, sex,

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[284] Both amendments' substantial protection is the same, but they bind different organs of state. The Fourteenth Amendment binds individual states while the Fifth Amendment binds federal government.

[285] Rabe Equality *Affirmative Action and Justice* 38.

[286] 38.

[287] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 31:

> "However, what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".

[288] CM Swain "Affirmative Action: Legislative History, Judicial Interpretations, Public Consensus" in N Smelser, W Wilson & F Mitchell (eds) *America Becoming: Racial Trends and Their Consequences: Volume I* (2001) 321.

colour, national origin and religion.[289] However, it was the combination of Title VII and the Executive Order 11246 which set the stage for a stronger implementation of affirmative action. The Executive Order required companies who enter into business with the federal government to take "affirmative action" to provide equal employment regardless of race, religion or national origin.

Like many jurisdictions, the USA did not have the greatest relationship with affirmative action and there was, of course, opposition to the Civil Rights Bill.[290] Jones states that it is when these "theoretical rights" began translating into tangible results that criticism from these opponents reached "fever pitch".[291] Jones states that "once affirmative action came out of the Executive Order closet and Title VII litigation shifted to scope of remedy and started adopting affirmative action plans as remedial devices, vindication of civil rights threatened entrenched interests".[292] The fact that Congress failed to provide such programmes with a constitutional foundation,[293] as well as enacting the CRA which seemed to prohibit their coming into existence,[294] would have definitely aided the opponents' case. Therefore, even though the Bill was enacted to end discrimination suffered by blacks, whites were also protected from race-based

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[289] 322.

[290] See also JE Phelan & LA Rudman "System Justification Beliefs, Affirmative Action, And Resistance To Equal Opportunity Organization" (2011) 29 *Social Cognition* 376 377:

> "[S]ome of whom argue that affirmative action devalues the accomplishments of people who are chosen ostensibly because of their minority status rather than their qualifications. More commonly, opponents claim that affirmative action leads to preferential treatment or reverse discrimination… In other words, opponents argue that affirmative action violates American values of hard work and personal autonomy by denying the rights of individuals to succeed by their own merit".

[291] JE Jones "Reverse Discrimination in Employment: Judicial Treatment of Affirmative Action Programs in the United States" (1982) 25 *Howard LJ* 217 222.

[292] 222.

[293] This is in contrast to South Africa where the Constitution provides for restitutionary measures in section 9(2).

[294] D Sabbagh "Affirmative Action: The U.S. Experience in Comparative Perspective" (2011) 140 *Daedalus, Race, Inequality & Culture* 109 111:

> "The Civil Rights Act prohibited discrimination on the basis of race, colo[u]r, religion, national origin, or sex by private employers with fifteen or more employees; federal, state, and local governments; and educational institutions, employment agencies, and labo[u]r unions."

discrimination in employment.[295] Section 703(j) of the CRA further stated that "nothing contained in this subchapter shall be interpreted to require any employer … to grant preferential treatment to any individual … because of race … on account of an imbalance which may exist". In the early stages of the application of affirmative action in the USA, there were fears of employment quotas and, as a result, the Civil Rights Bill was amended to prohibit quotas.[296] However, despite these fears being articulated, it will be illustrated that racial quotas did make their way into affirmative action programmes.

Despite the potential tension between affirmative action goals and civil rights laws which prohibit the consideration of race in employment decisions, there remained a need for affirmative action in the USA as non-discrimination alone would be insufficient to overcome the "lingering effects of historical discrimination".[297] Rabe states that "it is morally imperative that some form of remedial action is taken to achieve more social justice and equality for [racial minorities]".[298] Congress was aware of this and upon revision of Title VII, Congress enacted section 718 of Title VII of the Civil Rights Act of 1972, "which gave increased legislative validity to affirmative action plans as required under the Executive Order."[299] Furthermore, former Presidents Nixon and Clinton garnered support for affirmative action. President Nixon initiated the Philadelphia Plan of 1969[300] and stated that "[w]e would not impose quotas, but would require federal

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[295] 111; See also Rabe *Equality Affirmative Action and Justice* 43:

"[A]ffirmative action comes into conflict with the concept of discrimination as such measures are seen to discriminate against those people who suffer some form of prejudice as a result of such programs. This prohibition does not take into account institutionalised prejudice suffered by racial minorities as such disadvantage is not viewed as discrimination.".

[296] Swain "Affirmative action" in *America Becoming: Racial Trends and Their Consequences* 321.

[297] JL Thompson & SB Morris "What Factors Influence Judges' Rulings About the Legality of Affirmative Action Plans?" (2013) 28 *J Bus Psychol* 411 411 see also Rabe *Equality Affirmative Action and Justice* 77:

"it is claimed that the prohibition against discrimination is not able to combat such structural or social discrimination…it is argued that affirmative action in the form of preferences in employment and with regards to admission to educational institutions is required.".

[298] Rabe *Equality Affirmative Action and Justice* 77.

[299] Jones (1987) *Howard L J* 229.

[300] 226:

"Philadelphia Plan was a requirement that for federally assisted construction contracts in an area around Philadelphia, Pennsylvania, contractors were required to submit an

contractors to show 'affirmative action' to meet the goals of increasing minority employment".[301] While presenting a speech on the guidelines of affirmative action, President Clinton asserted that the case of *Adarand Constructors, Inc v Pena,*[302] ("*Adarand*") "reaffirmed the need for affirmative action and reaffirmed the continuing existence of systematic discrimination in the United States".[303] However, it is important to note that President Clinton called for the removal of any programme that:

> "(a) creates a quota;
> (b) creates preferences for unqualified individuals;
> (c) creates reverse discrimination, or
> (d) continues even after its equal opportunity purposes have been achieved".[304]

The Supreme Court may have failed to address all the issues involved in the affirmative action debate, but there was enough evidence to indicate that "classification by race or ethnic minority for granting remedies for past discrimination or bestowing benefits are not per se unconstitutional."[305] Given the latter, it is, therefore, crucial to delve into the relationship of the US Supreme Court with affirmative action.

4 2 2 The Supreme Court and affirmative action

The Supreme Court applies the strict scrutiny test when "so-called 'suspect classifications' are used by any governmental organ; and in cases where fundamental constitutional rights are burdened, or limited."[306] Therefore, when policies are

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acceptable affirmative action program which included specific goals for the utilization of minority persons in six skilled crafts. The Executive Orders required all applicants to include in their construction contracts specific provisions respecting fair-employment practices, including a provision that the contractor would take affirmative action to ensure that applicants are employed and treated during employment without regard to race, color, religion, sex, or national origin".

[301] B Brunner & B Rowen ""Timeline of Affirmative Action Milestones" (2000-2017) *Infoplease* <https://www.infoplease.com/spot/timeline-affirmative-action-milestones/> (02-11-2020).

[302] 515 US 200 (1995).

[303] Brunner & Rowen "Timeline of Affirmative Action Milestones" (2000-2017) *Infoplease*.

[304] Brunner & Rowen "Timeline of Affirmative Action Milestones" (2000-2017) *Infoplease*.

[305] Jones (1987) *Howard L J* 218.

[306] Rabe *Equality Affirmative Action and Justice* 47.

promoting the action of providing some form of benefit based on racial classification, it must be analysed using the most searching judicial enquiry. For the Supreme Court, the equal protection jurisprudence is that the Constitution "protect[s] persons, not groups"[307] and to maintain this personal right to equal protection, strict scrutiny is applied.[308] The Supreme Court has described the strict scrutiny test as entailing that such a suspect classification must serve a compelling government interest, and must be narrowly tailored to further that interest.[309] Therefore, government would need to show that there is a sufficiently close "fit" between the compelling goal and the means chosen to implement it.[310] In terms of implementing the above-mentioned two-prong analysis, the court would first have to establish whether the legitimate government interest or purpose is a compelling interest that justifies the use of a suspect classification.[311] Once this has been established, the court examines whether the means used to attain this goal are narrowly tailored to achieve the goal.[312] Decisions of the Supreme Court regarding affirmative action have varied considerably over the years. Through the evolution of case law, general principles regarding when affirmative action is allowed have developed,[313] however, the relationship between the Supreme Court and affirmative action has for the most part been tenuous as will be illustrated through varying case law decisions.

4 2 2 1 The role of the court

The landmark Supreme Court case of *Regents of the University of California v Bakke* ("*Bakke*"),[314] was the first affirmative action case decided on merit.[315] Rabe described this as a "victory and a defeat" for affirmative action because "a majority of the justices held that in principle racial preferences were permitted by the Constitution,

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[307] 515 US 200, 227 (1995).

[308] S Gajendragadkar "The Constitutionality of Racial Balancing in Charter Schools" (2006) 106 *Columbia Law Review* 144 168.

[309] *Wygant v Jackson Board of Education* 476 US 267, 274 (1986).

[310] *City of Richmond v J.A Croson Co* 488 US 469, 493 (1989).

[311] Rabe *Equality Affirmative Action and Justice* 48.

[312] 48.

[313] Thompson & Morris (2013) *J Bus Psychol* 413.

[314] 438 US 265 (1978).

[315] Rabe *Equality Affirmative Action and Justice* 134.

but the actual program was held to be invalid".[316] Allan Bakke, a white male, applied to the Davis Medical School. Upon the rejection of his application, he alleged that the Davis special admissions programme operated as a racial quota and was in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment as well as Title VI of the CRA.[317] The faculty devised a special admissions programme to increase the representation of "disadvantaged" students. Sixteen places in the class of 100 were reserved for "disadvantaged" students and they were only rated against themselves.[318] The court ruled that it is legitimate to deem race as a "plus" factor, but the use of a quota system is not. The Supreme Court was split 5-4 in its decision and this case provided an insight into the differing perceptions concerning affirmative action that divided the court and continue to divide the court.[319]

As a result of the differing views, Justices switched sides depending on the facts of the case and this resulted in a lack of consistency regarding the jurisprudence of the court.[320] This is evident in the cases concerning minority contracting set-asides. Set-asides involves government reserving a fixed proportion of public contracting dollars that by law must be spent on the purchase of goods and services provided by minority-owned businesses.[321] In *Bakke* strict quotas were struck down, however, in *Fullilove v Klutznick* ("*Fullilove*"),[322] the Supreme Court found that "modest" quotas were constitutional. The court upheld a provision of a federal law which required 10% of public funds for public works be set-aside for qualified minority workers.[323] The court found that the affirmative action programme did not violate the equal protection rights of non-minority contractors and the provision was a legitimate remedy for present

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316 134.

317 *Regents of the University of California v Bakke* 438 U.S 265, 278 (1978).

318 438 U.S 265, 279 (1978).

319 Rabe *Equality Affirmative Action and Justice* 134:

> "These ideological differences relate to a more formal or value natural view of equality held by the opponents of affirmative action and a more substantive view of equality, which takes account of the actual social inequalities, held by the supports."

320 134.

321 Swain "Affirmative action" in *America Becoming: Racial Trends and Their Consequences* 326.

322 448 US 448 (1980).

323 448 US 448, 492 (1980).

competitive disadvantages resulting from prior discrimination.[324] In a later case regarding set-asides, *City of Richmond v J.A Croson Co* ("*Richmond*"),[325] the court ruled that racial classifications in state and local set-aside programmes were inherently suspect and were subject to the most searching standard of constitutional review which is strict scrutiny.[326] The court stated that "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[327] The court invalidated the *Richmond* set-aside in a six-to-three decision, which yet again highlighted the unpredictability of the Supreme Court's decisions.

Like *Richmond*, which required that race-based action by state or local government required strict scrutiny, *Adarand* established that any federal affirmative action programme using racial classification needs to be justified by the strictest judicial scrutiny.[328] *Adarand*, therefore, set the precedent that strict scrutiny has to be applied in cases involving racial classification.[329] The court further tried to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact",[330] by asserting that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" justified the use of race-based remedial measures in certain circumstances.[331]

In another landmark decision, the Supreme Court decided the case of *Grutter v Bollinger* ("*Grutter*"),[332] which was decided more or less at the same time as *Gratz v*

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[324] 448 US 448, 473; the court used the strict scrutiny test and the court stated that a "racial classifications is suspect and subject to strict judicial scrutiny" and therefore found that there was no allocation of federal funds according to inflexible percentages solely based on race".

[325] 488 US 469 (1989).

[326] 488 US 469, 493 (1989).

[327] 488 US 469, 499 (1989).

[328] 515 US 200, 224 (1995).

[329] *Gratz v Bollinger* 539 US 244, 270 (2003); *Grutter v Bollinger* 539 US 306, 326 (2003); Rabe *Equality Affirmative Action and Justice* 140.

[330] *Regents of the University of California v Bakke* 438 US 265, 362 (1978); *Fullilove v Klutznick* 448 US 448, 519 (1980); Rabe *Equality Affirmative Action and Justice* 49: ""strict in theory, but fatal in fact" because other than the wartime case of Karomatsu v United States no racial classification subjected to this test has been found to be constitutional"

[331] *Adarand Constructors, Inc v Pena* 515 U.S 200, 237 (1995).

[332] 539 US 306 (2003).

Bollinger ("*Gratz*").[333] Both these cases concerned university admission programmes which were challenged as being unconstitutional on the basis that the admission programmes violated the Equal Protection Clause of the Fourteenth Amendment as well as Title VI of the CRA. In *Gratz,* the court, when applying strict scrutiny to the admission programme, found that providing "educational benefits that result from having a diverse student body" results in a compelling governmental interest.[334] However, the problem with the admission programme was that it was not narrowly tailored to achieve the interest.[335] In contrast, the university admission programme in *Grutter* passed the strict scrutiny test. The court relied heavily on the opinion of Powell J in *Bakke* and concurred that the attainment of a diverse student body was a compelling interest. However, the "means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose,"[336] and it is at this stage of the test where *Gratz* failed, and *Grutter* succeeded. When determining whether the admissions programme was narrowly tailored to further the compelling interest, the court again relied on the opinion of Powell J. According to him:

> "To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants'...Instead, a university may consider race or ethnicity only as a '"plus" in a particular applicant's file,' without 'insulat[ing] the individual from comparison with all other candidates for the available seats'… In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight'."[337]

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[333] 539 US 244 (2003).

[334] 539 US 244, 258 (2003).

[335] 539 US 244, 270 (2003), Opinion of the court:

> "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.".

[336] 539 US 306, 333 (2003).

[337] 539 US 306, 334 (2003); see also *Regents of the University of California v Bakke* 438 US 265, 417 (1978)

The court found that the admission programme did contain attributes of a narrowly tailored plan.[338] The court stated that race can be used as a plus factor in university admission programmes, however, the programme "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application".[339] This was the difference between *Gratz* and *Grutter*, as *Grutter* engaged in a highly individualised, holistic review of each applicant's file and awarded no "mechanical, predetermined diversity 'bonuses" based on race or ethnicity',[340] as was the case in *Gratz*.

The US Supreme Court has decided on the most searching judicial test for all racial classifications regarding affirmative action programmes. This may stem from the fact that affirmative action programmes have the potential to violate the equal protection clause as the interpretation of the equality provision is seen as a "rigid prohibition against discrimination".[341] Much like South Africa, racial quotas are prohibited as was stated by Presidents Nixon and President Clinton. This will also be illustrated with reference to various court judgments in the USA. While South Africa may have explicitly prohibited quotas in the EEA, the United States uses strict scrutiny to "smoke out" the use of quotas in affirmative action programmes. As stated in *Grutter*, "to be narrowly tailored, a race-conscious admission program cannot use a quota system".[342]

4 3 Quotas and the Supreme Court

The focal point of the study remains an analysis of racial quotas in affirmative action. Upon laying out a brief development of affirmative action in the USA, it becomes critical to look at how the US Supreme Court has defined a quota and how the court has dealt

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[338] 539 U.S 306, 316 (2003):

> "The policy does not define diversity "solely in terms of racial and ethnic status." … Nor is the policy "insensitive to the competition among all students for admission to the [L]aw [S]chool."... Rather, the policy seeks to guide admissions officers in "producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession."

[339] 539 US 306, 337 (2003).

[340] 539 US 306, 337 (2003).

[341] Rabe *Equality Affirmative Action and Justice* 77.

[342] 539 US 306, 334 (2003).

with quotas. Quotas were in limited instances found to be constitutional,[343] but with the adoption of strict scrutiny, quotas will be very difficult to justify and defend as they deny benefits based on race alone.[344] Keeping this in mind, it is important to analyse the rulings by the Supreme Court on racial quotas.

4 3 1 Defining a quota

In the case of *Bakke*, the trial court, as well as the Supreme Court of California, found that the admission programme which reserved sixteen places out of a hundred for minority applicants acted as a quota system because the minority applicants were only rated against one another for the sixteen places.[345] Unfortunately, the Supreme Court did not furnish a definition of a quota itself but Powell J did not deny the evaluation by the trial court. Powell J, however, did state that an admission programme may not "insulate the individual from comparison with all other candidates for the available seats".[346] In *Local 28 of the Sheet Metal Workers' v Equal Employment Opportunity Commission (Sheet Metal Workers)*,[347] the court defined a quota in two different contexts. O Connor J stated:

> "To hold an employer or union to achievement of a particular percentage of minority employment or membership, and to do so regardless of circumstances such as economic conditions or the number of available qualified minority applicants, is to impose an impermissible quota."[348]

O Connor J further stated that:

> "In the view of these federal agencies, which are charged with responsibility for enforcing equal employment opportunity laws, a quota 'would impose a fixed number or percentage

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[343] Prior to *Adarand Constructors, Inc v Pena* 515 US 200 (1995) there were cases where quotas were found to be constitutional, such as *Fullilove v Klutznick* 448 US 448 (1980).

