

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 232/2013

In the matter between:

JOHAN FREDERICK LANDMAN

Applicant

and

**MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES**

First Respondent

VM MASHELE

Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 15 March 2024.

JUDGMENT

MAHOSI, J

Introduction

[1] South Africa is a country burdened with its history, yet it envisions a society where all citizens are treated equally despite their race, gender, background, and social status. For this to become a reality, the law has to be blind to the traits of those seeking justice and must be applied uniformly and equally across the board.

- [2] The applicant, Mr Johan Landman (Mr Landman), brought an application in terms of section 6 of the Employment Equity Act.¹ (EEA), alleging that the first respondent (the Minister) unfairly discriminated against him on race and gender by failing to shortlist him for the advertised vacancy of Director for Employee Relations (the position).
- [3] The first respondent, Minister of Agriculture, Forestry and Fisheries (the Minister), opposed the matter. The parties agreed to proceed by way of a stated case.

Background

- [4] The Department of Agriculture, Forestry and Fisheries (the Department) advertised the position on 20 February 2011. The closing date was 07 March 2011. The position's requirements included, *inter alia*, relevant degree and six to ten years experience in a management position.
- [5] Mr Landman, whom the Department employed as a Deputy Director of Employee Relations from February 1997 and who had acted in the position, applied but was not shortlisted. Instead, the Department shortlisted five females and invited them for interviews on 03 August 2011. The selection committee found no shortlisted candidates suitable for the position. As a result, the Department followed a head-hunting route, inviting five candidates for interviews on 01 February 2012. After these interviews, the panel recommended Ms Mashele for appointment, which commenced on 1 July 2012.
- [6] Aggrieved by the Department's decision not to shortlist and appoint him, Mr Landman lodged a grievance with the Minister. Dissatisfied with the grievance outcome, Mr Landman referred an unfair labour dispute to the General Public Service Sector Bargaining Council (the bargaining council) for conciliation.

¹ No. 55 of 1998, as amended.

- [7] The bargaining council held the conciliation on 25 June 2012. At the conciliation, Mr Landman requested the Department to furnish him with reasons for not shortlisting him. The Department stated that the position was earmarked for employment equity and decided to fill it with an African female candidate which resulted in the shortlisting of women only. The Minister further submitted that the decision was fair as Mr Landman was not the only male who was not shortlisted.
- [8] The bargaining council could not resolve the dispute and issued the certificate of non-resolution, which prompted Mr Landman to launch this application claiming that the Minister unfairly discriminated against him based on race and gender in contravention of section 6 of the EEA and section 9(1) to (3) of the Constitution of the Republic of South Africa, 1996 (the Constitution).
- [9] Mr Landman seeks that the Court orders the Minister to:
- 8.1 Promote him to the grade equivalent to that of the position with effect from 1 July 2012 with all the associated benefits;
 - 8.2 Pay him the difference between the monetary value of the remuneration and benefits that he received from 1 July 2012 until 15 July 2017, when he resigned, and what he would have received had he been appointed to the position.
 - 8.3 Compensate him for R 200 000.00 (Two Hundred Thousand Rands).
 - 8.4 In the alternative, set aside Ms Mashele's appointment and re-advertise the position.
- [10] The Minister opposed the application and denied that he unfairly discriminated against Mr Landman.

Mr Landman's contentions

- [11] Mr Landman contends that there was no justification for not shortlisting and appointing him to the position and Minister's decision was an *ad hoc* individual decision that was not supported by any measures or programmes as the Department had no approved Employment Equity Plan in place at the time of the recruitment process. Further, if it existed it was not consistently applied as his other male colleagues were appointed to other vacant director posts during that period.
- [12] Additionally, Mr Landman contends that the Department did not reserve the post for any particular race or gender, as other male candidates were shortlisted and ultimately appointed to similar-level positions. Finally, he contends that if it had not been for the unfair discrimination, he would have been shortlisted and appointed since he is qualified and suitable.

The Minister's contentions

- [13] The Minister admits that the Department discriminated against Mr Landman based on race and gender but contends that such discrimination is rationally justified by the Department's pursuit of achieving its set representativity targets for designated race and gender.
- [14] The Minister submitted that the Department promotes employment and promotion in line with its equity framework, Employment Equity Plan, Parliamentary Cabinet's determination on gender representativity, and EEA. Further, the Department's draft Employment Equity Plan clearly demonstrates that there was a determined or determinable framework within which to operate, which could assist the Court in assessing whether his conduct was fair.
- [15] In addition, the Minister contends that the position is at Senior Management Service level 13, in which white males were adequately represented at the time

and the representation targets had not been reached. According to him, no exceptional circumstances existed to motivate the relaxation of the guidelines,

Employment equity legal framework

[16] Section 1 of the Constitution has its foundation on, among other things, the following values:

- ‘(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the Constitution and the rule of law.
- (d) ...’

