

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

CASENO: JS 970/2010

In the matter between:

SOLIDARITY obo M S LOUW

Applicant

AND

SA POLICE SERVICE

1st Respondent

THE MINISTER OF POLICE, N.O.

2nd Respondent

THE NATIONAL COMMISSIONER OF THE SAPS

3rd Respondent

K. NAIR

4th Respondent

JUDGMENT

Cawe AJ

Introduction

1]The present application, brought on behalf of **Mr M S Louw** by **SOLIDARITY**, emanates from the decision of the **South African Police Service** (hereafter referred to as the SAPS) to appoint **Ms Nair** (hereafter referred to as the Fourth Respondent). The Applicant seeks to have the Fourth Respondent's appointment set aside on the grounds of unfair discrimination.

2]The essence of the dispute between the parties is encapsulated in paragraphs

1 and 2 of the Applicant's main Heads of Argument. It reads as thus:

[1]The critical issue upon which this case turns is whether or not the Respondents' decision to prefer the Fourth Respondent to fill post 2650 and to reject the recommendation of the interview panel was in compliance with the provisions of the equity plan in force at the time.

[2]If the decision was not in compliance with the plan, it follows that the decision is bad and must be set aside.

3]The Applicant's Statement of Claim sets out the relief sought, in paragraph 7, as follows:

- 71 An order that the Respondent unfairly discriminated against the Applicant on the grounds of race and gender.
- 72 An order directing the Respondents to appoint the Applicant to position of Colonel in post 2650, or to any suitable vacant post of similar rank within the component, with retrospective effect to 1st March 2010
- 73 An order directing the Respondent to compensate the Applicant with an amount equivalent to the difference of the salary he has earned as from 1st of March 2010 and the salary he would have earned had he been promoted then.

ALTERNATIVELY

An order directing the Respondents to pay the applicant compensation in the amount that the Court deems fit to grant.

- 74 Directing the Respondent to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other white male applicants.
- 75 Publication of the Court's order in the event of the Applicant being successful.
- 76 Such further and/or alternative relief as the Honourable Court deems fit to grant.

The relevant facts

4]The facts upon which the Applicant relies in evidence are the following:

On the 4th of December 2009, post 2650, being the position of Senior Superintendent: Section Commander: Custody and Complaints Management: Community Services at the division Visible Policing together with various other positions were advertised and the Applicant duly applied for the position.

5]At the relevant time, the Applicant was employed as Lieutenant Colonel at the Visible Policing unit of the Crime Prevention component.

6]The Applicant is a white male who commenced employment at the SAPS on the 5th January 1978. He currently earns a gross salary of R24 718.25 per month.

7]The Applicant, together with six other candidates, was shortlisted and was interviewed on the 28th January 2010 by the interviewing panel consisting of the following members:

Chairperson: Assistant Commissioner Pienaar

Director Mkhwanazi

Director Van Staden

Director Le Roux

Director Mncadi

Secretary: Captain Venter.

8]The panel recommended three candidates, namely;

1. M S Louw (the Applicant) – a white male

2. Ms K. Nair – an Indian female
3. N Nkuna – an African male.

9]The recommendations were handed to the Divisional Commissioner for his recommendation in accordance with the Promotions Policy. After the recommendation, the National Commissioner sat with the panel to appoint a candidate they deem suitable for the post. The post applied for by the Applicant was a post Level 12 (Senior Superintendent).

10]The National panel decided not to appoint the Applicant. Instead the Fourth Respondent was appointed. The Applicant had scored the highest points of all the candidates at the interview.

11]On the 30th June 2010, the Applicant lodged a grievance with the SAPS regarding his non appointment. In his Particulars of Grievance, the Applicant sets out in detailed chronological order the posts that he had applied for and was not successful. He also highlights the fact that he had acted in many of those posts, including the instant one, without getting any permanent appointment.

12]Paragraph 2.10 of his grievance summarises the gist of his grievance and reads:

2.10. Taking all the above mentioned facts into consideration and by not being appointed in post number 2650, I am of the following opinion:

2.10.1. I was the best candidate for the post and should have been appointed.

2.10.2. In order to improve service delivery in the SAPS, I should have been appointed.

2.10.3. I was not treated rationally and fairly and the principals (sic) of fairness were not kept in mind with my appointment.

