



Not Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 66/2013

In the matter between:

**THE MINISTER OF SAFETY AND
SECURITY**

First Appellant

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICE
SOUTH AFRICAN POLICE SERVICE**

Second Appellant

Third Appellant

and

JENNILA NAIDOO

Respondent

Heard: 18 November 2014

Delivered: 11 June 2015

Summary: Affirmative action - Employment Equity Act 55 of 1998 – Affirmative action measures aiming at the advancement of designated groups – employee's recommendation by provincial panel for appointment overlooked by national panel – national panel appointing another candidate – employee contending unfair discrimination based on race – evidence proving that appointment of successful candidate advancing service delivery and that appointed employee having more operational experience than unsuccessful employee – Employer's decision consonant with its employment equity plan – Labour Court's judgment set aside – appeal upheld.

Coram: Musi JA, Murphy AJA et Kathree-Setiloane AJA

JUDGMENT

C J MUSI JA

- [1] Measures designed to achieve equality by targeting persons or categories of persons who have been disadvantaged by unfair discrimination have been the subject of many court challenges. This is yet another one of them.
- [2] This appeal, which is with leave of this Court, is against the order of the Labour Court (Shaik AJ) wherein it found that the National Commissioner of the South African Police Service (The second appellant or the Commissioner) unfairly discriminated against the respondent on the ground of her race and gender and declaring her non-appointment to be substantively and procedurally unfair.
- [3] During April 2009, the South African Police Service (SAPS) advertised various vacancies. The respondent applied and was subsequently interviewed for the position of Cluster Commander: Krugersdorp (the post). The provincial selection panel recommended her for appointment. The second appellant, however, rejected the recommendation and appointed another candidate, TS Maswanganyi.
- [4] The respondent lodged an internal grievance which was not resolved to the respondent's satisfaction. She referred the dispute to the Commission for Conciliation Mediation and Arbitration which issued a certificate that the matter should be referred to the Labour Court. The Labour Court found in the respondent's favour.
- [5] The facts of this matter are mainly common cause. The respondent (an Indian female) joined the SAPS in 1989 as a student Constable in KwaZulu Natal. She was transferred to Gauteng where she rose through the ranks and in 2001, she was appointed as a Deputy Area Commissioner. She had experience in operational and support functions. She confirmed that she applied, was shortlisted and interviewed for the post. She was dissatisfied

with her non-appointment because she was recommended for the post and her appointment would have enhanced gender equality and service delivery. She was of the view that the Commissioner discriminated against her based on her race and gender.

[6] General Bester, who was a member of the provincial panel that assessed candidates for, *inter alia*, the post and made recommendations to the Commissioner, testified that the selection panel considered the National Instruction 3 of 2000¹ when the candidates were assessed. The assessment consisted of looking at the curricula vitae of the candidates, their relevant experiences, prior learning, knowledge and skills, managerial ability and competence. The candidates had to do a presentation and they participated in a crisis management role-play.

[7] The respondent obtained 74,2% and Director Maswanganyi obtained 71,1%. Director Motlala obtained the highest mark, 77,7%. The provincial selection panel made the following recommendation:

'The panel recommends Director J Naidoo (respondent) as the first candidates due to the fact that the candidate with the highest mark (Motlala) is already recommended for post 2009. In the event that she cannot take up the post, Director Maswanganyi is recommended as the second candidate and Director A du Bruin as the third candidate. The recommendation will address gender equality.'

[8] Bester testified that the respondent was recommended because she was the best person for the post (merit) and her gender was also considered. She also testified that they received a document from the SAPS' equity experts which indicated that an Indian female may be appointed to the post.

[9] On 28 April 2009, the Divisional Commissioner: Career Management wrote a letter to *inter alia* All Divisional Commissioners and Provincial Commissioners, stating the following:

¹ National Instruction 3 of 2000 sets out the composition of the assessment centre, preparation thereof, how assessments should be conducted, the evaluation process and how marks for the key performance areas ought to be allocated.

- '1. The Cabinet memorandum dated April 2006 pertaining to the above-mentioned matter, paragraph 3 of the Head of Department's 8-principle Action plan for promoting women's empowerment and principle 9 of the Monitoring and Evaluation report on the South African Police Service (SAPS) refer. A copy of the memorandum, 8-point plan and principle 9 is enclosed herewith for easy reference.
2. Subsequent to the concerns raised by the DPSA and Presidency in terms of reaching the 50/50 allocation for women representation on the SMS level by March 2009, it is imperative that SAPS utilize and seize the opportunity to fill most of the posts advertised in the current round of appointments with women to adhere to the ratio approved by the Cabinet.
3. By setting a higher target, the SAPS will at least reach the 70/30 target, since there is only 21% women on the SMS level currently.'