[344] Rabe *Equality Affirmative Action and Justice* 154.

[345] *Regents of the University of California v Bakke* 438 US 265, 288 (1978) n 26:
"The court below found-and petitioner does not deny-that white applicants could not compete for the 16 places reserved solely for the special admissions program...Both courts below characterized this as a "quota" system".

[346] 438 US 265, 317 (1978).

[347] 478 US 421 (1986).

[348] 478 US 421, 495 (1986).

which must be attained, or which cannot be exceeded,' and would do so 'regardless of the number of potential applicants who meet necessary qualifications'."[349]

In *Grutter*, the court used previous cases to describe what constitutes a quota and stated that:

"Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.' ... Quotas ''impose a fixed number or percentage which must be attained, or which cannot be exceeded,'"… and 'insulate the individual from comparison with all other candidates for the available seats'."[350]

There are a few instances where cases define quotas, but it is similarly important to identify the stance the court has had in dealing with these racial quotas. As mentioned above, quotas will be difficult to defend under the strict scrutiny analysis and therefore the courts' reasoning behind their decisions regarding quotas will be invaluable for the comparative analysis between the USA jurisprudence and South African jurisprudence on quotas.

4 3 2 Racial quotas struck down by the Supreme Court

The Supreme Court in *Bakke* found that quotas do not pass constitutional muster because it violates the Fourteenth Amendment.[351] The court stated that:

"The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: 'No State shall... deny to any person within its jurisdiction the equal protection of the laws.' It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights,' …The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another colo[u]r. If both are not accorded the same protection, then it is not equal."[352]

[349] 478 US 421, 495 (1986).

[350] 539 US 306, 305 (2003).

[351] 438 US 265, 320 (1978): "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment."

[352] 438 US 265, 289 (1978).

Another characteristic of the quota in *Bakke*, which rendered it unconstitutional, was its rigidity. The admission programme's numerical goal was mandatory and therefore lacked flexibility and precluded the decision maker from treating each applicant as an individual.[353] Therefore, the court stated that when applying racial classification, preferring a member of one group "for no reason … [but] race … is discrimination for its own sake" and the Constitution forbids it.[354]

Similarly, in the case of *Richmond*, the court recognised that the rights created by section one of the Fourteenth Amendment are guaranteed to the individual.[355] The fixed quota in the Richmond Plan denied certain individuals the opportunity to exercise their rights and the court stated that regardless of citizens' racial groups, "their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making".[356] Therefore, strict quotas may not be permissible because the interests of innocent individuals may be harmed.

Apart from quotas violating the Fourteenth Amendment rights, some judges have held that quotas are not permitted under Title VII of the Civil Rights Act. O Connor J stated that in the case of *Sheet Metal Workers*, the majority tacitly conceded that racial quotas are improper and they are improper by virtue of section 703(j).[357] Burger J, in a dissenting opinion in the case of *Steelworkers v Weber*,[358] stated that a "racially discriminatory admission quota is flatly prohibited by the plain language of Title VII".[359]

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[353] 438 US 265, 317-318 (1978).

[354] 438 US 265, 307 (1978); in *Fullilove v Klutznick* 448 U.S 448, 497 (1980), the court stated that the admission program in *Bakke* was not appropriate because it made use of a fixed quota which "eliminated some nonminority applicants from all consideration for a specified number of seats in the entering class, although it allowed minority applicants to compete for all available seats".

[355] 488 US 469, 493 (1989).

[356] 488 US 469, 493 (1989).

[357] Title VII section 703(j) of the Civil Rights Act of 1964 states:

> "Nothing contained in this title shall be interpreted to require any employer … subject to this title to grant preferential treatment to any individual or to any group because of the race, colo[u]r, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, colo[u]r, religion, sex, or national origin employed by any employer".

[358] 443 US 193 (1979).

[359] 443 US 193, 228 (1979).

With the decision in *Adarand* to implement strict scrutiny as the judicial standard of review for all racial classifications, it has been more challenging for racial quotas to pass constitutional muster. Strict scrutiny requires not only for there to be a compelling state interest, but the means chosen to achieve the purpose must be narrowly tailored to achieve the stated purpose. It is at this point where quotas fall short of the mark, as was stated in *Grutter*: "to be narrowly tailored, a race-conscious admission program cannot use a quota system".[360] Therefore, to be narrowly tailored, a programme should not unduly burden individuals who are not members of a favoured race. As mentioned above, quota systems have the potential to limit individuals' personal rights which are guaranteed in the Fourteenth Amendment and therefore cannot be narrowly tailored.

4 3 3 Racial balancing

There are cases where provisions are implemented to achieve racial balance. Racial balancing in reference to district schools is described by Shane as:

> "[T]he reassignment of students throughout a public school district to prevent, to whatever degree possible, the concentration of minority students residing within the district in racially identifiable schools. Thus, if a district is seventy percent white and thirty percent black, the goal of racial balance would be the rough approximation of that ratio in as many schools as possible."[361]

Furthermore, racial balancing provisions can be described as aiming to limit or eliminate "racial isolation" or "racial imbalance".[362] Nevertheless, this does not make racial balancing constitutional, as the courts have in fact declared that racial balancing is unconstitutional. *Bakke* stated that:

> "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one

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[360] 539 US 306, 334 (2003).

[361] P Shane "School Desegregation Remedies and The Fair Governance of Schools" (1984) 132 U Pa L Rev 1041 1092.

[362] J Oluwole & P Green "Charter Schools: Racial-Balancing Provisions and Parents Involved" (2009) 61 *Ark L Rev* 1 22.

> group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[363]

In reference to the above, the court in *Grutter* stated that this "would amount to outright racial balancing, which is patently unconstitutional".[364] The admission programme in *Grutter* focused on each applicant as an individual instead of as a member of a particular racial group, and they did not pursue racial balance for "its own sake".[365] Therefore, the programme did not disguise racial balancing as "diversity", as was found to be the case in *Parents Involved v Seattle School District* ("*Parents Involved*").[366] The court declared a school district's consideration of race in assigning children to schools within a district as invalid. The court referred to previous case law which dealt with diversity as a compelling interest and found that *Grutter* proved that diversity may be a compelling governmental interest. However, *Bakke* stated that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups that can justify the use of race".[367] The court found that the "plans are tied to each district's specific racial demographics",[368] and therefore the racial demographic in each district drives the required "diversity" numbers. The goal was therefore to achieve a level of diversity which approximates the district's overall demographics. Furthermore, the court identified that:

> "The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts--or rather the white/nonwhite or black/'other' balance of the districts, since that is the only diversity addressed by the plans."[369]

In *Grutter*, the number of minority students "pursued", was an undefined "meaningful number", necessary to achieve a genuinely diverse student body. As

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[363] 438 US 265, 307(1978).
[364] 539 US 306, 330 (2003).
[365] 539 US 306, 330 (2003).
[366] 551 US 701 (2007).
[367] 438 US 265, 314-315 (1978).
[368] Opinion of Roberts CJ, 551 US 701, 18 (2007).
[369] Opinion of Roberts CJ, 551 US 701, 19 (2007).

opposed to *Parents Involved* who was "seek[ing] a defined range set solely by reference to the demographics of the respective school districts".[370] The court found that "in design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate".[371] *Parents Involved* outlined what accepting racial balancing as a compelling interest would entail and stated that:

> "[It] would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class'... Allowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race' will never be achieved." (Citations omitted)[372]

Furthermore, Kennedy J stated that racial balancing causes social division and individuals will be denied opportunities based on race.[373] As a result, race would always be relevant in the USA. Therefore, not only will some races lose out in the numbers game because of their race, and as mentioned above, the "'ultimate goal' of 'eliminating entirely from governmental decision making such irrelevant factors as a human being's race' will never be achieved".[374] Roberts CJ stated that "the principle that racial balancing is not permitted, is one of substance, not semantics".[375] Therefore racial balancing will not be transformed from being "patently unconstitutional" to a compelling state interest by relabelling it "racial diversity".[376] Racial balancing can never be a compelling state interest as it is contrary to the heart of the Constitution's guarantee of equal protection that states that government must treat citizens as individuals and not as components of racial or ethnic classes.[377]

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[370] Opinion of Roberts CJ, 551 US 701, 21 (2007).
[371]Opinion of Roberts CJ, 551 US 701, 18 (2007).
[372] 551 US 701, 22 (2007).
[373] Opinion of Kennedy J, 551 US 701, 17 (2007).
[374] Opinion of Roberts CJ, 551 US 701, 22 (2007).
[375] Opinion of Roberts CJ, 551 US 701, 24 (2007).
[376] Opinion of Roberts CJ, 551 US 701, 24 (2007).
[377] Opinion of Roberts CJ, 551 US 701, 22 (2007).

Furthermore, Title VII does not permit racial balancing. Section 703(j) states that:

> "Nothing contained in this subchapter shall be interpreted to require any employer … subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer…in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community[.]"

In the case of *Ricci v Destafano* ("*Destafano*"),[378] the court found that a fire department's race-conscious actions to avoid a racially disparate impact in promotions violated Title VII. One of the flaws of the fire department's actions was that it appeared to be acting with the intent of pursuing its "preferred racial balance".[379] The court cautioned against adopting "a de facto quota system, in which a 'focus on statistics' … could put undue pressure on employers to adopt inappropriate prophylactic measures".[380]

4 3 3 1 Racial Balancing equivalent to demographic representivity

Racial balancing is equivalent to demographic representivity, as this latter concept appears to be applied in terms of the EEA in South Africa. They both aim to transform the racial composition of the workforce to reflect the regional or national demographics of the country or region. Therefore, racial balancing in South Africa would require 17.6 of the 22 players to be African blacks.The USA clearly finds racial balancing to be unconstitutional, but in South Africa, demographic representivity has not been declared unconstitutional by the courts. This may be due to the fact that it is the express aim of the EEA to achieve demographic representivity in the workplace through the application of affirmative action. It is submitted that these two concepts are one and the same and the court in *Destafano* warns against adopting a "de facto quota system" to reach these targets. The US identifies racial balancing as resulting in a quota system, and it is therefore strange that South Africa cannot do the same in

[378] 557 US 557 (2009).
[379] 557 US 557, 19-26 (2009).
[380] 557 US 557, 22 (2009).

respect of demographic representivity. If an employer in the USA applied measures to achieve demographic representivity it would certainly be struck down.

The USA finds racial balancing to be unconstitutional because it goes against the aim of the US equality guarantee which is to treat citizens as individuals and not as components of racial classes. This is the sole reason as to why the programme in *Grutter* was allowed because they treated each applicant as an individual instead of as a member of a particular racial group. Thus, being in line with the USA's notion of equality. South Africa however, follows a group-based approach when implementing affirmative action measures and therefore does not focus on the individual but the "designated group" to which that individual belongs. Individuals do not need to show that past unfair discrimination personally or individually harmed them. This is clear by referring to the *Van Heerden* test,[381] which refers to targeting and advancing not only persons but *"categories of persons"* who have been disadvantaged by unfair discrimination. Similarly in the case of *Stoman v Minister of Safety and Security*, ("*Stoman*")[382] the court held that the emphasis is not on the individual but on the group or category of individuals of which the individual happened to be a member.[383] The court further states that the "aim is not to reward the…individual but to advance the category of persons to which he belongs to achieve substantive equality".[384] In the more recent case of *Barnard*, Van der Westhuizen J reinforces South Africa's group-based approach. Van der Westhuizen J believes that you cannot compare the dignity of one person against the collective dignity of previously disadvantaged people.[385] Van der Westhuizen J further states that this was ensured by our transformative Constitution as "[t]he calculation required to restore the dignity of many after decades of unfair discrimination and the possible cost to the interests of individuals…was done when the Constitution was agreed on".[386]

Furthermore, it is worth noting that the aim of affirmative action under the EEA in South Africa is the achievement of "equitable representation", which we have now established is used interchangeably with representivity. For South Africa, pursuing

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[381] See the text to Chapter 2.

[382] (2002) 23 ILJ 1020 (T).

[383] 1035H.

[384] 1035H.

[385] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 178.

[386] Para 78.

racial demographics for its own sake may, therefore, be permitted according to the EEA. But that would result in a "de facto quota system" or just an outright quota system. Would this be justified when considering the infringement of rights of non-beneficiaries? In the case of *Stoman*, Van der Westhuizen J stated that "the aim is not to punish or otherwise prejudice the [non-beneficiary] as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination".[387] In the more recent case of *Barnard*, Van der Westhuizen J again raised the point that as a result of over-representation in the workplace, a limitation of dignity was justifiably outweighed by the goal of the affirmative action measure, provided that the measure did not create an "absolute barrier to the prospective or continued employment or advancement of people".[388] However, this brings one back to the opinion of McGregor, who stated that:

> "Affirmative action was not intended to elevate demographics into 'dogma' or to eclipse 'Ms Barnard]'s rights by putting in place 'preordained' demographic targets: this could suffice only if it were accepted that the proper implementation of affirmative action entailed disregarding 'entirely' the rights of members of certain groups to apply and compete for vacant posts until demographic targets were reached and if the national commissioner possessed an 'unfettered' authority to decide whether and when exceptions should be allowed."[389]

The EEA explicitly prohibits quotas, and we cannot ignore the fact that the rigid pursuit of demographic representivity *can* turn legitimate targets into illegitimate quotas. If quotas were justified, we would not have judges speaking out against the use of quotas. Judges have stated that rigid quotas unduly infringe the dignity of non-beneficiaries and they are not allowed, and have highlighted the fact that quotas are inherently and irrationally discriminatory.[390] Katz J and Tlhotlhalemaje J warned that quotas are measures which elevate race as an absolute category without regard for an individual's characteristics or individual worth.[391] Further, Tlhotlhalemaje stated that measures based on quotas are inherently "arbitrary, capricious and displays naked

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[387] 1035H.

[388] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 177-181.

[389] McGregor (2013) *SALJ* n 147.

[390] See the text to Chapter 3.2.1.

[391] See the text to Chapter 3.2.2.

preference" and would consequently not pass constitutional muster based on *Barnard* and *Van Heerden*. Again, this shows the inconsistency of the interpretation of affirmative action under the EEA as discussed in chapter 3.

Strict scrutiny smokes out the use of quotas no matter how they are disguised and that is exactly what would happen under the USA law. One must bear in mind that demographic representivity is a relatively new concept in comparison to racial balancing and the concept is yet to be challenged pertinently before a South African court. If a challenge were to be brought forward against the achievement of demographic representivity it would be interesting to see whether the court would identify it as a form of a quota system as the USA jurisprudence has done in respect of racial balancing. This is yet another reason why the uncertainty of the appropriate standard of review of affirmative action measures under the EEA is of concern. An appropriate standard of review would assist the courts in "smoking out" disguised quotas. For now, what is accepted is that demographic representivity has the look and feel of a quota system.

4 4 Conclusion

The US Constitution is founded on the ideal of freedom, and the maximisation of freedom of the individual, as opposed to equality, which is the primary guarantee of the Constitution.[392] It further protects individuals' rights from state interference as opposed to promoting positive rights.[393] In the USA, the equal protection clause is deemed to operate as an anti-discrimination provision against all use of race. Affirmative action measures, therefore, appear to violate the constitutional guarantee of equal protection.

The USA's approach regarding affirmative action is both similar but also fundamentally different to that of South Africa. One of the main reasons for this is the fact that the USA follows a formal notion of equality as opposed to substantive equality. The right to and the achievement of equality is one of the core and foundational values of the South African Constitution. As Moseneke J stated, when the Constitution "took root a decade ago our society was deeply divided, vastly unequal and uncaring of

[392] Rabe *Equality Affirmative Action and Justice* 71.

[393] 135.

human worth"[394] and as a result there is a positive duty by the organs of state to protect and promote the achievement of equality.[395] Therefore, this conception of equality goes beyond formal equality of identical treatment which leads to entrenching existing inequalities.[396] Through the Constitution and section 9 thereof, the notion of substantive equality aims to redress existing inequality. This positive commitment to eradicate socially construced barriers to achieve substantive equality is achieved through restitutionary or affirmative action measures. Moseneke J affirmed that their purpose is to "protect and develop those persons who suffered unfair discrimination because of past injustices".[397] This cannot be achieved by simply treating everyone "equally" as the inequality of the past needs to be addressed and not merely "removed".

In the USA, the equal protection clause, along with the strict scrutiny test, deem most affirmative action programmes to violate the equality provision, when differentiation based on race is present (because of formal equality). Therefore, racial quota systems would not pass constitutional muster. The reasons for this include the fact that the standard of strict scrutiny is applied to all cases concerning racial classification. Strict scrutiny is required because of the potential for racial preference to violate the equality guarantee. It is the most exacting judicial examination and Powell J stated that it is necessary because "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another colo[u]r".[398] The two-pronged analysis of strict scrutiny requires proportionality between means and an end. Therefore, not only do quotas violate the Fourteenth Amendment, but the courts in the USA have recognised the rigidity of racial quotas. This may impact significantly on "personal rights" to equality which clashes with the US jurisprudence which prioritises the freedom of the individual. Lastly, quotas result in discrimination for its own sake and will therefore never be narrowly tailored to meet a legitimate governmental objective. This deems racial quotas as unconstitutional. The last reason resonates most with the South African equality guarantee.