2.10.4. My constitutional right to equality was ignored.

2.10.5. I was grossly and undeservedly discriminated against.

2.10.6. No due consideration was given to my particular circumstances and I was thereby adversely affected.

2.10.7. Contrary to the letter and spirit of the Constitution of South Africa, no due regard was given to my right of dignity and in was not respected.

2.10.8. I was discriminated against on account of my race and gender, although my non-appointment was not in line with the current affirmative action policy.

2.10.9. Although the selection panel had taken my personal work history and circumstances into account and, therefore recommended my appointment, it was ignored during the final decision not to promote me. These factors should have been regarded as important factors.

13]An investigation was done and the outcome thereof was outlined on page 3 of the investigation report. It is summarised as follows:

14]During 2009, the grievant applied for promotional post, Phase 2-2009/2010, post number 2650: Custody and Complaints: Community Services, Division Visible Policing.

15]The grievant was short-listed by the selection panel and during the interview the selection panel recommended the grievant as the successful candidate for the post. However, the Divisional Commissioner, Visible Policing did not approve the selection panel's recommendation and promoted an Indian female instead.

16]Lt Col Booysen indicated that the SAPS's focus during the promotion process, Phase 2-2009/2010 was addressing representivity within female employees, and K. Nair was rated as the highest among the female applicants, hence she was promoted to the post.

17]In terms of paragraph 4(11)(iv) of the National Instruction 2/2008, selection of a candidate must be based on the representivity of the relevant Division or Province as the level that is applicable to the post in terms of the Employment Equity Plan of the relevant business unit.

18]In addition, paragraph 4(12)(b) further stipulates that the Divisional or Provincial Commissioner must, upon receipt of recommendations, satisfy himself or herself that the process took place in accordance with the National Instruction 2/2008 and the

includes paragraph 4(11)(iv).

19]It is also important for the aggrieved to not that in terms of paragraph 4(1)(c) of the National Instruction 2/2008, an employee who has been appointed in an acting capacity in a higher post neither has a right nor a legitimate expectation to be appointed in the relevant post.

CONCLUSION

20]The Division Visible Policing maintains its status quo with regards to the decision taken.

21]After he received the outcome of his grievance, the matter was reported to internal mediation. No consensus was reached at the end of the mediation. His main contention, as he testified during the present application, was that there were more Indian females appointed already and the Fourth Respondent's appointment was irregular.

22]The Applicant seeks to challenge his non-appointment as discrimination under the Employment Equity Act 55 of 1998 (hereafter referred to as the EEA).

23]The specific provision of the EEA that the Applicant wishes to invoke is Section 20 which provides (and was extensively set out by the Applicant):

- (1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce
- (2) An employment equity plan prepared in terms of subsection 1 must state:
 - (1)The objectives to be achieved for each year of the plan;
 - (2)the affirmative action measures to be implemented as required by section 15 (2);

- (3)Where underrepresentation of people from certain groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve these goals;
- (4)**The timetable for each year** of the plan for the achievement of goals and objectives other than numerical goals;
- (5)The duration of the plan, which may not be shorter than one year or longer than five years;
- (6)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;
- (7)The internal procedures to resolve any dispute about the interpretation or implementation of the plan;
- (8)The persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- (9)Any other prescribed matter.

- (3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of the person's-

- (1)Formal qualifications;
- (2)Prior learning
- (3)Relevant experience; or
- (4)Capacity to acquire, within a reasonable time, the ability to do the job.

- (4) When determining whether a person is suitably qualified for a job, an employer must-

- (1)Review all factors listed in subsection (3); and
- (2)Determine whether that person has the ability to do the job in terms of any one of, or any combination of

those factors

- (5) In making a determination under subsection (3), “an employer may not unfairly discriminate on a person solely on the grounds of lack of relevant experience.
- (6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.”

24]The Applicant concluded his submissions by contending that the SAPS, as a designated employer under the EEA, did not comply with its own equity plan. The target on representivity in relation to Indian females had already been achieved. On the other hand, the Respondent argued that the Applicant was not overlooked solely because of his race. The rationale for overlooking the Applicant was done in the process of the SAPS exercising its managerial prerogative in deciding which candidate to appoint. The mere fact that a candidate comes top at an interview does not guarantee automatic appointment to that position. The prerogative lies with the National Police Commissioner.

