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NOTES

ADJUDICATING AFFIRMATIVE ACTION WITHIN A NORMATIVE FRAMEWORK OF SUBSTANTIVE EQUALITY AND THE EMPLOYMENT EQUITY ACT — AN OPPORTUNITY MISSED? *SOUTH AFRICAN POLICE SERVICE v SOLIDARITY OBO BARNARD*

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INTRODUCTION

The constitutional and legal parameters of positive measures to achieve equality, especially through the medium of employment equity plans, have been hotly contested in law and politics. The recent Constitutional Court judgment of *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) ('*Barnard*') might have established legal precedent, but it will do little to quell this debate. On the contrary, its four judgments are likely to enhance discussion about the implementation of employment equity or affirmative action in the workplace and the correct interpretation and justification of positive measures, and of substantive equality and dignity, in our democracy.

A decade ago, the case of *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) ('*Van Heerden*') confirmed the place of positive measures in our equality jurisprudence as an integral part of, rather than an exception to, substantive equality. In constitutional terms, positive measures should not be subject to the test of presumptive fairness for discrimination under s 9(3), but should be evaluated against the three criteria established in s 9(2). In this way, they are subject to an evaluation of purpose and effects, guided by the values underpinning the right, but with a thumb on the scale of overcoming disadvantage, rather than the impact on individual dignity. Interestingly, this conceptual framework was never fully applied to affirmative action measures under the Employment Equity Act 55 of 1998 ('the Act'), which tended to be tested solely as unfair discrimination under s 6(1) of the Act. One of the most disappointing outcomes of *Barnard*, as I argue below, is the failure of the Constitutional Court to develop a common understanding for evaluating employment-related affirmative action under the Act, within the overall normative framework of substantive equality established in s 9 of the Constitution.

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Of course, the development of a constitutionally informed legal standard to test employment equity plans and affirmative action measures will always be troubled in a country that has seen racial classification serve as the basis for oppression and subordination, and now seeks to use it to achieve a 'non-racial' democracy. Contestation over how to secure redress, restitution and substantive equality is inevitable. The *Barnard* judgment demonstrates a common commitment to restitution and transformation, and, indeed, a common outcome. However, between that commitment and the outcome lie important differences in philosophical and legal approaches to equality, to s 9 of the Constitution and s 6 of the Act (and the relationship between them), to the methods and standards of justification for positive measures, and to the need for courts to engage substantively with crucial issues in our democracy. In this note, after setting out the case history and judgments in some detail, I explore the contrasting ideas of equality that underpin the different approaches to positive measures and discuss which is best suited to our constitutional project. I argue for a multifaceted approach to equality in s 9, which recognises the multiplicity of values that underlie the right, and suggest that this normative framework allows courts to balance the reasons/purpose for an equity decision and its impact/effects, in the light of the competing and complementary values and principles that underlie equality. I suggest that this approach provides an effective conceptual framework for adjudicating employment equity decisions under the Act.

The implementation of affirmative action measures, including equity plans, generally involves employment decisions and can be challenged in court as claims of unfair discrimination under s 6(1) of the Act. However, such claims should be defended and adjudicated in terms of s 6(2)*(a)* of the Act. In doing so, the conceptual and value framework established by the place of s 9(2) in the right as a whole, as well as the relevant provisions of the Act, should guide the process of justifying the equity decision, and balancing its purpose and reasons against its effects. Although all the judgments in *Barnard* seek to evaluate purpose and effects in the context of the constitutional values of dignity and equality, I suggest that no single judgment gets it exactly right, namely to interpret and apply the Act with due regard to the complex, normative framework of substantive equality in the Constitution, and especially in s 9.

CONTEXT AND FACTS

The legal saga of *Barnard* has always been about more than bare facts and conflicting legal decisions. At its heart are anxieties about the place of racial quotas, targets and representivity in the implementation of affirmative action. The applicant, Solidarity, is a registered trade union, publicly committed to 'interven[ing] on behalf of people who are being unfairly disadvantaged by affirmative action':

> 'Solidarity believes that imbalances must be rectified without creating new forms of imbalance. The manner in which affirmative action is currently being

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> implemented is creating serious new forms of discrimination. Because of the ideology of representation the masses do not benefit and whites are being seriously disadvantaged.' (Available at *https://solidariteit.co.za/en/wat-maak-solidariteit-uniek/*, accessed on 22 October 2014)

Conceptually and politically, Solidarity is suspicious of positive measures and views affirmative action as a form of unfair discrimination that should always be rigorously justified. Its members — whites and members of minority groups who are unable to attain jobs or promotion because of equity targets — are perceived to be 'victims' of affirmative action.

Ms Barnard was assisted by Solidarity in her claim of unfair race discrimination against the South African Police Service ('the SAPS') after she was twice overlooked for promotion in circumstances where she was the top-ranking applicant and where, despite the presence of an apparently suitable black candidate, the position was not subsequently filled (a factor that, according to her, affected service delivery).

In brief: Ms Barnard applied for the promotion position of superintendent in the National Evaluation Services Unit of the SAPS in September 2005, and, although a white woman, was recommended as the top applicant by a racially diverse panel who had concluded that the second in line, a black male, could not be appointed 'without compromising service delivery' (para 8). Given the under-representation of black women and men at that level, the Divisional Commissioner declined to appoint for reasons of employment equity (para 9). A similar post was advertised in May 2006 and Ms Barnard again applied. Again, she was recommended and the panel noted that she 'would not enhance representivity at salary level 9 but would not aggravate the racial representivity of the division either as she was already part of the division' (para 12). It was noted further that her promotion would enhance representivity at level 8, where there was an over-representation of white women (ibid). This time, the Divisional Commissioner agreed to appoint her, believing that her appointment would 'enhance service delivery' and a failure to appoint her in the second round would 'foster the wrong impression' (para 13). Nonetheless, the National Commissioner, who made the final decision, did not confirm her appointment as the recommendation did not 'address the requirement of representivity and . . . the post was not critical to service delivery' (para 14). When the post was advertised for the third time, as directed by the National Commissioner, Ms Barnard did not apply.

Ms Barnard filed a complaint in accordance with the SAPS's grievance procedure, and was given reasons that reiterated the issues of representivity and service delivery, and spoke of restructuring the position in an attempt to address representivity (paras 15–16). Dissatisfied with these, she proceeded to the Commission for Conciliation, Mediation and Arbitration and then to the Labour Court, the Labour Appeal Court, the Supreme Court of Appeal and the Constitutional Court. In this trail of judgments, the lack of clarity and consensus in the interpretation and evaluation of positive measures and

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affirmative action in the Constitution and the Act became ever more apparent.

THE CONTRASTING JUDGMENTS OF THE LABOUR COURT, LABOUR APPEAL COURT AND SUPREME COURT OF APPEAL: FAIRNESS UNDER s 6(1) OF THE ACT OR RATIONALITY UNDER s 9(2) OF THE CONSTITUTION?

The nub of Ms Barnard's complaint was that she had been unfairly discriminated against on the basis of race under s 6(1) of the Act. This discrimination lay not in the content of the SAPS's employment equity plan, but in its implementation, and especially in the decision of the National Commissioner not to appoint her because she was white. The Labour Court disposed of the matter entirely on this basis, finding against the SAPS on the ground that it had not discharged the onus of showing, on the balance of probabilities, that the discrimination was not unfair (*Solidarity obo Barnard v South African Police Services* (2010) 31 *ILJ* 742 (LC)).

On appeal to the Labour Appeal Court, the focus shifted to the status of the SAPS Employment Equity Plan as a restitutionary measure envisaged by s 9(2) of the Constitution, and enabled by the Employment Equity Act. In other words, the balance shifted from a concern with the individual impact of employment equity (as unfair discrimination) to whether the Plan and its implementation were constitutionally and legally defensible (*South African Police Services v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC) paras 17, 20). The Labour Appeal Court noted that affirmative action measures do not constitute unfair discrimination under s 6(2)*(a)* of the Act, but should be evaluated as 'a constitutionally mandated tool in a designated employer's hands to ensure compliance with the injunction to ensure and achieve equitable employment practices and representivity' (para 34). Here the test is whether there is

> 'a rational connection between the transformational goal of promoting the achievement of equality by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workforce on the one hand and the means to achieve that goal on the other' (para 44).

The Labour Appeal Court found that the Commissioner was rationally pursuing the goal of representivity in declining to appoint Ms Barnard and, although representivity could be superseded by service delivery concerns, there was insufficient evidence for the court to 'second-guess' the National Commissioner on this issue (para 46).

The conflicting judgments of the two courts — an emphasis on the impact on individual rights and fairness in s 6 of the Act or the constitutionality of implementing the plan determined by rationality under s 9 of the Constitution — set the stage for the appeal to the Supreme Court of Appeal (*Solidarity obo Barnard v South African Police Services* 2014 (2) SA 1 (SCA)). The Supreme Court of Appeal defined its normative approach at the outset, noting that '[i]n redressing the skewed situation created by our racist past, and to

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recalibrate and achieve a balanced society, there has to be an accommodation and a scrupulous adherence to fairness' (para 1). It located the case within an overall understanding of substantive equality, restitution, reparation and the creation of a 'non-racial, non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights' (para 10, quoting from *Van Heerden*). Honing in on the Act, the court accepted the importance of employment equity plans to 'overcome historical obstacles and disadvantages and provid[e] equal opportunities for all', but cautioned against 'the mechanical application of formulae and numerical targets' (para 23). It judged the matter squarely within the determination of unfair discrimination under s 6 of the Act and the onus established in s 11 (para 50) and proceeded to engage in a careful, contextual analysis of the matter, subjecting the facts of the case to 'close . . . and scrupulous scrutiny' (para 58), ultimately concluding that the decision of the National Commissioner not to appoint Ms Barnard was unfair discrimination. Importantly, it found that the SAPS had not discharged the onus of showing that the discrimination was fair. Central to this judgment was the Supreme Court of Appeal's contention that the level of scrutiny of positive measures must be vigorous and fair, especially as race classifications were central to 'the grand apartheid design' and should be used, of necessity, but with care, in building a fully inclusive society (para 80).

THE CONSTITUTIONAL COURT

The court delivered a 114-page judgment, comprising a seven judge main judgment penned by Moseneke ACJ, a three judge minority (concurring in the outcome) of Cameron, Froneman and Majiedt JJ ('Cameron et al JJ'), and two single judgments (also agreeing with the outcome) written by Van der Westhuizen J and Jafta J (in which Moseneke ACJ concurred). On the face of it, there is much agreement; they are, after all, 'concurring' judgments. All judges accepted that s 9(2) is a pivotal mechanism for overcoming the legacy of our past, and that positive, restitutionary measures are essential to equality and reconciliation. All endorsed a 'substantive' understanding of equality. Moreover, all agreed that Ms Barnard's claim should not succeed, and that the decision not to appoint her was justified. However, they differed quite fundamentally in the conceptualisation of the claim, their understandings of equality and its underlying principles, the level of scrutiny to be applied to positive measures and the basis for such scrutiny, and hence the nature and degree of justification required for such measures. These vary between rationality and reasonableness (main judgment and Jafta J), fairness under the Act (Cameron et al JJ), and balancing purpose and impact under s 9(2) and within the Constitution as a whole (Van der Westhuizen J). Given the diversity and richness of these judgments, and the conversation that takes place between them, it is worth setting each out in some detail.

THE MOSENEKE MAIN JUDGMENT

Moseneke ACJ placed the matter squarely within the 'transformative mission' of the Constitution and the need 'to take active steps to achieve

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substantive equality' (para 29). In seeking the goal of a 'more equal and fair society that . . . is non-racial, non-sexist and socially inclusive', he said that care should be taken that 'the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals' (paras 30–2). Following the judgment in *Van Heerden*, Moseneke ACJ stated that the test for evaluating the constitutionality and lawfulness of positive measures, including affirmative action, is not 'unfair discrimination', but whether the measure is defensible under s 9(2) of the Constitution and s 6(2) of the Act. Of the Supreme Court of Appeal judgment, he noted:

> '[T]he Court misconceived the issue before it as well as the controlling law. It was obliged to approach the equality claim through the prism of s 9(2) of the Constitution and s 6(2) of the Act.' (para 51)

Affirmative action measures should not be presumed to be suspect and unfair (and thus subject to a *Harksen* analysis), but should be subject to the three criteria derived from s 9(2), namely that they must: (i) 'target a particular class of people who have been susceptible to unfair discrimination'; (ii) 'be designed to promote or advance those classes of persons'; and (iii) 'promote the achievement of equality' (paras 36–7).

Disappointingly, the judgment took three steps backward at this stage. First, instead of developing this conceptual approach in relation to implementing affirmative action under the Act, Moseneke ACJ limited the ambit of *Van Heerden* by setting a minimum rationality standard for evaluating restitutionary measures: they 'must be rationally related to the terms and objects of the measure' (para 39). Secondly, Moseneke ACJ failed to apply s 9(2) to the facts at hand. Instead, he reinterpreted the claim as one 'directed, not at unfair discrimination based on race under section 6(1) of the Act, but at reviewing and setting aside the National Commissioner's decision not to appoint her' (para 59). This oddly formalistic side-step avoided a substantive engagement with the problems of evaluating affirmative action within an overall understanding of employment law and substantive equality. Thirdly, he found that the matter (as a claim for administrative review) was not properly before the court, and concluded that 'this belated attempt to . . . review . . . the National Commissioner's decision must fail' (para 60).

The judgment concluded with reasons as to why, even if the court were 'benevolently to entertain the review, it is without merit' (ibid). First, the appointment fell squarely within the discretion of the National Commissioner, and he was lawfully entitled to decline to appoint Ms Barnard for reasons of representivity (para 62). Secondly, there was no basis to believe that service delivery would be affected by Ms Barnard's non-appointment (paras 63–4). Thirdly, in preferring representivity over Ms Barnard's competence, the decision was not unreasonable. It is in this last nod to reasonableness that the court balances the quest for representivity against the impact on Ms Barnard, finding that it did not constitute an ultimate bar on her advancement and that Ms Barnard knew about, and accepted, the targets under the Employment Equity Plan (paras 65–8).

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THE CAMERON MINORITY, CONCURRING JUDGMENT

Justices Cameron, Froneman and Majiedt concurred in the main judgment's articulation of the constitutional values that underlie restitutionary measures and in its outcome, but write separately to (i) emphasise the racial tensions that 'accompany the formulation and implementation of restitutionary measures'; and (ii) identify the appropriate standard for deciding when a restitutionary measure is 'constitutionally compliant' (paras 74–5). In contrast to the main judgment's characterisation of the claim as an administrative review of the National Commissioner's decision, the judges defined the 'core issue' of the litigation to be a claim of unfair discrimination which required them to 'mediate the tension between th[e] prohibition [of unfair discrimination] and the Act's recognition that affirmative action measures are justified, and to formulate a robust, constitutionally compliant standard by which to adjudicate Ms Barnard's claim' (para 82).

Expanding on the 'transformative tensions' that accompany restitutionary measures, the judges identified a concern (also present in the Supreme Court of Appeal) with the use of race as a category to redress the past, whilst building an inclusive society that is not defined by race, and the tensions that this might create between 'the equality entitlement of an individual and the equality of society as a whole' (para 77). In resolving these tensions, the judges warn against using race as 'the only decisive factor in employment decisions' (para 80), and seek a more flexible and multifaceted standard that would enable them to balance competing constitutional values. In doing so, they rejected the main judgment's adoption of a rationality standard: 'The important constitutional values that can be in tension when a decision-maker implements remedial measures require a court to examine this implementation with a more exacting standard of scrutiny' (para 95). A rationality standard, they argued, is too deferential in that it would generally prevent a court from determining when 'a decision-maker had impermissibly converted a set of numerical targets into quotas' (para 96). 'Any decision that accords with numerical targets would bear at least some rational connection with the measure's legitimate representivity goals' and thus pass constitutional muster (ibid). For them, this would be an undue elevation of race (representivity) over other concerns. These concerns include the impact on the dignity of the person(s) adversely affected, as well as the need to balance the position and interests of multiple designated groups (ibid).

Unlike the main judgment's focus on s 9(2) of the Constitution and *Van Heerden* for guidance, Cameron et al JJ seek to 'formulate a standard specific to the Act' that is rigorous enough to balance the purposes of the Act with the interests of all affected (paras 84–5, 97). This, they decide, is fairness — a flexible and open-ended norm (familiar in labour law) that can be developed as precedent is established. For them, fairness applies in two ways to affirmative action measures: first, the measures must meet the standard of fair discrimination; and secondly, the implementation of the measures must meet the standards of fairness developed for that purpose (para 101). Again, this

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contrasts with the main judgment's averment that affirmative action measures should be evaluated outside of the standard of unfair discrimination (and presumptive fairness). By adopting this more rigorous standard, Cameron et al JJ open to scrutiny the reasons given by the National Commissioner for his decision (para 102).

As the individual implementation of an employment equity plan is an employment decision, the judges worked with the text of the Act and labour law (rather than the Constitution) to identify criteria for determining whether employment equity plans have been fairly implemented. These criteria included the purpose of redressing disadvantage and achieving equitable representation (s 2), as well as s 15, which speaks about the kinds of measures that can be implemented as part of employment equity. For example, these measures must be flexible targets, rather than rigid quotas; should further diversity and equal dignity and respect; should not constitute an absolute barrier to employment; and should take account of merit (paras 87–90).