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[394] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 23.
[395] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 24.
[396] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 26.
[397] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 35.
[398] 438 US 265, 289 (1978).

In South Africa, the EEA prohibits quotas and emphasises the importance of the right to dignity by insisting on affirmative action measures "based on equal dignity and respect of all people".[399] Moseneke ACJ has stated that remedial measures must be implemented in a manner which must not unduly invade the human dignity of non-beneficiaries.[400] Racial quotas not only have the ability to demean an individual's self-worth, but also prevent them from exercising their right to occupation and trade, but these measures are yet to be definitively declared unconstitutional.

Furthermore, it was found that programmes that are geared towards the achievement of racial balance are unconstitutional in the USA. Case law has reiterated the fact that racial balancing cannot be pursued for its "own sake" and it is unambiguously unconstitutional.[401] It further creates a "de facto quota system" which is unconstitutional. It was argued that racial balancing resembles demographic representivity, which is an objective that has been advanced by the South African government in a number of spheres. It was discussed whether South Africa's group-based approach justifies more aggressive affirmative active measures and therefore may justify the use of quotas. Despite South Africa's ideals of substantive equality calling for a group-based approach, it cannot be said that quotas fall under the ideal of substantive equality. Even though substantive equality creates room for more progressive affirmative action measures than ones applied in the USA. Achieving demographic representivity remains a contentious point in the context of the EEA, but what is certain is that demographic representivity, like racial balancing, denies opportunities based on race and may, therefore, potentially amount to unfair discrimination. South Africa, with its use of demographic representivity to achieve "equality", should heed this warning.

The US Supreme Court, having dealt with racial quotas for several years, has raised several key factors that South African courts can take into consideration, although one must always remain vigilant of the fact that the US Constitution and the South African constitutional aims remain different. That is one of the main reasons that South Africa would never apply the standard of strict scrutiny as it would be contrary to the

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[399] Section 15(2)(b).

[400] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 32.

[401] See *Grutter v Bollinger* 539 U.S 306, 330 (2003): *City of Richmond v J.A Croson Co* 488 US 469, 507 (1989): *Regents of the University of California v Bakke* 438 US 265, 307 (1978).

achievement of substantive equality. However, both countries have a history of inequality and therefore it makes an appealing comparison.

The second comparison which is necessary is to evaluate the South African sports transformation policies against the rules and regulations of international sporting federations. All the national sports bodies are members of international federations and are therefore bound by their rules and regulations. South Africa does not only have a history of discrimination in sport (during the apartheid era), but we now have transformation policies which are unique in the world of sport, in respect of their use of race for purposes of access to sporting opportunities. This will be examined in the chapter that follows.

CHAPTER 5: INTERNATIONAL SPORTS LAW: RULES AND REGULATIONS

5 1 Introduction

There has been a clear transformation agenda pursued by the South African government, with the primary aim of achieving "demographic representivity" of participants in professional team sports. It is also well-documented that the South African government is moreover pressurising South African sports bodies to implement these measures. These policies and measures may constitute nothing more than "racial balancing" which was found to be unlawful in other jurisdictions, such as the United States of America.[402] Having compared South African affirmative action law to that of the United States of America, the next comparison that is relevant is that of the South African national sports bodies' practises against the applicable rules of various international sporting federations. Therefore, to fully determine whether the South African transformation targets are unlawful, one would need to place the implementation of these targets against the international principles to which the South African sports bodies are bound.

It is well known that sport is played in an international context, and national domestic sports bodies are members of international sports bodies.[403] As such, a national governing body will usually mirror the rules of the international body.[404] For one to, therefore, determine why race-based quotas may be unlawful, it is necessary to place it in the context of both domestic constitutional norms as well as international sporting principles, to which domestic federations are bound. National bodies such as SASCOC adopted unique sports policies, ostensibly to dismantle the legacy of apartheid.[405]

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[402] See Local 28, *Sheet Metal Workers' International Association v Equal Employment Opportunities Commission* 478 US 421 (1986) 487:

> "The requirement of … flexibility with respect to the imposition of a numerical goal reflects a recognition that neither the Constitution nor Title VII requires a particular racial balance in the workforce. Indeed, the Constitution forbids such a requirement if imposed for its own sake … Thus, a court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination."

[403] A Lewis & J Taylor *Sport: Law and Practice* (2003) 57.

[404] 57.

[405] J O'Leary & TG Khoo "Changing the world: sport, racism and law in South Africa and Malaysia" (2013) 13 *Int Sports Law J* 45 52.

The task at hand for SASCOC is not an easy one. They have taken on the task of deconstructing systematic inequality and aim to put everyone on an equal footing. Equal footing in respect of sport should be when every person/athlete has had the same opportunity to develop and be exposed to sports in order to grow their skill set and therefore compete with one another on an 'equal footing'. If they then decide to pursue a career in a given sport, sporting merit (performances) will be the determining factor. Sometimes they get it right and sometimes they get it wrong and we need structures in place to ensure that they get it right more often than not. One of these structures is, of course, the fact that they are bound by international bodies. While these policies may seem morally laudable in light of our past, occasionally these policies may be contrary to the fundamental principles of international sport and the rules of the international sports federations, which "unambiguously and unequivocally" prohibit any form of discrimination based on race.[406] Various international federations' rules and regulations will be considered below. This comparison will aid in establishing the mandate of these international bodies concerning the universal promotion of equality and the prohibition of discrimination, as opposed to South Africa's domestic racial transformation agenda.

5 2 International sports governance

(Sports) governance can be described as:

> "[T]he structure and process used by an organisation to develop its strategic goals and direction, monitor its performance against these goals and ensure that its board acts in the best interest of its members."[407]

Therefore, sports governance is concerned with issues of "policy and direction for the performance of sports organisations".[408] The governance of sport (in terms of the European model of sports governance) follows a hierarchical structure, and may be described as being pyramidal shaped, with international federations being at the apex

[406] AM Louw *Sports Law in South Africa* 2 ed (2012) 121.
[407] M Jansen van Rensburg, P Venter & HS Kriek "Boards and governance in African national cricket organisations: An exploratory study" (2013) 17 *Southern African Business Review* 23 25.
[408] 25.

of a "vertical chain of command, running from continental, to national, to local organisations".[409] Examples of international federations include the ICC, *Fédération Internationale de Football Associations* ("FIFA"), the IOC, and World Athletics. These are the supreme bodies in their respective sports fields, who not only have global authority but also have the authority to "impose a variety of governance and administrative practises" on its members.[410] Therefore, the stance taken by the "supreme" international body will not only influence decisions made by a national body under their umbrella, but national bodies will moreover be bound by the rules set out by these international bodies.[411]

A fitting example of the governance structure is that of the IOC. The IOC adopted not only the rules of the Olympic Games but also the organisational and procedural rules of the Olympic Movement. Chapter One of the Olympic Charter[412] states that "[a]ny person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC".[413] This is emphasised once more, as Principle Seven of the Olympic Charter states that belonging to the Olympic Movement requires compliance with the Olympic Charter. Failure to do so may be met with sanctions imposed by the IOC.[414] Furthermore, the mission and roles of National Olympic Committees ("NOCs") are likewise set out in Chapter Four of the Olympic Charter, which includes "promoting and developing the Olympic Movement … in accordance with the Olympic Charter".[415] Therefore, for any national body to be a part of the Olympic Movement and be recognised by the IOC, they would have to adhere to the Olympic Charter.

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[409] M Mrkonjic & A Geeraert "Sports organisations, autonomy and good governance" in J Alm (ed) *Action for Good Governance in International Sports Organisations* Final Report (2013) 133 138.

[410] Jansen van Rensburg, Venter & Kriek (2013) *SABR* 28.

[411] Mrkonjic & Geeraert "Sports organisations, autonomy and good governance" in *Action for Good Governance in International Sports Organisations* 138.

[412] International Olympic Committee *Olympic Charter* in force as from 26 June 2019 <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.12602295.1647177704.1573474536-261038775.1573474536> (accessed 20-11-2019).

[413] Chapter 1.4 of the Olympic Charter.

[414] Chapter 6.

[415] Chapter 4.

If one considers the position in respect of cricket, the cricket network is made up of a set of autonomous, interrelated federations with the ICC at the top of the pyramid, and numerous national associations beneath the ICC.[416] The national federation which is responsible for the governance of cricket in South Africa is CSA. Beneath CSA are the provincial associations, for instance, the Western Province Cricket Association, and below that exists professional franchise teams such as The Six Gun Grill Cape Cobras and various other amateur cricket clubs in the region. All these organisations are responsible for the governance and management of cricket in their region, but they have to "report to" and "comply with" the rules of the organisation that stands above them in the network. A good example of this is the objective laid out in article 5(B) of the Memorandum of Association of the ICC, which states that the ICC must:

> "[G]overn and regulate Cricket at the international level, including by promulgating appropriate playing conditions for each format of the game of cricket, and to recognise the rights and responsibilities of its Members to govern and regulate Cricket in their respective Cricket Playing Countries."[417]

Therefore, members of the ICC, that is, the national federations, have been authorised to regulate cricket in their respective countries. However, despite this authority, as members of the ICC, they are obliged to comply with the rules of the ICC.[418] Similarly, CSA's Memorandum of Incorporation states that its members' rules and regulations need not only comply with CSA's rules and regulations but also the ICC's rules and regulations.[419]

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[416] These are: CA (Cricket Australia), ECB (England and Wales Cricket Board), BCCI (Board of Control for Cricket in India), NZC (New Zealand Cricket), CSA (Cricket South Africa), AFC (Afghanistan Cricket Board), BCB (Bangladesh Cricket Board), PCB (Pakistan Cricket Board), SLC (Sri Lanka Cricket), CI (Cricket Ireland), WIC (West Indies Cricket) and ZI (Zimbabwe Cricket).

[417] 5(B) of the Amended and Restated Memorandum of Association and Articles of the Association of the International Cricket Council 2017.

[418] Article 2.4 (f):

"adopt, implement and enforce within its Cricket Playing Country a set of regulations (including anti-doping and anti-corruption regulations) that are consistent with the Memorandum of Association, these Articles of Association, each Members' Resolution that is passed, and the Regulations".

[419] Article 12.2.1 of the Memorandum of Incorporation 2017:

South African national bodies evidently not only have a duty to regulate their respective sport in South Africa, but they also have international obligations that need to be adhered to. These are contractual obligations incurred under the law of associations. Therefore, any action taken by these national bodies needs to be in line with the relevant rules and regulations of their "supreme" international body.

5 3 Rules and regulations of international sport federations

In the context of this dissertation, it is critical to look at key rules and regulations applied by these "supreme" international federations and the obligations that they set forth for their members, in terms of both discrimination and political interference in sport. The common themes that will be illustrated are that not only do *all* of the international federations prohibit all forms of discrimination, whether it be based on race, gender or religion, but also the fact that national federations need to act independently from political or governmental interference in the governance of their sport.

5 3 1 The IOC's Olympic Charter

The IOC adopted the Olympic Charter, which may rightly be viewed as akin to a Constitution which codifies principles of international customary law of sport in respect of the sporting codes that make up the Olympic Movement. It further contains the rules and by-laws adopted by the IOC. There are several provisions which forbid discrimination and external interference:

- Principle 4: "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

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"Affiliate Members', Associate Members' and Ancillary Members' constitutions and any rules or regulations formulated there under shall not be in conflict with this MOI or the International Cricket Council.":

see also the Constitution of the Western Province Cricket Association article 18.2.1 which states that:

"Affiliate Members', Associate Members' and Ancillary Members' constitutions and any rules or regulations formulated there under shall not be in conflict with this Constitution, the CSA MOI or the International Cricket Council".

spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play."[420]

- Principle 6: "The 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."[421]
- Principle 5: "Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied."[422]

The mission and role of the IOC and NOC's include:

- Rule 2.5: "to take action to strengthen the unity of the Olympic Movement, to protect its independence, to maintain and promote its political neutrality and to preserve the autonomy of the sport;"
- Rule 2.6: "to act against any form of discrimination affecting the Olympic Movement;" and
- Rule 2.10: "to oppose any political or commercial abuse of sport and athletes."
- Rule 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."
- Rule 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."
- Article 44.4: "An NOC shall only enter competitors upon the recommendations for entries given by national federations. If the NOC approves thereof, it shall transmit such entries to the [Organising Committee of the Olympic Games, or OCOG]. The OCOG must acknowledge their receipt. NOCs must investigate the validity of the entries proposed by the national federations and ensure that no one has been excluded for racial, religious or political reasons or by reason of other forms of discrimination."[423]

[420] Principle 4 of the Olympic Charter.

[421] Principle 6.

[422] Principle 5.

[423] Chapter 5, Article 44.4.

Furthermore, the IOC strengthened its stance against discrimination by partnering with the United Nations to fight racism and racial prejudice.[424] The president of the IOC stated that "[p]ractising sport, without discrimination of any kind, is a human right and a fundamental principle of the Olympic Movement".[425]

5 3 2 World Rugby Board's rules and regulations

World Rugby is defined under its by-laws as the association of unions and/or associations in membership with World Rugby in accordance with its by-laws. The objectives, functions and by-laws of the World Rugby Handbook include the following:

- "To prevent discrimination of any kind against a country, private person or groups of people on account of ethnic origin, gender, language, religion, politics or any other reason."[426]
- "Membership of World Rugby by a Union or Association shall be effective as an agreement binding such Union or Association (which agreement requires such Union or Association to similarly by agreement bind its affiliated membership which such Union or Association undertakes to do) to abide by the Bye-Laws, Regulations and Laws of the Game and to accept and enforce all the decisions of World Rugby, Council and the Executive Committee (as the case may be) in respect of the playing and/or administration of the Game throughout the country or countries within the jurisdiction of such Union or Association. Any breach of this agreement or any conduct which may be prejudicial to the interests of World Rugby or of the Game shall render such Union or Association liable to disciplinary action in accordance with Regulation 18 of the Regulations Relating to the Game."[427]
- "A Union may be suspended or 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: it may no longer be considered as fully responsible for the organisation of rugby related matters in its territory; 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."[428]

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[424] Anonymous "IOC Takes a Stand against Discrimination and Celebrates the Power of Sport To #Fightracism" (21-03-2017) *Olympics* <https://www.olympic.org/news/ioc-takes-a-stand-against-discrimination-and-celebrates-the-power-of-sport-to-fightracism> (accessed 02-11-2020).

[425] Anonymous "IOC Takes a Stand against Discrimination and Celebrates The Power Of Sport To #Fightracism" (21-03-2017) *Olympics*.

[426] Bye-law 3(f).

[427] Bye Law 7.

[428] Bye-law 10(e).

- "Provided that the same are not in conflict with these Regulations and subject to conformity with the relevant legal systems a Union may make and adopt other more restrictive regulations. Such domestic regulations shall have effect only within the jurisdiction of that Union."[429]
- "All Unions, Associations, Rugby Bodies, Clubs and Persons: shall not do anything which is likely to intimidate, offend, insult, humiliate or discriminate against any other Person on the ground of their religion, race, sex, sexual orientation, colour or national or ethnic origin."[430]

World Rugby has recently stated that it is taking a "firm" stand against discrimination. World Rugby proclaimed that rugby is a sport for all (which includes diversity and inclusion) and that one must be conscious of the fact that discrimination can be built into "policies, procedures and attitudes".[431] World Rugby further states that "everyone should have the opportunity to play the game or be a part of rugby regardless of their national, racial or ethnic origin, sex, gender identity, sexual orientation, disability, language, religion, politics or any other reason".[432]

5 3 1 Rules and regulations under the ICC and World Athletics

The ICC and World Athletics both have constitutions as well as rules and regulations prohibiting discrimination in any form. The ICC is responsible for the global governance of cricket and it was established to ensure, amongst other obligations, the promotion and development of cricket worldwide and to protect the autonomy of the ICC and its members to govern and regulate cricket. These rules and regulations include the following:

- Article 2.3(I): "Each member shall enjoy the rights and benefits conferred on Members by the Memorandum of Association and these Articles of Association, which shall include (subject to the terms of the Memorandum of Association and these Articles of Association): each Member being recognised by the ICC and its fellow Members as having the sole and exclusive right and responsibility (subject to the Memorandum

[429] Regulation 3 of the World Rugby Handbook

[430] Regulation 20 appendix 1 1.13 of the Code of Conduct in the World Rugby Handbook.

[431] "Anonymous" Rugby for All (24-04-2019) *World Rugby* <http:www.world.rugby/rugbyforall?lang=en> (accessed 02-11-2020).

[432] "Anonymous" Rugby for All (24-04-2019) *World Rugby*.

of Association, the Articles of Association and the Regulations) to govern, regulate and administer Cricket in its Cricket Playing Country."[433]

- Article 2.4(D): "Each Member must at all times: manage its affairs autonomously and ensure that there is no government (or other public or quasi-public body) interference in its governance, regulation and/or administration of Cricket in its Cricket Playing Country (including in operational matters, in the selection and management of teams, and in the appointment of coaches or support personnel)."
- Article 2.4(F): "Each Member must at all times: each Member being recognised by the ICC and its fellow Members as having the sole and exclusive right and responsibility (subject to the Memorandum of Association, the Articles of Association and the Regulations) to govern, regulate and administer Cricket in its Cricket Playing Country."
- Article 12: "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".

