

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case No : PA 6/98

In the matter between :

DEPARTMENT OF CORRECTIONAL SERVICES

Appellant

and

E VAN VUUREN

Respondent

JUDGMENT

FRONEMAN DJP :

[1] It is perhaps inevitable that the proposed transition of South Africa to a non-racial, non-sexist democratic society in terms of the new constitutional dispensation will produce its own ironies. Unlike the situation in George Orwell's

Animal Farm, where some became more equal than others after the revolution, this is a case about some said to be more unequal than others prior to the recent constitutional changes. The relative inequalities of the protagonists involved and the use of that fact in promoting people in the employment of the appellant are what this appeal is about.

[2] The respondent is a white woman. By all accounts she is a well qualified, able and efficient employee. She commenced employment with the appellant in 1984 and rapidly rose through the ranks. In 1996 she applied for the post of control educationist at the St. Albans prison in Port Elizabeth. After interviewing thirty-one applicants the interviewing panel recommended only four applicants for the post. The respondent headed that list : she was the only one who was strongly recommended. The decision to make the appointment, however, was not the responsibility of the interviewing panel; that decision rested with the commissioner of correctional services. He decided not to appoint the respondent. Instead he appointed a black man.

[3] The respondent, understandably, was upset and approached the industrial court for relief on the basis that the failure to appoint her in the post amounted to an unfair labour practice. In that tribunal she emerged successful, but the appellant now seeks to overturn that finding on appeal, heard by this Court by virtue of the transitional provisions of the Labour Relations Act, no 66 of 1995.

- [4] The basis of the finding in the industrial court was not that the failure to appoint the respondent was discriminatory in nature (it was in fact accepted that it was not discriminatory in terms of the appellant's affirmative action policy). The finding flowed from a more formal approach. The presiding officer in the industrial court found that the precondition for implementation of the affirmative action policy, namely registration, had not occurred by the time the commissioner made his decision. That fact, he held, precluded the commissioner from making a decision based on the guidelines set out in the policy.
- [5] In terms of section 9 (G) of the Correctional Services Act, no 8 of 1959 ("the CSA"), read with section 2(5) of the Public Service Act, 1994 ("the PSA"), the commissioner was competent to decide whom to appoint to the post. Whether he was competent to do so by taking into consideration the guidelines of the unregistered policy is an issue which calls for an examination of the provisions of the then applicable interim Constitution, Act no 200 of 1993 ("the Constitution"), the PSA, the CSA and the Public Service Labour Relations Act, 1994 ("the PSLRA").
- [6] Section 8(2) of the Constitution prohibits unfair discrimination on the basis of, amongst others, gender and race. Section 8(3) provides, however, that the right to equality does not preclude measures "designed to achieve the adequate

protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms” (what has thus far been referred to as affirmative action). This almost symbiotic relationship between the prohibition on unfair discrimination on the one hand, and permitting affirmative discrimination on the other, is a recurrent theme of further provisions of, or flowing from, the Constitution.

[7] The Constitution envisages a public service structured in terms of a law to provide effective public administration (section 212(1)). The public service must be non-partisan, career-orientated and function according to fair and equitable principles (section 212(1)(a)) and must serve all members of the public in an unbiased and impartial manner (section 212(1)(c)). Employment in the public service should be accessible to all South African citizens on the general basis that appointments should be made to ensure efficiency (compare section 212(3) and (4)). Notwithstanding all this, however, the public administration must be broadly representative of the South African community (section 212(2)(b) and (5)).

[8] The vehicle chosen to effect these goals is the Public Service Commission (“the PSC”). Section 209 of the Constitution provides for its establishment and section 210 for its powers and functions. In terms of section 210(1)(a)(iii) the PSC is

competent to give directions for appointments and promotions in the public service and in terms of section 210(3) these directions should generally be implemented within six months.