[10] Bester testified that the 'current round of interviews' in the letter refers *inter alia* to the interviews conducted for the post. They therefore considered the 50/50 target when they recommended the respondent. She testified that after they had made their recommendation, she received a telephone call from General Phahlane who asked her about the female candidates that were recommended for other positions and about the respondent. With regard to the respondent, she told him that the respondent was the first woman ever appointed as a Cluster Commander because she was appointed Commander of the Randburg zone during a pilot project, and that her appointment would also address gender equity. Phahlane then said that the respondent is a support person. She requested him to read the respondent's CV. Bester confirmed that the second appellant rejected their recommendation and appointed Director Maswanganyi.

[11] During cross-examination, Bester testified that she was not familiar with the SAPS's equity plan or its implementation but that she viewed it as a guide. She conceded that the SAPS was obliged to act in terms of their equity plan when appointing personnel but that she has never seen the equity plan. She

confirmed that the panel gave effect to the Cabinet decision and disregarded the equity plan.

- [12] Colonel Ramathoka, who was stationed at the Division: Human Resource Utilisation and working as the Subsection Head: Monitoring and Evaluation, testified that it was, *inter alia*, his responsibility to draft the equity plan of SAPS. He confirmed that the equity plan was implemented after an extensive consultative process within both the SAPS and the Bargaining Council for the safety and security sector. The Employment Equity Plan of the SAPS was developed in line with the prescripts of the Employment Equity Act² (the Act). The relevant employment equity plan was valid and applicable from 1 January 2007 to 31 December 2010.
- [13] He confirmed that statistical data in relation to the demographics of the national population was extrapolated from the national census report of 2006 that was compiled by Statistics South Africa, at the time. Based on those statistics, the equity plan determined that 79% of all posts should be allocated to Black Africans. Of the 79%, 70% of the posts would be allocated to Black males and 30% thereof to Black females. 2,5% of all posts would be allocated to Indians. Of the 2,5%, 70% would be allocated to Indian males and 30% to Indian females. The 2,5% was derived from the census report and was reflective of the number of Indian citizens. The targeted ratio was therefore 70% males and 30% females.
- [14] He confirmed that the SAPS has a plan which commenced on 1 January 2014. In terms of the new plan, the gender representivity target was changed from 70/30 to 50/50.
- [15] In terms of the numeric targets of the equity plan none of the five positions advertised on level 14 were supposed to be allocated for Indian females. The witness demonstrated how numerically on a 70/30 or 50/50 ratio there would still be no allocation for Indian females given the number of posts and the national demographics. There were 19 level 14 posts in terms of the resource allocation guide. Fourteen of the nineteen posts were already filled. The

² 55 of 1998.

remaining five were advertised and the post was one of them. In order to determine, numerically, how many posts should be allocated to which designated group and gender, one should take national demographics of the particular group. In the case of Indians, they were 2,5 % of the national population. Multiply that by the number of actual posts ($5 \times 2,5\% = 0,125$), which will give the number of Indians which may be appointed. In order to determine the number of Indian women that should be appointed 0,125 must be multiplied by 30%, therefore $0,125 \times 30\% = 0,375$; which rounded off is equal to zero. Even on the 50/50 ratio, it would still be zero for level 14 posts in Gauteng Province, because $5 \times 2.5\% = 0,125$. $0.125 \times 50\% = 0.0625$ which would, if rounded off, still amount to zero. There were no Indian females on level 14 in Gauteng which was, in terms of the employment equity plan, ideal.

[16] Lieutenant General Phahlane testified that he was the Divisional Commissioner: Personnel Services and therefore responsible for the recruitment, selection and appointments process in the SAPS. He also serves as the Secretary of the national appointment panel (the national panel) which was chaired by the National Commissioner. He confirmed that the national panel received the provincial panel's recommendations but they were not satisfied. They were dissatisfied because, firstly, the respondent would not function optimally in the post; secondly that she did not have sufficient experience in the operational environment and thirdly they were of the view that her appointment would not enhance the employment equity profile of the business unit on level 14. He was requested to consult with the Provincial Commissioner in order to share the concerns raised by the national panel and to get his input.