25]The Respondent submitted that at the time the decision was made, White males at Level 12 were over-represented by nine. The Equity Plan that applied between January 2010 and December 2014 required the SAPS to move towards a fifty (50) per cent representation of women at higher levels, such as level 12. The Fourth Respondent is a woman falling within this category. Respondent’s case is that the case is not about race but about gender.

26]Testifying for the Respondent, **Johannes Kgomo** (Divisional Commissioner: Personal Services at the relevant time) drew the Court’s

attention to the provisions of the National Instruction 2/2008 (Grade Progression and Promotion of Employees of the Service to post levels 2 to 12 and Bands A to MMS). The relevant paragraphs to which he referred are (c), (f) and (i) which read:

c)The *promotion* of employees to level 8 or Band C and higher levels or *bands* must be submitted to the National Commissioner for consideration with the recommendation of the Divisional or Provincial Commissioner concerned.

f)The National, Divisional or Provincial Commissioner may accept or reject the finding and recommendations of an evaluation panel. If the National, Divisional or Provincial Commissioner does not approve a recommendation of an evaluation panel, he or she must record the reason for his or her decision in writing.

i)If the National Commissioner does not approve the *promotion* of a recommended candidate, the National Commissioner must consult with the relevant Deputy National Commissioner, the Divisional or Provincial Commissioner, or the evaluation panel and either promote another candidate of his or her choice from the preference list submitted by the evaluation panel, or direct that the post be re-advertised.

27]He sat on the National Panel that decided to appoint the Fourth Respondent as opposed to the Applicant. He echoed what was held by the investigation team regarding an officer's acting in a particular post. This appears earlier in this judgment.

28]On the question of the fifty per cent goal by the First Respondent, Phahlane testified that it did not mean that men would never be appointed. It only took into consideration that there were more males already appointed and appointing the Applicant would have worsened the situation. There was already a seventy-one per cent male representivity as opposed to twenty-

nine per cent women. Moreover, there was only one Indian female on the relevant band. Phahlane also added that the Fourth Respondent was suited for the position as she had the right qualifications.

29] Answering questions, during cross examination, Phahlane pointed out that the panel did not consider what Sutherland termed “the absolute barrier” to white males as they were not considering Mr Louw as a candidate before them. The panel did not even have to consider the Applicant’s personal circumstances as he was not a party before them. They were only dealing with the Fourth Respondent’s application.

30] **General Lamoer**, testifying for the SAPS, pointed out that although the target Indian females was one (1) and had already been met there was the gender question to be considered. The Fourth Respondent is a female and was thus preferred to the Applicant.

Analysis

31] In his closing argument, the Applicant abandoned his earlier submission that the Respondent’s equity plan was invalid. Now all that the Court is called upon to decide is; first, whether or not the equity plan was complied with and whether the targets set in the plan had already been met; secondly, whether or not a holistic appreciation of the candidates was conducted and thirdly, whether or not what happened violated the Applicant’s dignity.

32] The claim by the Applicant that the equity plan of the employer was not complied with is based on what he perceives as discrimination against him based on his race and gender. To deal with his submissions in this regard, one has to put his case in the context of the EEA and the Constitution of the

Republic of South Africa Act 108 of 1996 (the Constitution). Both the Constitution and the EEA provide for the equity and non-discrimination in the workplace.

33]The EEA provides for suitably qualified people from designated groups to have equal employment opportunities and be equitably represented in all occupational categories and levels in the workplace of a designated employer (section 15).

34]The SAPS, as a state organ, is a designated employer. The EEA also makes it obligatory for designated employers to develop and implement equity plans. In the instant case, the Applicant seeks to argue that by appointing the Fourth Respondent as opposed to himself, the employer did not comply with its own equity plan as there was an over-representation of Indian females in the contested level.

35]The equity plan of the SAPS at the relevant time reflects that the male to female ratio at the level 12 salary band was 71.67 per cent to 28.33per cent. The ideal that the SAPS was striving for was 50 per cent to 50per cent.

36]According to the breakdown of the equity plan, Indian females were over-represented in this band. The question that has to be asked is what was considered in the appointment of the Fourth Respondent. Was it ethnic group, gender or race (taking into consideration that so called Indians are Black)? It is clear from the evidence of both Phahlane and Lamoer that the National Selection panel considered the gender of the Fourth Respondent in their appointment. Now one has to consider whether this went against the spirit of the SAPS's equity plan as alleged by the Applicant. Were the

actions of the National Panel discriminatory, unfair and based on his race and gender?