[17] Section 2 of the Constitution provides that:

‘This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’

[18] Section 7(2) of the Constitution requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Thus, the State must operate within the confines of the Constitution, which is the supreme law of this country.

[19] Section 6 (1)² of the EEA proscribes unfair discrimination in a manner akin to Section 9 of the Constitution, which provides that:

² “(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.”

- '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[20] Section 195 of the Constitution provides for the values and principles governing public administration, and it reads:

- '(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (a) A high standard of professional ethics must be promoted and

maintained.

- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

- (a) administration in every sphere of government;

(b) organs of State; and

(c) public enterprises.

(3) National legislation must ensure the promotion of the values and principles listed in subsection (1).

(4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.

(5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.

(6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.'

[21] The provisions of section 11(2) of the Public Service Act³ (PSA) are apposite in this regard, and they provide as follows:

'In making of any appointment in terms of section 9 in the public service-

(a) all persons applied and qualify for the appointment concerned shall be considered; and

(b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act 55 of 1998), the

³ Act 103 of 1994

imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.’

[22] In *Minister of Correctional Services and Others v Z.A Duma*⁴, Davis JA held that:

[11] In order to evaluate the dispute as presented by the parties to this Court, it is necessary to consider the relevant law. Section 6 (1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against an employee in an employment policy or practice on one of a number of its specified grounds as set out in the section, which include “on any other arbitrary ground”. Turning to s 6(2) of the EEA, it is not unfair discrimination to take affirmative action measures consistent with the purpose of EEA or to distinguish, exclude or prefer any person on the basis of an inherent requirement for a job. Section 11 (1) provides that, if unfair discrimination is alleged on a ground listed in s 6(1), the employer, against whom allegation is made, must prove, on a balance of probabilities, that such discrimination –

- (a) did not take place as alleged
- (b) is rational not unfair or is otherwise justifiable

Section 11(2) provides that if unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that

- (a) the conduct complained of is not rational; and

⁴ (CA10/2016) [2017] ZALAC 78 (23 June 2017) at para 11.

- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.’

Analysis

[23] It is common cause that the Department is a designated employer as it employs more than the threshold in the EEA. Therefore, section 20 of the EEA requires the Department to design, implement, monitor and evaluate affirmative action measures within the workplace by adopting an Employment Equity Plan.

[24] The Supreme Court of Appeal in *Gordon v Department of Health: Kwa Zulu Natal*⁵ held that:

‘[23] The injunction that the public service must be broadly representative is an important one. It enjoins those in charge to strive towards representivity. This in my view calls for attention to be focused on the respects in which the service is not representative and what measures should be implemented to achieve the required representivity. This suggests that a properly considered policy or plan to address the situation as opposed to *ad hoc* random action is impermissible. Compare *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 119 (LC) at 1125 para 19” where it said:

‘There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

19.1 there must be policy or programme through which affirmative action is to be effected;

⁵ (2008) 29 ILJ 2535 (SCA).

19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

[24] ...

[25] It has to be pointed out, as appears from the cases cited, that the policies, plans and/or programmes involved there were crafted in consideration of the context, such as identifying relevant demographics and the gaps in representivity that had to be addressed through affirmative action.'

[25] It is apparent from the above authority that an employer must address representivity in the workplace within the framework of a plan or program and cannot take an *ad hoc* decision. Section 20 of the EEA requires the designated employer to prepare and implement an employment equity plan that will steer the employer towards achieving employment equity in the workplace. The duration of the employment equity plan may not be shorter than a year or more than five years. Section 23 of the EEA states that before the end of the period of the current equity plan, the employer must prepare a subsequent equity plan.

[26] Section 44 of the EEA allows the Director General to review the equity plan of any designated employer to determine whether it complies with the EEA and other legislative requirements in terms of employment equity. The recommendation in terms of section 44 of the EEA is binding on the employer, and should the employer be unhappy with the recommendation, it first needs to be reviewed and set aside by the Labour Court⁶.

⁶ See *Director-General, Department of Labour v Comair Ltd* [2009] 11 BLLR 1063 (LC) at para 40.