[17] Deputy Commissioner Bester was acting as the Provincial Commissioner and he spoke to her. Her response was that the recommendations were made by the Provincial Panel.

[18] He testified that all the documents including the curricula vitae and score-sheets of the candidates were before the national panel. It was clear that Maswanganyi had superior operational experience when compared to the respondent but the bulk of the respondent's experience was in a support

environment. The national panel also considered the fact that there was a disparity in the scores; it looked like Bester, undeservedly, gave the respondent very high marks whilst she gave Maswanganyi low marks, even though he had more experience than the respondent. General Bester's scores were not consistent with the information contained in the CV's of the two candidates. The National Panel also considered a letter written by the respondent on 17 September 2007, approximately two years before this process. In the letter, she made representations not to be transferred from Johannesburg Central Support Service to Sophia town as Station Commissioner, which was an operational post. In the letter, she *inter alia* wrote the following:

'I would once again like to bring to your attention that I have no experience or training as a Station Commissioner or any exposure to Detective Service work. I do not have the passion for or the interest in such a position. I thus believe that given the challenges of and the needs of the Sophia town community, that will be unfair to post an inexperienced Station Commissioner who still has to learn the job and is unable to deliver on their needs, immediately. I also believe that this will set me up for failure and will certainly not be empowering to me in any way.

As much as I appreciate the fact that you believe that () is meant to empower me for my future growth and career in the SAPS. I would like to state that I have never in the past applied for promotional posts as a station commissioner and have no intention of doing so in the future.

My passion and interest, if I remain in the service, is Human Development specifically in a training environment, since I believe that it is an area that could impact positively on the SAPS as a whole. To this end I intend studying further in this field. I would be able to do training at my current or any other level and foresee (sic) this as my future career path, promotion or non promotion (sic).'

- [19] Based on the national panel's view that Maswanganyi had superior operational experience; that his appointment will enhance employment equity in the business unit and that they suspected that he was being deliberately

overlooked by the provincial panel, the provincial panel's recommendation was rejected. The national panel commented as follows:

'Recommendation not approved in respect of Director J Naidoo. The appointment not enhancing employment equity. The panel's recommendation not consistent with the service delivery objectives. The second candidate Director Maswanganyi's appointment to the post approved.' [20] It was common cause that the Provincial Panel had no power to appoint the respondent. They only recommend a candidate for appointment by the National Commissioner. In terms of National instruction 3 of 2000, the selection panel must indicate to what extent employment equity would be promoted by the implementation of its recommendation.³ Furthermore, that a candidate who, on average, obtained the highest score is not entitled to be appointed to the advertised post.

[22] The Labour Court found that Phahlane's explanation, with regard to the inherent requirements of the job precluding the respondent from being appointed, is an afterthought. It also found that her lack of experience was not mentioned by the National Commissioner as a reason for her non-appointment. The Labour Court correctly found that it was the assessment centre and the Provincial Panel that were charged with the duty to assess candidates. It however said the following:

'If the national panel was of the view that the scoring was not a fair reflection of the candidates that it ought to have requested a re-examination and by a differently constituted panel. It was not entitled to reject the scoring and substitute their own if indeed that is what they did.'

[23] The Labour Court pointed out that the National Instruction stated that the appointment procedure is based on the principle of open competition, competency, and objectivity of the fairness and is aimed at creating a workforce which is broadly representative of the South African population, in

³ Paragraph 11 (2) and (3) of the National Institution reads as follows:

- "2. The selection panel must indicate to what extent employment equity will be promoted by the implementation of its recommendation. If the appointment of the recommended candidate will not promote representivity in the component, division or province at the level of the advertised post, a full motivation must be submitted together with the recommendation.
3. A candidate who, on average, obtained the highest score in the assessment or was recommended for appointment, is not entitled to be appointed in the advertised post or any other post."

particular as far as race, gender and disability is concerned. The Labour Court then concluded that the national panel did not meet the competing candidates, did not afford them the opportunity to place information relevant and necessary before it and thereby compromised the values underlying the National Instruction. According to the Labour Court, at the very least, candidates ought to have been made aware that the results of the assessment were being nullified and their assessment was being conducted by the national panel and the process that would be followed.