Furthermore, in 2012 the ICC adopted an anti-racism policy, which echoes the words above, and the policy further states that:

- "[T]he ICC strives to ensure that all such participants can enjoy the sport without being the subject of conduct that is (for example) offensive, insulting, humiliating or intimidating on the basis of race, religion, culture, colour, descent, and/or national or ethnic origin."[434]
- "The ICC and all of its Members should: not at any time offend, insult, humiliate, intimidate, threaten, disparage, vilify or unlawfully discriminate between persons based on their race, religion, culture, colour, descent, and/or national or ethnic origin ('Inappropriate Racist Conduct');[435]
- "The ICC and all its Members should: adopt appropriate policies, protocols, mission statements and similar so that it is clear to all employees, officials, commercial partners and other participants and stakeholders that Inappropriate Racist Conduct (including in any public statements) will not be tolerated by the ICC or by the Member, whether at International Matches played within its jurisdiction or those played as part of an ICC Event (as applicable), or at other times including commercial partners and stakeholders."[436]

[433] Article 2.3(l) of the ICC Amended and Restated Memorandum of Association and Articles of Association.

[434] Article 1 of the ICC Anti-Racism Policy for International Cricket.

[435] Article 6(a).

[436] Article 6(b).

World Athletics is the world governing body for athletics and the purposes of World Athletics, which are found in Part 1 of the World Athletics Constitution,[437] set out the organisation's position on discrimination and autonomy. This includes the fact that World Athletics must:

- Article 4.1(e): "[P]rotect the integrity of Athletics and World Athletics by developing and enforcing standards of conduct and ethical behaviour and implementing good governance"
- Article 4.1(j)"[P]reserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play."

Furthermore, members of World Athletics need to abide by the Constitution and the rules and regulations of World Athletics. Members' obligations include:

- Article 9.1(b): "[To] comply with this Constitution and all Rules and Regulations;"
- Article 9.1(f): "[To] adopt a constitution, rules and regulations which comply with, and are not inconsistent with, this Constitution, the Rules and the Regulations".

Article 13 of the Constitution provides for suspensions and sanctions if members do not comply with the rules and regulations of World Athletics. This may accrue if a member federation:

- Article 13.1(a): "is in breach of any one or more of its obligations under Article 9 (Obligations of Members) including its failure to pay the Membership Fee or any other fees or payments due and owing by the date specified in Article 10.2;"
- Article 13.1(b): "is otherwise in breach of any other Article in this Constitution or any Rule, Regulation or a decision of Congress or Council;"
- Article 13.1(c): "acts in a manner which is contrary to any of the Purposes of World Athletics, or the government of the Country or Territory that the Member represents, acts in a manner contrary to any of the Purposes;"

The World Athletics Integrity Code of Conduct further requires applicable persons to uphold the principle of equality:

[437] World Athletics Constitution of 2019.

> "[N]ot to unlawfully discriminate on the basis of race, sex, ethnic origin, colour, culture, religion, political opinion, marital status, sexual orientation or other differences and in particular to encourage and actively support equality of gender in Athletics."[438]

5 4 Understanding the rules

Taking the above-mentioned rules and regulations of the various international federations into account, it is clear that the autonomy of their sport is codified in their relevant constitutions. National bodies are required to implement the rules and regulations adopted by the international body free from external interference. Pierre de Coubertin, the founder of the IOC, believed that politicians could only violate sports integrity and stated that "the beam formed by the goodwill of all its members of an autonomous sport, relaxes when the giant figure of this dangerous and imprecise figure called the state appears".[439] Therefore, NOCs are encouraged to maintain their autonomy and resist pressures, including but not limited to political interference.[440] Again, the idea of autonomy and being free from political interference is a rule that World Rugby, the ICC, World Athletics and FIFA[441] have adopted. The ICC specifically speaks about government interference in team selection and management, and it is a point that will be elaborated upon below. The South African national federations that are members of these international federations would need to abide by these rules and regulations, but on the face of it, it appears that they often fall short of these obligations.

What is also evident in the various rules and regulations is the universal condemnation of discrimination. The Olympic Charter states that practising sport is a human right and that every individual should enjoy playing sport without discrimination. This coincides with the views regarding discrimination by World Rugby, the ICC and World Athletics. More specifically they mention that individuals should not be discriminated against based on national, racial or ethnic origin, sex, or religion. The

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[438] Article 3.3.9 of the World Athletics Integrity Code of Conduct 2019.

[439] Mrkonjic & Geeraert "Sports organisations, autonomy and good governance" in *Action for Good Governance in International Sports Organisations* 134.

[440] Article 27.6 of the IOC Olympic Charter:

> "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".

[441] Article 14(1)(i) and Article 19 of the FIFA statues June 2019.

ICC and World Athletics emphasise these rules as it is found in separate documents to the general rules and regulations found in a Constitution or a Memorandum of Association.[442] Discriminating based on race would, for example, be allowing a black individual to compete in the sport at the expense of allowing a white individual the opportunity to compete, or vice versa, based on race as opposed to sporting merit. Therefore, as the Olympic Charter describes it, one would be prohibiting one of those individuals from exercising the freedom to enjoy their human right of practising sport.

A leading example of a South African sports body that is inconsistent with the above international laws is the actions of SASCOC in their support of government's pursuit of race-based sports transformation. The team manager, Mr Khaya Majeka stated that "[re]presentivity would be part of the selection criteria" and for sports teams to be sent to the 2008 Olympic Games, they would have to at least show a 50/50 black-white ratio of participants.[443] Furthermore, SASCOC and other sporting codes entered into an agreement with the Minister of Sport and Recreation, whereby failure to meet the transformation targets that were agreed upon would result in the Minister punishing federations by withdrawing their ability to award national colours.[444] This seems quite inconsistent with rule 27.5 and 27.6 of the Olympic Charter, set out above.[445]

5 5 The South African transformation agenda

The National Sports and Recreation Amendment Act 18 of 2007 ("NSRAA") is the official legislation regulating and governing sport in South Africa. The purpose of the NSRAA is to, *inter alia*, provide for measures to correct imbalances in sport and recreation and to empower the Minister to make regulations.[446] Section 2(5) instructs all national federations to develop its sports or recreation at club level in accordance

[442] The ICC introduced the Anti-racism policy, while World Athletics has the Integrity code of conduct.

[443] Sports, Arts and Culture "Beijing Olympics Team Preparation: Input by SASCOC and SRSA; SABC Siyanqoba Campaign; SA Football Supporters Association" (19-06-2007) *PMG* <https://pmg.org.za/committee-meeting/9997/> (accessed 23-04-2020).

[444] Minister Fikile Mbalula: Aftermath of Springbok Campaign in the IRB 2015 World Cup Championships (05-11-2015) South African Government <https://www.gov.za/speeches/minister-sport-and-recreation-south-africa-mr-fikile-mbalula-mp-statement-aftermaths-senior> (accessed 23-04-2020).

[445] See the text to chapter 5.3.

[446] Preamble of the Nationals Sports and Recreation Amendment Act 18 of 2007.

with the service level agreement referred to in section 3A, the development programmes in section 10(3) and the guidelines issued by the Minister in terms of section 13(A). Section 3A states that the "sports confederation [SASCOC] and national federations must, in the prescribed manner, enter into a service level agreement with Sports and Recreation South Africa in respect of any function assigned to them by this Act".

Furthermore, the Minister is empowered to make regulations. In this regard, section 4(1) of the NSRAA provides that the Minister may, "after consultation with or consideration of proposals made by the SASCOC in so far as high-performance sport is concerned, from time to time, determine the general policy to be pursued with regard to sport and recreation". The Minister may amongst other things, determine policy concerning the institution of affirmative action measures. Section 4(2)(g) and (h) state that the policy to be determined may relate to "helping 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". Coupled with that, section 13A provides that the Minister must issue guidelines or policies to promote equity, representivity and redress in sports and recreation. 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 measure taken to protect or advance persons or categories of persons, disadvantaged by unfair discrimination as contemplated by section 9(2) of the Constitution". Louw rightly states that it is "unclear what 'instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process' entails, exactly."[447] He remarks further that the NSRAA does not provide guidance on the meaning of affirmative action in the context of sport and it, therefore, does not seem to provide legislative authority for a special form of affirmative action in sport.[448] If affirmative action in sport includes quotas, the conflict section in the EEA states that "any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of

[447] Louw (2019) *De Jure Law Journal* 395.

[448] 396; what is very interesting is that section 13(5)(a)(ii) refers to unfair discrimination as contemplated by section 9(2) of the Constitution and not necessarily reference to the EEA and its purpose of equitable representation.

this Act will prevail".[449] As a result, Louw states that because the EEA applies to professional sportspersons and quotas are prohibited by the Act, "and the fact that the EEA supersedes all other legislation concerning matters dealt with in the Act, the use of quotas in team selection must be seen to be unlawful".[450] However, like all affirmative action measures, it must comply with the Constitution and its "parameters for constitutionally legitimate affirmative action measures".[451]

South African national federations may not always enjoy their autonomy, as is clear from the actions of former Minister of Sport, Fikile Mbalula, who sought a rapid increase in black representation in national sports teams and warned of harsh punishment for those who failed to meet the set criteria.[452] As previously mentioned, the punishment included: withdrawal of government funding to bodies, withdrawal of national colours and not allowing bodies to bid to host international events.[453] However, intending to keep national federations free of external interference and to preserve their autonomy, section 13(5)(b)(ii) prohibits the Minister from performing certain actions, which includes that the Minister may not "[i]nterfere in matters relating to the selection of teams, administration of sport and appointment of, or termination of the services of, the executive members of the sport and recreation body." Setting a target for national federations of 50% black representation may be adding constraints on the selection of teams and may be viewed as a rather blatant contravention of the above provisions of the Act.

5 5 1 Government's strategy

It is no secret that government has, for some time, played an active role in determining the transformation plans formulated and implemented by the national sports bodies in South Africa, as illustrated above. However, implementing racial

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[449] Section 63.

[450] Louw (2004) *Stell LR* 243.

[451] 396.

[452] S Mnyanda "Imposing racial quotas is a vital step forward for South African sport" (29-04-2019) *The Guardian* <https://www.theguardian.com/world/2016/apr/29/south-africa-racial-quotas-sport-rugby-springboks-cricket> (accessed 02-11-2020)

[453] EPG: *Sport Transformation* Status Report Overview 2017/2018 5; see also Sport24 "SARU to get quota clarity" (14-04-2014) *Sport24* <https://www.sport24.co.za/Rugby/SARU-to-get-quota-clarity-20140414> (accessed 02-11-2020).

quotas simply to meet government criteria is not one of the methods that these national bodies should be forced to use. In 2012, the South African government adopted the Transformation Charter (the "Charter") to aid in the broad-based transformation of sport in South Africa. Article 1.5 of the Charter provides that the transformation strategy should be:

> "[M]ulti-dimensional and focused on changing demographic profiles on and off the field of play, ensuring equitable access and resource availability, skill and capability development on and off the field of play; extensive community involvement with a view to provide participation opportunities and to identify potential talent; and building and shaping relationships with its future support and spectator base, future leaders and decision-makers on the basis of broad-based community engagement. This approach will drive and shape sport's future demographic profile."

The Charter recognises that one-dimensional transformation models have to be changed to multi-dimensional models. Thus, it appears that the objective is to ensure that transformation is not only about demographic representation but similarly about having a broader impact on South African society. Part 3 of the Charter identifies the six dimensions of the multi-dimensional strategy, which includes access to infrastructure and participation opportunities, human resource skill and capability development, demographic profile, performance, contribution to government priorities and good governance. These dimensions are composed into a scorecard and the scorecard serves as a "framework designing a set of indicators for activities selected as the key drivers for transformation".[454] Each of the six dimensions will have pre-set and agreed performance goals (targets) and along with the respective indicator sets, will contribute to the achievement of the objectives set out in the Charter.[455]

The demographic profile dimension aims to change sports' demographic profile on and off the field so that it ultimately reflects a more equitable demographic profile at local, provincial and national level. The Charter states that it is not only about replacing "white faces with black faces".[456] The Charter provides that in setting "representation" targets, it is important to take cognisance of the fact that certain geographical regions

[454] Transformation Charter for South African Sport (2012) 26.

[455] 26.

[456] 36.

differ substantially from others in terms of population demographics and therefore it may require different representation targets in different sports in different regions.

Through the Charter, the South African government is ostensibly committed to correcting what is viewed as a "skewed picture of sporting facilities and opportunities" and to ensure that our national teams are representative of the total South African population.[457] Two key issues on the government directive stand out, and that is the fact that "it is not the policy of the Government to advocate the racial composition of national teams, nor to prescribe to National Federations on how they should select their teams", and that "transformation of teams should be from the bottom up".[458] As a result, it is portrayed that transformation is a conscious process of eliminating inequality, and not furthering the interests of one particular group. Government speaks about transformation from the "bottom up", which should essentially mean from grassroots levels, but that begs the question as to why there remains a need to burden our national sports teams with transformation "targets".

5 5 2 National federations' targets

In 2012, the Sport Transformation Commission called the Eminent Persons' Group (or "EPG"), was appointed to guide transformation and to advise the Minister on ways to progress in respect of transformation. The EPG has as its main objective monitoring and evaluating the implementation of the Charter. The EPG is further mandated to provide leadership and direction in developing a targeted transformation measurement and progress monitoring system; advise on the Charter dimension targets; compile, distribute, collect and analyse data sheets and make recommendations and generate transformation audit reports; advise on the design of a process of monitoring transformation status and a reporting system to assess the success or failure of the implementation of transformation targets; monitor and advise the Minister on punitive measures concerning sporting bodies not driving transformation; offer a long-term strategic direction on transformation and advise the Minister on the design of short

[457] 16.

[458] 17.

and long-term transformation strategy.[459] After the EPG pilot report,[460] weaknesses were identified which hindered the progress of transformation since its inception, and these weaknesses were that it was:

- "generic ('one size fits all') i.e. not *sport-specific enough*
- *retrospectively* focused (rear-windowed) not *forward* looking and
- restricted with respect to federation leadership accountability."[461]

The Charter sets out "generic" targets to be achieved by all the national federations for the representation of "Generic Blacks" in the various sports teams, and this is found in the Transformation Status Report of 2013, which states that:

> "Demographic profiles are evaluated in terms of the % achievement of the 50% target set for the percentage generic black (black African, Coloured and Indian) and black African representation profile of the structure under review."[462]

No statistics were gathered to determine the amount of people that are actively playing a given sport at a professional or semi-professional level. This could assist in setting specific targets for various individual sports and as opposed to the "one size fits all" approach which was already recognised as a weakness. Running simultaneously with the Charter, a select group of national federations entered into agreements with the SRSA and SASCOC[463] to give effect to the EPG's recommendations:

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[459] Briefing to Select Committee Education and Recreation - PowerPoint PPT Presentation (17-09-2014) *SlideServe* <https://www.slideserve.com/freya-hardy/briefing-to-select-committee-education-and-recreation> (accessed 01-09-2020).

[460] Sport and Recreation South Africa *Pilot Evaluation Rugby | Cricket | Netball | Athletics | Football: A Transformation Status Report* (2013) 26.

[461] PMG "EPG outcomes and strategies" (undated) *PMG* <https://pmg.org.za/files/170530EPG.pptx> (accessed 02-11-2020).

[462] Sport and Recreation South Africa *Pilot Evaluation* 26.

[463] EPG: *Sport Transformation* Status Report 2016/2017 15:

> "'Barometer' project involving the original 5 pilot codes, athletics, cricket, football, netball, and rugby entering into MoU's with SRSA and SASCOC in which they undertook to set and project forward their own (self-set) targets in selected Charter categories. Actual

> "In 2014/15 the EPG also introduced the notion of a Transformation Barometer. This was a more proactive approach – with each code – based on its particular circumstances – setting targets for itself. Actual achievement against these self-set targets is monitored and subjected to penalties for non-achievement of at least 50% of these targets."[464]

Therefore, national federations have to meet the transformation targets set out according to the Charter, as well as their own "self-set" targets, and this is referred to as the new transformation barometer.[465] This is indicative of governments' level of interference in the team selection of South African national teams. SARU has gone as far as to stipulate that, in its Strategic Transformation Plan, the Department of Sport and Recreation has set targets for SARU:

> "The Department of Sport and Recreation has in place a target of at least 50% generic black representation for a team or dimension to be regarded as having been transformed. Within that 50% representation, the expectation is that half of those will be black African. It has been anecdotally suggested by the Eminent Persons' Group that that requirement for black African representation should be raised to 60%".[466]

For the past five years, national federations have had to act on these agreements and, as a result, we have our 'flagship' national federations implementing what arguably amounts to racial "quotas" in sports such as rugby, cricket and netball. However, the Department of Sport and Recreation refrains from referring to it directly as quotas but instead refers to it as "targets".

The targets set out in SARU's Strategic Transformation Plan, are as follows:

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performance against these targets is annually measured and a penalty imposed on those federations failing to achieve 50 % or more of their self-set targets."

[464] 5.

[465] EPG: *Individual Federation Barometer and Charter*, Transformation status scorecard 2017/2018 19:

"Self-set targets are influenced by federation specific circumstances including views on its current position and the perceived impact of internal and external forces on its future. Prevailing federation culture and value sets linked to leadership commitment to and understanding of the transformation process, are key actors in repositioning a federation."

[466] South African Rugby Union Strategic Transformation Plan 4.