- [27] The Court in *Harksen v Lane NO and others*⁷ formulated the test applicable in matters relating to unfair discrimination claims. The first question is whether there was differentiation. If so, does the differentiation amount to discrimination? And if so, whether such discrimination is fair?
- [28] In *casu*, it is common cause that the respondents' equity plan had lapsed at the time of the shortlisting. It is also common cause that a draft proposed equity plan for the new period was rejected by the Director General for review. The Minister admits that he discriminated against Mr Landman based on race and gender. The issue is whether such discrimination was fair and based on a justifiable reason.
- [29] The Minister contends that the discrimination against Mr Landman is rationally justifiable as the Department implemented the draft employment equity plan to achieve its set representivity targets for designated groups and gender representativity. In explaining the draft employment equity plan, the Minister submits that Agriculture, Fisheries and Environment were integrated in 2010 to form the Department of Agriculture, Forestry and Fisheries. At the time, the Department of Agriculture had a five-year employment equity plan for the period April 2006 to March 2010 with the following principles:
- 'It is also the primary principle of this plan to align all departmental strategies, policies, and practices to the plan in ensuring the successful attainment of our departmental targets in so far as numerical goals are concerned.'
- [30] The newly established Department of Agriculture, Forestry, and Fisheries, after or during the integration process, drafted a five-year employment equity plan for the period March 2010 to April 2014 that was submitted to the Department of

⁷1997 (11) BCLR 1489 (CC).

Labour. The equity plan was not approved due to insufficient consultation with different unions.

[31] Before that and on 12 May 2010, the Transformation Forum (TF) reported that even though the statistics for the Fisheries and Forestry components were not yet included, the Department "*successfully managed to ensure compliance to the EE targets*". Mr Landman was an *ex officio* observer and, in some, a member of these TF meetings. On 15 November 2012, having full knowledge of the status of the employment equity plan, Mr Landman enquired whether the Department had an employment equity plan for the years 2011 and 2012. The transformation officer recorded that the Department evokes other legislation and regulations once the employment equity plan expires.

[32] The Minister contends that there is no room for Mr Landman's contention that the Department should have acted within an approved employment equity plan, as the draft employment equity plan provided guidance and the framework to comply with employment equity targets and evoked the provisions of EEA. In this regard, the Minister relied on *Willemse v Patelia N.O and Others*.⁸, where the Court stated as follows:

[34] Obviously, an employment equity is helpful as framework within which to determine the fairness of an employer's discriminatory decisions when it purports to make appointments, or refuse to make them, in furtherance of the employer's employment equity objectives...There accordingly was a determined or determinable framework within which the DEAT was to operate and against which one can assess whether the conduct of the DEAT herein was fair and whether its constituted an unfair labour practice or not ... I

⁸ [2007] 2 BLLR 164 (LC). See also *Stone v South African Police Services* [2013] 1 BLLR 70 (LC). In both cases, the equity plan was awaiting approval. Nothing in the law states that a plan must be approved to be implemented, which is distinguishable from the matter herein, where the equity plan was found non-compliant.

am therefore satisfied that the fact the DEAT did not have an employment equity plan as required by the EEA, does not in and by itself render the refusal to promote Dr Willemse unfair. I also do not believe that the absence of an employment equity plan is in and by itself a cause of action when dealing with the question whether the employer committed an unfair labour practice relating to its failure or refusal to appoint or promote an employee.'

- [33] The Minister further contends that the Department's draft employment equity plan demonstrates a determined or determinable framework within which to operate and against which one can assess whether the first respondent's conduct was fair.
- [34] In addition, the Minister contends that when Ms Mashele was appointed, white males were adequately represented within the SMS, and the representativity targets or numeral goals of 50% were not yet reached or achieved in terms of the draft employment equity plan. In addition, the Minister contends that no exceptional circumstances existed to motivate the relaxation of the guidelines and that the representativity or numerical goals targets had yet to be achieved.
- [35] Lastly, the Minister contended that in addition to being duly qualified based on the post's requirements, another significant requirement to be met was the Minister's intention to give preference to candidates from previously disadvantaged backgrounds regarding its employment equity and representativity targets.
- [36] In *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality*⁹, the City of Tshwane failed to shortlist a candidate based on his race and gender and relied on a lapsed equity plan. In determining whether the non-shortlisting was unfair discrimination based on gender and race, the Court held that an action

⁹ [2016] 7 BLLR 685 (LC).

taken to further affirmative action must be capable of measurement and should be able to be evaluated and monitored. Without such targets and goals in an active or approved equity plan, there was no way to measure whether the non-shortlisting was an act in furtherance of equity within the workplace. As such, the Court held that decisions based on an equity plan that had lapsed amounted were discriminatory, without justification and unfair.