In evaluating the National Commissioner's reasons, the judges focused on two critical issues raised in the appointment process: Was an appointment necessary for service delivery? Would the promotion of Ms Barnard have addressed representivity? Overall, the question was whether the Commissioner had adequately explained how he had balanced service delivery and representivity (in respect of both race and gender), and had applied the Plan in a flexible and fair manner (to avoid the de facto conversion of numerical target into rigid quotas). In weighing these issues, the judges found that the Commissioner's failure to give reasons for choosing representivity over service delivery, and even to consider the issue of gender representivity, were both indications that he had not implemented the Plan in a fair manner (paras 113, 120). Indeed, the Commissioner's reasons, on their own, provided limited evidence of the fair implementation of the Plan (para 121). In contrast to the approach of the Labour Court and Supreme Court of Appeal, Cameron et al JJ do not seem to adopt a presumptive idea of fairness that shifts the onus to the employer/state to dispose of the matter. Thus they consider 'the absence of proper challenge and argument' in Ms Barnard's case on issues of service delivery, gender representivity, the Plan, and its targets, as a critical factor in tipping the scales in favour of the decision-maker's stated reasons (para 122). To this 'close call' in deciding that there was fair implementation, they note that the over-representation of white women at salary scale 9 justified a preference for racial representivity, and Ms Barnard's eventual promotion suggested that the non-appointment did not constitute an absolute barrier to her advancement in the SAPS. These factors mitigated in favour of the interpretation of numerical targets as 'permissible goals and not as impermissible quotas' (para 123).

THE VAN DER WESTHUIZEN JUDGMENT

Justice van der Westhuizen's insightful judgment engages the main judgment and the Cameron judgment. He differed from them in constructing the

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matter, not as an as administrative review or application of the Act, but as an evaluation of a s 9(2) measure in accordance with the standard set in *Van Heerden*. Van der Westhuizen J was particularly concerned that in developing and implementing 'measures to restructure . . . society, heal [our] country and promote dignity and equality' (para 128), there is a sense of 'an integrated project to achieve equality, within the context of the . . . Constitution [as a whole], our history and the [non-racial, non-sexist and socially inclusive] future of which we dream' (para 130). In particular, he sought to develop a balance between the individual impact of positive measures, the need to achieve substantive equality, and the dignity of both Ms Barnard and 'those humiliated by apartheid' (para 131). His approach, therefore, was to identify two constitutional bases for evaluating the implementation of positive measures: (i) the s 9(2) test and, especially, its third leg of 'advancing equality' (para 146); and (ii) an assessment of 'whether the impact of the implementation of a section 9(2) measure on other rights is more severe than is necessary to achieve its purpose' (para 164).

Turning to s 9, Van der Westhuizen J confirmed that positive measures are integral to a coherent understanding of substantive equality (paras 135–9). In determining the extent to which the implementation of positive measures may be scrutinised by courts, he drew from the *Van Heerden* test. Once a measure has been evaluated for constitutionality in terms of all three criteria and 'is found to fall within section 9(2) and . . . not unfair discrimination under section 9(3), the effect and impact of its implementation must be evaluated' (para 145). In doing so, more than 'mere abstract rational testing is required', especially as the third *Van Heerden* criterion, the need to 'promote equality', suggests that the *impact* of the measure must be evaluated (para 146, my emphasis). Van der Westhuizen J drew out several factors from this. First, the implementation of the measure should not involve 'abuse of power or impos[ition of] . . . a substantial and undue harm on those excluded from its benefits' (para 147, quoting *Van Heerden*). More broadly, however, the enquiry should 'take into account whether the measure undermines the goal of s 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society' (para 148). In seeking equality, more than demographic representivity is required, especially when this results in small numerical targets that exclude persons from consideration and thus 'may unjustly ignore the hardships or disadvantages suffered by the candidate or category of person, not to mention . . . [their] qualifications, experience and ability' (para 149). In addition, one should not aggravate inequality — in this case by worsening the over-representation of a group (para 150).

In applying the criterion of 'achieving equality' to the decision not to appoint Ms Barnard, or anyone at all, Van der Westhuizen J considered several factors. First, the decision avoided aggravating over-representation and inequality on the basis of race (a corollary of promoting equality). Secondly, the Employment Equity Plan paid attention to the intersectional

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position of white women as a group, but sought to avoid an existing over-representation of white women at the particular salary level. Thirdly, the failure to appoint anyone was not relevant to the decision not to appoint Ms Barnard and could not be used to render it unlawful (paras 150–6).

However, he found that the enquiry did not end there, as attention had to be paid to other constitutional rights and values. Here Van der Westhuizen J sought to identify a constitutional basis for balancing a potentially prejudicial impact of the decision on the affected individual, against the equality justifications of the decision-maker (sourced in s 9(2)). This is possible under 'fairness' in the s 9(3) (unfair discrimination) enquiry, but Van der Westhuizen J correctly noted that to apply 'fairness' to s 9(2) risked 'internal inconsistency' (para 158). He reminded us of the precedent set in *Van Heerden*, that s 9(2) provides a complete defence against unfair discrimination, and that courts would rightly be reluctant to second-guess policies that clear *Van Heerden* standards and are thus not unfair (para 160). Van der Westhuizen J thus posed a further enquiry, namely, 'whether the impact of the implementation of a section 9(2) measure on other rights is more severe than is necessary to achieve its purpose' (para 164). This drew from the proportionality analysis of s 36, and required the court to 'engage in a balancing exercise and arrive at global judgment on proportionality and not adhere mechanically to a sequential checklist' (ibid). It involved a 'case-sensitive and concrete assessment of competing rights' in which a 'right or value is not compromised more than is necessary, in the context of a constitutional state founded on dignity, equality and freedom in which government has positive duties to uphold such values' (para 166). In the present case, Van der Westhuizen J identified as significant not only rights to human dignity, but also the constitutional values around service delivery and accountability.

The potential of affirmative action to impair dignity is present in the emphasis of one's race, gender or disability over other attributes; an emphasis that could amount to 'a substantial and undue harm' (para 168). How then do we measure dignity harms in relation to affirmative action? Van der Westhuizen J distinguished a narrow and subjective notion of dignity as an infringement of dignitas or self-esteem from the idea of being treated, more generally, with equal concern and respect (paras 170–2). Here the focus is not on an atomised individual, but on the 'collective impulses' of dignity and ubuntu, our 'interdependence as members of a community' (para 174). Affirmative action measures should be evaluated not only in terms of their impact on a single individual, but on how they enhance the dignity of society as a whole (paras 175–6). In this instance, we need to consider the importance of positive measures and affirmative action to restoring the dignity of those affected by apartheid (paras 177–8). This means weighing individual against collective dignity and the goal of substantive equality. In considering whether the impact on Ms Barnard's dignity was reasonable and justifiable in the light of the goal of substantive equality (in this case equitable representation in the SAPS), Van der Westhuizen J asked whether she was

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treated as a means to an end and her place in society denigrated (para 180). Related to this was whether the non-appointment 'amount[ed] to an absolute barrier to her advancement'. He found neither to be the case as a result of the over-representation of her group and the flexibility in the Plan which allowed her to be promoted to another position (para 182).

Finally, the judge weighed ideas of personal integrity and an efficient public service against the promotion of equality (as representivity). In the end, understanding the effects of a policy, appointment or vacancy on service delivery is a complex balance that requires evidence and specialist institutional knowledge. Van der Westhuizen J found that there was insufficient evidence to make a call in this case, and deferred to the Commissioner's decision (paras 187–9).

THE JAFTA CONCURRING JUDGMENT

Justice Jafta agreed with, and extended, the main judgment and, in particular, the finding that the cause of action had developed into a review of the National Commissioner's decision that was not on the papers and should not have been considered.

To the extent that he made comments, obiter, on the appropriate standard to be applied to implementing positive measures, Jafta J also opposed the fairness threshold identified by Cameron et al JJ. However, he did agree with their instinct to find a standard within the Act. He suggested that the evaluation of affirmative action measures, and their implementation, must take place in terms of s 6(2) of the Act, namely, that they must be consistent with the purpose of the Act. Here he confined his reading of purpose to s 2 of the Act and rejectd Cameron et al JJ's use of other sections of the Act. Accordingly, he limited the enquiry to whether the purpose of equitable representation was met, to the exclusion of considerations of impact and other effects (paras 224–7). For him, an approach that requires courts to take account of 'competing interests' and 'weigh the interests of the claimant against those of the class the restitutionary measure was adopted to advance, as well as the interests of an employer who is obliged by the Act to achieve equity' would undermine the very objectives of s 9(2) of the Constitution and the Act (paras 228–9). At its foundation, this argument — together with that of the Labour Appeal Court which Jafta J cited with approval — prioritises redress and restitution in the achievement of equality. The only standard that the decision-maker must meet is that he or she must rationally aim to achieve 'representivity and equity' (para 227).

ANALYSIS

The judgments raise many issues. At the centre of these is the absence of a common, coherent and holistic interpretation of positive measures and affirmative action within a broad understanding of (substantive) equality. Rather, the judgments express contrasting approaches to racial transformation and positive measures, and grapple with different ways of giving

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expression to these in law. Yet, all judgments address — and seek to evaluate — the same underlying issues concerning the purpose of and reasons for the decision, and its impact on Ms Barnard, and all agree that Ms Barnard cannot succeed in her claim. Surprisingly, the application of different legal standards makes no difference to the result. For the main judgment (and Jafta J), the greater emphasis on rationality allowed a measure of deference to the National Commissioner. But even on the majority's alternative reasonableness standard, the claim failed (paras 65–70). Cameron et al JJ and Van der Westhuizen J sought, in different ways, to balance goals of restitution and representivity against considerations of individual impact and service delivery, with reference to particular understandings of the values of dignity and substantive equality (see further below). Whilst Cameron et al JJ relied on a notion of fairness to evaluate competing concerns, Van der Westhuizen J used a value-based framework of proportionality drawn from s 36 of the Constitution to evaluate whether the decision was 'reasonable and justifiable' and, in particular, 'whether the impact of the implementation of a section 9(2) measure on other rights is more severe than is necessary to achieve its purpose' (para 164). In the end, the call made in both judgments is influenced by limited information, and both cite a paucity of evidence and argumentation on both sides as factors in the result (see for example paras 122, 187–9). By contrast, the Supreme Court of Appeal (working within a framework of unfair discrimination) engaged the evidence on record in much finer detail, insisting that the SAPS bear the onus of providing evidence of fairness, and concluding that the scarcity of this evidence and the failure of the National Commissioner properly to explain the non-appointment meant that the discrimination was unfair.

The Supreme Court of Appeal and Constitutional Court judgments illustrate the differences between the close scrutiny of impact in a fairness approach (required by s 9(3) of the Constitution and s 6(1) of the Act), with its attendant onus, on the one hand, and the more deferent approach of rationality, the operation of fairness, without an operative onus, or proportionality guided by substantive equality and 'collective dignity' on the other. Yet, while the Constitutional Court set a clear precedent that one should not adjudicate positive employment measures as a matter of discrimination and presumptive fairness, it did not reach consensus on the constitutional framework required by s 9 and its influence on the Act. In the end, therefore, the case sets little detailed precedent. The judgment as a whole remains open-ended and contested, its failure to carve out a common constitutional standard creating uncertainty in an area that is in dire need of clear precedent.

What precedent does Barnard *set?*

What does the case tell us about the evaluation of positive measures in the workplace? First, following the decision in *Van Heerden,* the case is (again) clear precedent for the fact that the conceptual framework for evaluating the state's employment equity plans and affirmative action measures, as well as decisions taken in terms of them, starts with s 9(2) and not unfair discrimina-

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tion in s 9(3). Once more the court reminded us that positive measures are subject to a different constitutional and legal standard than s 9(3) fairness. Although this is not a direct precedent for private employers, it is likely that a similar approach would apply to them. What remains undeveloped is a clear understanding of what the correct conceptual framework is, what legal standard applies, and what the relationship between s 9(2) and the Act is.

Secondly, in evaluating the *content* of employment equity plans and affirmative action measures by the state, the minimum standard is one of rationality, but it is not the definitive standard. As I argue below, *Van Heerden*, properly and generously read, clearly sets a higher standard and, as Moseneke ACJ noted in the judgment, 'these are minimum requirements, it is not necessary to define the standard finally' (para 39).

Thirdly, the standard for assessing the *implementation* of employment equity plans and affirmative action measures by the state remains undecided. Whilst one could argue that the main judgment is precedent for the standard of rationality, the judgment's concern with the absence of legal argument on the issue (see for example paras 54–60, 216) suggests that this, too, is open to further consideration. Moreover, the application of administrative review to an employment decision remains a matter of some controversy (see most recently *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC)). Even if the matter is open to administrative review, it must surely also be open to challenge under the relevant labour law, as an employment decision (see also Cameron et al JJ para 97). Here, it is clear, as three of the four judgments stated, that (whilst it might be brought as a case of unfair discrimination) it cannot be evaluated as an instance of unfair discrimination, or in terms of a notion of 'fairness' (Moseneke ACJ paras 51–3; Van der Westhuizen J para 160; Jafta J paras 228–9). As discussed further below, I suggest that the standard should be derived from a reading of s 9 that embraces a multi-faceted notion of equality and enables different values and principles to guide the balancing of purpose and effects in employment equity decisions.

The case *does not*, therefore, set a final constitutional standard; provide a definitive interpretation of the application of s 9(2) to employment-related positive measures and employment equity; specify the relationship between s 9 and the Act in these matters; or establish clarity on the idea of substantive equality and its multiple underlying principles that would underpin a coherent reading of s 9. Starting with the latter, it is to these points that I now turn.

Contested ideas of (substantive) equality

The judgment reveals how the idea of (substantive) equality in s 9 remains contested, and even undeveloped. Perhaps the most prominent debate in equality jurisprudence has been the place of dignity in the equality right. While there is significant support in courts and academia for dignity to be the 'lodestar for equality', and for unfair discrimination to be measured by a Kantian idea of equal moral worth (Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013); S Woolman 'Dignity' in S Woolman,

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T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS, 2006)), this has been disputed in the literature and in some judgments (Cathi Albertyn & Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; D M Davis 'Equality: The majesty of Legoland jurisprudence' (1999) 116 *SALJ* 398), and some have argued for a more complex and multifaceted understanding of substantive equality in which dignity is but one dimension (Albertyn & Goldblatt op cit; Sandra Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *SAJHR* 214; Henk Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1; Cathi Albertyn & Sandra Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' 2015 *Acta Juridica* 430).

The dignity-centred approach emerged in the development of unfair discrimination under s 9(3). Here dignity serves two purposes. First, it distinguishes between differential treatment under s 9(1), subject to a test of rationality, and differential treatment under s 9(3) which amounts to discrimination and is subject to the test of fairness. Differentiation amounts to discrimination only when it takes place on grounds that have *the potential to impair dignity*. Secondly, it is only when there is *actual impairment of human dignity* that this discrimination is found to be unfair. Here the *impact* of the impugned law or conduct on the dignity of the person complaining of discrimination is determinative (*Harksen v Lane NO & others* 1998 (1) SA 300 (CC) para 53). So, dignity is pivotal to deciding unfair discrimination and is here predominantly understood to connote inherent human worth and the need to be treated as equally worthy and with equal concern and respect.

In dignity, the focus is on individual worth. However, a more group-based approach to 'socio-economic disadvantage', that emanates from one's membership of a disadvantaged group, is factored into the evaluation of fairness (*Harksen* para 53). This idea of group-based disadvantage has roots in critical rather than liberal theory, and generally refers to more systemic and institutionalised group-based forms of inequality. However, in s 9(3) jurisprudence, it is generally subsumed by the overall evaluation of impairment of individual dignity as equal moral worth. It is thus often seen as an extension of dignity, rather than a separate understanding of inequality, or an autonomous dimension of a more complex idea of inequality (Albertyn & Fredman op cit at 436).

The problem with an equality approach based on the impact of an impugned action on individual dignity as self-worth is that it leaves little conceptual space to develop an understanding of positive measures that seek to advance members of historically disadvantaged groups. If the impact on the dignity of the individual complainant is determinative, and this is enhanced by a presumption in favour of unfairness, how do you justify positive measures that seek to redress collective disadvantage but also affect individual members of other, usually more privileged, groups?

Both Cameron et al JJ and Van der Westhuizen J sought to address positive measures by retaining the determining power of dignity. The former did so

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within a framework of equality (and s 9), while Van der Westhuizen J stepped outside of this. Cameron et al JJ identified the need to develop a 'standard to determine whether the implementation of a remedial measure has *adequately balanced substantive equality with the dignity of the person* negatively affected by the measure' (para 94, my emphasis). However, they gave little autonomous normative content to substantive or restitutionary equality, and, in the end, identified dignity as the defining value in concluding that the equality goal of affirmative action is 'equal dignity and respect of all' — equal dignity and respect both of those being advanced and those being affected by the measure (para 89). Although it is not entirely clear (as they endorse Van der Westhuizen J's comments on dignity in note 107), Cameron et al JJ seem only to be concerned with individual dignity (equal moral worth) rather than following Van der Westhuizen J in balancing the 'collective' dignity of a group versus the individual.

Although there is much to value in Cameron et al JJ's judgment (especially its instinct to develop a balanced constitutional standard), overall, its conceptual prioritisation of individual dignity and its failure to develop the idea of group disadvantage and substantive equality limits its capacity to reach out to a richer, more coherent and complex understanding of equality and positive measures within a holistic interpretation of s 9.