- [9] These constitutional injunctions find their expression in the PSA. Section 3 of the PSA provides that the PSC shall exercise its powers and functions in accordance with the provisions of section 212 of the Constitution. It may give directions regarding measures to promote the objectives of section 212(2) of the Constitution in accordance with section 212(5) of the Constitution (section 3(5)(a)(vii)), notwithstanding the provisions of section 11 of the PSA. Section 11 of the PSA reads as follows :

“(1) In the making of any appointment or the filling of any post in the public service -

- a)no person who qualifies for the appointment, transfer or promotion concerned shall be favoured or prejudiced;
- b)only the qualifications, level of training, merit, efficiency and suitability of the persons... and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission... shall be taken into account.”

- [10] In terms of section 5(7) of the PSA a recommendation, function or decision which relates to a matter of mutual interest under section 13 of the PSLRA may only be made in terms of an agreement negotiated on such a matter in the relevant chamber of the Public Service Bargaining Council. Notwithstanding this section 5(8) provides that :

“(a) the Commission or.... person mentioned in subsection (7) may deal with the case of an individual in terms of... this Act or any other applicable law... : Provided that[it]...shall not derogate from or annul such an agreement or the collective

relationship, or reduce.... or deprive such individual of his or her remuneration, service benefits or worker compensation, except in accordance with the provisions of section 34 of this Act;

c)the Commission or... may... implement the last offer on a specific matter made by the employer in the... chamber if a deadlock in negotiations is reached...”

[11] The broad scheme of these provisions seems to be reasonably clear. What is sought is an efficient public service open to all citizens, but without sacrificing the equalising principle of favouring those who, by reason of past disadvantage, may have been unable to compete on equal terms. The PSC is entrusted to attain this goal by issuing recommendations or directions. Where these relate to matters of mutual interest between the state as employer and its employees the recommendations or directions must preferably be the result of negotiation arrived at by collective bargaining. The collective bargaining process may, however, be augmented in certain prescribed situations where individuals are concerned, or where deadlock is reached.

[12] For the purposes of this appeal it is not necessary to go into the detail of what steps were taken by the PSC and the appellant to implement the demands of the Constitution and the PSA. Suffice it to state that the appellant's policy was negotiated and agreed at through the necessary collective bargaining process and the result has not been attacked on appeal as being unfair or unconstitutional. What the respondent did argue, however, was that the presiding officer in the industrial court was correct in finding that it was an unfair labour practice to implement the policy guidelines in the individual case of the

respondent prior to the necessary registration of the policy.

[13] In essence this amounts to an argument that the commissioner exceeded his statutory competence or powers in making the appointment he did and by failing to appoint the respondent to the post. Assuming, without deciding, that it was competent for the industrial court to make such a finding (in effect a review of the commissioner's decision), it nevertheless appears that the provisions of section 5(8)(a) of the PSA are applicable (apart from any other possible legislative provisions). The commissioner's decision did not derogate from, or annul the agreement reached in collective bargaining. All it did was to anticipate the application of its terms in a particular individual's case. There was no evidence that this adversely affected the collective bargaining relationship, nor that it reduced the respondent's remuneration, service benefits or worker compensation; the factors mentioned in the section which might have precluded the commissioner from validly taking the decision he did.

[14] The commissioner thus acted within his competence or powers when he made the decision. His evidence at the hearing discloses that he did not slavishly adhere to a fixed policy or principle in making his final decision but that, to the contrary, he gave careful consideration to the particular circumstances of the respondent, the demands for representivity in that particular post in the Eastern Cape and other relevant factors. That the outcome was to a certain extent

dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants is more of a reflection on the remaining strangeness of our society, rather than an indication of arbitrariness on his part.

[15] In the result the appeal succeeds with costs, including the costs of two counsel.

The order in the industrial court is set aside and replaced by the following :

“The application is dismissed”.

FRONEMAN DJP

I agree,

CONRADIE JA

I agree,

NICHOLSON JA

Date of hearing :

18 June 1999

Date of judgment :

Appellant's representative :

Mr M J Lowe S.C. and Mr G Bloem instructed by The
State Attorney

Respondent's representative :

Mr J G Grogan instructed by Chris Baker &
Associates