> "Increase black participation in Super Rugby competition to 50% by 2019 … [By] engag[ing] Super Rugby franchises to increase black player representation to 30% (7 black players in squad of 23). From the 7 generic black players 2 must be black Africans. By the end of the competition all black players should at least have played 1 full match."[467]

> "Increase black participation in the Springbok team to 50% by 2019... [By] engag[ing] national coach to increase black player representation to 30% (7 players in squad of 23). From the 7 generic black players 2 must be black Africans."[468]

In CSA's Transformation Philosophy and Plan, it sets out their targets which run from 2017 to the year 2020. In the Transformation Philosophy and Plan, CSA has implemented racial quotas for senior provincial and franchise cricket teams and the minimum number of black players per team (per match) is set at six black players in the match-day squad.[469] Of those six, three need to be black Africans. CSA has stated that they would not implement racial quotas for their national teams,[470] but unfortunately, the Transformation Charter has done that for them. The 2017/2018 EPG states that 54% of the cricket team has to be generic black throughout the season, and 20% needs to be Black African.[471] In 2013, the EPG found that CSA did so well in meeting their targets, that they further considered setting the target for generic black representation in the national cricket teams to 60%, "to further progress the game towards the goal of representative team demographics reflecting the demographics of the country".[472]

According to the 2017/2018 EPG Transformation scorecard,[473] ASA set a target for the amount of Generic Blacks to compete for Team South Africa. The targets indicated that 60% of male individuals had to be Generic Blacks, of which 30% had to be Black Africans, and 40% of female individuals had to be Generic Blacks, of which 28% had

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[467] 7.

[468] 8.

[469] Cricket South Africa *Transformation Philosophy and Plans* 8.

[470] 4.

[471] EPG: *Individual Federation Barometer and Charter* Transformation status scorecard 2017/2018 65.

[472] Sport and Recreation South Africa *Pilot Evaluation* 28.

[473] EPG: *Individual Federation Barometer and Charter* Transformation status scorecard 2017/2018.

to be Black Africans.[474] In the same report, NSA set targets for a certain amount of Black representatives in the team throughout the season. The target for Generic Blacks was set at 58% and 38% for Black Africans.[475]

Furthermore, the trade union, Solidarity, obtained the forecasted and actual performance transformation targets agreed upon by the above federations. SARU's forecast for senior national rugby players include:[476]

- An increase in generic black representation from 21% in 2014 to 49% in 2018.
- An increase in African black representation from 9% in 2014 to 30% in 2018.

CSA's forecast for senior national cricketers include:[477]

- An increase in generic black representation from 54% in 2016 to 60% in 2020.
- An increase in African black representation from 18% in 2016 to 27% in 2020.

ASA's forecast for senior athletic participants include:[478]

- An increase in male generic black participants from 40% in 2014 to 84% in 2018 (the forecast is exactly the same for African black participants).
- An increase in female generic black participants from 20% in 2014 to 40% in 2018. (the forecast is exactly the same for African black participants).

NSA's forecast for senior national players include:[479]

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[474] 33-35.

[475] 99.

[476] Staff Writer "New race quotas for SA rugby, cricket and netball revealed" (02-03-2017) *Business Tech* <https://businesstech.co.za/news/lifestyle/161391/new-race-quotas-for-sa-rugby-cricket-and-netball-revealed/> (accessed 20-10-2020).

[477] Staff Writer "New race quotas for SA rugby, cricket and netball revealed" (02-03-2017) *Business Tech*.

[478] Staff Writer "New race quotas for SA rugby, cricket and netball revealed" (02-03-2017) *Business Tech*.

[479] Staff Writer "New race quotas for SA rugby, cricket and netball revealed" (02-03-2017) *Business Tech*.

- An increase in generic black team members in the season from 21.29% in 2014 to 25% in 2018.
- An increase in African black team members in the season from 55.46% in 2014 to 71% in 2018.

It is important to recall that there is no basis outlined in the EEA for the selection of a national demographic profile to determine the composition of a sports team. Further, the EEA does not make mention of classing coloureds, Indians and Africans in separate categories but classes them all under a single category, black people, as a designated group. It is quite evident that sporting merit (experience and ability) is not the most important factor, but an athlete's selection may lie in the category that they fall in (Coloured, Indian or African). Therefore, taking the above into account, it is abundantly clear that the Minister along with the national federations imposed a quota system in their selection of athletes and national teams.

What happens if these federations do not meet these "targets"? The former Minister of Sport has informed us that they will be punished. If they are punished for not meeting "targets" then it can strongly be argued that these are not targets at all but rather mandatory quotas. These federations are under clear pressure from government to meet these strict and now rigid quotas to avoid government sanctions. As mentioned before, quotas can be defined as being externally imposed as well as sanctions being imposed if these quotas are not attained. World Rugby uniformly warns that discrimination can be built into policies.[480] The South African transformation agenda may be an example of one of those policies and a significant one at that. Therefore, given the rules and regulations we have seen, can racial quotas (or even racial targets) pass scrutiny under these international sports laws? It is submitted that they cannot.

5 6 Potential consequences

Not very long ago, South Africa was trapped in international sports isolation due to racist practices which ultimately filtered into sport. Under the appalling regime of apartheid, the government institutionalised and legislated racial segregation. The implementation of these racist policies meant that black athletes could not be part of

[480] See the text to part 5.3.

a representative South African team competing in international competitions or the Olympic Games.[481] Furthermore, the government prevented mixed sports teams to represent South Africa and correspondingly attempted to prevent mixed sports teams from other nations from competing in South Africa.[482] A great example of this is the notorious case of Basil D'Oliveira, a non-white South African émigré, who played cricket for England. The England tour of South Africa was cancelled since the South African government would not allow D'Oliveira to play, and as a result, the international community viewed South Africa's racial segregation as a violation of the principles of sport and duly expelled the country.[483] The national federations in South Africa, which were members of international federations, did not allow non-white membership and therefore prevented non-white athletes from competing on the international stage.[484]

5 6 1 South African sport in isolation

International sports federations, however, were not always quick to expel South Africa. In 1964, South Africa instructed each group to represent their racial affiliation for the Olympic Games. This discriminatory stance was against the principles of the IOC, and due to not sending a mixed team, the IOC forbade participation.[485] In 1968, the IOC initially invited South Africa to participate in the Mexico Games.[486] However, only through a threatened boycott by 50 nations, did an under-pressure IOC eventually suspend South Africa from the Mexico Games.[487] The IOC may have never suspended South Africa had it not been for the threatened boycott of numerous nations. McClean explains it as follows:

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[481] P Nongogo, A Goslin & J van Wyk "An argument for the struggles to de-racialise South African sport: The Olympic Movement's response, 1896-1946" (2014) 20 *AJPHERD* 1637 1649.

[482] 1649.

[483] D Booth "The South African Council on Sport and the Political Antinomies of the Sports Boycott" (1997) 23 *Journal of South African Studies* 51 54.

[484] Nongogo, Goslin & Van Wyk (2014) *AJPHERD* 1650.

[485] P Labuschagne "Sport, Politics and Black Athletics in South Africa During the Apartheid Era: A Political-Sociological Perspective" (2016) 41 *Journal for Contemporary History* 82 93.

[486] D Booth "Hitting Apartheid for Six? The Politics of the South African Sports Boycott" (2003) 38 *Journal of Contemporary History* 477 480.

[487] 480.

> "Although South Africa had not been invited to the 1964 Tokyo Olympics, the IOC had sidelined demands to explore claims that the South African National Olympic Committee (SANOC) violated the Olympic Charter by practi[c]ing racial discrimination – an allegation made to the IOC by the South African Sports Association in 1960. Debates in Mexico City forced the IOC to act. The IOC's fact-finding mission to South Africa in 1967 had been instructed to address only whether SANOC complied with Olympic regulations, not to judge apartheid; this instruction to limit the focus came after repeated accommodation of and adaptation to the structure of apartheid sport alongside denunciation of but no action against government interference in sport."[488]

The IOC was reluctant to get involved with any political regimes and it was evident that it was only through the influence of other nations that the IOC was forced to act. However, in 1970, the IOC voted to expel South Africa due to the South African government's insistence that the "international world should accept the discrimination on the basis of race".[489] The other international federations followed suit, with World Athletics (previously known as the IAAF) terminating South Africa's membership due to racial policies, but World Rugby was the exception.[490] Eventually, the Commonwealth leaders came together to effectively boycott sporting relations with South Africa, through what became known as the Gleneagles Agreement.[491] The agreement had a profound effect on a racist South Africa, as it effectively curtailed South Africa's ability to compete internationally in sports such as cricket and rugby, which the Commonwealth countries dominated.[492]

While it was the blatant racial segregation that enforced the sporting isolation of South Africa during apartheid, one could likewise question the legitimacy of current

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[488] M MacLean "Revisiting (and Revising?) Sports Boycotts: From Rugby against South Africa to Soccer in Israel" (2014) 31 *The International Journal of the History of Sport* 1832 1835.

[489] Labuschagne (2016) *Journal for Contemporary History* 92; see also M MacLean (2014) *The International Journal of the History of Sport* 1835, who stated that "increasing membership of the IOC from Third World and Eastern bloc states that resulted in a shift in the IOC's power balance meant that in 1970 the IOC voted to expel South Africa".

[490] Booth (2003) *Journal of Contemporary History* 480.

[491] Anonymous "Gleneagles Agreement starts apartheid South Africa's sporting isolation" (undated) *The Commonwealth* <https://thecommonwealth.org/history-of-the-commonwealth/gleneagles-agreement-starts-apartheid-south-africas-sporting-isolation> (accessed 02-11-2020)

[492] Anonymous "From the Archive: Gleneagles Agreement on Sport" (09-11-2016) *The Commonwealth* <https://thecommonwealth.org/media/news/archive-gleneagles-agreement-sport> (accessed 02-11-2020).

racial policies which are being implemented in South African sport today. It has been mentioned that, according to the South African Transformation Charter, all sports codes have been set targets of having 50% black representation in their teams. In addition, our national federations have set their own targets – under pressure from government to do so – and if those are not met, sanctions will be imposed on them. Government is again controlling the mandate of sport participation in South Africa, albeit in a way that purports to rectify past injustices.

5 6 2 Current "targets" are against international federations' rules

Analysing the South African national federations' above-mentioned transformation policies will shed some light on their legitimacy concerning the rules and regulations of international federations.

5 6 2 1 Discrimination

The South African rugby team requires seven of the 23 players to be black, while at least two have to be black Africans. The same measures are implemented at Super Rugby level. Therefore, seven white players who may be good enough to make the team will not be allowed to be selected due to the quota system that has been enforced. World Rugby clearly states as an objective and function that they aim to prevent discrimination of any kind and that members should not do anything which will discriminate against any person on grounds of their race.[493] Furthermore, as a member of World Rugby, the South African domestic governing body is bound by all by-laws and regulations of World Rugby,[494] and as a result, any breach of these rules may result in disciplinary action. This may be an example of discrimination against players who fall outside the categories of coloured, Indian and African and therefore breach by-law 3(f) as well as a breach of the objectives and functions of World Rugby. That is because there is a strong case that these targets constitute racial quotas and, as previously mentioned, it is not only contrary to the EEA (therefore not a legitimate affirmative action measure) but judges have also stated that quotas cannot pass

[493] See the text to part 5.3.

[494] See the text to part 5.3.

constitutional muster under section 9(2) of the Constitution. Quotas were also referred to as “inherently” and “irrationally” discriminatory by Thlothlalemaje J.[495]

CSA has implemented quotas in domestic competitions, which required six of the eleven players to be black whereas the EPG has mandated that 60% of the national cricket team needs to be black during the course of the season. Again we see a scenario where there are only eleven positions on the cricket field and six of those are reserved for black players. That means only five white players will be able to be selected. The ICC has explicitly stated that the ICC or its members shall not at any time unlawfully discriminate against persons based on their race. Furthermore, the ICC’s anti-racism policy insists that its members adopt policies and protocols that indicate that all inappropriate racist conduct is not tolerated.[496] The reservation of six places for black players in the cricket team cannot be deemed lawful under the rules of the ICC’s articles of association. CSA would certainly defend their stance by referring to this as affirmative action. However, regardless of whether it is affirmative action or discrimination, nowhere in the ICC’s rules and regulations does it refer to affirmative action measures or make an exception for it (in fact none of the international federations makes mention of affirmative action). This may be because the application of affirmative action (or, what purports to be affirmative action) in South African sport is so unusual in the world. At least on the face of it, these racial targets appear to be clear discrimination by the CSA, and if the ICC takes action, the CSA may be suspended for not adhering to the objectives and functions of the ICC.[497]

Cricket is a specialist sport which is based largely on player statistics. A cricket team generally consists of five batsmen with two openers, which are considered specialists positions, a wicketkeeper and four to five bowlers. To be selected as a batsman, one would need to have a good batting average, which is calculated using the total amount of runs scored to innings played (similar for bowlers but one uses wickets taken to innings played). Therefore, it would be clear for the public if someone is selected and they are not up to “standard” or has a less favourable average than another batsman. It follows that if a non-white player does not perform and his statistics are not

[495] See the text to part 3.2.

[496] See the text to part 5.3.

[497] Article 2.10 of the ICC Amended and Restated Memorandum of Association and Articles of Association.

favourable compared to a fellow white player, it is hard to justify the selection. However, this may be the current situation if selection is based purely on race. A notable incident is the one between Vernon Philander and Kyle Abbot. The South African cricket team's former high-performance coach reported that for the semi-final of the 2015 World Cup**,** South Africa was mandated by CSA to include another player of colour in the starting eleven following their quarter-final win.[498] Abbot, a white South African bowler is the player who was allegedly sacrificed for the selection of a player of colour in the form of Philander. Philander left the field injured after an unfavourable bowling display and much was made of the fact that Philander had to replace an in-form Abbot. If these reports are accurate, it can be regarded as a clear example of not only government interference but also discrimination against Abbot, who was not allowed to play due to his race. A more comical example transpired in a franchise match between the Highveld Lions and the Titans. The Lions were in a pickle when African black spinner, Eddie Leie, got injured during the warm-up and the Lions had to get permission from CSA to field a white player, as the quota system at the time required all franchise teams to field a minimum of six players of colour in their starting team with three having to be black African. With Leie being injured, they did not meet the quota requirement, but CSA nevertheless granted the permission. Another Lions player got injured in the third over of the game and the coach Geoffery Toyana (a Black African coach) was forced to do some fielding before they managed to get a young white spectator to do some fielding for the rest of the match.[499]

The quota system implemented by ASA states that Team South Africa's male athletes have to comprise of 84% Generic Blacks and 40% of the female athletes have to be Generic Blacks. The principles of the IOC, as well as those of World Athletics, state that every individual has the right to practise and participate in athletics without discrimination. Furthermore, the IOC explicitly states that the NOCs need to ensure

[498] D Middleton "Cup team was changed to fill race quota: coach" (16-04-2015) *Cricket* <https://www.cricket.com.au/news/south-africa-mike-horn-world-cup-race-quota-vernon-philander-kyle-abbott/2015-04-16> (accessed 17-11-2019).

[499] Anonymous "Quota system creates dilemma for Lions" (18-02-2016) *Sports24* <https://www.sport24.co.za/Cricket/OneDayCup/quota-system-creates-dilemma-for-lions-20160218> (accessed 02-11-2020).

that athletes are not excluded based on racial reasons or other forms of discrimination.[500]

The IOC, one of the oldest sporting associations in the world, is extremely unambiguous about athletes not being selected based on race, and this is clearly something South Africa may be guilty of. The IOC is the only international federation which explicitly states that athletes may not be excluded based on race. It is a federation which in the past has suspended and expelled South Africa because it has been guilty of racist practices.

It is well known that under South African jurisprudence, neither the Constitution nor the EEA prohibits discrimination per se; it is unfair discrimination that is explicitly prohibited. It is important to note that under the rules and regulations of the international bodies, discrimination is prohibited and it makes no difference whether it is “unfair” or just “ordinary” discrimination; it is prohibited, plain and simple. Therefore, it would appear that it would not matter if South Africa finds discrimination to be lawful (as constituting affirmative action), as these domestic federations are still bound by the rules and regulations of these bodies, and these sports transformation policies may therefore violate the given provisions. However, the fact that these targets may constitute racial quotas and therefore cannot be legitimate affirmative action measures, aids the case of these targets being recognised as (unfair) discrimination under the international federations’ rules.

It is easy to point out the remarkable similarities that exist between sport under apartheid and the current racial quota system implemented in South African sport. Due to apartheid policies, black sportspersons were prohibited from not only competing in sports in South Africa but also internationally. Currently, white deserving players are left out of South African teams because a specific number of positions are reserved for black players. It is not my intention to compare the current racial quota system in sport with apartheid, as that would be outrageous. Apartheid did not only affect sports participation, but it also crippled racial groups from being on equal footing with one another in all spheres of life and it is a burden we all carry to this day. But that is not an excuse to say that what is currently happening under our law is necessarily lawful or constitutional, simply because it may occur in the name of redress.

[500] See the text to part 5.3.

5 6 2 2 Political interference

A further potential breach of international sporting rules relates to the principle of autonomy. The IOC, ICC and World Rugby state as rules that the respective sports must be governed domestically free from political interference. Despite this, we have seen on more than one occasion in recent years that the relevant national bodies in South Africa have acted under pressure from the government. A perfect example is the punitive measures with which the Minister threatened the poor performing sports federations to ensure race-based transformation, as referred to earlier. One cannot be autonomous if the composition of your team is governed by rules that are implemented by the Minister or the government.