Van der Westhuizen J worked with dignity outside of equality and balanced one against the other. For him s 9(2) focuses mostly on the nature of the measure to achieve equality and whether or not, in general, it actually achieves equality (paras 145–50). Here he initially poses an idea of substantive equality that recognises group-based disparities and intersectional disadvantage, and that seeks to undo the unequal distribution of power, privilege and opportunities in society. Positive measures seek to redistribute opportunities, and must do so in a nuanced, intersectional and situation-sensitive manner, without imposing 'substantial and undue harm' (as illustrated by the analysis in paras 150–5). At this stage, the idea of equality is defined not by dignity, but by achieving a more just distribution of power and resources. For Van der Westhuizen J, dignity only enters the equation as a self-standing right which must be weighed against the nature and scope of the equality measure. Thus he sought to balance the value and right of equality (as positive measures) against other rights and values, especially dignity (para 169).

In doing so, Van der Westhuizen J developed a dual understanding of dignity which accepts the more dominant Kantian idea of dignity as intrinsic worth and being treated with equal concern and respect (para 71), but also speaks to a more collective understanding in which the well-being of each person is connected to others and to the well-being of society as a whole (para 175, drawing on *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC)), and especially those injured by apartheid (paras 170–6). Van der Westhuizen J then sought to balance the dignity of the group versus the dignity of the individual (paras 178–9), as well as the individual dignity impact on Ms Barnard, against 'the goal of substantive equality' (paras 180–3). Here he no longer speaks of the distributive aims of equality (to

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redress inequality in the distribution of power and privilege), but of its dignity aims: to ensure that people are equally valued and are treated with equal concern and respect (para 180).

Although Van der Westhuizen J argued for 'an integrated project to achieve equality' (para 130) and seemed to recognise that equality should be developed as a coherent conceptual idea that enables different principles to emerge and be developed, in practice he did not do this. He was alive to redistribution and redress of disadvantage as an important component of equality under s 9(2), but did not coherently relate this to other dimensions of equality such as equal concern and respect. This is because he ended up locating important components of equality outside of the right, within an expanded notion of dignity, rather than accommodating multiple values and interests within the equality right. By doing so, dignity becomes overloaded, straining under the weight of its more dominant meaning of inherent human worth and a more collective notion of group-based dignity. Equally disconcerting is the fact that the discussion on the right to dignity almost entirely derives from equality jurisprudence! It is clear that Van der Westhuizen J was seeking an effective way of balancing the various competing considerations and values that are generated by the implementation of affirmative action. However, he seemed to end up with a dignity-centred approach and missed a crucial opportunity to develop equality jurisprudence — and the rich debates in *Van Heerden* — to strengthen the justificatory mechanisms and resolution of the multiple purposes, principles and values that underpin this complex right.

In the end, both judgments persisted in an approach in which dignity continues to define equality, and a more complex idea of equality remains undeveloped. The focus of equality (whether as fairness or as positive measures) is on equal dignity as a mechanism of securing the equal status and equal recognition of individuals, rather than more systemic, collective and redistributive goals. By this I mean that positive measures seem to be justified largely because of the indignity of apartheid and its failure to accord equal recognition to persons, regardless of race, rather than by the concomitant need to redistribute goods, resources and opportunities, or to overcome systemic group-based oppression and subordination.

Elements of the main judgment seem to adopt an approach in which the achievement of equality is informed by the need to overcome unequal power relations and disadvantage, whilst being alert to the dignity of all (paras 28–32). Substantive equality is achieved, inter alia, by the taking of restitutionary or affirmative measures, but it is not equated with this (paras 33–5). Rather, it seems to be allied to the broader goal of achieving a 'non-racial, non-sexist and socially inclusive society' (para 32). There seems to be an understanding that this does not merely imply equal concern and respect (although dignity remains an important measure: para 31), but also requires a collective understanding of group-based equality and the need for systemic change that dislodges existing social and economic hierarchies and power relations (see for example paras 29, 33, 35). However, this idea

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remains implicit and unarticulated as the judgment, disappointingly, does little conceptual work in developing equality and defers to a rationality standard in testing the claim.

In summary, therefore, all judgments lack a multifaceted understanding of the purposes and principles of substantive equality that would have enabled a clear and consistent development of s 9 equality jurisprudence. Such an approach could have drawn on *Van Heerden* to provide greater clarity and guidance on how to balance and justify the apparently competing claims of discrimination and affirmative action, both in s 9 and in the Act.

Substantive equality as a complex, coherent and multifaceted idea

In contrast to a dignity-centred approach, I argue for an understanding of s 9, as a whole, that captures a complex, multi-dimensional right to *substantive* equality, informed by a variety of constitutional principles and values. At minimum, they include the democratic values of the achievement of equality, dignity and freedom.

There is little space in this note to elucidate this idea or to give detailed meaning to these values; however, the following content seems to flow most logically from the Constitution and its jurisprudence. The value of dignity would generally concern recognition or social equality issues and signify a concern with the equal social worth of individuals. The value of achieving equality can be read to seek redress of structural disadvantage towards a more just and egalitarian social and economic order (as a complex idea of intersecting social and economic, distributive and relational inequalities: Jonathan Wolff & Avner de-Shalit *Disadvantage* (2007)). The principle of affirming difference and diversity captured within s 9 is simultaneously an incidence of individual self-worth and of removing the hierarchies of privilege and power that impede group-based recognition — reflecting the values of equality and dignity. The influence of the values of freedom and participation on s 9 speaks to the ability of individuals to make choices and secure their full place within society. This is closely linked to the value of equality in so far as it requires undoing hierarchies of power and privilege and establishing the social and economic conditions necessary for individual well-being, positive relationships and meaningful choice. How each of these is understood in a particular claim, as well as the relationship between them, might differ (as the experience and conditions of inequality differ), but each must be articulated contextually within an overall goal of promoting individual well-being, enabling the conditions of greater equality, and achieving a more just society. (See further on this multi-dimensional approach Fredman op cit; Botha op cit; Catherine Albertyn ' "The stubborn persistence of patriarchy": Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165 at 184–94; Albertyn & Fredman op cit.)

Overall, these values speak to a society which, inter alia, seeks to (i) accord equal status and recognition to all and overcome the failure to treat individuals with equal concern and respect; (ii) address the systemic and

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entrenched conditions of group-based disadvantage; (iii) affirm difference and diversity; and (iv) secure the conditions necessary for participation and choice. Such an approach evinces a concern with the individual, but within a deeper understanding that individual circumstances and choices are structured by intersectional and overlapping group-based systems of inequality.

Although s 9 is not the only right that aspires to create the society described above, it plays a significant role in addressing unfair discrimination (the differences to which disadvantage attaches) and positive measures that proactively remove or address the social and economic disadvantage that attaches to race or gender (or other) difference. The multi-dimensional approach to s 9 recognises that multiple, competing and complementary principles and values inform the right as a whole, and might be differently balanced in different sections of the right (such as s 9(2) versus s 9(3)) and in different instances of inequality. A single value, such as dignity, is no longer determinative. Rather, issues of individual dignity, for example, can be weighed against group-based disadvantage within an overall understanding of the kind of society that we are seeking to achieve. Unlike Van der Westhuizen J's approach, this is done within the ambit of s 9 and its animating values. Courts are therefore expected to find the appropriate balance between dignity and disadvantage, between the individual (and her dignity) and the (structural disadvantage of the) group, and between immediate harm and long-term transformative goals. In particular, a greater emphasis needs to be placed on developing ideas of remedying disadvantage and enhancing participation in interpreting the right. The next section builds on *Van Heerden* and *Barnard* to consider how this might be done in s 9 in general, and s 9(2) in particular, as well as how this might inform the interpretation and application of the Act.

Substantive equality, the Act and the interpretation of s 9(2) of the Constitution

Two of the judgments (main and Van der Westhuizen J) accepted that employment equity by the state must be evaluated through the prism of s 9(2), although only Van der Westhuizen J provided substantive content to, and justification for, this. Neither of these judgments applied the Act directly. The two remaining judgments identified the role that the Act must play in determining the legality of decisions concerning employment-based affirmative action. Cameron et al JJ gave content to their idea of fairness with reference to the provisions of ss 2, 6, 15, 20 of the Act, while Jafta J would limit his to the purpose of the Act set out in s 2. However, neither Cameron et al JJ, nor Jafta J, developed s 9 of the Constitution as a conceptual frame for this approach.

In the next part below, I posit an approach that interprets and applies the Act to decisions concerning affirmative action with due regard to a conceptual framework derived from s 9 of the Constitution. This recognises the multiple values underlying the right and develops the precedent set by *Van Heerden* to provide a mode of evaluating purpose and effects, with due

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regard to these values, and the constitutional importance of advancing disadvantaged groups.

The precedent set by Van Heerden

The constitutional standard for positive measures was set in *Van Heerden*, a case concerning the application of a positive measure (in the form of beneficial pension contributions) to first-time members of parliament after 1994 (a group that was largely defined by race). At that stage, precedent had favoured the s 9(3) route, in which positive measures were tested against the standard of 'fairness'. This cohered with a broad understanding of those acting on behalf of 'victims' of affirmative action that it was a form of reverse discrimination requiring a high standard of justification. The Constitutional Court disagreed. Citing the need for 'a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework' (para 25) and 'a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege', the majority judgment of Moseneke DCJ identified 'a substantive conception of equality inclusive of measures to redress existing inequality' (para 31). Within this, '[r]emedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9' and 'differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)' (para 32). In two minority judgments, Mokgoro J generally agreed with the approach (with some reservations: see below) and developed the understanding of the place of s 9(2) in the right as a whole, and Sachs J agreed with the outcome and further elaborated the overall approach. I draw on the main and the minority judgments below, in so far as I find them to be clear and logical developments of each other and of the best overall approach to s 9(2). Overall, I am seeking the best interpretation of the case and of s 9(2) within a multifaceted and coherent understanding of the right.

What is important for the purposes of this note is the content of the s 9(2) test; the manner in which the court seeks to balance competing factors; the level of scrutiny it applies to this; and the values it uses to justify its conclusions.

Positive measures certainly attract a lower standard of scrutiny than unfair discrimination and involve a degree of deference in which the 'judiciary . . . [should not] second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination' (para 33, Sachs J para 152). However, it is not correct that *Van Heerden* established a rationality standard for s 9(2) (as argued by, for example, J L Pretorius 'Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) 130 *SALJ* 31). This is an impoverished interpretation of the judgment, which sets a standard higher than rationality, but perhaps lower than (and different

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from) the fairness threshold of s 9(3). As I argue below, the evaluation can be read to entail a justificatory mechanism that balances purpose and effects, with due regard to multiple values (and especially remedying disadvantage) within the overall vision of the Constitution.

The court isolated three overlapping criteria in s 9(2) to test positive measures. First, the measure should target a category of beneficiaries disadvantaged by unfair discrimination. There is disagreement in *Van Heerden* as to how this should be constituted, with the majority accepting that the 'overwhelming' number are of the disadvantaged group, and the minority judgments wanting the group to be comprised only of disadvantaged persons (see for example Mokgoro J para 89). Secondly, the measure must be 'designed to protect or advance such persons or categories of persons' and must be 'reasonably capable of attaining the desired outcome'. No causal connection is required to show that it actually would achieve such an outcome (paras 41–2). 'The fact that the same remedial purpose could have been achieved in other and possibly better ways would not be enough to invalidate it' (Sachs J para 153). Thirdly, the measure must promote 'the achievement of equality' (para 37) and ensure that it does not impose disproportionate burdens or 'constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened' (para 44, Sachs J para 152).

These criteria demonstrate a concern with the purpose of the measure as well as its impact, and the underlying values that should guide the appropriate result. Although the case is more directly relevant to the evaluation of a positive measure than its implementation, a full reading of *Van Heerden* can provide important indicators of the standards and methods of evaluating both content and implementation.

First, *Van Heerden* suggests that the evaluation entails a proportional assessment of purpose and impact, including the various interests affected by the measure or decision. This is apparent in the manner in which the court addressed the s 9(2) enquiry, which, across all three factors being evaluated, involved a fairly detailed scrutiny of the issues, including a consideration of the measure (or decision) as a whole; its historical context; the duration, nature and purpose of the measure (paras 45–52); the position of the person complaining of unfair discrimination and the impact of the measure on him or her and his or her class (paras 53–6); as well as the position of the group being promoted (para 48). The nature of this proportional assessment is also addressed in the concurring judgment of Sachs J (see for example paras 136, 140).

Secondly, this is a contextual enquiry that looks at the issue holistically and should comprehend the structures of advantage and disadvantage that underpin the measure or decision (para 44; Sachs J paras 139–42).

Thirdly, it deals with, and draws on, the values underpinning the right (paras 22; 44, Sachs J paras 140–2). Here the principle of remedying disadvantage is particularly strong. As Sachs J notes:

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> 'The overall effect of section 9(2) . . . is to anchor the equality provision as a whole around the need to dismantle the structures of disadvantage left behind by centuries of legalised racial domination, and millennia of legally and socially structured patriarchal subordination' (para 141).

Dignity, in the shape of equal concern and respect for all, is also important: it entails an appreciation of individual dignity along with the dignity of those affected by apartheid and patriarchy, and thus for all to 'benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings' (Sachs J para 145).

Most importantly, in finding the balance between the competing interests and principles that might emerge, s 9(2) allows us to place a thumb on the scale of disadvantage and the remedial purpose of the measure: 'Given our historical circumstances and the massive inequalities that plague our society, the balance when determining whether a measure promotes equality is fair will be heavily weighted in favour of opening up opportunities for the disadvantaged' (Sachs J para 152). Justice Mokgoro describes s 9(2) as forward-looking with a particular concern with the collective benefit of the group being advanced, while s 9(3) is backward looking and emphasises the impact on the group or individual being discriminated against (para 80). Section 9(2) inevitably gives less weight to the position of the complainant, but it does consider this and does not merely defer to the need to promote disadvantaged groups. Overall, the approach to s 9(2) and to finding the balance in positive measures is quite different from that of evaluating unfair discrimination in s 9(3). In s 9(3), individual impact measured by individual dignity has been determinative; in s 9(2), the goal of remedying group-based disadvantage is given particular weight.

Using Van Heerden *and the Act in evaluating the implementation of employment equity by the state*

In the context of vindicating rights, the Constitutional Court has insisted that matters be brought under relevant legislation rather than relying on a constitutional right; for example, in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 rather than s 9(3) of the Constitution, and the Promotion of Administrative Justice Act 3 of 2000 rather than s 33 of the Constitution (*MEC Education Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40). Thus, if the Act is the starting point for evaluating positive measures in the workplace, then it must be applied. Section 6(2) of the Act provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act, but provides no direct guidance on how to evaluate these. Hence many courts have (incorrectly) adjudicated affirmative action measures in terms of s 6(1) and unfair discrimination, with its relevant onus. Indeed, the lack of clarity within the Act on the relationship between s 6(1) and s 6(2)*(a)*, and how to determine when affirmative action measures are 'consistent with the purposes of the Act', has led to confusion and differing approaches in the courts.

The correct approach, it is suggested, is that the Act should be interpreted and applied with due regard to the Constitution (as is required by s 3 of the

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Act), and in particular s 9(2) and the best interpretation of s 9 set by the court in *Van Heerden*. As discussed above, the conceptual framework of s 9(2) developed from *Van Heerden* requires all factors to be assessed proportionally and contextually, but in the balance between remedying disadvantage and addressing dignity, greater weight should be given to redress of disadvantage. This section sketches the outlines of this approach in interpreting and applying the Act to decisions about public sector employment (rather than the content of employment equity plans).

First, the enquiry is a contextual one that seeks to evaluate both purpose and effects, taking account of evidence and reasons. The absence of evidence and reasons can weigh against parties in balancing purpose and effects. The s 9(2) approach is not a 'hands-off' approach although, in the balance, it is more deferent to purpose over impact, and probably to values of disadvantage over individual dignity. At the risk of repetition, there is no onus that operates in favour of the complainant. The provision of reasons, values and justification — by the state and in the judgment — not only enables a proper adjudication of the claim, but also addresses an anxiety about overreach and abuse of power, accords equal concern and respect to all (*City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para 81), and recognises all as constitutional subjects, even if subjective individual dignity is impaired.

Secondly, the task of balancing purpose and impact, as well as different values and principles, is assisted by the provisions of the Act. On the side of the purpose of remedying disadvantage are the purposes of the Act set out in the preamble and s 2, as well as the more concrete provisions of s 15. Thus the Act seeks to promote equality and overcome disadvantage, to redress the past, to provide equal employment opportunities, and to ensure diversity and equitable representation (preamble, s 2). To do this, it allows affirmative action measures within the scope of the Act (ss 15 and 20). On the side of dignity and impact, these measures must be developed and implemented in a way that furthers the 'equal dignity and respect of all' (s 15(2)*(b)*) and must not establish 'an absolute barrier to the continued employment or advancement' of persons who are not from designated groups (s 15(4)). In addition, the implementation may include preferential treatment and numerical goals, but not fixed quotas. Part of the enquiry, therefore, is to establish whether flexible targets are too rigidly and formulaically applied (s 15(3)). Both the main and Cameron judgments speak to many of these issues, although the former does not apply them fully and the latter does so in terms of a fairness norm.

The Act also speaks to issues of an effective and efficient workforce (preamble) and the need for affirmative action candidates to be suitably qualified (s 20(3) and (4)). Clearly this, too, goes into the mix of evaluating an affirmative action decision, although it was not directly an issue in the case. Service delivery, however, was an issue, and this can be linked to the Act's concern with efficiency and skills (see also the main judgment para 80). As it is a public sector appointment, the Act can be read and applied in the context of constitutional obligations to provide an effective and responsive public service (s 196 of the Constitution).