- [37] It is common cause that under the draft equity plan, the statistics for the Fisheries and Forestry components were not yet included. Thus, the Department's numerical goals had not yet been set in a new equity plan. Although the EEA is the legal framework within which every employer must operate, it lays the framework for affirmative action measures and does not prescribe those measures, which are found in the equity plan.
- [38] To an extent that the Minister seeks to rely on the matter of *Willemse* is distinguishable from the matter herein. In the matter at hand, not only had the equity plan lapsed, but the new draft equity plan was rejected, with the Director General making recommendations to incorporate it into the equity plan, thereby finding that the equity plan was not in compliance with the EEA and equity legislative framework. Can an equity plan that does not comply with equity legislation be implemented?
- [39] In the matter of *Director General: Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd*¹⁰, although in the context of implementing a fine on the non-compliant employer, the Court held that even though the employer had 100% representation from designated groups, the employer failed to comply with the recommendations of the Director General. This failure tainted the equity plan, as a genuine equity plan could only have been filed after consultation with the relevant stakeholders regarding the items listed in the EEA. The employer was

¹⁰ [2007] 9 BLLR 845 (LC).

found non-compliant because it had drafted an equity plan without consultation with the workforce, as was the case herein.

[40] In the current matter, it is not apparent if the Director General took further steps to enforce the recommendations or if the Department implemented them, or if they have since lapsed. Evidently, the Director General's recommendations had not lapsed at the time of the non-shortlisting. The question is whether, under the circumstances, a non-compliant equity plan could be implemented?

[41] In a situation where an equity plan was rejected and not yet corrected, the argument that implementing a rejected equity plan is consistent with the furtherance of the employment equity legislative goals and framework cannot stand as that very same equity plan was already rejected on the basis that it was not in compliance with the very equity framework on which the Minister is relying.. Therefore it follows that such a plan cannot be implemented.

[42] The principle was laid down in *Gordon*. A decision not to shortlist and appoint is *ad hoc* without a proper equity plan. This Court in *Solidarity* supported this decision, holding that a lapsed equity plan cannot be implemented, and any decision taken in terms thereof would be unfair.

[43] What does this spell for the applicant? This Court should determine whether the applicant would have been promoted into the position 'but-for' the unfair discrimination. In *Sun International Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*¹¹ the Court held that:

[11] There was also no evidence before the arbitrator as to why the interview process would have necessarily have resulted in Mogoro's appointment. Having inferred, wrongly or rightly, that Mogoro did have the minimum qualifications, the arbitrator then

¹¹ (JR939/14) [2016] ZALCJHB 433 (18 November 2016)

jumped to the conclusion that he therefore was the best candidate, which is illogical. The arbitrator overlooked that Mogoro also needed to demonstrate not only that he was a suitable candidate for consideration but that he was the best candidate...'

[44] The Court held in *Ekurhuleni Metropolitan Municipality and Another v SALGBC and Others*¹² held that 'protected promotion' should only be awarded when it can be established that the applicant was the best candidate for the job, 'but for' the unfair conduct he would have been promoted. The Court then set aside the award of 'protected promotion' because the applicant failed to provide evidence that had he been shortlisted, he would have been the best candidate for the job.

[45] In this matter, 'but for' the unfair conduct of the Department, Mr Landman would have been allowed to compete for the position. However, there is no guarantee that he would have been the candidate recommended for appointment. Therefore, there is no grounds for a protected promotion. This Court in *KwaDukuza Municipality v SALGBC and Others*¹³ held that protected promotion is merely a disguised form of compensation and substituted the award of protected promotion with an award of compensation.

Conclusion

[46] The Department's equity plan had not only lapsed at the time of the shortlisting, but the Director General also rejected the new draft equity plan finding it non-compliant with the legal framework it purports to uphold. Therefore, any decision made in terms of it cannot be justifiable, and any decision that discriminates based on it will be unfair.

[47] Mr Landman has *prima facie* shown that he would have been shortlisted for the position because he met the minimum requirements. However, this does not

¹² (JR369/15) [2019] ZALCJHB 91 (10 May 2019). See also: *Ethekwini Municipality v SALGBC and Others*(2022) 43 ILJ 2781 (LC).

¹³ (2009) 30 ILJ 356 (LC).

naturally translate to him being the best candidate for the job. Considering the evidence, it is apparent that Mr Landman was not shortlisted due to the unfair conduct of the Department. However, he has yet to establish that 'but for' this conduct, the defendants would have appointed him. In the circumstances, a *solatium* is an appropriate relief.

[48] Concerning costs, the requirements of law and fairness dictate that there should be no order as to costs.

[49] Accordingly, the following order is made:

Order

1. The Respondent is found to have committed an unfair labour practice against the applicant by not shortlisting him.
2. The Respondent is to pay to Mr Landman compensation equivalent to his five (5) months' salary calculated at the rate of his remuneration as per the date of the Minister's decision to not shortlist him.
3. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances

For the applicant: Mr LP Phatshwane of Phatshwane Attorneys

For the first respondents: Advocate J.C. Basson

Instructed by: State Attorney