Louw states that one could argue that "the transformation of South African sport is a legitimate governmental objective".[501] However, as mentioned previously, *Barnard* stated that not only must an affirmative action measure be lawful, but it must also be lawfully implemented, and coupled with that is the fact that rigid quotas are prohibited according to the EEA.[502] It is at least arguable that the measures driven by governmental pressure on domestic federations are illegitimate. If one considers the similarities between race-based measures currently employed and the racist policies of the apartheid governments, one may question why, from a purely sporting perspective, international federations have not once again stepped in as they did during the apartheid years in South Africa. Is it, therefore, a case of two wrongs making a right? The evidence clearly shows that a number of South African domestic federations are in apparent direct and blatant contravention of various rules and regulations of the international federations. More recently, the Institute for Race Relations has reported CSA to the ICC for "blatant racist" policies and political interference. After being under pressure from government, CSA has committed to exclusively hiring black coaching consultants.[503] The deputy head of policy research, Herman Pretorius stated that over the last decade there have been issues of "political

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[501] Louw (2019) *De Jure* 406.

[502] *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 38 and 42.

[503] L Burnard "CSA commits to hiring black consultants exclusively in effort to speed up transformation" (01-09-2020) *Sports24* <https://www.news24.com/sport/cricket/proteas/csa-commits-to-hiring-black-consultants-exclusively-in-effort-to-speed-up-transformation-20200901> (accessed 06-09-2020).

interference, of malfeasance, mismanagement and of course…just blatant racism."[504] The outcome of this case will most probably give a clear directive as to how South African sports bodies should deal with political interference.

If one takes a closer look at the history of South African sport, it is clear that the international federations did not make the first move in terms of apartheid South Africa's suspension from international participation. International federations expressed reluctance to interfere in what appeared to be domestic political matters. This is clear when one considers that in 1968, South Africa was again invited to the Olympic Games even though it was stated that the IOC was completely opposed to any political interference in sport.[505] In this regard, Nongogo et al state that the IOC and its president were well aware at the time of the fact that the SANOC had "voluntarily chosen to exclude black sportspersons, in direct response and alignment to its government's racist policy of apartheid".[506] It was only due to boycotts by other nations as well as the Gleneagles Agreement that South Africa was eventually placed in sporting isolation. Therefore, in the current climate, it may take much of the same doing before international federations would act on potential racial discrimination in South African sport. History shows that South Africa has a unique past and therefore international federations may be hesitant in acting on any potential discrimination. However, that is not to say that international federations are afraid of implementing their rules and regulations.

5 6 3 International federations laying down the law

There have been instances where international federations have banned national sports federations for not complying with their constitutions or their rules and regulations. To name but a few of these instances: Kuwait faced a ban by the IOC for sports legislation which permitted governmental interference in the internal functioning of its NOC and other sporting federations, which runs contrary to the Olympic

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[504] S Mjikeliso "Institute for Race Relations reports Cricket SA to ICC, citing 'stupid' stance on consultants" (03-09-2020) *Sport24* <https://www.news24.com/sport/cricket/proteas/institute-for-race-relations-reports-cricket-sa-to-icc-citing-stupid-stance-on-consultants-20200903> (accessed 06-09-2020).

[505] Booth (2003) *Journal of Contemporary History* 480.

[506] Nongogo, Goslin & Van Wyk (2014) *AJPHERD* 1654.

Charter.[507] Furthermore, legislation was enacted to confer upon the Kuwaiti Sports Ministry the power to assume control of national sporting bodies, and this again was contrary to the policy of sports governance autonomy. FIFA similarly banned Kuwait for failing to comply with similar obligations in the FIFA statutes.[508] In July 2019, the ICC banned Zimbabwe over a failure to keep the sport free from political interference. Zimbabwe breached the ICC Constitution when the Zimbabwean government suspended the Zimbabwe Cricket Board and replaced it with an interim committee.[509] Pretorius claims that CSA has followed the route of Zimbabwe by allowing political interference and should face the same consequences.[510]

5 7 Conclusion

South African national sports bodies have been authorised to govern their respective sports codes in the country. However, the national bodies will have to comply with the constitutions of their respective international federations as well as their rules and regulations. South Africa, with its unique circumstances and history, has introduced affirmative action into the world of sport, from the side of government policy as well as through the rules and policies of national federations. It has not been indicated that some sort of special affirmative action exists for sports employment. Therefore, in the case of professional sportspersons, these affirmative action measures are regulated by the EEA. The same rules that apply to so-called “normal” employees, apply to professional athletes. Furthermore, the applicable governmental charter makes it clear that it is neither the policy of government to advocate for the racial composition of national teams, nor how these teams should be selected and, further, that transformation should be from the bottom up. Considering the South African national

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[507] A Moroney “Governmental interference in global sport - Why Kuwait is still in the Olympic wilderness” (15-06-2018) *Law in Sport* <https://www.lawinsport.com/content/sports/item/governmental-interference-in-global-sport-why-kuwait-is-still-in-the-olympic-wilderness> (accessed 02-11-2020).

[508] Moroney “Governmental interference in global sport - Why Kuwait is still in the Olympic wilderness” (15-06-2018) *Law in Sport*.

[509] Anonymous “Zimbabwe suspended by ICC over 'political interference'” (18-07-2019) *Sports24* <https://www.sport24.co.za/Cricket/CricketWorldCup2019/zimbabwe-suspended-by-international-cricket-council-20190718> (accessed 02-11-2020).

[510] Mjikeliso “Institute for Race Relations reports Cricket SA to ICC, citing 'stupid' stance on consultants” (03-09-2020) *Sport24*.

federations' transformation plans, which have been discussed above, this raises the question of whether government is indeed adhering to the key principle raised in its own Charter? By setting a target of 50% black representation it is clear that government is interfering with the racial composition of the teams and squads and, at least indirectly, in the selection of teams. The NSRAA explicitly prohibits this.

Furthermore, South African national federations may not be adhering to the rules and regulations inherent to their international obligations. These are international federations which have not shied away from suspending sports teams and federations for non-compliance with their rules and regulations, as was illustrated above with nations such as Kuwait and Zimbabwe. International federations' prohibitions against discrimination as well as political interference are common amongst all their constitutions. While we have seen examples of suspension due to political interference, nothing stops international federations from imposing sanctions for discrimination against individuals, especially where such instances of discrimination are, in fact, as a direct result of governmental interference.

South African national sports federations are clearly implementing a government-directed transformation agenda. National bodies implementing race-based policies for participation in sport is something that remains unusual in the world of sport. However, one thing is certain and that is that these national sports bodies have obligations towards the international federations. Moreover whether South Africa's transformation agenda and the measures implemented comply with those rules of international federations is yet to be ascertained, and only time will tell whether this might have significant implications for South African sport in future.

CHAPTER 6: POSSIBLE JUSTIFICATION FOR RACE-BASED QUOTAS?

6 1 Introduction

It has been argued that racial quotas in professional sports teams are unlawful, both under South African domestic law as well as in terms of international sports law. It must accordingly be emphasised again that this type of affirmative action measure in this context is highly anomalous. In terms of South African employment legislation (and the courts) quotas are prohibited in all other industries and contexts for purposes of transformation. We find these racial quotas in sport as measures that designated employers impose under direct pressure from government, and it is unusual in the world of sport. Considering this anomaly, it may be of significance to consider whether there exists some special justification for the use of these highly contentious measures in this very specific context.

South Africa is a proud sporting nation, and one cannot underestimate the role sport has played in the reconciliation of the country after apartheid. One merely has to reflect on the 1995 Rugby World Cup, when then newly-elected president, Nelson Mandela, clad in a Springbok rugby jersey, handed the William Web-Ellis trophy to Francois Pienaar, in a symbolic event of reconciliation that is unlikely to be matched.[511] Many commentators agree that sport has a special role to play in nation-building, and it is definitely more than just a form of physical or recreational activity:

> "In addition, as a universal language, sport can be a powerful medium for social and economic change. It can be utilized to bridge cultural gaps, resolve conflict and educate people in ways that very few non-physical activities can. Sport is the only forum that can bring people together for a common goal."[512]

Therefore, despite the mental and physical benefits of sport which include building self-confidence and developing social skills, it has a greater impact on society as a whole. One would be remiss not to investigate whether sport, as a tool for nation-building, justifies the use of such a controversial and problematic type of affirmative action measure as the racial quota.

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[511] K Höglund & R Sundberg "Reconciliation through Sports? The case of South Africa" (2008) 29 *Third World Quarterly* 805 805.

[512] R Oloyede, T Akinsanmi & N Fajembola "The Role of Sports in National Development" (2012) 3 *Journal of Science and Science Education* 1 2.

6 2 Sport and nation-building

An important part of nation-building is creating a sense of nationalism. Sport is one of the few tools that can do this, as it is one of the best fora apart from religion that can bring people together for a common goal.[513] Citizens in a nation need to feel that they are a part of the nation and sport provides a platform for that type of unity to grow. The value of sport can be described as a "means of exchange and understanding among people of various backgrounds, nationalities or beliefs, and it promotes expression beyond traditional barriers".[514] It results in "rivals" under one flag competing for the honour of one country,[515] and it consequently creates an "us" versus "them" mentality which can bind national supporters in the context of international competition.[516] Therefore, sport has the potential to unite diverse groups in a divided country.

The United Nations ("UN") has recognised the role and impact that sport can have on nations and, as a result, the UN Office for Sport, Development and Peace was established.[517] The objective was to "raise awareness about the use of physical activity, sport and play as powerful development tools in the advancement of development and peace objectives".[518] The areas identified where sport can help drive positive change include health, gender equality, education, economic growth and sustainable communities.[519] But these are not the only areas of influence, as mentioned above, sport benefits self-confidence, socialisation and mutual understanding across divisions of race, culture and gender and therefore its

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[513] M Boit "Using Sports in National Development" (12-11-2000) *Play the game* <https://www.playthegame.org/news/news-articles/2000/using-sports-in-national-development/> (accessed 28-10-2019).

[514] Oloyede, Akinsanmi Fajembola (2012) *Journal of Science and Science Education* 2.

[515] P Labuschagne "The 2010 FIFA World Cup and Nation Building in South Africa: Missing the Goal Post" (2011) 9 *Commonwealth Youth and Development* 53 55.

[516] K Freeman "Sport as swaggering: Utilizing sport as soft power" (2012) 15 *Sport in Society* 1260 1260.

[517] Institute for Human Rights and Business, "Rights Through Sport: Mapping "Sport for Development and Peace"" (April 2018) *IHRB* <https://www.ihrb.org/focus-areas/megasporting-events/report-mapping-sport-for-development-and-peace> (accessed 29-10-2019).

[518] 12.

[519] 14; the UN has since partnered with the IOC to initiate sport initiatives.

importance to nation-building and reconciliation initiatives should never be underestimated.[520] In a report by the UN Secretary-General on the progress of sport development,[521] it was found that many sports initiatives focused on skills which would foster social integration, inclusion and cohesion.[522] It was further stated that "[s]ports supports the process of peacebuilding by bridging relationships across groups and communities that might otherwise tend towards distrust and hostility".[523]

Sport has played a significant role in many nations prior to the UN identifying sport as a peacebuilding and development mechanism. As early as 1956, sport played a role in unification, as was seen with West and East Germany appearing under one flag at the Olympic Games, despite their political differences. West Germany set up its own National Olympic Committee after the Cold War, but East Germany was refused this for fear of the potential of provoking political tensions, and as a result, to compete in the games, they had to compete as one nation despite taking nearly four more decades to become one Germany again.[524] After unification, sport was again used as a tool to "enhance national unity and solidarity in a reunited country".[525] An example of this includes hosting the 2006 FIFA World Cup, and in the same breath, all the marketing campaigns were aimed at promoting a new self-image of Germany.[526] Moreover, Angola used the hosting of the 2010 African Cup of Nations to show the world that the civil war which had plagued the country for decades was officially over.[527] The focus was used to showcase Angola to the world and to enhance

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[520] Oloyede, Akinsanmi & Fajembola (2012) *Journal of Science and Science Education* 2.

[521] Report of the Secretary-General on *Sport for development and peace: towards sport's enabling of sustainable development and peace* (2018) *UN* 1-17.

[522] 9.

[523] 9.

[524] Anonymous ""The Bloody Olympics Down Under": Sport, Politics and the 1956 Melbourne Games" *Sport & Society, The Summer Olympics and Paralympics through the lens of social science University of the Pacific* 1-11 6 <https://www.pacific.edu/Documents/powell-scholars/KendraConsiglioArticle.pdf> (accessed 01-11-2020) ; see also E Blakmore "A Divided Germany Came Together for the Olympics Decades Before Korea Did" (updated 01-09-2018) *History* <https://www.history.com/news/a-divided-germany-came-together-for-the-olympics-decades-before-korea-did> (accessed 30-10-2020).

[525] H Meier & M Mutz "Sport-Related National Pride in East and West Germany, 1992-2008: Persistent Differences or Trends Toward Convergence?" (2016) 6 *SAGE Open* 1-10 1.

[526] 1.

[527] Freeman (2012) *Sport in Society* 1270.

development. As a result, according to Freeman, Angola is now one of Africa's emerging nations "with the arrival of relative political stability and growth in both the petroleum and diamond industries therein".[528] As Freeman stated: "sport, politics, and nationalism are all intimately intertwined, both at the national and international levels".[529] This is echoed by Labuschagne who stated that:

> "Sport is an important vehicle that evokes and strengthens this emotional attachment, and is regularly used by politicians and other leaders for nation-building purposes. It is a very important instrument to guide or even manipulate a divided society towards the attainment of emotional attachment and the sharing of values, a common bond, and loyalty in a society."[530]

One country that certainly resonates with this statement is South Africa. In South Africa's unique history, sport has had a pioneering role in the unification and reconciliation of the nation.

6 2 1 The impact of sport in South Africa

Segregation was established under apartheid through various Acts of Parliament, such as the Group Areas Act, which allocated areas of habitation and business according to race.[531] While nothing in the Act specifically related to the outlawing of races participating in sport together, the Act had a profound effect on sport and recreation which included reserved sporting facilities such as public swimming pools, arenas, courts and athletic tracks according to one's race and exclusively for the use of white persons.[532] Under the apartheid government sportspersons of colour could not compete with their white counterparts and the playing fields were extremely uneven in terms of opportunities to participate. In 1967, the Prime Minister, John Vorster, announced that no mixed sports would be played in South Africa irrespective of the proficiency of the relevant participants.[533] Sport during the white minority rule

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[528] 1270.

[529] 1260.

[530] Labuschagne (2011) *Commonwealth Youth and Development* 55.

[531] C Merrett, C Tatz & D Adair "History and its racial legacies: quotas in South African rugby and cricket" (2011) 14 *Sport in Society Cultures, Commerce, Media, Politics* 752 762.

[532] 761.

[533] 762.

was marred by racial separateness and boycotts. However, the abolishment of apartheid meant the end of segregated sport[534] as well as the international isolation and boycotts experienced. Then arrived the popular triumph of the 1995 Rugby World Cup. Hosting and winning the 1995 Rugby World Cup was highly symbolic. Nelson Mandela used the Rugby World Cup to unite a divided South Africa. He ingeniously used the "Springboks" (a symbol of white supremacy) as a means to address divisiveness and as a result, African blacks, coloureds and Indians all believed that the Springboks not only belonged to "the white man" but to them as well. The victory promoted a new-found nationalism and improved social bonds of a multi-racial democracy.[535] These sorts of symbols can promote reconciliation by representing multiculturalism and unity despite diversity.[536]

The ruling party recognised that sport can be a powerful weapon in the reconciliation of the nation post-apartheid, and the sports establishment blithely accepted this idea.[537] As a result, there was now a greater focus on changing the dynamic of South African sport. Government linked sports to development, and riding on the success of the historic triumphs in 1995 and the 1996 soccer African Cup of Nations, government saw an opportunity to transform the sports sector through national development programmes. [538] In democratic South Africa's short history of competing on the world stage, there have been some great achievements in the sporting world. South Africa won the Rugby World Cup for a record-equalling third time in 2019 to go along with the 1995 and 2007 victories, the country hosted the 2010 FIFA Soccer World Cup, and it boasts Olympic Gold medallists in Caster Semenya and Wayde van Niekerk.

Sport is one domain where South Africans have constantly found success on the international stage and, therefore, in this passionate and determined nation, we associate our sports teams with success. We look to them as a beacon of hope and possibility. Young kids from the township want to be the next Bongiwe Msomi (current Proteas Netball captain), Kagiso Rabada (current Proteas cricketer) or Siya Kolisi

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[534] Höglund & Sundberg (2008) *Third World Quarterly* 809.

[535] G Gems "Sport and Nation Building: A Comparison of the United States and South Africa" (2010) *Physical education, sports and health culture in modern society* 3 8.

[536] Höglund & Sundberg (2008) *Third World Quarterly* 807.

[537] Merrett, Tatz & Adair (2011) *Sport in Society Cultures, Commerce, Media, Politics* 767.

[538] Höglund & Sundberg (2008) *Third World Quarterly* 806.

(current Springboks captain). They see these stars on television and in the media representing their country and immediately realise that the possibilities are endless.

The South African government has previously used symbolism as a key tool to reunite the nation. Achieving international success is one of the major contributors to nation-building. However, more recently the implementation of sports transformation policies has become increasingly apparent in the government's quest to achieve reconciliation. These extreme policies have often experienced mixed reviews; however, symbolism and transformation policies have played a crucial role as tools for nation-building and will, therefore, be discussed further.