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Although too briefly sketched, the general approach suggested in this note is that a full reading of *Van Heerden* can set a broad conceptual framework for the detailed application of the Act. How does this differ from what the judges said in *Barnard*, especially as both the Cameron and Van der Westhuizen judgments engage in forms of proportionality and balancing values, purpose and effects?

The instinct of Cameron et al JJ to work with the Act, to balance competing factors, and to avoid a presumptive onus of fairness (that prioritises individual impact) is correct. However, in their reliance on fairness as the normative standard, the judges limited themselves to a dignity-centred approach and did not sufficiently distinguish between constitutional fairness under s 9(3), the fair labour practice jurisprudence, and the fairness of positive measures. Given that the adjudication of fairness in equality jurisprudence has a particular meaning that is tied to impact and individual dignity, more work would need to be done to develop fairness as a mechanism for adjudicating positive measures. Justice Sachs's minority judgment in *Van Heerden* suggests that this is possible (especially paras 136–40), but it requires a much more nuanced and multi-dimensional approach to s 9 and to equality as a whole. Thus Van der Westhuizen J and Jafta J were correct to worry about the conceptual coherence of using fairness under s 9(2) and in relation to affirmative action. Van der Westhuizen J was, of course, correct to seek to balance the competing principles of dignity and equality, but the manner of doing so (overloading the right to dignity and weighing it against an aspect of the right to equality) is cumbersome and unnecessary. Equality in s 9 is quite capable of incorporating these balancing mechanisms, and the jurisprudence provides some guidance to that effect. Of course, to do so, one would have to move away from the dignity-centred approach, which in itself acts as a barrier. Van der Westhuizen J and the main judgment were wrong to limit their enquiry to s 9(2) and the Constitution. Surely, the jurisprudence on subsidiarity tells us that the Act comes first and should be applied. Finally, Jafta J was correct to read s 9(2) and the Act together, but was wrong to limit the role of the Act to the purpose set out in s 2. This unduly narrowed the scope of the enquiry on this very important issue. Thus, no judgment fully captures the importance of defining the overarching normative and methodological framework set by s 9(2) and its application to the Act.

CONCLUSION

This note has only sketched the broad brush-strokes of a substantive interpretation and application of the Act to employment equity decisions within the overall guidance of the Constitution, especially s 9(2). Fundamentally, the argument is for the interpretation of the Act within the framework of s 9 that the Constitutional Court began to develop in *Van Heerden*. It is suggested that the court missed an important opportunity to develop this approach within a complex understanding of the right to

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substantive equality in s 9. A core argument is that s 9 should not be reduced to a single value and to different meanings of equal dignity, and that this cannot, on its own, guide the difficult work that needs to be done in balancing a jurisprudence of unfair discrimination with one that affirms positive measures. Rather, the right to substantive equality should be recognised as one that is informed by several values and principles, and a clear framework should be established for this. This framework can then inform the interpretation of the Act and the work that needs to be done in balancing the different issues and interests raised by the provisions of the Act, within our overall commitment to a non-sexist and non-racial society based on freedom, dignity and the achievement of equality.

LOST WILLS AND SECTION 2(3) OF THE WILLS ACT

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INTRODUCTION

It happens from time to time that on the death of a person the deceased's last will and testament cannot be found, although it is believed that the deceased executed a will during his or her lifetime. In such a situation, much will turn on whether the missing will was known to have been in the deceased's possession. If so, then the fact that the will cannot be found gives rise to a rebuttable presumption that the will was destroyed by the deceased with the intention to revoke it (*Ex parte Warren* 1955 (4) SA 326 (W) at 326F–H; *Le Roux v Le Roux* 1963 (4) SA 273 (C) at 277C–E; *Theart v Scheibert* [2012] 4 All SA 278 (SCA) para 25 read with para 27; see also M M Corbett, Gys Hofmeyr & Ellison Kahn *The Law of Succession in South Africa* 2 ed (2001) 99). Alternatively, if the last will was known to have been in the custody of some other person, such as the deceased's attorney or a trusted friend, then no such presumption of revocation arises (*In re Beresford, Ex parte Graham* (1883) 2 SC 303 at 305–6; *Warren* (supra) at 327A–B; *Theart* (supra) para 27). In such a case, the lost will is in principle operative, even though it is not physically available (M J de Waal 'Law of succession (including administration of estates) and trusts' 2012 *Annual Survey of South African Law* 831 at 842; Linda Schoeman-Malan 'Diverse probleme rondom die bestaan en geldigheid van 'n testament by die dood van die testateur (deel 2)' (2013) 46 *De Jure* 684 at 692). This applies equally where the presumption of revocation operates, but is rebutted by the available evidence (see for example *Ex parte Serralha* 1939 CPD 417 and *Ex parte Slade* 1922 TPD 220).

In such cases, where the will is lost but still legally operative, it can be given effect to, provided that there is sufficient evidence to establish its contents, and the courts enjoy a common-law power to authorise and direct the Master to accept a copy of the lost will as the deceased's will. Corbett et al explain this common-law power as follows (Corbett et al op cit at 117):

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> 'In the event of an original will being lost or destroyed, and if there is no duplicate original, it will, therefore, be necessary for interested parties to apply to court to obtain an order declaring a copy of the will (where such copy is in existence) to be the will of the deceased and authorizing the Master to accept the copy. The application must disclose that the original will was duly executed, the circumstances under which the will was lost, that the copy is a true copy of the original and that the original will was not revoked by the testator.'

In such an application, the contents of the lost original might be established in a number of ways. For example, in *Ex parte Serralha* (supra) a typed copy of the original will had been given to the deceased at his request (at 418); in *Ex parte Slade* (supra) a carbon copy of the original will was available (at 221); in *Uys NO v Uys* [2008] ZANCHC 30 a photocopy of the will was available (para 3); and in *Ex parte Ntuli* 1970 (2) SA 278 (W) the contents of the will were reconstructed relying on the memories of persons who had read the will after the deceased's death before it disappeared (see the facts at 278–9).

A court's powers with respect to the recognition of copies of lost wills are a function of the working together of rules of the law of succession and the more generally applicable rules of the law of evidence. As explained earlier, the lost will does not lose its legal efficacy unless it is presumed or shown to have been revoked. The principles of evidence, however, require the contents of any document, including a will, to be proven by production of the original thereof. This is the so-called best evidence rule. In the case of a lost document, however, there is an exception to this rule, which applies when satisfactory reasons can be given for the failure to produce the original. Importantly, this exception forms the basis of the courts' power to order the Master to accept a mere copy of a will, as explained in the seminal decision of *In re Beresford, Ex parte Graham* (supra) at 306:

> 'Now it is a wholesome principle . . . that a party on whom it is "incumbent to prove any fact, matter or thing is bound to give the best evidence of which from its nature such fact, matter or thing is capable". Upon this principle it is a general rule that the contents of a document must be proved by primary evidence, that is to say, by the production of the document itself. It is clear, however, that such a rule if rigidly adhered to must often be productive of extreme injustice, and accordingly certain exceptions have from time to time been grafted upon it, under which secondary evidence may in certain cases be given of the contents of a document. One of these exceptions is where the original has been lost and proper search has been made for it, for in such a case a copy made from the original and proved to be correct is admissible as evidence, and even oral testimony of the contents of the document may be given by persons who have themselves seen it. In the present case it is not necessary to resort to such oral evidence, because we are satisfied that the copy which has been produced is a correct copy of the original will.'

(In this connection see also the comments in *Kuhnemund v The Master of the High Court* 1922 SWA 78 at 80, where the court indicates that use of 'parole evidence' is permitted to establish the contents of a lost will.) This explanation of the jurisprudential origins of the courts' powers to accept a

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copy of a lost will will be relevant to the analysis that follows the case discussion below.

An interesting question that has arisen more recently, and which is the focus of this note, is the interrelationship between the courts' common-law powers with respect to a lost will and their statutory powers in terms of s 2(3) of the Wills Act 7 of 1953 (as amended) (hereinafter 'the Wills Act'). Section 2(3) was introduced into the Wills Act in 1992 and its purpose is to avoid a situation in which the genuine will of a testator is frustrated for want of compliance with the relevant will-making formalities (*Stoltz ID v The Master* 1994 (2) PH G2 (E)). Section 2(3) reads as follows:

> 'If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).'

Significantly, if a deceased's will has been lost in circumstances which do not indicate revocation of the will, the question arises whether it is competent for a court in terms of s 2(3) to order the Master to accept a copy or transcript of the will as the deceased's will. This question arises in two distinct situations. The first is where the lost original was duly executed in terms of the will-making formalities (for the formalities see s 2(1) of the Wills Act); and the second is where the lost original was not executed in compliance with the will-making formalities, but the deceased intended it to be his or her will.

The case law on the use of s 2(3) with respect to a lost will is limited and in some respects unsatisfactory (*Ex parte Porter* 2010 (5) SA 546 (WCC); *Haribans NO v Haribans* [2011] ZAKZPHC 46; *Hassan v Mentor NO* [2012] ZAGPPHC 74 (referred to in some writings as *H v M NO* [2012] JOL 29002 (GNP)); *Yokwana v Yokwana* [2013] ZAWCHC 22 and *Smith v Sampson* [2013] ZAWCHC 11). In what follows, these cases will be explained and critically examined. Thereafter, a modified approach will be suggested, which takes into account the important distinction between lost wills that were duly executed and those that were not.

CASE LAW

Porter

Ex parte Porter (supra), a decision of the Western Cape High Court, Cape Town, concerned a missing codicil to the testator's will (para 2). Although not a will itself, a codicil is on the same footing and the same principles are applicable. The testator's attorney prepared and e-mailed a draft codicil to the testator's home, which the testator then printed out and signed, in compliance with the relevant will-making formalities (para 3). Thereafter, the signed codicil was placed in an envelope and delivered by a messenger to the

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attorney's offices (para 2). The attorney's receptionist recalled receiving the envelope, although she was unaware of its contents. Thereafter, no one could say what became of the envelope and its contents (ibid). After the testator's death, an application was brought for an order, in terms of s 2(3) of the Wills Act, directing the Master to accept a copy of the codicil, in the form of a print out from the e-mail mentioned above, as a codicil to the testator's will (para 5). This relief was, however, refused by Binns-Ward J because (para 8):

> 'The document which the testator executed complied in all respects with the prescribed formalities. That was the document which the testator intended to be a codicil to his will. The document which the applicants seek to have the Master directed to accept is not that document, but only a template of the one that was executed. In my view these characteristics, which are distinguishable from those that would be apparent in the kind of document contemplated in s 2(3) of the Wills Act, make it clear that the provision is not intended to address the predicament that arises when the testamentary instrument in issue has been executed in compliance with the formalities but has subsequently been lost.'

Binns-Ward J went on to say that in his view the term 'document' in s 2(3) did not include 'any document which exactly replicated the text of the intended testamentary instrument', but is confined to 'the narrower concept of the actual piece of paper in issue' (para 11). For these reasons, he held that the requirements of s 2(3) were not satisfied and that application ought to have been made in terms of the common law for the court to authorise that a 'reconstructed copy' of the codicil be accepted by the Master (para 12). All was not lost however, because Binns-Ward J went on to find that the requirements of the common law in that regard were satisfied on the evidence available and, relying on the applicant's standard prayer for alternative relief, he granted such an order in the form of a rule nisi (paras 12 and 13).

Haribans

Haribans NO v Haribans (supra), a decision of the KwaZulu-Natal High Court, Pietermaritzburg, concerned a dispute between two brothers regarding which of two wills was the genuine last will of their late father who had died in November 2005 (para 1 read with para 6; for convenience the parties will hereafter be referred to as the 'appellant' and the 'respondent'). After the deceased's death, the administration of his estate commenced in terms of a will that had been validly executed in 2004 ('the 2004 will') (para 6(d)) and which disinherited the respondent (para 19). However, just as the estate was on the verge of being completely wound up, a photocopy of a further will, purportedly executed in 2005 ('the 2005 will'), made a mysterious appearance. The 2005 will included the respondent as a beneficiary (paras 15(l) and 31(g)(i)).

The respondent explained the discovery of the copy of the 2005 will as follows: the respondent's attorney had requested that a copy of the deceased's late wife's will be obtained from the Master's Office in connection with another matter which the attorney was handling for the respondent (para 6(e) read with para 15(l)). When an official of the Master's Office gave the

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respondent's wife a copy of the deceased's wife's will, a copy of the 2005 will, purportedly executed by the deceased, was found to be attached to it (para 15(l)). No explanation could be given as to how the copy of the deceased's 2005 will had ended up in the file relating to his predeceased wife's estate (para 11(i)), and the original could not be found (para 11(l)). Evidence was led regarding the circumstances in which files are stored and retrieved by the Master's Office (para 13), as to the veracity of the testator's signature on the 2005 will (para 14), and as to bad blood that existed between the deceased and the respondent (paras 15(f)–(g) and 20(d)–(g)). The court a quo had granted an order directing the Master to accept the 2005 will as the testator's will (para 4) and the matter went on appeal to a full bench of the KwaZulu-Natal High Court, Pietermaritzburg (para 5). In the event, after considering all the evidence as a whole, the full bench was of the view that it could not be said on a balance of probabilities that the 2005 will was in fact the will of the deceased (para 41, judgment paraphrased). Accordingly, the appeal succeeded and the order directing the Master to accept the 2005 will was set aside (para 44).

What is noteworthy about the judgment in the present context is that no adverse comment was made by the full bench regarding the use of s 2(3) of the Wills Act in respect of a document that, if genuine, was a copy of a duly executed will. Indeed, early in the judgment, the court states (para 9, emphasis supplied):

> 'Although there is no suggestion that the copy of the disputed will (the document relied upon) does not comply with all the formalities of the Wills Act, 1953, the respondent nonetheless bore the onus to establish on a balance of probabilities that the document was a copy of a valid will executed by the deceased. . . . *Once the court is satisfied in that regard it has no discretion but to order the Master to accept the document as a will for the purposes of the Administration of Estates Act, 1965*.'

Accordingly, the full bench appears to have accepted that had the 2005 will been shown to have been genuine, then proceedings in terms of s 2(3) would have been appropriate. However, there is no indication in the judgment that the propriety of using s 2(3) was ever placed in issue by the appellants. Moreover, the full bench's conclusion on the facts made it unnecessary for it actually to make a ruling on this issue. Consequently, its apparent acceptance in principle of the application of s 2(3) to a copy of a duly executed will is obiter.

Hassan

In *Hassan v Mentor NO* (supra), a decision of the Gauteng North High Court, Pretoria, the dispute was between the deceased's two children by his first marriage (hereinafter the 'applicants') and his son by a second marriage (represented by his son's mother because his son was then a minor, hereinafter the 'respondent') (para 2.9). After the deceased's death, no original will could be found (para 4.1). However, one of the applicants found a document amongst the deceased's personal documents that purported to be

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a copy of a duly executed typewritten will of the deceased (paras 4.2 and 4.3 read with para 6). This document bequeathed the deceased's estate to the two applicants and left nothing to the respondent (para 4.4). The evidence was that shortly before his death, the deceased had told one of the applicants (and her husband) that he had left a will with his attorneys that appointed the applicants as sole heirs (para 7.3). After the deceased's death, the attorneys confirmed having prepared the will in question but, notwithstanding a diligent search, the original could not be found in their offices (para 7.6). It appeared that the original document had been duly executed as a will (para 6), so that the court was dealing with a lost will and not a defective will. Nevertheless, the judgment records (without adverse comment) that the applicants relied on s 2(3) (para 5), and the court described its order as one 'corresponding with the terms as claimed by the Applicants in their notice of motion' (para 14). Whilst the order does not expressly state that it was issued in terms of s 2(3), it would appear that the court was acting in terms of that provision. If it were otherwise, one would have expected comment from the court that it was granting the order on a ground other than that on which the applicants had relied. Furthermore, there was no debate whether an order on the ground relied upon by the applicants was appropriate and there was no reference to the views of Binns-Ward J in *Porter* (supra). The question whether the use of s 2(3) would be proper does not appear to have been placed in issue by the respondents. Accordingly, although the matter is not entirely clear, I cannot agree with the view of Schoeman-Malan who states (Schoeman-Malan op cit at 700, emphasis supplied):

> 'In *Hassan v Mentor* lyk dit *of regter Davis die standpunt van regter Binns-Ward volg* waar 'n aansoek om kondonering van 'n afskrif gedoen is. Die testament was behoorlik verly maar het velore geraak. Die hof verklaar dat die afskrif as testament aanvaar kan word. Daar is egter nie 'n uitdruklike aanduiding of die kondonasie roete of die gemeneregtelike roete toepas is nie.'

There is, with respect, no indication that the judge was aware of the views of Binns-Ward J or that he was following them.

Yokwana

Yokwana v Yokwana (supra), a decision of the Western Cape High Court, Cape Town, involved a dispute between the deceased's son (hereinafter the 'applicant' (para 1)) and daughter (hereinafter the 'respondent' (para 3)). The applicant sought an order in terms of s 2(3) of the Wills Act, alternatively under the common law, directing the Master to accept a certain document as the will of the deceased (para 1). The document concerned was a copy of a will that had apparently been executed by the deceased at her attorney's offices (para 3 read with para 10). Unfortunately, the original document did not comply with the will-making formalities (paras 3 and 10 read with para 12). It seems that the original will was left in the custody of her attorneys (para 8), which means that the rebuttable presumption of revocation by destruction would not have come into play. There is no explanation apparent

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from the judgment as to how the original will came to be lost, nor is it entirely clear how the applicant came to be in possession of a copy of it (see the discussion in para 8). We must assume that the attorneys, who had possession of the original, supplied it. Binns-Ward J was satisfied on the evidence available, which included the evidence of a handwriting expert relating to the deceased's signature on the document, that the document was authentic and that the deceased had intended the original signed by her to set out her testamentary wishes (para 25 read with para 26).