- [24] The Labour Court criticised the national panel for taking the representations of the respondent into consideration when it made the appointment. It referred to paragraph 10(8) of the National Instruction which reads as follows:

‘Negative information regarding particular candidates may not be taken into account if the information has not been put to the candidate during the assessment and he or she was not afforded the opportunity to respond to such information.’

- [25] The Labour Court concluded that “the competing candidates had no meaningful opportunity to press their candidature on the national panel. As a result of the national panel nullifying the scoring of candidates done at the assessment centre and by the provincial panel, the taking into account irrelevant considerations, the absence of any process let alone one that was objective and fair caused the principle of open competition to be violated and as a result of such violation the Applicant (respondent) was made to suffer prejudice.”

- [26] The Labour Court found the national panel’s assertion that the provincial panel’s recommendation is inconsistent with service delivery objectives to be vague and nebulous.

- [27] The Labour Court reviewed the employment equity plan and concluded that it is inconsistent with the purpose of the Act and the Constitution of the Republic of South Africa 108 of 1996 (the Constitution).

[28] On this score, Mr Ngcukaitobi submitted that the court *a quo* erred in reviewing the equity plan because that was neither the respondent's request nor her case. He argued that the Labour Court was supposed to confine itself to the respondent's case which concerned the application of the plan in relation to her. He further submitted that the court *a quo* totally misconstrued the facts and the law relating to this matter.

[29] The Constitutional Court has delivered a judgment in a similar matter.⁴ The different views and nuances of the separate judgments in *Barnard* were comprehensively analysed by this Court in *Solidarity and Other v Department of Correctional Services and Others*.⁵ It is therefore unnecessary to repeat that exercise in this judgment.

[30] Section 9 of the Constitution reads as follows:

"9. Equality

1. Everyone is equal before the law and has the right to equal to 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.

⁴ *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

⁵ Unreported judgment by Waglay JP and Davis JA delivered on 10 April 2015.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

[31] The employment equity plan is a measure that was taken by the appellants to protect or advance persons or categories of persons who were disadvantaged by unfair discrimination. In *Minister of Finance v Frederick Jacobus Van Heerden*,⁶ it was said that:

‘When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it promotes the achievement of equality and it is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within s 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.’⁷

[32] Once a measure passes the above test, it is neither unfair nor presumed to be unfair.⁸ Although remedial measures may be taken to advance those who were disadvantaged by unfair discrimination, they must not invade the human dignity of those affected by them.⁹

[33] The Act seeks *inter alia* to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated group, in order to ensure their equitable representation in all occupational categories and levels in the workplace. In terms of section 6(2) of the Act, it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

⁶ 2004 (6) SA 121 (CC).

⁷ At para 37.

⁸ *Barnard* at para 33.

⁹ *Barnard* at para 38.

[34] Section 15 of the Act states:

'15 Affirmative action measures

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

(2) Affirmative action measures implemented by a designated employer must include-

- (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
- (d) subject to subsection (3), measures to-
 - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.'

[35] In terms of section 20(1) of the Act, a designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workplace. Section 20 (2) states:

- '(2) An employment equity plan prepared in terms of subsection (1) must state-
- (a) the objectives to be achieved for each year of the plan;
 - (b) the affirmative action measures to be implemented as required by section 15 (2);
 - (c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
 - (d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
 - (e) the duration of the plan, which may not be shorter than one year or longer than five years;
 - (f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
 - (g) the internal procedures to resolve any dispute about the implementation of the plan;
 - (h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
 - (i) any other prescribed matter.'

[36] In *Barnard*, it was said that:

'The next question beckoning is whether the manner in which a properly adopted restitution measure was applied may be challenged. The answer must be yes. There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.

As a bare minimum the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally.¹⁰

[37] The application of an employment equity plan must be in accordance with its prescripts. There must be a correlation between the abilities of the beneficiaries and the job they are required to perform. It must be applied to advance its legitimate purpose.

[38] I agree with Mr Ngcukaitobi that the validity of the employment equity plan and the National Instruction was not challenged by the respondent. The respondent's case was that she was unfairly discriminated against and that the employment equity plan was implemented incorrectly in her case. The court *a quo* was therefore wrong to review the employment equity plan under circumstances where the validity of the plan was not challenged and where there was no proper case made out for its review. In *Barnard*, Moseneke ACJ stated:

'With respect, that 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. This is because the employment equity plan was never impugned as unlawful and invalid. It was not open to the court to employ the *Harksen* analysis of unfair discrimination, which presumed the application of the Employment Equity Plan to be suspect

¹⁰ *Barnard* at paras 38 and 39.

and unfair. At stake before that court was never whether the employment equity plan was assailable, but whether the decision the national commissioner made under it was open to challenge.”¹¹

[39] It was not open to the court *a quo* to review the employment equity plan or the National Instruction.