6 2 1 1 The power of symbolism

As mentioned above, winning, hosting, and competing in international sports events can be highly symbolic as it can portray unity within a divided nation. According to Höglund and Sundberg, South Africa utilised symbolism to great effect:

> "The new South Africa and its focus on multiculturalism and unity were encapsulated in the reference to South Africa as a Rainbow Nation. Significantly, sport provided opportunities for portraying new symbols of this unity, and for creating new national myths regarding the transformation. For instance, in the 1992 Barcelona Olympics the South African team, consisting of both white athletes and athletes of colour, flew in an aeroplane completely covered by the new national flag, and also saw Nelson Mandela attending the games. This took place before the first democratic elections, and at a time when the negotiations between the ANC and the National Party were experiencing a crisis."[539]

Since the inception of a democratic government, sport clearly had a prominent role to play in South Africa. De Beer and Radley state that "unless South Africa recognises diverse values and manages the role of diversity and change accordingly it will miss a major opportunity for the successful integration that is necessary for the country to progress".[540] Therefore, sport has an enormous potential to shape our country.

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[539] 807.

[540] A Goslin, G van Wyk & N Welman "Diversity Management in South African Sport Federations" (2007) 13 *AJPHERD* 330 331.

6 2 1 1 1 International success

We need not look further than the class of 2019 Rugby World Cup-winning Springboks, a perfect example of sport uniting a nation. The victory was referred to as an "inspiration" to a nation suffering from racial tensions, unemployment and violence".[541] The Springboks' first black captain, Kolisi stated that:

> "We have so many problems in our country and this team comes from different backgrounds, different races, but we came together with one goal and we wanted to achieve it … I really hope we've done that for South Africa. (It) just shows that we can pull together if we want to achieve something … we can achieve anything if we work together as one."[542]

Rassie Erasmus, the Springboks' winning coach, stated that the win could act as a "catalyst to help resolve some of the country's complex problems".[543] One media article further reported that:

> "The upwelling of hope and national unity that the Springbok fountain appears uniquely equipped to deliver was almost tangible across the country yesterday, just as it was in 1995 and again in 2007. But it was also apparent that this time might be a little different."[544]

The message was clear, if South Africans look past race and class and move on from the past and work together for the good of the country, we can achieve remarkable things as a nation. The 2019 triumph encapsulated the meaning of national symbolism. A team not defined by colour but by their unity to achieve a common goal. The 1995 triumph was described as an "orchestration of national identity", an outward

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[541] AFP "South Africa's triumph hailed as an 'inspiration'" (03-11-2019) *Sport24* <https://www.sport24.co.za/Rugby/RugbyWorldCup2019/south-africas-triumph-hailed-as-an-inspiration-20191103> (Accessed 04-11-2019).

[542] AFP "Once a whites-only team, the Boks thrive with racial unity" (03-11-2019) *Sport24* <https://www.sport24.co.za/Rugby/RugbyWorldCup2019/once-a-whites-only-team-the-boks-thrive-with-racial-unity-20191103> (accessed 04-11-2020).

[543] Sunday times "Kolisi and his Boks have a lessons in unity and purpose for all of us" (03-11-2019) *Pressreader* <https://www.pressreader.com/south-africa/sunday-times-1107/20191103/281956019587448> (accessed 04-11-2019).

[544] Sunday times "Kolisi and his Boks have a lessons in unity and purpose for all of us" (03-11-2019) *Pressreader*.

reconciliation of which the harsh realities of South African life were sanitised and commodified for both internal audiences and an international market.[545] However, the 2019 triumph seemed to create so much more than just symbolism, there is a real feeling that hope has been created by a multicultural team filled with whites and blacks. How South Africa uses this as a springboard to tackle the many challenges remains to be seen, but there is no doubt that on the day of the historic triumph, Siya Kolisi and his troops united South Africa.

6 2 1 1 2 Transformation policies

Former Minister of Sport and Recreation, Makhenkesi Stofile stated that:

> "Sport must be a catalyst for the building of a non-racial, non-sexist, democratic, prosperous and free South Africa. It must build social cohesion and build a proudly South African nation of all South Africans".[546]

The ANC, therefore, started implementing policies to transform sport in South Africa, as according to the Minister, "sport is an important barometer of how a particular society is organised."[547] The ANC wanted to make sport more inclusive and, within this charged climate, the South African government instituted various instruments in order to address the imbalances of sport in South Africa, which include the White Paper on Sports and Recreation of 1998, the NSRA as well as the Transformation Charter. The reason why transformation policies fall under symbolism is that selecting and fielding a multi-racial sports team can be very symbolic of the achievement of transformation on a broader level. However, South Africa as a nation grapples with the real and apparent tension between the ideal of being a truly successful sporting nation but at the same time potentially sacrificing that success to implement the above measures to redress social injustices of the past. Concerning this ideological tension (and at the same time highlighting the role of sporting merit, which was touched on in an earlier chapter), O'Leary and Khoo state that:

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[545] Merrett, Tatz & Adair (2011) *Sport in Society Cultures, Commerce, Media, Politics* 765.
[546] Höglund & Sundberg (2008) *Third World Quarterly* 815.
[547] Goslin, Van Wyk & Welman (2007) *AJPHERD* 331.

> "Few would argue that modern international sport serves a greater function than providing a convenient structure for global competition. To some nations it is an important factor in defining the status and prowess of a nation. It is inextricably linked with national identity and wellbeing. For other nations, however, international sporting success requires a political compromise. An important internal function of a nation's sport is to provide means of health and social cohesion. The objective is to be inclusive: to bestow sporting opportunity on all citizens and provide a means of redressing disadvantage in all its forms. This worthy objective causes tension, however, when juxtaposed with international sports competition, because competitive sport at all levels is inherently elitist. If international sporting competition is to provide consequential benefits for a nation, then international selection is likely to require a ruthless filtering of the strong from the weak. If sporting opportunity within a nation is such that reasonable equality of opportunity can be assured, then such a selection process is unlikely to cause tension. If a significant proportion of the population is disadvantaged, however, a nation, through its laws, needs to find a compromise that is politically acceptable. That may be achieved by policies that promote equality at the cost of international sporting success, or that, effectively, promote sports inequality to achieve what the nation might believe to be the net benefit of a high international sporting profile. It is most likely to be a compromise between the two."[548]

This succinctly encapsulates South Africa's sports transformation mission. The sacrifice that O'Leary et al refer to is not new to South Africans. Former Minister Stofile had, in the past, called for sports administrators to "sacrifice a little bit in terms of winning in the interest of transformation".[549] South Africa's rich sporting history coupled with government's progressive transformation policies (racial quotas) have created serious tension in respect of the implementation of the governmental agenda to redress social injustice. But few will argue against the fact that transformation policies are exactly what might be required in South Africa.

In 1995, the Rugby World Cup team had one player of colour and in 2007 there were only two players of colour on the field. These types of inequalities needed to be addressed as the national sports teams were not demographically representative enough. A political tool used to achieve representivity was the introduction of affirmative action to amateur and professional sport which in some cases led to the

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[548] J O'Leary & TG Khoo "Changing the world: sport, racism and law in South Africa and Malaysia" (2013) 13 *Int Sports Law J* 45 45-46.

[549] A Quintal "Sacrifice winning for change, says Stofile" (17-02-2005) IOL <https://www.iol.co.za/news/politics/sacrifice-winning-for-change-says-stofile-234203> (accessed 16-06-2020).

implementation of racial quota systems.[550] Racial quotas were implemented in all sports codes at all levels. It can be described as being "necessary for redress".[551] As stated previously quotas are used to reserve places in sports teams for previously disadvantaged groups in order for the team to be demographically representative of the nation. People of colour were so marginalised that the only way to fast track them into teams was to potentially use racial quotas. The fact that only two players of colour could make the starting fifteen of the 2007 Rugby World Cup-winning team should speak volumes, and as a result, more was needed to ensure that more players of colour received opportunities. Even though it could be argued that racial quotas may paint over the cracks, it could nevertheless be a powerful tool to aid symbolism. Why not fill the team with more black players to have the black population represented on the international stage? This would give young kids in disadvantaged areas hope that they can one day be a Protea or a Springbok and that it is not just for the lucky few.

6 2 1 2 The problem with symbolism

Hosting and/or winning major sporting events are fleeting events, often with a long period of time between them.[552] Merret, Tatz and Adair state that the error made by South Africa "was and is to believe that these transient games on sports fields are an enduring contribution to nation-building and a tangible 'solution' to gross poverty, unemployment, lack of shelter, elementary utilities, reasonable health and schooling standards".[553] Boit referred to the saying, the strength of the rope lies in the weakest point and said that "similarly the strength of national development lies in the weakest point".[554] Therefore, international events do little for those in the poor and rural areas. It brings a "kumbaya" moment, but without meaningful development in those areas, there will not be growth.

We further must wonder what implementing racial quotas does for the disadvantaged individuals in rural areas. We are placing players of colour into teams

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[550] Höglund & Sundberg (2008) *Third World Quarterly* 809.

[551] Merrett, Tatz & Adair (2011) *Sport in Society Cultures, Commerce, Media, Politics* 768.

[552] Höglund & Sundberg (2008) *Third World Quarterly* 808.

[553] Merrett, Tatz & Adair (2011) *Sport in Society Cultures, Commerce, Media, Politics* 765.

[554] M Boit "Using Sports in National Development" (12-11-2000) *Play the game* <https://www.playthegame.org/news/news-articles/2000/using-sports-in-national-development/> (accessed 28-10-2019).

and it is to symbolise a transformed team. Resorting to such an extreme form of transformation shows that either we are not implementing the correct measures at the grassroots level or, as Merret et al stated, that they are "arguably a consequence of the failure to think more deeply about the history of South Africa; they also reflect an ignorance and arrogance about past and present".[555] Gardiner described sport as a useful measure to determine "how far we have come and how far there is to go in terms of race relations and racial integration". Racial quotas may not give a clear indication of how far we have come because it is not only a highly artificial measure, it also comes at an expense of non-beneficiaries, and one needs to ask whether that would really aid race relations or racial integration or cause more social division. Thus bearing in mind that South Africa has in the past had white athletes leave to represent foreign nations because of quota systems. By implementing racial quotas, we have not closed the proverbial gap between white and black athletes. After 25 years of democracy, should there be equal opportunity for all our athletes? This is certainly what government believes if they are aiming to speed up transformation.

The much renowned Siya Kolisi has risen to the forefront of international rugby by overcoming incredible odds. This is clear by the media frenzy surrounding the fact that Kolisi watched the Springboks' 2007 triumph in a tavern, and 12 years later lifted the trophy himself. The message around Kolisi's achievements was presented in a manner that indicates that anyone can achieve and excel regardless of their early childhood circumstances, but this was described by one journalist as a "seductive lie".[556] McKaiser stated that:

> "The media parade these poor achievers with an uncomplicated narrative that has a clear subtext and often an explicit moral: sheer hard work and a positive attitude can guarantee you success in life regardless of the structural conditions under which you live…Being inspired by the overcoming narrative isn't something we should feel bad about. But if we only feel moved and do not also think critically about these stories, then we will miss some important insights about the limits of these stories."[557]

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[555] Merrett, Tatz & Adair (2011) *Sport in Society Cultures, Commerce, Media, Politics* 769.

[556] E McKaiser "Siya Kolisi's inspiring tale is seductive but limited" (30-10-2019) *M&G* <https://mg.co.za/article/2019-10-30-00-siya-kolisis-inspiring-take-is-seductive-but-limited> (accessed 04-11-2019).

[557] McKaiser "Siya Kolisi's inspiring tale is seductive but limited" (30-10-2019) *M&G*.

McKaiser further stated that no one should be a statistical outlier and that the people should be mindful not to imply that hard work ensures success. He described Kolisi and other successful African blacks as lucky and stated that society and in particular the state, "must eliminate the structural injustices".[558] While it is by no means to imply that Kolisi or all players of colour in our sports teams are quota players, it is necessary to be conscious of how the media can use these athletes of colour to paint a certain picture. That picture portraying that we are transformed, as our national teams are littered with players of colour. In the cases where quotas are implemented, it indicates that we still have a long way to go in terms of transformation. McKaiser rightly states that it remains the few, or the "statistical outliers" who make it. The fact that we still implement racial quotas may indicate that he is correct in that analysis. It may look good for the nation to have sports teams that are demographically representative of the nation, but it hides major problems,[559] like the lack of facilities and the lack of opportunities afforded to those from previously disadvantaged groups. That may be exactly the problem with symbolism - without tangible work, it merely papers over the cracks.

The remark by the former Minister of Sport should, however, be given due regard. Apartheid was an abnormal system; does anyone have an idea of how to normalise an otherwise abnormal society?[560] The current government believes that quotas are the method that produces the "best" results. We are dealing with a unique system and perhaps unique measures are required. South Africa does not have the luxury of referring to examples from elsewhere and therefore every step of the sports transformation journey is highly scrutinised.

The legal principle, however, is that despite governments best efforts to transform sport, under the EEA, quotas are explicitly prohibited and therefore cannot be rational (let alone fair). These transformation policies cannot be said to be aimed at protecting and advancing people who are previously disadvantaged by unfair discrimination. The measures are introduced with the apparent objective of simply achieving demographic representivity, and as previously highlighted, there does not appear to be a link between the notion of substantive equality and demographic representivity. As stated

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[558] McKaiser "Siya Kolisi's inspiring tale is seductive but limited" (30-10-2019) *M&G*.

[559] Oloyede, Akinsanmi & Fajembola (2012) *Journal of Science and Science Education* 5.

[560] See the text to Chapter 3.2.

by Penrose, we cannot say that the previously disadvantaged are now compensated for by reserving seats in national teams.[561] The Constitution makes no mention of representivity, and it remains highly questionable why government should use representivity as a yardstick or indicator for the achievement of equality. In the sporting context, merit would, therefore, be irrelevant and race would be the deciding factor. This must surely be in conflict with section 9(2) of the Constitution.

6 3 The reality of sports transformation

Widely recognised names in various sporting codes have spoken out against implementing racial quotas in sport in order to speed up transformation. Former SARU president, Oregon Hoskins, spoke out against the government's transformation plan and stated that "players of colour will continue to be thrown in at the deep end". Hoskins further stated that:

> "Rugby is part and parcel of South African society [but] there isn't a commitment on the part of government to genuinely tackle the development of the sport and it's all well and good saying that you should transform the national team and transform the franchise teams but that's not going to work, it's never going to work."[562]

Former Proteas cricketer, Darryl Cullinan, in an interview, voiced concerns over the transformation in cricket in South Africa. Cullinan stated that for African blacks, the progress of cricket is hindered because soccer remains the most popular sport amongst the black community, and that cricket is an expensive sport to play, which puts it out of reach of most aspiring, disadvantaged black sportspersons.[563] He further questioned why it took 25 years for the first African black top-order batsman (Temba

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[561] Penrose (2017) *SA Journal of Philosophy* 382.

[562] C Lewis "Hoskin queries transformation plan" (23-09-2016) *SArugbymag* <https://www.sarugbymag.co.za/hoskins-questions-transformation-plan/?fb_comment_id=1095253733855151_1095611383819386#f2824b865214564> (accessed 28-02-2020).

[563] H Hancke 'Waar was Krieket SA dan vir 25.j?' (04-09-2016) *Netwerk24* <https://www.netwerk24.com/Sport/Krieket/hendrik-hancke-gesels-met-daryll-cullinan-20160904> (accessed 01-03-2020).

Bavuma) to represent the Proteas, and that it similarly took 'Afrikaners' a long time to be successful at cricket.[564]

A report by Brink and Nortjè highlight the lack of development of grassroots level through statistics:

> "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."[565]

On the face of it, it appears that the government is not pulling their weight when they speak about a transformation from the "bottom up" and investing more resources at "grassroots" level. As a result of the lack of development, quotas are an easy fix and will remain an easy fix if the development at the grassroots level is not improved.

6 4 Conclusion

Sport is a powerful transformative tool and it has been illustrated that there are many examples of it contributing to nation-building and reconciliation. Its impact cannot be underestimated, as an organisation like the UN has also used sport as a tool for development and peace. South Africa is a prime example of sport uniting a divided nation, albeit only for fleeting moments. A country that was torn apart by apartheid, demonstrated how sport transcends differences and inequality. The entire country supported the Springboks at the 1995 Rugby World Cup despite it previously

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[564] H Hancke 'Waar was Krieket SA dan vir 25.j?' *Netwerk24* (04/09/2016) <https://www.netwerk24.com/Sport/Krieket/hendrik-hancke-gesels-met-daryll-cullinan-20160904> (accessed 01-03-2020).

[565] E Brink & J Nortjè "Report: Transformation in SA Sport" *Afriforum, Solidarity* (07-2017) *Solidariteit* <https://solidariteit.co.za/wp-content/uploads/2017/07/Transformation-in-sport-SA-eng.pdf> (accessed 30-11-2019).

being a symbol of white supremacy. South Africa is not unique; it is one of a few countries that, in the past, has employed legal separation of different races.[566] However, the question remains whether the use of race-based quotas can be justified due to the importance of sport in South Africa. The many examples above illustrate the important impact that great sporting moments and sports teams have had on South Africa's pathway to reconciliation as a nation.

