

EE not an absolute bar to appointment of non-designated candidates

By [Jacques van Wyk](#)

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The Supreme Court of Appeal, in rejecting the decision of the Labour Appeal Court, found that the employee in this case had been unfairly discriminated against by being denied an opportunity for promotion where no other suitable candidate, aside from herself, was present for the position.



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The court confirmed that while employment equity is important it should never be regarded as an absolute bar to the appointment and advancement of non-designated employees.

Court's decision

In the recent case of *Solidarity obo Barnard v SAPS (165/2013) [2013] ZASCA 177 (28 November 2013)* the court had to consider whether Barnard, an employee of the South Africa Police Services ("SAPS"), had been unfairly discriminated against in terms of the EEA by virtue of the SAPS failing to promote her.

Barnard was employed by the SAPS as police captain. She was a white female. She twice applied, and was twice rejected, for a promotion to the post of superintendent in a specialised unit of the SAPS. On both occasions Barnard scored the highest scores, she was also the only applicant who showed a unique blend of enthusiasm and passion to deal with members of the community. Notwithstanding this, the SAPS rejected her application on both occasions, instead electing to withdraw the position. The SAPS justified this decision on the basis of the need for representivity within the workplace and on the basis that the post was not critical and therefore did not need to be immediately filled.

Barnard contended that the SAPS' failure to appoint her to the post when there were no other suitable candidates amounted to unfair discrimination. The Labour Court agreed with her contention. The Labour Appeal Court disagreed with the Labour Court and the matter then came before the Supreme Court of Appeal.

The Supreme Court of Appeal, in finding that there had been unfair discrimination, made the following material findings:

1. while the EEA allows for preferential treatment for the promotion of employees who are from designated groups (being black people, women and people with disabilities) it does not allow for quotas;
2. that although the focus in employment equity is on designated groups, it is no absolute barrier to the prospective or continued employment or advancement of persons who are not from designated groups;
3. that in applying the goals of EEA one must avoid the mechanical application of formulae and numerical targets as this could amount to the establishment of quotas, a practice expressly prohibited by the EEA;
4. the considerations of representivity and numerical targets are not absolute criteria for employment; and
5. the fairness of discrimination in each instance will be determined on the facts of the particular case, there is no across the board incantation applicable to all the instances which are likely to come before the courts.

Importance of the case

This case makes clear that while the objects of ensuring employment equity are necessary for ensuring a future which will eventually be colour blind it should not be construed as an absolute bar to the appointment and advancement of employees from non-designated groups. The EEA calls for a more nuanced and inclusive stance in implementing measures aimed at the rectification of past injustices.

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Jacques van Wyk is a director in Labour and Employment Law at Werksmans Attorneys. He was named as a recommended lawyer in Labour & Employment by the Legal500 (2010-2012), and co-authored 'Labour Law in Action - A Handbook on the new Labour Relations Act - 1997' with Frances Anderson. Jacques specialises in commercial employment transactions arising during mergers and acquisitions, corporate restructures, executive employee terminations of employment, drafting employment contracts and letters of appointment; disciplinary codes and procedures; and grievance procedures.

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