Had the document before the court been the original will, there would have been no difficulty in applying s 2(3) of the Wills Act. The applicant conceded, however, consistently with Binns-Ward J's ruling in *Porter* (supra), that the relief sought under s 2(3) of the Wills Act was not available because the document before the court was not the actual document signed by the deceased (para 1). Accordingly, the matter fell to be dealt with in terms of the court's common-law powers. One would have thought that this would have left the applicant in grave difficulty because the courts have never before claimed authority to accept as a will a document that does not comply with the will-making formalities of s 2(1) of the Wills Act, except within the ambit of the statutory exception provided by s 2(3). Nevertheless, Binns-Ward J granted an order that the Master accept the copy as the deceased's will (para 29). In doing so, he purported to be acting in terms of the common law (para 28). After referring to judgments in which the court had relied on draft wills to reconstruct the deceased's original will (para 1, namely *Ex parte Gowree* 1915 CPD 108, *Ex parte Ntuli* (supra) and *Nell v Talbot NO* 1971 (1) SA 207 (D)), Binns-Ward J went on to state (para 2, emphasis supplied):

> 'The last-mentioned three judgments concerned draft wills, or in *Talbot's* case, a prior will which had been superseded by a lost will which contained an additional provision which, because its operation was predicated on the simultaneous demise of the co-testators, did not have any effect in the particular factual circumstances. The governing principle applied in all these cases, however, is that the court may direct the Master to accept as a will any document containing testamentary dispositions if it is satisfied that the contents accurately and completely reflect the intending testator's testamentary intentions. That a document that is proven to be a true copy of one actually executed as a will should fall within the embrace of the common law power is thus axiomatic in my judgment. *It matters not that the original might not have complied with the formalities prescribed in terms of the Wills Act*.'

The validity of this assertion will be assessed in the analysis below.

Smith

Smith v Sampson (supra), a decision of the Western Cape High Court, Cape Town, involved a request for the court to accept a reconstructed document as the deceased's will. The facts are not entirely clear from the judgment. It is not expressly stated that the application was for an order in terms of s 2(3), but the judge's description of the order prayed echoes the wording of s 2(3) (para 1). The deceased died in 2009 (para 5) leaving a valid will executed in

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1992, in which he bequeathed his entire estate to his daughter (paras 3 and 8). However, the deceased's wife (hereinafter the 'applicant') contended that in 2002, she and the deceased decided to execute a joint will appointing the survivor of them as sole beneficiary of the first dying (para 4). She alleged that a draft will, giving effect to this intention, was prepared by a third party by the name of Chotia (para 4). There is no mention of the draft being signed, nor any explanation of the failure to do so (assuming that it was not signed), but the judgment is not entirely clear on this fact (cf para 4 which refers to 'draft will' and para 5 which refers to 'the Will'). Presumably, if the draft had been executed, this would have merited express mention in the judgment. After the deceased's death, 'the Will' could not be found and the applicant sought an order directing the Master to accept a reconstructed copy of it (para 5). In the event, the court concluded that on the facts there was insufficient evidence to reconstruct the will accurately and completely (paras 13 and 14). Despite the fact that the court appeared to be dealing with a reconstruction of an unexecuted will, there is no mention of the requirements of s 2(3). Regarding the legal position Traverso AJP states simply (para 12):

> 'It is well established that where the original Will has been lost or destroyed it will [be] necessary to apply to Court for an order declaring a copy of the Will to be the Will of the deceased and an order authorising the acceptance by the Master of the copy. However where no copy of a lost Will is available, evidence is admissible to prove the contents of the Will, and where such evidence satisfactorily establishes the contents of the Will, a Court will order that the reconstructed Will be accepted as the Last Will of the testator. However, in order to grant such relief the Court must be satisfied that the reconstruction is both accurate and complete. The *onus* to prove this on a balance of probabilities is on the party seeking the relief.'

Although the situation is far from clear, it would appear that the court would have been willing to make a s 2(3) order in respect of a lost, defectively executed will, had the evidence before the court been sufficient to justify relief. In the event, however, sufficient evidence was not forthcoming.

ANALYSIS

General comments

If we are going to recognise defectively executed wills, as s 2(3) now requires us to do, there would seem to be no reason in principle why the defectively executed will should be treated any differently to the duly executed will, if the original defective document cannot be found after the deceased's death or is found at death, but is subsequently lost or destroyed before the estate can be wound up. In other words, there ought to be provision for the courts to recognise it. However, the courts are constrained by the fact that their powers to condone the failure to execute a will properly are regulated by statute and, consequently, if the provisions of s 2(3), properly construed, do not allow for recognition of a defectively executed will that has been lost or accidentally destroyed, then we must recognise that there is a lacuna in the

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legislation. Fortunately, as will appear from the discussion that follows, I do not believe that such lacuna exists.

It is clear from the case discussion in the previous section that the law relating to the application of s 2(3) to wills that have been lost or accidentally destroyed cannot be regarded as settled. With respect to duly executed wills that have been lost or accidentally destroyed: *Porter* ruled that s 2(3) was not applicable, but granted an order at common law; *Hassan* granted an order where the applicants relied on s 2(3), but without any analysis as to whether the statutory remedy was properly available and without expressly referring to s 2(3) in the order; and *Haribans* stated, without any analysis, that s 2(3) is available. However, in view of its findings on the facts, it was not necessary for the court in *Haribans* to come to a decision on the law. Its views on this issue, therefore, are obiter. Furthermore, the fact that the *Haribans* judgment did not discuss the possible objections to the use of s 2(3) with respect to a duly executed lost will also diminishes the value of the court's views on this issue — the contrary views of Binns-Ward J in *Porter* would certainly have merited discussion if the full bench had been made aware of them. However, there is no indication that the court was alerted to his judgment. As will appear from my discussion of *Porter* in due course, I agree with Binns-Ward J's view that s 2(3) is not intended to be used with respect to duly executed wills.

With respect to defectively executed wills that have been lost or accidentally destroyed, counsel in *Yokwana* conceded that s 2(3) is not available when the original document cannot be produced, consistently with the views that the presiding judge had previously expressed in *Porter*. However, the court took the novel approach of making an order in terms of its common law powers in respect of a copy of a defectively executed will. In *Haribans*, it seems that the court was of the contrary view that a s 2(3) order can be issued in respect of a defectively executed will that has been lost, in light of its brief statement of the law, which did not distinguish between lost wills that are duly executed and those that are not. However, the case actually was only concerned with a duly executed document. As will appear from my discussion of *Yokwana* (below), I believe that the decision in that case is incorrect, and that s 2(3) can be used properly with respect to a defectively executed will that has been lost or accidentally destroyed.

In what follows I will indicate my views on the merits of each of the judgments under discussion in turn.

Hassan

As indicated above, I understand the judgment in *Hassan* as one in which the court actually granted an order in terms of s 2(3) in respect of a duly executed document. (Admittedly, there is an element of uncertainty around the basis on which the order was made.) The judgment makes no mention of the contrary approach in *Porter,* and it seems likely the court was unaware of the *Porter* judgment. For the reasons indicated in my discussion of *Porter* below, I am of the view that the *Hassan* decision is incorrect in so far as the order was made in terms of s 2(3). The order ought to have been made in terms of the

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court's common law powers relating to lost wills (see De Waal op cit at 843, who alludes to the element of ambiguity around the basis of the order and also states that if it was made in terms of s 2(3) then it was 'clearly wrong').

Porter

In *Porter*, the court was concerned with a duly executed missing codicil. Binns-Ward J's reasons for refusing an order in terms of s 2(3) were two-fold. First, he seems to have been of the view that the section is only intended to deal with documents that do not comply with the execution formalities. He points out that the codicil in question complied with the formalities and, therefore, its characteristics are distinguishable from those that would be apparent in the kind of document contemplated by s 2(3) (para 8, paraphrased). Secondly, he relied on the meaning of the word 'document' in s 2(3) and argued that the document that the section refers to, and in respect of which a court makes an order, is the actual piece of paper which the deceased intended to be his will, and that its place cannot be taken by a replica of the document where the original has been lost (para 11). As a result of this approach, Binns-Ward J completely excluded the use of s 2(3) in respect of all lost documents, even, as appears from *Yokwana*, those that were defectively executed.

In my view, Binns-Ward J is correct in his view that s 2(3) is not intended to apply to a duly executed will that has been lost or accidentally destroyed. The history of the enactment of s 2(3), as appears from the pre-enactment deliberations of the South African Law Commission, shows clearly that it was intended to confer a power on the courts to condone a failure to comply with the execution formalities (South African Law Commission *Report* on Project 22: *Review of the Law of Succession* (June 1991) 4–14). In the words of Navsa JA in *Van der Merwe v Master of the High Court* 2010 (6) SA 544 (SCA) paras 14 and 16:

> 'By enacting s 2(3) of the Act the legislature was intent on ensuring that failure to comply with the formalities prescribed by the Act should not frustrate or defeat the genuine intention of testators. . . . The very object of s 2(3), as pointed out above, is to ameliorate the situation where formalities have not been complied with but where the true intention of the drafter of a document is self-evident.'

That the purpose of s 2(3) is to condone failure to comply with the formalities is also indicated in the closing words of the section, which indicate that the court has the power to order the acceptance of the defectively executed will 'although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1)'.

Schoeman-Malan also supports the decision in *Porter* on this point. She states (op cit at 699):

> 'Artikel 2(3) handel spesifiek met kondonering van nie-nakoming van formaliteite in artikel 2(1) en bied nie gepaste regshulp waar 'n "geldige verlyde testament" vermis word of verlore geraak het nie. Artikel 2(3) val dus streng

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> gesproke buite die konteks van hierdie bespreking. Daar blyk egter onduidelikheid te wees ten aansien van die aanwending van artikel 2(3). 'n Artikel 2(3)-aansoek maak nie voorsiening vir kondonering van 'n afskrif van 'n geldige testament nie, maar vir 'n dokument wat nie aan die formaliteitsvereistes voldoen nie. . . . In *Ex parte Porter* (waar die testament na die dood van die testateur vermis word) word tereg bevind dat 'n artikel 2(3)-aansoek nie die korrekte prosedure is om 'n *verlore testament* te bewys nie.'

(See also M J de Waal 'The law of succession (including administration of estates) and trusts' 2010 *Annual Survey of South African Law* 1170 at 1183, where he states that '*Porter* was certainly the correct case in which to apply the common-law relief opted for by the court'.)

In my view, Binns-Ward J's second objection to the use of s 2(3) in relation to a lost will (which would apply to all lost wills, however they were executed) is not well founded. If application is made in terms of s 2(3) with respect to an informal will (that is, a will that does not comply with the formalities) that has been lost, then the document the court is concerned with is the very document that the deceased allegedly intended to be his or her will. It is that document, which is not actually before the court, that must satisfy the requirements of s 2(3) that it must have been drafted or executed by a person who has since died and who intended it to be his or her will. However, because the document itself is not available to the court, its contents will be proven by means of a copy or a reconstructed document, in terms of the law of evidence, provided that sufficient reason has been given for not being able to produce the original informal will. This does no violence to the wording of s 2(3) — it does not involve an attenuated interpretation of the term 'document' or of any of the other requirements of the section. It is a simple application of the section read with the established principles of the law of evidence, and the legislature is presumed to have been cognisant of these principles when the section was enacted. Importantly, it is not s 2(3) itself that permits the use of a copy in these circumstances — the section is not directed at the problem of lost wills — it is the general framework of the law of evidence which does so. This means, however, that if the lost will is not an informal will, but one that was properly executed, then s 2(3) has no legitimate role in the proceedings, for the reasons given in Binns-Ward J's first objection and as reflected in my earlier discussion of *Haribans*.

Owing to Binns-Ward J's incorrect focus on whether the e-mail itself complied with the requirements of s 2(3), it became necessary to consider whether such requirements, that the document be drafted or executed by the deceased, had been satisfied by the e-mail itself. In this respect, Binns-Ward J applied the decision in *Bekker v Naude* 2003 (5) SA 173 (SCA). He thus held that an e-mail that a testator caused to be drafted by another person cannot be regarded as having been drafted by the testator himself as required by s 2(3) (see *Porter* paras 10–11. Binns-Ward J's conclusion that the deceased could not be held to have drafted the e-mail was correct: De Waal 2010 *Annual Survey of South African Law* op cit at 1183). However, since the lost codicil had

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been duly executed, s 2(3) actually was irrelevant. The question that should have been asked was whether the e-mail accurately established the contents of the lost will, as required by the common law principles relating to lost wills.

Schoeman-Malan's approval of *Porter* is in general terms and does not specifically discuss the use of s 2(3) in respect of a defectively executed lost will (Schoeman-Malan op cit at 699, as quoted above). Although Schoeman-Malan does mention *Yokwana* (which dealt with a defectively executed lost document), this is done in passing, without expressing an opinion on whether it was correctly decided.

Yokwana

In my view, the decision of Binns-Ward J in *Yokwana*, in which the court used its common-law powers to give effect to a copy of a defectively executed document, is wrong. Binns-Ward J cites Corbett et al (op cit at 116–17) as authority for his statement (para 1) that:

> 'The court does, however, have jurisdiction under the common law to direct the Master to accept a reconstruction of a will that has become lost provided it is satisfied that the reconstruction is both accurate and complete.'

What he omits to mention, however, is that Corbett expressly states that the original will must have been duly executed (Corbett et al op cit at 117). Binns-Ward J then goes on to refer to *Ex parte Gowree* (supra) and *Ex parte Ntuli* (supra) and states that these judgments 'concerned draft wills' (para 2). It is not clear whether this assertion is intended to justify the ultimate assertion that '[i]t matters not that the original [will] might not have complied with the formalities prescribed in terms of the Wills Act' (para 2). However, if that is so, then the reliance is misplaced, because the cases referred to do not provide such authority. In *Gowree* (supra) there is no specific mention of how the original will was executed. Furthermore, use of a reconstructed copy (as occurred in *Gowree* (supra)) does not provide common law authority for recognition of a will that was defectively executed. In *Ntuli* (supra), the facts (which are provided in the headnote at 278E) suggest that the original will was duly executed, so it also does not provide support for a common-law power of a court to recognise a copy of a defectively executed will.

As already indicated, Corbett expressly states in respect of the court's common-law powers that the application for recognition 'must disclose that the original will was duly executed' (Corbett et al op cit at 117). Unfortunately, most of the judgments dealing with the courts' common-law powers are terse and do not comprehensively state the requirements for an order. A notable exception, however, is *Uys NO v Uys* (supra) in which the requirements listed by Corbett, including that the original will was validly executed, are specifically indicated (para 9). Of the cases cited by Corbett (Corbett et al op cit 117n29), only *Kuhnemund v The Master of the High Court* (supra) expressly sets out the requirement that the original will must have been duly executed (at 79). In fact, the outcome of the case turned, in part, on whether the will had been executed properly (*Kuhnemund* (supra) at 80).

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In several of the other judgments, the facts indicate that the original was duly executed, but it is not something that is discussed specifically as a requirement for an order (see *In re Beresford, Ex parte Graham* (supra) at 305; *In re Guruvadoo* (1900) 21 NLR 187 at 187 first para; *Ex parte Serralha* (supra) at 418 first para; *Ex parte Hartley* 1937 SR 237 at 237 second last para; and *Ex parte Ntuli* (supra) at 278E). In the remaining cases, no mention is made of how the original will was executed (see *In re Templeman's Estate* (1900) 17 SC 226; *Re Duminy* 1902 TS 190; *In the joint will of J M Kemp and C J Kemp* (1906) 27 NLR 309; *Ex parte Adcock* 1909 TH 271; *Ex parte Gowree* (supra); *Ex parte Webb's Estate* 1922 EDL 150; *Ex parte Slade* (supra); *Ex parte Bremont* 1930 WLD 127; and *Ex parte Roux* 1937 OPD 32).

There does not seem to be any case (other than *Yokwana* itself) in which a court granted an order under the common law directing the Master to accept a defectively executed will. This is not surprising. To grant such an order would fly in the face of s 2(1)*(a)* of the Wills Act, which states that no will, executed on or after the first day of January 1954 shall be valid, unless the formal requirements for validity are satisfied. The only power of a court to condone the defective execution of a will is that provided for by s 2(3), the use of which Binns-Ward J eschewed in connection with lost wills. The courts have no other power to accept wills that do not comply with the formalities. That is surely why Corbett et al maintain that a common-law application in respect of a lost will must disclose that the original was duly executed (Corbett et al at 117). Accordingly, since Binns-Ward J rejected the use of s 2(3) in all cases where the document before the court is not the original, he was not free to make an order directing the Master to accept the *copy* of the defectively executed will. Nevertheless, as indicated above, it is my view that if we view the rules relating to the recognition of a copy in their proper context (as grounded in the *law of evidence*), then it becomes permissible to make an order in terms of s 2(3) with respect to a defectively executed lost will. For this reason, the order in *Yokwana* should have been made in terms of s 2(3).