[40] The Labour Court also erred in finding that Phahlane’s explanation that the inherent requirements of the job precluded the respondent from being appointed was an afterthought. It was common cause that when Phahlane called Bester he raised the concern that the post was essentially an operational one whereas the respondent had mainly support experience. The National Instruction is also clear on the issue of inherent requirements. Clause 8 thereof reads as follows:

- ‘1. The members of the selection panel must consider all the applications on the basis of:-
 - a. The inherent requirements and core functions of the advertised post;
 - b. The ability and potential of the applicant to function in the post;
 - c. The status of every applicant as provided for in the Employment Equity Act;
 - d. The representivity of the relevant division or province at the salary level that is applicable to the post.’

[41] The service delivery objective of the post must logically include the inherent requirements of the job. That was indeed one of the stated reasons why the respondent was not appointed.

[42] The court *a quo* seemingly lost sight of the fact that the provincial panel only made recommendations to the National Commissioner. The National Commissioner was however not bound by the recommendation. The National Instruction states the following in this regard:

¹¹ See para 51.

'The National Commissioner may approve the appointment of a candidate subject to the to the conditions set out in paragraph 13-

- a. After he or she has taken all the relevant information into consideration;:
- b. After he or she has consulted with all stakeholders, if he or she deems it necessary; and
- c. If he or she is satisfied that the candidate is in every respect suitable to fill the post.

If the National Commissioner does not approve the appointment of the recommended candidate, he or she may consult with the relevant deputy national commissioner, divisional commissioner or provincial commissioner or the selection panel if he or she deems it necessary, and either appoint another candidate of his or her choice from the recommended list submitted by the panel, or direct that the post be re-advertised.

The National Commissioner is under no obligation to fill a post.

The reasons for any decision taken by the National Commissioner must be recorded.¹²

[43] The national panel did not reject the scoring of the provincial panel. It decided to appoint the second candidate despite the fact that the respondent obtained a higher score, as it was entitled to do. There was no need for the national panel to refer the matter back to the provincial panel for a re-examination by it or a differently constituted panel, because it had all the information before it and it was in any event not bound by the recommendation.

[44] There was also no need for the national panel to interact with the candidates. There is no such requirement in the National Instruction. There was also no evidence that the results of the assessment centre were nullified. In fact, Phahlane testified expressly that they accepted the scores of the Provincial Panel but were sceptical of Bester's scores.

¹² See paragraph 12 (6) to 9 of the National Instruction. Paragraph 13 deals with the Employment Contract and the performance Agreement.

- [45] The Labour Court's criticism of the National Panel for taking the representations which the respondent made two years before this process into consideration is misplaced. The National Commissioner is enjoined to take all relevant information into consideration and he or she must be satisfied that the candidate is in every respect suitable to fill the post. The respondent had stated categorically albeit two years earlier that she had never applied for a post as a Station Commissioner (which is essentially an operational post) and had no intention of doing so in the future. That, in my judgment, is indeed a relevant factor to consider. Not only did the respondent say that she has no passion for the operational side of the job but she also said she would not apply for such a job in the future.
- [46] The court *a quo* totally misunderstood paragraph 10(8) of the National Instruction. That paragraph relates to the assessment centre and not to the National Commissioner. The National Commissioner may consider any relevant information.
- [47] The court *a quo*'s conclusion that the targets constitute an absolute barrier against the employment of Indian women by the SAPS is also, in my view wrong. The court *a quo* misconstrued the evidence. It conflated the absence of Indian females on level 14 in the SAPS employment profile with the fact that the ideal allocation for Indian females on level 14 in Gauteng Province, taking the resource allocation guide into consideration was zero. The equity plan did not proscribe the appointment of Indian females. What the court *a quo* misunderstood was the fact that had there been more posts on level 14 in Gauteng the formula might have yielded a different result that would have made provision for Indians or Indian females. It was common cause that two Indian females were appointed on level 14 in KwaZulu Natal because the requirements of the respective business units provided for such appointments. This also showed that the employment equity plan was not an absolute barrier against the employment of Indian females.
- [48] The court *a quo* found that the letter dated 26 March 2006, relating to the Cabinet resolution took precedence over the employment equity plan. It said the following:

'It is to be noted that this adoption of the Cabinet resolution and the instruction issued was regardless of the fact the Equity Plan of 1 January 2007 – 31 December 2010, stipulates a 70: 30 ration in the appointment of men and women. That Plan then was changed and unilaterally so and by means of fiat. In effect, SAPS amended the formula that is set out in the Equity Plan. In the circumstances, it is difficult to understand why in the case of the Applicant, here and now, SAPS insist on the use of a construct and criterion that was repudiated.'

- [49] The evidence makes clear that the equity plan was not amended by the letter or Cabinet's resolution. Colonel Ramathoka's testimony was to the effect that the Minister of the South African Police Service as the executing authority did not authorize the amendment of the equity plan and secondly that the plan was a measure that was approved in terms of the Act after extensive consultation. It may therefore not be amended unilaterally. The court *a quo's* finding that the plan was changed is therefore not correct. The plan was adopted for five years. It was not changed. In any event, the letter did not change but confirmed the 70/30 ratio. It was also demonstrated that the numerical targets even on a 50/50 ratio would not have provided for an Indian female to be appointed. The Cabinet resolution was properly incorporated in the subsequent plan.
- [50] General Bester's testified that the Provincial Panel's decision to appoint the respondent was based on the 50/50 resolution and not in terms of the equity plan. She further testified that the Provincial Panel did not have the equity plan before it when it made its recommendation. How the Provincial Panel came to the conclusion that the recommendation of the respondent would "address gender equity" is not clear. In terms of the National Instruction, the selection panel must indicate to what extent employment equity will be promoted by the implementation of the recommendation. I am not surprised that this was not done by the Provincial Panel because it could not be done without the employment equity plan or a proper understanding thereof which Bester by her own admission did not possess.

[51] The national panel came to the conclusion that the recommendation of the respondent, based on the equity plan would not enhance employment equity. This decision was neither arbitrary nor capricious. It was rational and reasonable based on the targets in the employment equity plan.

[52] It is not in dispute that Maswanganyi had more experience than the respondent. It was also not contested that his experience is predominantly in the operational sphere. The service delivery objectives of the post were predominately operational. The core functions of the Cluster Commander were set out in the advertisement for the post. They were:

‘Directly accountable to the relevant Provincial Commissioner, the candidate will ensure excellent service delivery through effective cluster management at provincial level to meet organizational responsibilities as required by the Constitution of the RSA, 1996 (Act no 108 of 1996), which includes ensuring visible policing services within a demarcated cluster, ensuring detective service investigations within a demarcated cluster, managing the Cluster Crime Combatting Forum manage a Cluster Support Services Forum, ensuring information (intelligence products) provided by Crime Intelligence (CIS) is managing operational, plans and other administration related functions ensuring major events/specific crimes are policed in co-ordination with other policing agency and role players, proper management and utilization of all resources allocated to the immediate post environment in accordance with relevant directives and legislation.’

[53] The respondent admitted two years earlier that she lacked the requisite passion, training, skill and inclination to function in an operational environment while Maswanganyi was engaged in the operational sphere for practically his entire career. It goes without saying that the appointment of Maswanganyi would be more consistent with the service delivery objectives of the SAPS because he would be able to function optimally in such an environment.

[54] In my view, the reasons given by the National Commissioner for appointing Maswanganyi are consistent with the lawful purpose of the equity plan, rational and reasonable and in accordance with the National Instruction.

[55] The respondent has since resigned from the SAPS. I am of the view that fairness and the law dictate that no costs order should be made.

[56] I therefore make the following order:

- a. The appeal succeeds with no order as to costs.
- b. The order of the court *a quo* is set aside and replaced with the following:
 - i. The claim is dismissed with no order as to costs.

C. J. Musi JA

Murphy *et* Kathree-Setiloane AJJA concur in the judgment of Musi JA

APPEARANCES:

FOR THE APPELLANT:

Adv T Ngcukaitobi and Adv N Muvangwa

Instructed by State Attorney

FOR THE FIRST RESPONDENT:

Adv Beaton SC with Adv Prinsloo

Instructed by Du Toit Attorneys