The two processes identified through which reconciliation and nation-building can take place include the utilisation of symbolism through hosting and/or winning international events and the implementation of transformation policies (more specifically, racial quotas). South Africa has used symbolism to great effect over the years and the country is referred to as the "Rainbow nation" to show that it is one country with diverse races and cultures. However, we have seen that hosting major sporting events is fleeting and there are large time gaps between these events. While it may bring unity to the nation and provide a sense of national identity, one must question whether it is really reconciliatory in the South African climate. In between these events and major triumphs, not much has materialised in terms of the country transforming. Furthermore, symbolism is highly dependent on success, and therefore cannot be deemed viable for long- term reconciliation in the absence of accompanying sporting success on the international stage.

Racial quotas were implemented because of the inequalities that persisted in sport after apartheid. According to government, the national teams had to represent the demographics of the nation. The implementation of quotas has caused numerous controversial debates. However, having a team filled with players of colour does not only give opportunities for those players but it also denotes a more demographically representative team, albeit in a controversial manner. Young kids from rural areas get to have heroes that they can more readily identify with and it allows them to believe that sport can save them from their current circumstances. Implementing extreme measures due to the persistence of structural inequalities in South African sport does however circumvent selection based on merit. Perhaps with continuous opportunities, players will improve and eventually their true potential will be displayed, and they would "deserve" to be selected. The fear, however, is that quotas merely paper over

[566] The United States being the other nation to do so; see Gems (2010) *Physical Education, Sports and Health Culture in Modern Society* 4.

the cracks. The question that needs to be asked is why at the highest level of competition does South Africa need to implement quotas? The answer may lie in the fact that there is a lack of development at the grassroots level. Quotas portray the "seductive lie" that anyone can represent their country despite their circumstances. However, people do not look further than that because the media does not necessarily focus on it. Without a quota system, the players of colour who do get selected on merit may still only be the "outliers" or the "lucky few". Further, one cannot overlook the impact that implementing a quota system has on those individuals from non-designated groups and the potential infringement of their rights. But it is noted that South Africa is still suffering from the effects of apartheid. Consequently, some may argue that quotas are a temporary tool that is required to rectify the abnormal system and that it can be justified in light of the current plight of government's transformation agenda. This dissertation has previously questioned whether two wrongs can make a right, but considering the past, is this temporary tool really a "wrong" if we think about what the nation faces? It cannot be easy for government to deconstruct a system that they had no hand in building.

Sport is an integral part of being a South African, and due to the unification role of sport, it has helped to lay a foundation for a democratic country. This is something that has never been overlooked and that is why sport is viewed as a harbinger of peace and reconciliation. While symbolism is evidently important for nation-building, South Africa needs so much more for sport to have the desired impact of true reconciliation. As Labuschagne said, sport is a prominent tool for nation-building due to its relative innocence outside the parameters of politics.[567] But we have witnessed that in South Africa, sport and politics are intertwined and this may be due to the unique history of South Africa. This may mean that the unique sports transformation policies may be what is required on a short-term basis to give hope and to paint a representative picture, but the positive long-term effects – in the absence of the government assisting in a more tangible way to strengthen the "weakest point of the rope" - remain unclear.

[567] Labuschagne (2011) *Commonwealth Youth and Development* 57.

CHAPTER 7: CONCLUSION

7 1 Introduction

South Africa has a uniquely dark history and a potentially bright future. For some, it was a country that offered very little in terms of prospects. These people were mainly those affected by the apartheid regime's segregationist and repressive policies: black Africans, coloureds and Indians. It was a time when whites were deemed superior to their counterparts and enjoyed and benefited from most of the resources provided. The generation growing up in what is now labelled the "new South Africa" often cannot fathom the extent of the struggle and fight for equality, while the scars of the past remain.

From a sporting perspective, how do we determine whether affirmative action and in effect transformation has been successful? Is success measured by the racial composition of our national sports teams or the number of players from every race that is currently a professional in their respective sports code? Or further, is it the level of access that is afforded to those that have been previously disadvantaged to ensure that everyone starts on equal-footing? I believe it should be the level of opportunity or access afforded to the previously disadvantaged in order to start competing on equal-footing. Affirmative action involves treating people differently by favouring one group over another. But the main aim of affirmative action remains to achieve a just and "equal" society in light of past injustices suffered. When it comes to affirmative action in professional sport in South Africa, the conversation surrounding racial quotas frequently dominates. Quotas are often disguised as either targets or numerical goals and sometimes not disguised at all and blatantly referred to as quotas, all to achieve demographic "representivity". Absolute demographic representivity causes a number of grievances as it not only affects non-beneficiaries' right to trade and occupation but also their right to human dignity. These are apprehensions that have not been raised enough when talking about professional athletes in sports teams. From the aforementioned examination, it is suggested that government's standard for successful affirmative action is almost exclusively based on the racial composition of South Africa's national and other high-level sports teams. But is that a legitimate aim for affirmative action under the Constitution and the EEA? It is against this standard that race-based quotas in South African sport were analysed.

There are many avenues to analyse race-based quotas in professional sport, but this study aimed to focus on the legal aspect of the implementation of affirmative action as opposed to the more political, often anecdotal debate which frequently surrounds sports transformation in South Africa. In this study of a complex phenomenon, many questions remain unanswered. These include the questions surrounding the appropriate standard of review of constitutionally-compliant affirmative action, and the question of whether the EEA is inconsistent both in terms of its own regulations and the Constitution, as well as the question why judges have apparently unquestioningly accepted representivity as a legitimate, and constitutionally-compliant objective of affirmative action in terms of the EEA. All these aspects play a role in consideration of the lawfulness of the implementation of racial quotas. However, a more in-depth study of each of these topics may need to be done, individually, to sift through the complex questions that the EEA raises. While acknowledging those questions, the research set out to critically analyse the legality of race-based quotas in professional sports teams in South Africa.

7 2 Research findings

It has been shown that affirmative action measures under the EEA differ significantly to affirmative action as set out in the Constitution. In addition to eliminating unfair discrimination, the EEA aims to ensure equitable representation of designated groups in the workplace. Equitable representation is not defined in the Act and the term is not mentioned anywhere in the Constitution. Commentators have questioned whether this renders the EEA inconsistent with the Constitution. While this question was not explored further, it is to take note of it. This influences affirmative action measures under the EEA, especially since equitable representation has been used interchangeably with, and even implied to mean, “representivity”. Representivity means to reach a level of representation in a workforce which equates to the national or regional demographic profile, but in this context, to the racial demographic profile of the entire population. This is vastly different from the constitutional aim of affirmative action which is to redress past disadvantage, as expressly recorded in section 9(2) of the Bill of Rights.

Neither the EEA nor the NSRAA state that professional sports teams must be selected based on the national demographic profile of the country. In fact, the EEA

through section 20(3) warns against promoting race above merit. However, government spokespersons, as well as the President, are calling for demographic representivity in various sectors of the workforce despite the potential negative implications of such a form of affirmative action for non-beneficiaries. It is submitted that one cannot set legitimate numerical goals or targets when striving for absolute demographic representivity, especially when the Minister of Sport has enforced punitive measures for not meeting these "targets", without facing the real risk of such "targets" turning into illegitimate racial quotas. Therefore, race has now become a stand-alone/determinative factor when implementing affirmative action in professional sport. There are more than enough examples of sports bodies having to meet set targets or face punishment. Positions in teams are clearly reserved based on race and would appear to equate to discrimination for its own sake, as the USA courts have ruled in the past.

It is now clear that the South African government has in effect defined equitable representation to mean demographic representivity. Therefore, Malan's words may ring true that the EEA may now simply be aimed towards the achievement and maintenance of quotas in the workforce. Why then are racial quotas debated in sport? Because despite the government's interpretation and implementation of the Act, the Act expressly prohibits quotas. Professional athletes are protected by this very Act, and as mentioned above, the EEA and the NSRAA do not make any assertion that sports teams should reflect the national demographic profile of the nation. At the very least there might be significant tension between these two pieces of legislation in their application in this context. Furthermore, the courts have not only explicitly stated that quotas are inherently and irrationally discriminatory, but they are also rigid and lack flexibility and therefore may place undue, and an unconstitutional burden on non-beneficiaries. That burden equates to an infringement of non-beneficiaries' right to dignity, as well as their right to freedom of trade and occupation.

Racial quotas are discriminatory in nature; however, the Constitution and the EEA prohibits unfair discrimination, not merely discrimination. Is the implementation of racial quotas therefore unfair discrimination? Section 6(2) of the EEA states that affirmative action measures consistent with the purposes of the Act are not unfair discrimination. Du Toit is of the view that affirmative action can never result in unfair discrimination. Du Toit, therefore, states that not only does the EEA exclude

"affirmative action measures from the scope of 'unfair discrimination'',[568] but the Constitution also views it as its own category outside of the "ambit of 'discrimination'"[569] It had seemed as if Moseneke J had given plausibility to this point of view when, in the case of *Van Heerden,* he stated that even if measures are based on any of the listed grounds in section 9(3) of the Constitution, but pass constitutional muster under section 9(2), it cannot be *presumed* to be unfair discrimination.[570] However, this refers to the presumption of unfair discrimination and not necessarily the fact that affirmative action could never be unfair discrimination. Furthermore, if the government equates equitable representation to the rigid pursuit of demographic representivity, then according to their interpretation implementing racial quotas are consistent with the purposes of the Act. However, the Act says quotas are prohibited, and this will result in government's interpretation of equitable representation leading to the Act being internally inconsistent.

It is further true that the EEA must be interpreted to be in line with the Constitution, and according to the Constitutional Court's interpretation of section 9(2), affirmative action measures must be rational. The Constitution states that there must be a rational link between the proposed affirmative action measure and its objective. While this allows for a clear intention to achieve a certain goal, it does not require that success of achieving that goal is guaranteed or mandatory, like the 'targets' advanced by the government in agreement with various sports bodies.[571] Furthermore, if quotas are explicitly prohibited under the Act, it cannot pass any standard of review which has been proposed as the Act would be inconsistent with itself (A point that cannot be stressed enough). This should be the norm even when quotas are not blatantly used but disguised in measures aiming to achieve demographic representivity.

The USA used the highest standard of review, strict scrutiny, to "smoke out" illegitimate quotas even when they were disguised as racial balancing. However, the USA follows a formal approach to equality and as a result, the implementation of

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[568] D du Toit "Protection against unfair discrimination in the workplace: are the courts getting it right?" (2007) 11 *Law, Democracy and Development (Special Issue)* 1 11.

[569] 12.

[570] *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 33.

[571] Section 20(1) - Employment Equity Plan – "A designated employer must prepare and implement an employment equity plan which will achieve *reasonable progress* towards employment equity in that employer's workforce" (emphasis added).

affirmative action measures are applied with scepticism. The standard of strict scrutiny ensures that quotas will never pass constitutional muster because it prefers one person over another for no reason other than race. This, in the view of the US Supreme Court, is discrimination for its own sake. Where the USA gets affirmative action "right" is when they acknowledge race as a plus factor and not the determinative/stand-alone factor in selection or admission. Therefore, the measure must be flexible enough to ensure that each athlete is evaluated as an individual and not in a manner that makes the athlete's race the defining factor. This is where racial quotas fall short of the mark. It seems that in South Africa equitable representation equates to elevating race as the sole criterion for selection. Unfortunately for South Africa, in the context of professional sport, there remains a lack of case law to build up legal precedent on the matter.

This lack of case law against discrimination in professional sports may further be a reason why international sports bodies have not been proactive against the implementation of racial quotas in South African sport. We have seen that these racial quotas are discriminatory and therefore breach countless international sports bodies' rules and regulations. Even though South Africa prohibits unfair discrimination and not discrimination per se, South Africa remains bound by the rules and regulations of the international bodies. Furthermore, there are countless examples of political interference in South African sport. Government's influence over the sports sector in South Africa should, however, come as no surprise, as sport was identified as one of the most essential tools to lead the country into a non-racial society. However, this should not give the government the license to interfere as they please as we have seen international bodies punish federations for breaching these rules and regulations.

With that said, one needs to look no further than the National Sports and Recreation Amendment Bill, 2020 (which is still before Parliament) for a sign of things to come. The Bill aims to give the Minister even more power and this is made clear when one looks at the proposed amendments. These include giving the Minister the power to review the recognition of SASCOC for failing to perform their functions as contemplated in the amendment Bill. The Minister may either withdraw funding, withdraw its recognition of national colours or suspend its recognition wholly or partially. Furthermore, the Minister would be given full control in approving all applications for the bidding and hosting of major events. In respect of section 13A (issuing of policies and guidelines by the Minister to promote equity, representivity and redress), the Minister and not SASCOC may now cause an investigation to be

undertaken to ensure compliance with the above provision as well as the Transformation Charter. Without the above amendments appearing in any existing legislation, it is apparent that the Minister is already attempting to exert this sort of power. The main purpose is clearly to grant the Minister more power to be able to influence transformation in sport to a greater degree. The power being removed from SASCOC and being granted to the Minister is an example where there would probably be more blatant examples of political interference in sport in the future.

However, South Africa has in the democratic era avoided sanctions or punishment from these international bodies. A reason for the lack of sanctions and punishment may be due to the terrible sports system endured by black athletes under the apartheid regime, which was fundamentally built on a system of blatant discrimination. Would the role that sport has played in the South African unification process then justify the use of racial quotas? It is no secret to the world what black athletes went through and in some cases are still going through to enjoy the same opportunities as their white counterparts. This means that quotas are considered an appealing mechanism to enforce change with immediate effect. The government often uses the past as a reason for supporting the implementation of racial quotas in sport. It raises the question of whether the abnormal system of apartheid and its lingering effects requires an abnormal tool like racial quotas to dismantle the legacy of apartheid. Over the years, quotas have been a quick-fix tool for federations to select representative teams. But the fact that quotas still raise many questions and we remain far off the mark of “equality” in sport, shows that perhaps we need to critically rethink how to level the playing fields.

However, we are focusing on the legality of the measure and not merely what seems morally right or wrong. Yes, sport was used to dismantle an oppressive system and introduce a new-found unity to South Africa, but does and should this override the basis of fundamental constitutional values in respect of human dignity and equality? It is submitted that, for the reasons advanced in this dissertation, racial quotas simply cannot be deemed lawful. Sport is no longer enjoyed or participated in simply for leisure and has become the livelihood of many professional athletes who enjoy (or should enjoy) the same rights as any other working citizen. Sport should, therefore, not be allowed to be used as a political tool. Quotas are unfairly discriminatory. Therefore, lawyers and judges will have to answer the question, whether irrespective

of the potentially “special” nature and value of sport, measures and policies that appear to flout constitutional principles can ever be justified.

7 3 Recommendations

Taking the above into consideration, there are four specific recommendations to be considered. Firstly, Affirmative action is discrimination, yet is viewed as part and parcel of the right to substantive equality and the prohibition against unfair discrimination, due to its constitutional and legislative mandate. However, measures still need to pass constitutional muster. The fact that the EEA differs so much from the Constitution may result in many challenges and debates. This stems from the fact that equitable representation is the main aim of the EEA. It is therefore of vital necessity to define the concept ‘equitable representation’ either in the Act and/or by the courts. We have clearly seen the results of the lack of definition. Equitable representation has been equated to ‘representivity’ and when enforced by government, amounts to a racial quota system. Therefore, the role of representivity (which is not mentioned anywhere in the Constitution) in respect of the fundamental objectives of the affirmative action chapter of the EEA should also be defined and explained. This will go a long way in ensuring that the aim of the EEA is set out clearly and does not leave scope for confusion or manipulation.

Secondly, there is clarity regarding quotas being prohibited by means of legislation (the EEA), but not whether they are unconstitutional, and more cases need to be brought before our courts to adjudicate on matters relating to the constitutionality of quotas, specifically in the sports context in order to establish clarity and precedent on the matter. The USA could identify racial balancing resulting in a quota system because the US Supreme Court had adjudicated on quotas over a number of years and therefore had managed to create legal precedent.

Thirdly, to make a real impact, sustainable sports transformation should be driven from the bottom up. The “grassroots” levels need to be targeted as this results in sustainable and long-term results. This would ensure that sporting merit will also eventually feature more strongly. In this respect, the evidence is that government has not done what it could and should, and that quotas in that context specifically is smoke and mirrors at the expense of substance. The EEA’s protection extends to professional sportspersons and they need to be treated as such. Athletes need to be protected and

cannot be taken advantage of because professional sport is a “special” type of occupation. It is exactly because of this “special” nature of sport in South Africa, that a decision needs to be made whether sport’s special nature means that one should allow a limitation of fundamental constitutional principles and rights.

Lastly, it is important to note yet again that quotas are prohibited for a reason. That reason being that it creates unfair discrimination against non-beneficiaries of affirmative action in sports teams. Transformation is necessary considering the harm suffered by people of colour. That should never be debated, but it is a sensitive topic that needs to be approached as such and addressed correctly, legally and constitutionally. It might be advisable for government and/or the major sports federations to obtain a proper and high-level legal opinion on the lawfulness of the current transformation measures (particularly quotas/racial targets) in light of the applicable international legal framework, in order to facilitate a due diligence exercise to determine potential liability for federations and to plan in order to avert future sanctions from international bodies. The progress that South Africa has made in terms of transformation would mean very little if, for example, South African cricket is suspended from international competition. It would then matter very little what the racial composition of the Proteas team is.

No one has a memorandum on how to best recover from apartheid, but what we do have is a Constitution which is transformative in nature. I believe that if all else fails, one should always base one’s actions on the Constitution, and it is highly questionable whether the transformation of South African (professional) sport is currently being done constitutionally.

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