To summarise, Binns-Ward J was correct to hold that a court does not have the power to grant an order in terms of s 2(3) in respect of a lost will that was properly executed. The proper order would be an order in terms of the court's common-law powers. It cannot be correct, however, that there is a blanket exclusion of all lost wills from the purview of s 2(3), even those that do not comply with the will-making formalities. Where a lost will was defectively executed, the court must proceed in terms of s 2(3), read with the rules of the law of evidence, which permit it to accept proof of the contents of the document by way of a copy, provided there is an adequate explanation for the failure to produce the original.

Smith

It is difficult to know what to make of the judgment in *Smith*'s case. Clearly there was insufficient evidence to support an order accepting the reconstructed will and in that respect the judgment is correct. Although the court

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appeared to be dealing with the reconstruction of an unexecuted will, there is no discussion of the interrelationship between the court's common law powers and s 2(3). Furthermore, the court does not appear to have been alerted to the judgment of Binns-Ward J in *Porter*, a case in the same division, to the effect that s 2(3) is inapplicable in the case of lost wills. In so far as *Smith* would appear to support the use of s 2(3) with respect to a defectively executed lost will, I agree with the decision.

CONCLUSION

The case law on the use of s 2(3) of the Wills Act with respect to lost wills is in an unsatisfactory state. On the one hand, the decisions in *Haribans* and (it seems) *Hassan* would permit the use of s 2(3) in respect of a duly executed will that has been lost. This is arguably contrary to the purpose for which the section was enacted, as reflected in the final words of the section that require the court to order the Master to accept a will 'although it does not comply with all the formalities for the execution . . . of wills'. On the other hand, *Porter* and *Yokwana* take the view that s 2(3) cannot be used in connection with any lost will, making no exception for one that does not comply with the will-making formalities. In *Yokwana*, the court's use of its common-law powers relating to lost documents to order the Master to accept a copy of a defectively executed will was clearly wrong, since the court's only power to condone defective execution is the power given in s 2(3). Otherwise, according to s 2(1)*(a)*, no will shall be valid unless it complies with the prescribed formalities. Therefore, if *Porter* was correctly decided, it would mean that a defectively executed document that was lost, even one lost after the death of the testator, cannot be given effect to at all. This would amount to a serious lacuna in the courts' powers. However, *Porter* is wrong on this point.

I have argued that whilst it is not correct to make an order in terms of s 2(3) with respect to a duly executed will that has been lost, the general principles of the law of evidence permit a court to issue an order in terms of s 2(3) with respect to a defectively executed, lost will. The application of s 2(3) to such a will would have to satisfy the section's specific requirements, namely that the lost document be one personally drafted or executed by the deceased who intended for it to be his or her will. In addition, the applicant would have to show the circumstances in which the defective will was lost, that it cannot be found despite a diligent search, that it was not revoked by the deceased (and here, the usual presumptions would operate), and that the copy presented to the court is a true copy of the original, or an accurate and complete reconstruction thereof (*Uys v Uys* (supra) para 9).

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CONTAINING THE MALADY OF CORRUPTION IN SOUTH AFRICA: CAN THE COURTS STEM THE TIDE?

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It is painful, twenty years after the introduction of South Africa to constitutionalism, to read the opening paragraph of the judgment of the Constitutional Court delivered by Chief Justice Mogoeng in *Helen Suzman Foundation v President of the Republic of South Africa & others; Glenister v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC):

> 'All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.'

It is even more painful to observe that this and various related cases deal with an obvious reluctance on the part of a government that has been in office during the entire period of constitutional supremacy to establish effective measures to contain the corruption before it becomes 'something terminal'. There is however some relief for the pain to be found in the fact that the judiciary is willing to engage the legislative and executive branches in calling them to constitutional order regarding their responsibilities concerning the curbing of corruption.

The Directorate of Special Operations was launched in 2000 under the popular designation 'the Scorpions' as a component of the National Prosecuting Authority ('NPA'). The NPA's existence and general nature is provided for in s 179 of the Constitution of the Republic of South Africa, 1996. Section 179(4) of the Constitution provides that 'national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice'. Furthermore, s 32(1*)(b)* of the National Prosecuting Authority Act 32 of 1998 ('the NPA Act') provides:

> 'Subject to the Constitution and this Act, no organ of state and no member or employee of an organ of state nor any other person shall improperly interfere with, hinder or obstruct the prosecuting authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.'

When the disbandment of the Scorpions (ostensibly for reasons concerning the investigation of criminal activity among highly placed political figures) was announced in 2008, the Organization for Economic Co-operation and Development ('OECD') Working Group on Bribery in International Business Transactions expressed its serious concern in its Phase 1 Review on South Africa (para 96, available at *http://www.oecd.org/dataoecd/51/30/40883135.pdf*, accessed on 13 January 2015).

Through the amendment of both the NPA Act and the South African Police Service Act 68 of 1995 ('the SAPS Act'), the Scorpions Unit was replaced in 2008 by 'the Hawks', statutorily designated the 'Directorate for Priority Crime Investigation' ('DPCI'). The Hawks are detached from the

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NPA and their directorate is positioned within the South African Police Service. In terms of s 206(1) of the Constitution '[a] member of the Cabinet must be responsible for policing and must determine national policing policy'.

Noting these developments, and the ensuing litigation up to and before the judgment of the Constitutional Court in November 2014, the OECD's Working Group expressed, in its Phase 3 *Report on Implementing the OECD Anti-Bribery Convention in South Africa* (published in March 2014 at *http://www.oecd.org/daf/anti-bribery/SouthAfricaPhase3ReportEN.pdf*, page 38, accessed 13 January 2015), its continued doubt about the independence and effectiveness of the Hawks regarding the investigation of foreign bribery cases and stated (at 41) that it remains 'very concerned by the strikingly low level of foreign bribery enforcement in South Africa'.

From the outset the replacement of the Scorpions with the Hawks was challenged by Mr Hugh Glenister and the Helen Suzman Foundation ('HSF'). In 2011 Glenister's contention that the provisions of the SAPS Act regulating the Hawks failed to secure 'an adequate degree of independence' for the Hawks and that they were therefore inconsistent with the Constitution, was upheld by a Constitutional Court in *Glenister v President of the Republic of South Africa & others* 2011 (3) SA 347 (CC) ('*Glenister II*'). In that case the bench was divided five to four. The court suspended the declaration of constitutional invalidity in order to give Parliament the opportunity to remedy the defect.

Following Parliament's amendment of the SAPS Act in 2012, purportedly to remove the constitutional shortcomings identified by the Constitutional Court, Glenister and HSF approached the high court separately to impugn the constitutional validity of the new version of the statute, with mixed success. HSF applied to the Constitutional Court for confirmation of their successful application in the Western Cape High Court, appealed against the part of the judgment in which they did not succeed, and Glenister appealed against the same court's striking out of the additional evidence he sought to present, not declaring the entire legislative scheme of the 2012 amendments to the SAPS Act unconstitutional, and the making of a punitive costs order. The Constitutional Court dealt with these related cases jointly.

Various separate judgments were delivered. The majority consisted of six justices out of a full bench of eleven, and in four separate minority judgments points of partial agreement and disagreement were raised regarding the constitutionality of the legislation and on the question whether Glenister's appeal should have succeeded or not.

The majority of the court rejected Glenister's appeal, finding that the Minister of Police's constitutional oversight of national policing policy in terms of ss 206(1) and 207(2) of the Constitution 'accords with political accountability which is not inimical to adequate independence' (para 18). At least three of the justices saw this issue in a fundamentally different way. This reflects a difference in perceptions regarding the seriousness of the challenges the country is facing. Despite the sharpness of the remarks of the majority on

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this aspect, the minority viewed the need to curb the executive's interference with the independence of the Hawks to be even more severe, and that it justified a higher degree of judicial engagement.

The HSF's application for the confirmation of the high court's findings of constitutional invalidity in accordance with s 167(5) of the Constitution was one of some eight issues dealt with by Mogoeng CJ. The high court had found the (amended) provisions of the SAPS Act to be unconstitutional for the following reasons:

(i) the appointment process of the head of the Hawks lacked sufficient criteria and vested, against international best practice, an unacceptable degree of political control in the executive;
(ii) the Minister's power to extend the terms of office of the head and deputy head of the Hawks did not warrant sufficient independence;
(iii) the suspension and removal processes allowed for an inappropriate measure of control by the Minister, and unacceptable procedures based on arbitrary criteria; and
(iv) the degree of political oversight in the jurisdiction of the Hawks was unacceptable and the provisions were embarrassingly vague.

The Western Cape High Court therefore declared ss 16(2)*(h)* and (3), 17A, 17CA, 17D, 17DA and 17K(4) to (9) of the SAPS Act unconstitutional. Due to poor draftsmanship and the complexity of the amending patchwork that was done on the text, determining the effect of various provisions of the SAPS Act is a demanding task. Mogoeng CJ critically commented on this feature of the Act in para 93 of his judgment, but did not confirm all of the high court's findings on unconstitutionality.

The majority of the Constitutional Court concerned itself with the following provisions of the Act:

(i) Section 16, dealing with the 'national prevention and investigation of crime', more particularly 'organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof' (subsec (1)). This provision appeared in the original version of the SAPS Act, but was amended partially in 2008 when the Hawks were established, and again in 2012 in consequence of the judgment in *Glenister II*.
(ii) Sections 16(2)*(h)* and (3) as amended in 2012, which both contained the words 'in accordance with the approved policy guidelines'. The 'policy guidelines' were those envisaged in s 17K(4) to (8), which was intended to empower the Minister to 'determine, with the concurrence of Parliament' policy guidelines for the selection, by the National Head of the Hawks, of national priority offences and for the referral by the National Commissioner of SAPS of offences for investigation by the Hawks.
(iii) Section 17CA, inserted in 2012, which provided for the appointment of the National Head of the Hawks for a non-renewable fixed term (subsec (1)*(b)*) of between seven and ten years. Although it is not

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expressly provided for, it may be assumed (as Mogoeng CJ did in para 78 of his judgment) that the National Head would be expected to retire at the age of sixty. However, subsecs (15) and (16) purported to allow the Minister to 'retain' the National Head beyond sixty, albeit for a maximum of two years and with the incumbent's concurrence.

(iv) Section 17DA(1) and (2), inserted in 2012, purported to provide for the suspension and removal from office of the Head of the Hawks by the Minister.

(v) Section 17D(1)(*a*A), inserted in 2012, which provided that the functions of the Hawks included the prevention, combating and investigation of 'selected offences not limited to offences referred to in Chapter 2 and s 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004' ('the Corruption Act'). These provisions of the Corruption Act are focused on 'offences in respect of corrupt activities'.

In his judgment for the majority, Mogoeng CJ focused on the question whether the SAPS Act complied with 'the constitutional obligation to establish an adequately independent anti-corruption agency', given the need for the Hawks to 'enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate' (para 2 of the judgment). In essence, the court found that some of the adjustments made to the Act in 2012 failed to satisfy this need.

In contrast to the finding of the high court that the appointment criteria and processes for the appointment of the Head of the Hawks were unjustifiably broad and therefore constitutionally flawed, the Constitutional Court was satisfied that it was unnecessary to require the Head to have a legal qualification or to require more of the Minister than to report an appointment made with the concurrence of Cabinet to Parliament, as opposed to submitting it to Parliament for approval (paras 63–76).

One of the incidental benefits of the Chief Justice's motivation for these findings is a rare judicial explication of the meaning of the expression 'fit and proper person', which is often used as an appointment criterion, amongst others, for judges and the admission of legal practitioners. In para 63 it was stated that 'fit and proper',

> 'broadly speaking, means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability "to be entrusted with the responsibilities of the office concerned". Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate.'

The Constitutional Court partially confirmed the high court's order relating to the constitutional inconsistency of the impugned provisions but replaced it with its own. The Chief Justice summarised the reasons for the order towards the end of his judgment.

First, a key component of the order related to the manner in which the SAPS Act dealt with the Hawks' functions. The explanation of how this

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should be done was introduced by the following statement (in subpara (c) of para 110 of the judgment):

> 'South Africa needs a dedicated and better focused anti-corruption entity. A clear identification of the functions of the DPCI is therefore crucial. To achieve that all-important objective, the segments of section 17D that are toxic to the operational independence of the DPCI must be excised.'

Severance (in fact deletion, or as Mogoeng CJ put it in para 110(c)(i) of the judgment, *relieving* the provision) of certain words in the errant statutory text, was the chosen remedy. In order to clarify the Hawks' mandate and function, words and phrases that purported to place the Minister in the position to interfere in their activities were removed from section 17D(1)*(a)*. The effect of the severance is that the discretion to decide which 'national priority offences' are to be prevented, combated and investigated by the Hawks lies with their National Head and not with the Minister or the National Commissioner of SAPS.

The severance of a few words from section 17D(1)(*a*A) causes the Act to focus the work of the Hawks on offences in respect of corrupt activities, as is intended in the Corruption Act.

Secondly, the order ensured the complete removal of everything that purported to 'provide for the unbridled power to make ministerial policy guidelines that touch at the heart of the DPCI's operational independence'. This involved ss 16(2)*(h)* and (3), 17CA(15) and (16), 17D(1)*(a)*, and 17K(4), (7) and (8).

Thirdly, the order addressed the empowerment of the Minister to 'retain' the Head beyond retirement age by severing subsecs 17CA(15) and (16) on the following grounds:

> 'They militate against independence by potentially birthing an illegitimate hope in the belatedly-appointed National Head that a less assertive approach to certain investigations might just enhance the prospects of renewal. The certainty of retiring at 60 years of age however brightens the prospects of adequate personal and institutional independence.'

Fourthly, and (as it emerged soon thereafter) significantly, the procedures for the suspension and removal of the Head of the Hawks provided for in s 17DA were declared unconstitutional, since the power to suspend and remove 'vested exclusively in the Minister', leaving 'the performance-related concerns . . . or alleged acts of misconduct' intact in provisions 'which are more in sync with the legislative vision to create an adequately independent anti-corruption unit whose National Head's job security is entrenched'.

Froneman J and Cameron J concurred in the main judgment, except that they would have allowed Glenister's application for leave to appeal against the dismissal of his application for the declaration of the entire legislative scheme of the 2012 SAPS Amendment Act to be unconstitutional. They were prepared to consider evidence and entertain argument to the effect that the placement of the Hawks within SAPS was in itself unconstitutional and in line with the court's previous judgment in *Glenister II* (see also the separate

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judgment of Cameron J in which Froneman J and Van der Westhuizen J concurred). Quoting the Chief Justice's reference to the malady of corruption at the opening of the main judgment, Froneman J expressed his agreement, and then went on to say (in paras 128 and 129):

> 'But it does not follow that further probing into the possible extent of the corruption is now a "closed chapter" and an issue that "was settled" in *Glenister II*. What if the corruption is so "rife" that the very idea of locating the DPCI within the SAPS — an otherwise perfectly acceptable option for "reasonable decision-makers" — becomes unthinkable because those controlling the SAPS may themselves be part of the corruption?
>
> The very idea that this situation might exist will be scandalous for our country, but it does not mean that our courts are entitled to prevent concerned persons from seeking to present evidence to sustain an assertion of that kind.'

Froneman J furthermore pointed out that the evidence that Glenister wished to present relating, inter alia, to the ANC's policy of 'cadre deployment', to public political statements that the criminal justice system was 'dysfunctional', and that courts' striking down of unconstitutional legislation was an interference of the judiciary with executive policy (paras 133–145 of the judgment), should not have been struck out by the high court. In his separate judgment Van der Westhuizen J added that, although constitutional law is often 'political', and that the judiciary should not 'play politics', allowing evidence on 'cadre deployment' would not have involved the court in partisan politics. He said: 'I am uncomfortable with evidence being labelled as "political" as constituting a ground for its inadmissibility' (para 205).

In his separate judgment, Cameron J referred to the OECD Report where mention was made of the need that the selection process of the head of a specialised anti-corruption institution 'should be transparent and should facilitate the appointment of a person of integrity on the basis of high-level consensus among different power-holders' (para 160). Referring to the high court's indication that the National Head's appointment should be made subject to parliamentary approval, Cameron J explained (paras 165–7):

> 'This has many virtues. First, it dilutes the power possessed by any single individual to appoint the Head he or she desires. Resonant with the separation of powers, it attaches a significant counterweight to the power of the Executive and its members. Second, it spreads scrutiny of the appointment across the political spectrum, ensuring that a diversity of political actors has a say — including parties whose members, not being in government, will feel less exposed to possible investigation.
>
> This is no panacea, of course, especially since the votes of the ruling party's members may eventually be sufficient to carry through the appointment. But parliamentary involvement is salutary for a third reason. It is good for transparency, public accountability and democracy. It forces the appointment process out of the Executive's impenetrably private deliberations into the fresh light of the parliamentary chamber, whose proceedings are publicly accessible, and where they are ripe for dissection and disputation by every person in the country.
>
> Our Constitution pointedly regards as a fundamental value not only

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> universal adult suffrage but also "accountability, responsiveness and openness" of government.'

In her separate judgment, Nkabinde J also concurred in the main judgment, except for the finding that neither the integrity testing measures that the Minister may prescribe in terms of s 17E(8)*(a)* of the SAPS Act, nor the remaining wide discretionary powers should pass muster. She implied in para 179 that the majority shied away from the task to test whether the statutory provisions under scrutiny allowed for sufficient independence of the Hawks 'from undue political interference'. In his separate judgment, Van der Westhuizen J did not agree with Nkabinde J on this point (para 196).

The judgment of the Constitutional Court was delivered on 27 November 2014. On 9 December 2014 the Minister of Police wrote to the incumbent Head of the Hawks, Lieutenant-General Anwa Dramat, indicating that he was considering placing him on provisional suspension in terms of s 17DA(2)*(a)*(i) of the SAPS Act because of his alleged role in the deportation of Zimbabwean citizens in 2010 and 2011, which the Minister considered to have been illegal (for the content of the Minister's letter, see *Helen Suzman Foundation v Minister of Police* [2015] ZAGPPHC 4 para 6).

In his response to the Minister, Dramat pointed out that s 17DA(2) of the SAPS Act no longer applied since the Constitutional Court had declared it unconstitutional. The Minister nevertheless informed Dramat in a letter dated 23 December 2014 that he was placed 'on precautionary suspension', insisting to be legally empowered to do so in terms of legislation relating to the public service (ibid paras 8–10).

The Helen Suzman Foundation approached the Gauteng North High Court, Pretoria, basing its standing on its own and the public's interest (citing Dramat as second respondent) and obtained an order declaring the Minister's decision to suspend Dramat (and to appoint an acting National Head in his place) unlawful and invalid, and that the Minister did not have the power to suspend him other than in terms of the remaining provisions of s 17DA. These provisions require a two-thirds vote in the National Assembly following an investigation by a parliamentary committee. Section 17DA(5) however allows the Minister to suspend the Head

> 'at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person'.

On 29 January 2015 the Minister of Police requested the parliamentary Portfolio Committee on Police 'to initiate a process that will lead to the removal of the head of HAWKS'. The Portfolio Committee decided to seek the guidance of the Speaker of the National Assembly on the question whether it, or an ad hoc committee, should deal with the matter (statement by the chairperson of the Portfolio Committee dated 30 January 2015, available at *www.parliament.gov.za*, accessed on 12 February 2015).

It does not require any speculation to conclude from the manner in which Parliament and the Executive have been dealing, first with the Scorpions since 2008, and lately with the Hawks, that an agency mandated to deal with

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corruption independently, ie without political oversight, is a thorn in the flesh of the incumbent government. Such a conclusion is also supported by various judicial observations in the judgments delivered by the Constitutional Court on 27 November 2014. In the main judgment Mogoeng CJ for example observed (para 107):

> 'That the SAPS Act amendments under consideration are a consequence of efforts meant to cure the constitutional defects identified by this Court in *Glenister II* already, is in some respects regrettable. Regrettable having regard to the apparent reluctance to strengthen the DPCI as directed by this Court, in instances like the ministerial policy guidelines and renewability.'

Why the government does not wish to entrust efforts to stem the flow of corrupt activities to an independent agency is a burning question which however cannot at this stage be answered satisfactorily from a legal point of view. Nonetheless, the constitutional question that in my opinion arises more urgently from the circumstances surrounding the evident undermining by government of the operation of the Scorpions and the Hawks in their efforts to 'contain the malady of corruption' is this: *has the integrity of the Constitution and the law lost the support of a government that is pursuing goals that do not sit well with constitutionalism*?

Posing this question and seeking an answer to it is more important than transient political issues, however burning they may be. It goes to the heart of the concern whether constitutionalism can survive under the apparent offensive of an executive set on its dilution, if not its destruction, and if the country is gradually being led along the road to authoritarian, patrimonial rule under which even judicial correction may come to naught.

However these developments may further unfold, one may be grateful that the courts have shown their determination to uphold and promote constitutionalism, albeit not always from a consolidated perspective. Their efforts in this regard deserve the full support of the legal community, which should at the same time be wary of all attempts to undermine its own independence.

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THE FINANCIAL SECTOR REGULATION BILL IN SOUTH AFRICA, SECOND DRAFT: LESSONS FROM AUSTRALIA*

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INTRODUCTION

The proposed reforms to financial regulation in South Africa, as embodied in the Financial Sector Regulation Bill, (second draft, 10 December 2014) ('the FSR Bill'), available at *http://www.treasury.gov.za/public%20comments/FSR2014/2014%2012%2011%20FSRB%20including%20Consequential%20Amendments%20and%20Memo%20of%20Objects.pdf*), represent the most important reforms to South Africa's financial regulatory architecture since the 1987 De Kock Commission. The degree to which these reforms succeed will determine the extent to which South Africa can maintain financial stability, and manage the effects of a future financial crisis.

The De Kock Commission's findings led to the creation of the Financial Rand, and a dual exchange rate system for South Africa (Pieter Cornelis Smit *Economics: A Southern African Perspective* (1996) 421). The current proposed reforms introduce two regulators for the Republic's financial sector — a so-called 'Twin Peaks' regulatory model: a Prudential Authority, which 'will supervise the safety and soundness of banks, insurance companies and other financial institutions', and a Financial Sector Conduct Authority, which 'will supervise how financial services firms conduct their business and treat customers' (National Treasury Media Statement 'TWIN PEAKS: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment' (11 December 2014)). This model was first adopted by Australia, and the South African authorities have drawn on the Australian experience (National Treasury Media Statement 'A safer financial sector to serve South Africa better' (23 February 2011) 28–9 and 40; Financial Regulatory Reform Steering Committee 'Implementing a twin peaks model of financial regulation in South Africa' (1 February 2013) 22–3; Bryane Michael 'The ''Twin Peaks'' regulatory model: The future of financial regulation?' (March–April 2014) *Banking Today* 3–4).

What follows is an analysis of the South African iteration of the model, and where and how it differs from the Australian model in certain respects,

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including the inter-agency co-ordination arrangements, and the extent to which the FSR Bill adequately creates the conditions for such co-ordination.

Importantly, the FSR Bill expressly recognises that the purpose of the legislation is to 'maintain and enhance financial stability', and that its object is 'to achieve a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the Republic' (FSR Bill, Preamble and s 6, headed 'Object of this Act').

The impact of a financial crisis can be catastrophic, as the Global Financial Crisis so amply demonstrated. It led to the closure of venerated financial firms such as Lehman Brothers (Phillip Swagel 'The financial crisis: An inside view' (Spring 2009) *Brookings Papers on Economic Activity* at 1, 2, 5 and 8) and disrupted financial markets (and relationships) around the world (Massimiliano Cali, Isabella Massa & Dirk Willem te Velde 'The Global Financial Crisis: Financial flows to developing countries set to fall by one quarter' (13 November 2008) *Research Reports and Studies* 1; Claes Norgren 'The causes of the Global Financial Crisis and their implications for supreme audit institutions' *INTOSAI Report* (2010) 8[49]; Guy Debelle 'Some effects of the Global Financial Crisis on Australian financial markets' (31 March, 2009) *Finance Professionals Forum*). At one stage during the Global Financial Crisis, UK authorities activated anti-terrorism powers against Iceland's banks (invoking s 4 of the Anti-Terrorism, Crime and Security Act, 2001; see further Timothy Edmonds, 'Icelandic bank default' *Publications & Records, Briefing Papers* (21 July 2009) 13; 'Terror law used for Iceland deposits' *The Financial Times* 8 October 2008). Iceland in turn faced either the loss of currency sovereignty or default on their foreign debt (Már Guðmundsson 'Iceland's crisis and recovery and current challenges' unpublished paper presented at a conference organised by the French-Icelandic Chamber of Commerce; Islande, La Renaissance, 2013). By comparison, Greece chose default (Richard M Salsman 'Greece's disgraceful debt default — and calls to ''euthanize'' bondholders' *Forbes* 20 March, 2012 at 1).

The Bill's focus on financial stability is supported by a definition of 'financial stability'. Section 4 provides that

> 'there is said to be "financial stability" ' if:
> *(a)* financial institutions generally provide financial products and financial services without interruption and are capable of continuing to do so; and
> *(b)* there is general confidence in their ability to continue to do so.'

Section 8 of the Bill provides for the functions of the South African Reserve Bank ('SARB') in relation to financial stability, and the method by which financial stability should be restored or maintained in the event of a systemic event. The definition of 'systemic event' is provided in s 1 of the Bill and serves as a counterpart to the definition of 'financial stability' in so far as it relates to the inability of a financial institution or a group of financial institutions 'to provide financial products and financial services' or 'a general failure of confidence of financial customers in the ability of one or more financial institutions to continue to provide financial products or services'.

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Central to the 'Twin Peaks' model in South Africa is the creation of two regulators, namely the Prudential Authority (Chapter 3 of the Bill) and the Financial Sector Conduct Authority (Chapter 4 of the Bill). Each authority will be a juristic person; however, the Prudential Authority will be housed within the South African Reserve Bank ('SARB') and will operate 'within the administration of the Reserve Bank' (s 27(1)). Under s 46 of the FSR Bill, '[t]he Reserve Bank must provide the Prudential Authority with the personnel, accommodation, facilities, the use of assets and other services and resources that are determined in accordance with section 45(1).'

There are many elements that underpin the effectiveness of the 'Twin Peaks' system of financial regulation, under which there are separate regulators for prudential supervision and market conduct. These include a clear allocation of objectives and responsibilities between each regulator; effective co-ordination between the regulators; transparency and accountability on the part of each regulator; effective powers of supervision and enforcement; operational independence of each regulator (vis-à-vis the executive government); a sound governance system and adequate resources (Michael W Taylor '"Twin Peaks": A regulatory structure for the new century' Centre for the Study of Financial Innovation Report, December 1995 at 1–3; Michael W Taylor 'The road from "Twin Peaks" — and the way back' (2009–2010) 16 *Connecticut Insurance LJ* 64; Michael W Taylor 'Regulatory reform after the financial crisis — Twin Peaks revisited' Lecture delivered at the Law and Finance Senior Practitioner Lecture Series, Oxford University, 16 February, 2011, available at *https://www.law.ox.ac.uk/events/regulatory-reform-after-financial-crisis-twin-peaks-revisited*). Most (if not all) of these elements form part of the Basel Core Principles for Effective Banking Supervision (Basel Committee on Banking Supervision 'Core Principles for Effective Banking Supervision' (September 2012) available at *http://www.bis.org/publ/bcbs230.htm*).

This note will focus on three fundamental questions by reference to the experience and current debate in Australia, which has recently undergone a comprehensive review of the financial system, known as the Financial System Inquiry ('FSI') (Financial System Inquiry 'Financial System Inquiry Final Report' (November 2014)). The FSI has generated debate around a number of fundamental issues, including the nature and structure of the system of financial regulation in Australia. The questions that arise for South Africa are as follows: (1) what are the implications of housing the prudential regulator within the National Central Bank ('NCB')? (2) How should effective co-ordination between the regulators be achieved? (3) What substantive functions and powers should an inter-agency co-ordinating body have?

WHAT ARE THE IMPLICATIONS OF HOUSING THE PRUDENTIAL REGULATOR WITHIN THE NATIONAL CENTRAL BANK?

It is noteworthy that in Australia the prudential regulator, the Australian Prudential Regulation Authority ('APRA') (created pursuant to the Austra-

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lian Prudential Regulation Authority Act (Cth), (1998)), is separate from the Reserve Bank of Australia, and is an independent statutory authority, as is the market conduct regulator, the Australian Securities and Investment Commission ('ASIC') (created pursuant to the Australian Securities and Investments Commission Act (Cth), (2001)).

In the United Kingdom, on the other hand, the Prudential Regulation Authority is part of the Bank of England, and is a limited liability company, wholly owned by the Bank of England. Its relationship with the Bank of England is regulated by Schedule 1ZB of the Financial Services Act, 2012. Various arguments have been made for and against each approach. In our view, the weight of opinion (theoretically at least) is in favour of a stand-alone regulator that is independent of the NCB, provided that adequate co-ordination is achieved between the regulators (namely, the market conduct regulator and the prudential regulator) and also between each regulator and the NCB. (See for example Carmine Di Noia & Giorgio di Giorgio 'Should banking supervision and monetary policy tasks be given to different agencies?' (November 1999) *International Finance* 361 at 372–6; Basel Committee on Banking Supervision op cit § 41 p 10; Charles Goodhart & Dirk Schoenmaker 'Institutional separation between supervisory and monetary agencies', (October–December 1992) 51 *Giornale degli economisti e annali di economia* 361; H Robert Heller 'Prudential supervision and monetary policy' *International Financial Policy: Essays in Honour of Jacques J Polak* (1991) 5; Vasso P Ioannidou 'Does monetary policy affect the central bank's role in bank supervision?' (2005) 14 *Journal of Financial Intermediation* 60; José Tuya & Lorena Zamalloa 'Issues on placing banking supervision in the Central Bank' in *Frameworks for Monetary Stability: Policy Issues and Country Experiences. Papers presented at the sixth Seminar on Central Banking, Washington DC, March 1994* (1994) 680).

The arguments in favour of a stand-alone prudential regulator relate, principally, to conflicts of interest and operational independence. From an economics and finance perspective, Goodhart & Shoenmaker op cit at 361 have observed that a conflict of interest

> 'may arise between the monetary authorities, who wish for higher rates . . . , and the regulatory authorities who are frightened about the adverse effects such higher rates may have upon the bad debts, profitability, capital adequacy and solvency of the banking system'.

Under the FSR Bill, the Reserve Bank must deal with similarly competing priorities. Section 12 provides that when the Reserve Bank acts to prevent or manage a systemic risk, it must have due regard to various needs, including the need to 'protect and maintain financial stability', which may involve the continuing provision of financial products and financial services by financial institutions, the need to 'protect, as appropriate, financial customers' and the need to 'contain the cost to the Republic of the systemic event and the measures taken to manage it'.

An assessment of these factors may involve competing priorities and give rise to potential conflicts of interest. For example, the costs of a systemic

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event could potentially be lower in the event that a bank is deemed to have failed, and should exit. However, a bank exit policy may conflict with the goal of protecting financial customers where the bank in question is designated as a systemically important financial institution, and should therefore continue to provide financial products and financial services. Such circumstances may create challenges in terms of determining which priority should prevail.

Along similar lines, Ioannidou op cit at 60 has asserted that

> 'when the Fed tightens monetary policy, it becomes less strict in bank supervision (i e, an increase in interest rates or a decrease in reserves is associated with a lower probability of intervention). One possible explanation is that the Fed tends to be less strict on bank supervision in order to compensate banks for the extra pressure it puts on them when it tightens monetary policy. The Fed might be interested in compensating troubled banks either because it is concerned about possible adverse effects from bank failures on its reputation or because it is concerned about possible knock-on effects. After all, the Fed is responsible for maintaining the stability of the financial system and it is responsible for the supervision of some of the biggest banks in the United States.'

There is also evidence that an independent regulator leads to better macro-economic outcomes, such as lower average inflation (Di Noia & Di Giorgio op cit at 361–72) and, further, that an independent prudential regulatory authority correlates to a more competitive banking system (ibid at 373).

From a regulatory perspective, an independent regulator comports more closely with the Basel Committee Principles on Banking Supervision, in particular principle 2, which states as follows:

> 'Independence, accountability, resourcing and legal protection for supervisors: The supervisor possesses operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy and adequate resources, and is accountable for the discharge of its duties and use of its resources. The legal framework for banking supervision includes legal protection for the supervisor.'

Conversely, and from a practical perspective, there are benefits in housing the prudential regulator within the NCB. These include the ability to achieve synergies in relation to resources and expertise, and to avoid the difficulties that arise in relation to information-sharing that do not present where the central bank and the prudential regulator are one organisation. In addition, in jurisdictions that do not have a tradition of independent regulatory agencies, but do have a tradition of a strongly independent central bank, housing the prudential regulator within the NCB may ensure that it operates independently of government. Anecdotal evidence suggests that this was a factor behind the proposed reforms in South Africa.

In Australia, the prudential regulator, APRA, was established as a stand-alone regulator on 1 July 1998 in response to the recommendations of the 1996 Financial System Inquiry, known as the Wallis Inquiry. This was

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established to examine the Australian financial system and led, ultimately, to the adoption of the 'Twin Peaks' model in Australia (Stan Wallis, Bill Beerworth, Jeffrey Carmichael, Ian Harper & Linda Nicholls *Financial System Inquiry Final Report* (1997) 20). Its ability to perform its role effectively from the outset was attributable, in part, to the movement of personnel to APRA from the Reserve Bank of Australia ('RBA'). This ensured that APRA had the necessary expertise for its functions, and also provided a firm basis for co-ordination and co-operation between APRA and the RBA. Empirical research suggests that there is general consensus among the regulators and the RBA in support of APRA's stand-alone status (interviews with ASIC, APRA and the RBA conducted by the authors in July 2014), and that such support is reflected in the business community more broadly. For example, the submission by KPMG to the FSI, commenced in Australia at the end of 2013, stated that 'KPMG is inclined to view the current model — with APRA remaining a separate authority focused on prudential supervision – [as] the better arrangement' (Adrian Fisk & Ian Pollari 'Financial system inquiry, KPMG submission' (March 2014) *Financial Services* 6). This, KPMG suggested, was due to its 'cultural traits', knowledge and experience, as well as the risk of conflicts of interest that would arise if APRA were merged with the RBA (ibid).

The regulatory design in any country has to accommodate the specific circumstances and needs of that country. In South Africa, there are likely to be cogent reasons for housing the Prudential Authority within the SARB. To some extent, the FSR Bill overcomes some of the concerns that are identified above, by clearly stipulating the objectives and internal governance structures of the Prudential Authority. However, it will still be necessary to ensure that the Prudential Authority achieves an appropriate level of operational independence in practice, and that the risks of conflicts of interest and competing priorities, as referred to above, are appropriately managed.

HOW SHOULD EFFECTIVE CO-ORDINATION BETWEEN THE REGULATORS BE ACHIEVED?

Regulatory co-ordination — soft law vs hard law

Much has been written about soft law in the context of regulation, and its relative merits, as compared with hard law. For example, it has been said that regulators turn to soft law in financial regulation because of the 'sociological pull of soft law venues', the fact that soft law is 'quicker, cheaper and more flexible' and also that it is non-binding in nature, all of which 'appeals to fast-moving regulators who need to try things out' (Claire R Kelly 'The sociological pull of soft law' (2012) 106 *American Society of International Law Proceedings* 327). Soft law is often embodied in memoranda of understanding between the regulatory agencies. As Ferran & Alexander state (Ellis Ferran & Kern Alexander 'Can soft law bodies be effective? Soft systemic risk oversight bodies and the special case of the European Systemic Risk Board', (June 2011) *Legal Studies Research Paper Series* 6):

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> 'Hard law ordinarily gives rise to enforceable obligations and therefore has to be reasonably certain and predictable so that people can determine what is expected of them. Soft law, not being directly enforceable, can be more open-textured.'

In Australia, the legislative framework for regulatory co-ordination is high level and outcomes focused. Although there is a general reference to co-ordination in the legislation governing APRA, there are no detailed provisions as to the nature of co-ordination and how it should be achieved. Instead, s10A of the APRA Act provides in general terms as follows:

> '(1) The Parliament intends that APRA should, in performing and exercising its functions and powers, have regard to the desirability of APRA cooperating with other financial sector supervisory agencies, and with other agencies specified in regulations for the purposes of this subsection.
> (2) This section does not override any restrictions that would otherwise apply to APRA or confer any powers on APRA that it would not otherwise have.'

This provision was added to implement recommendations handed down by the HIH Royal Commission (The HIH Royal Commission 'Report of the HIH Royal Commission' (April 2003)) 'on liaison and co-ordination with both domestic and international regulators and other agencies' (see the Australian Prudential Regulation Authority Amendment Act (Cth) (2003), Explanatory Memorandum).

This process relies substantially on 'soft-law' mechanisms in the form of memoranda of understanding and informal protocols between the regulators, where the legislative framework is more facilitative, or enabling, than prescriptive. Overseeing the process is the Council of Financial Regulators ('CFR'), which 'operates as a high-level forum for co-operation and collaboration among its members' (The Council of Financial Regulators, 'Memorandum of understanding on financial distress management between the members of the Council of Financial Regulators' (September 2008)). The soft-law approach in Australia is reflected in the fact that neither the CFR, nor the form or content of the regulatory memoranda of understanding, is prescribed by statute.

The soft-law approach was also underscored in the Interim Report of the Australian Financial System Inquiry, which drew on the submission of the RBA in stating that '[l]egislation cannot be relied on to promote a culture of cooperation, trust and mutual support between domestic regulatory agencies. These have been highlighted as essential elements of an effective financial stability framework, especially during a crisis' (Financial System Inquiry 'Financial System Inquiry interim report' (July 2014) 3–119). Of greater importance to the regulators in Australia, the RBA has suggested, is cultivating a culture of co-ordination, under which the main focus is on regulatory performance, rather than regulatory structure. The Assistant Governor (Financial) of the RBA has attributed the efficacy of co-ordination between the regulators in Australia to a culture

> 'where we regard cooperation with the other agencies as an important part of

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> our job, and there is a strong expectation from the public and the government that we will continue to do so. . . . Key aspects [of coordination] include an effective flow of information across staff in the market operations and macroeconomic departments of a central bank and those working in the areas of financial stability and bank supervision. Regular meetings among these groups to focus on risks and vulnerabilities and to highlight warning signs can be very valuable. A culture of coordination among these areas is very important in a crisis because, in many instances, a stress situation is first evident in liquidity strains visible to the central bank, and the first responses may be calls on central bank liquidity.' (Malcom Edey 'Macroprudential supervision and the role of central banks' (September 2012) at 3. Paper presented at the Regional Policy Forum on Financial Stability and Macroprudential Supervision Hosted by the Financial Stability Institute and the China Banking Regulatory Commission.)

The soft-law approach to regulatory co-ordination in Australia can be contrasted with the more prescriptive 'hard-law' approach to regulatory co-ordination adopted in the United Kingdom as set out below, and the proposed approach in South Africa, as set out in chap 6 of the FSR Bill, particularly in ss 76 and 77. Indeed, the preamble to the Bill provides expressly that one of its objects is 'to provide for co-ordination, co-operation, collaboration, consultation and consistency' between the regulatory authorities. In particular, the South African model borrows from the UK model in terms of prescribing the nature of co-ordination between the regulators, and imposing a statutory duty on the regulators to co-operate or co-ordinate their activities (the FSR Bill, s 76). This can be contrasted with Australia, where, although co-operation is referred to in the legislation governing APRA, there are no detailed provisions as to the nature of co-operation and how it should be achieved (APRA Act, s 10A).

In the UK, s 3D of the Financial Services Act, 2012 provides as follows:

> '(1) The regulators must co-ordinate the exercise of their respective functions conferred by or under this Act with a view to ensuring —
>
> (a) that each regulator consults the other regulator (where not otherwise required to do so) in connection with any proposed exercise of a function in a way that may have a material adverse effect on the advancement by the other regulator of any of its objectives;
>
> (b) that where appropriate each regulator obtains information and advice from the other regulator in connection with the exercise of its functions in relation to matters of common regulatory interest in cases where the other regulator may be expected to have relevant information or relevant expertise; . . .'

This duty is qualified under s 3(2):

> '(2) The duty in subsection (1) applies only to the extent that compliance with the duty —
>
> (a) is compatible with the advancement by each regulator of any of its objectives; and
>
> (b) does not impose a burden on the regulators that is disproportionate to the benefits of compliance.'

This approach finds parallels in s 76(1) of the FSR Bill, which provides:

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> 'The financial sector regulators and the Reserve Bank must co-ordinate, co-operate, collaborate and consult with each other in relation to performing their functions in terms of this Act and the other financial sector laws.'

Under s 76(2)*(b)*, *(c)* and *(f)*, the duty to co-ordinate includes the requirement to 'inform each other about, and share information about, matters of common interest' (unlike the legislation in the UK (see Financial Services Act, 2012, s 3D(3)), the FSR Bill does not expressly define 'matters of common interest', although various examples are provided in certain sections), 'coordinate their actions to the extent that is appropriate and practicable' and 'interact with each other in relation to strategic directions and understandings of national and international regulatory challenges'. There is no direct equivalent to s 3D(2) of the UK legislation.

Regulatory memoranda of understanding

The FSR Bill makes provision for a regulatory memorandum of understanding to be entered into by the regulatory authorities (see the FSR Bill, s 77). This will deal with various matters, including how the regulators and the Reserve Bank will comply with their duties to co-ordinate in practice, delegation of powers between the Prudential Authority and the Financial Sector Conduct Authority and how differences between them are to be resolved. In Australia, the understanding is that the memoranda of understanding between the regulators and between each regulator and the RBA are not legally binding. This would appear to be the case under the FSR Bill.

Arguably, the hard-law nature of regulatory co-ordination in South Africa, which involves a statutory duty to co-operate, raises various concerns, including whether this approach will result in inflexibility (namely, an inability to adapt to circumstances as and when they arise), and a culture that is more concerned with compliance than in achieving appropriate outcomes. Our findings, derived from interviews conducted with the regulators in Australia, suggest that a flexible approach to co-ordination, able to adapt to the circumstances, enabled the Australian regulators to deal effectively with the challenges arising out of the Global Financial Crisis and the 2010 Sovereign Debt Crisis. It was evident that over-prescription, or formalisation, would have stifled this flexibility.

Some flexibility to managing crises or systemic events is achieved in s 12(3) of the FSR Bill, which provides that the Governor of the Reserve Bank 'may establish a management committee, consisting of senior representatives of the Reserve Bank, the financial sector regulators and other relevant organs of state, to assist with co-ordinating activities to manage a systemic event referred to in subsection 1*(b)* and its effects'.

Empirical evidence suggests that the experience in Australia is that the memoranda of understanding do not have any practical effect or utility in terms of achieving the relevant outcomes, and that neither ASIC nor APRA relies strictly on the letter of the memoranda of understanding. Instead, the main value of the memoranda is in signalling to the public how the regulators intend to achieve effective co-ordination, and also the process by which they

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are reviewed from time to time (interviews conducted with the regulators by the authors in July 2014). The FSR Bill provides in s 77(3) that '[t]he financial sector regulators and the Reserve Bank must review and update the memoranda of understanding as appropriate, but at least once every three years.' In the UK, s 3E(4) the Financial Services Act, 2012 provides that the memorandum of understanding between the regulators must be reviewed at least once in each calendar year.

WHAT SUBSTANTIVE FUNCTIONS AND POWERS SHOULD AN INTER-AGENCY CO-ORDINATING BODY HAVE?

The South African model borrows from the Australian model in terms of establishing a Council of Financial Regulators ('CFR'), a body that has no equivalent in the UK. An interesting difference between South Africa and Australia, however, is that the CFR will have a statutory basis under the FSR Bill, whereas the CFR has no statutory basis in Australia, reflecting the soft-law approach we noted above. In addition, the CFR in Australia 'has no legal functions or powers separate from those of its individual member agencies' (The Council of Financial Regulators 'About the CFR' (2013–2014), available at *http://www.cfr.gov.au/about-cfr/index.html/).* The question whether the CFR should have a statutory basis has been the subject of recent debate in Australia in the context of the FSI, including whether greater transparency and accountability should be introduced into the regulatory system in Australia.

As the RBA outlined in its submission to the Financial System Inquiry (FSI) (Reserve Bank of Australia 'Submission to the Financial System Inquiry' (March 2014) 66):

> 'The CFR is the coordinating body for Australia's main financial regulatory agencies. Its membership comprises APRA, ASIC, the RBA and the Treasury. The CFR was established in 1998 following the recommendations of the previous Financial System Inquiry (the Wallis Inquiry). It is a non-statutory interagency body, and has no regulatory functions separate from those of its four members.
>
> CFR meetings are chaired by the Reserve Bank Governor, with secretariat support provided by the RBA. They are typically held four times per year but can occur more frequently if required. As stated in the CFR Charter, the meetings provide a forum for:
>
> - identifying important issues and trends in the financial system, including those that may impinge upon overall financial stability;
> - ensuring the existence of appropriate coordination arrangements for responding to actual or potential instances of financial instability, and helping to resolve any issues where members' responsibilities overlap; and
> - harmonising regulatory and reporting requirements, paying close attention to the need to keep regulatory costs to a minimum. . . .
>
> Much of the input into CFR meetings is undertaken by interagency working groups, which has the additional benefit of promoting productive working relationships and an appreciation of cross-agency issues at the staff level.
>
> The CFR has worked well since its establishment and, during the crisis in particular, it has proven to be an effective means of coordinating responses to potential threats to financial stability. . . .

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> The experience since its establishment, and especially during the crisis, has highlighted the benefits of the existing non-statutory basis of the CFR.'

By contrast, section 79(2) of the FSR Bill makes provision for the operation and responsibilities of the CFR, stating that its function is to 'facilitate co-ordination, co-operation, collaboration, consultation and consistency, by allowing senior officers of its constituent institutions to discuss and inform themselves about matters of common interest, including strategic directions to be adopted, and understanding and meeting international and domestic regulatory challenges'. Membership of the CFR includes representatives from the regulatory authorities and certain departments, and the heads of any organ of state or other organisation that the Minister determines.

The open-ended nature of the membership of the proposed CFR in South Africa raises some queries and provides an interesting contrast with the approach in Australia, where the membership is limited to APRA, ASIC, the RBA and the Treasury. It should be noted, however, that submissions to the FSI had called for the membership in Australia to be extended to other regulatory agencies (see for example, the submissions of the Commonwealth Bank of Australia, 'Wellbeing, resilience and prosperity for Australia, Financial System Inquiry' (March 2014) 88, and Fisk & Pollari op cit at 4). However, this recommendation was not subsequently accepted in the FSI Final Report. The FSR Bill further provides that meetings of the Council must be held at least twice a year (FSR Bill, s 80(1)). By contrast, the expectation in Australia is that the Council will meet at least four times each year, and that the Council will include working groups and subcommittees in areas such as enforcement, legislation, standard-setting and financial inclusion (FSR Bill, s 81).

As we have noted above, the FSR Bill makes a general provision for the CFR. As yet, there is no indication as to what, if any, substantive powers and functions it will have. Two questions arise in this regard: (1) should the Council have substantive powers and functions that go beyond its consultative and co-ordinating role? and (2) how should accountability and transparency be achieved?

These two questions were the subject of submissions to the FSI in Australia and various stakeholders suggested that the role and functions of the Council of Financial Regulators should be enshrined in statute. For example, KPMG submitted that the Council's 'role, transparency and accountability would be strengthened if it were given statutory recognition' (Fisk & Pollari op cit at 5). In addition, the National Australia Bank recommended that 'the Council of Financial Regulators (CFR) should be given a more formal structure and be tasked by the Treasurer to coordinate the implementation of regulatory change by APRA and ASIC' (National Australia Bank 'NAB Submission to the Financial System Inquiry' (March 2014) § 3.2.2, p 4).

One concern in having a statutory-based inter-agency co-ordinating body is that it might be treated as the only channel through which inter-agency co-ordination can be achieved. In this regard, it is relevant to note that

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s 79(4) of the FSR Bill provides that '[t]his section does not limit the powers or duties of the Council of Financial Regulators' constituent institutions, including other powers and duties in relation to consultation, co-operation and co-ordination'.

A further concern, which was expressed by the RBA in its submission to the FSI, is that 'formalising the CFR with explicit responsibilities and policy tools would involve transferring agency constituent powers to the CFR, with the risk of blurring lines of responsibility that to date have worked well' (Reserve Bank of Australia 'Submission to the Financial System Inquiry', (March 2014) 67). In other words, conferring explicit powers and responsibilities on the CFR that go beyond its consultative and co-ordinating role might cut across the powers and responsibilities of the member agencies. A better approach, it has been suggested, is for the Council of Financial Regulators to be 'seen as the collaborative dimension of the regulatory agencies' activities, rather than as a separate body with its own ability to make the regulatory agencies cooperate' (Financial System Inquiry 'Financial System Inquiry Interim Report' op cit at 3–119). This is consistent with the approach of one of the regulators, expressed during interviews conducted by the authors, that giving formal co-ordination powers to the CFR may confuse accountability and require a more intrusive infrastructure, and that the system in Australia works well without one body directing the process. Further, what is critical to regulatory co-ordination is, at a formal level, the regular meetings of the Council of Financial Regulators and its working committees and, at an informal level, the relationship between the people involved (interviews with the regulators in July 2014).

In its submission, the RBA noted that although formal structures for co-ordination between agencies might assist to mediate the resolution of differences between regulatory agencies, and thereby enforce outcomes, 'it is unclear how reassigning part of a regulatory agency's constituent powers to an overarching body will influence coordination and effectiveness of regulatory policies. Similarly, it remains to be seen if formality is the feature of institutional arrangements that ensures better outcomes' (Reserve Bank of Australia 'Submission to the Financial System Inquiry' op cit at 53).

Underlying this reservation, it is suggested, is a concern that formalising the role of the CFR and the inter-agency co-ordinating arrangements might distract from the flexibility and robustness required to make co-ordination work; namely, it might result in a situation where the regulators involved are more concerned about complying — and being seen to comply — with the formal requirements, than they are about regulatory performance and achieving the desired outcomes. This may have been one of the reasons why the FSI Final Report did not recommend any fundamental change to the current institutional arrangements. The approach in Australia appears to be reflected in the approach in South Africa, where the Council of Financial Regulators has a facilitative function and is not granted express powers that might cut across the powers and responsibilities of its members.

One area in which there has been some limited development in Australia in relation to the CFR is increased transparency in the form of a webpage for

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the CFR on the website of the Australian Commonwealth Treasury (The Council of Financial Regulators 'Welcome to the Council of Financial Regulators' (2013–2014), available at *www.cfr.au/*). The webpage contains information about the Council, media releases, publications and other resources. This is in line with the views expressed in the FSI Final Report that 'there would be benefit in increasing the transparency of the CFR's deliberations, including its assessment of financial stability risks and how these are being addressed'. To date, however, the minutes of the meetings of the CFR have not been published. By contrast, s 57(2)*(b)* of the first draft of the FSR Bill provided for a higher level of transparency, by stipulating that the meetings of the CFR 'must be published on the National Treasury's website for public information, unless the decision involves confidential information'. This provision was not carried over into the second draft of the FSR Bill.

CONCLUSION

The move in South Africa towards a 'Twin Peaks' model of financial regulation is a significant reform that should promote financial stability and strengthen South Africa's ability to manage and mitigate the effects of financial crises. The experience of Australia provides some insights into the challenges that this model presents, particularly in the area of regulatory co-ordination, and the various ways in which these challenges might be overcome. One of the key lessons suggested by the Australian experience is that the legislative and regulatory framework is a necessary — but, of itself, insufficient — element in terms of achieving the desired outcomes. Of equal importance is a 'culture of co-ordination' under which the main focus is on regulatory performance rather than regulatory structure. In this regard, the high-level, outcomes-focused and 'soft-law' approach adopted in Australia offers an interesting contrast to the more prescriptive 'hard-law' approach in the United Kingdom, and the proposed approach in South Africa. Of critical importance, this note suggests, is achieving an appropriate balance between formality and flexibility; namely, making clear provision for the nature and scope of regulatory co-ordination while at the same time ensuring that the system is sufficiently flexible to allow it to adapt to specific circumstances, as and when they arise.