37]To answer this question, one has to look at the provisions of section a(3) of the Constitution which stipulates that:

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.

38]A cursory glance of the above provisions would lead one to believe that the Applicant was discriminated against on the basis of his race and gender.

39]The next consideration would be whether the discrimination against the Applicant was unfair or not. The relevant provisions of the Constitution in this regard is section (5) which reads:

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

40]The answer to this question lies in the demographics of the SAPS. In a scenario where the representivity of males is 71per cent as opposed to 28.8per cent females, it is inconceivable that yet another male had to be appointed to the position currently occupied by the Fourth Respondent. Here we are dealing with a White male who is pitted against a Black female (in the broader sense). When race is considered, Ms Nair, the Fourth Respondent, is a female despite her Indian ethnic group.

41]The Applicant's counsel did not address the Court on how it would be

equitable to appoint the Applicant to the position whereas White males at salary level 12 were already represented by 9. His argument centres on what he perceives as the Respondent's eagerness to reach the ideal 50 per cent representation of females, at the applicable salary level, at any cost.

42]The Fourth Respondent's appointment has to be subjected to the provisions the National Instruction 2/2008 (Grade Progression 2 to 12 Bands A to MMS). The relevant paragraphs in this regard are 8(b) and (h) which lay out what should be considered when dealing with the issue of equity in promotions.

8(b) provides:

b)"A chairperson of a panel must at all times ensure that the equity statistics of the relevant business unit are presented before the panel to ensure that employment equity is taken into account and supported. A panel must, in considering the applications for *promotion*, promote equal opportunities, fair treatment, employment equity and advance service delivery by the Service."

and

8(h) provides:

h)"The *promotion* of a candidate should add value to service delivery and panels must therefore ensure that recommended candidates display the necessary *competence* or potential and that they meet the *inherent requirement of the job*."

43]The actions of General Lamoer cannot be faulted when one considers the provisions of section 8(supra). The Fourth Respondent was deemed also suitable for the position. She was found to be adequately qualified and this met the inherent requirements of the job. She was only 1.3 points lower than the Applicant when they were scored. She is a Black woman. Her

appointment would not jeopardise service delivery in the SAPS.

44]The Applicant's counsel sought to rely on the case of **Solidarity on behalf of Barnard v SA Police Service (2010) 31 ILJ (LC)** to prove that the Applicant was sacrificed for the sake of addressing gender and race. The present case is distinguishable from Barnard's in that in the Barnard case no-one was appointed whereas in the instant case a competent and suitably qualified woman was appointed. It was not, as in the Barnard case, a matter of the Applicant not being appointed and the position left vacant.

45]One also has to ask two further questions regarding the appointment of the Fourth Respondent. The questions are: Firstly; did the appointment of the Fourth Respondent "fly in the face" of the service delivery imperatives of the SAPS? Secondly; Was the SAPS prejudiced in its mission of having a visible police force by the appointment of the Fourth Respondent? The answer to both questions has to be in the negative as a member of an under represented gender was appointed.

46]Another crucial point to consider is whether the appointment of the Fourth Respondent constituted a gallop towards the 50 per cent female representivity goal of the SAPS equity plan at the expense of the Applicant. The appointment of one Black (Indian) woman would not result in the scales being balanced between the sexes and races. White males are over-represented by 9. This cannot be said of Indian women. The demographics in the relevant category remain skewed in favour of White males even after the Fourth Respondent's appointment. Unlike the **Willemse v Patel & others [2007] 2 BLLR 164 (LC)** where the Court concluded that the acting director-general had failed to apply his mind, in the present case there were deliberations right up to the highest echelons of the SAPS regarding the

Fourth Respondent's appointment. In the Willemse case (supra) the court concluded that the employer had applied affirmative action in an arbitrary and unfair manner. In the present situation both the Applicant and the Fourth Respondent were evaluated holistically and a just and equitable decision was reached.

47]In his address to the Court, during his closing argument, Mr Sutherland refers to **Du Preez v Minister of Justice and Constitutional Development and others (2006) 27 ILJ 1811 (SECLD)** as the critical decision in regard to absolute barriers. One should not lose sight of the fact that in that case, the Applicant was much more experienced than his competitors. This distinguishes that case from the instant one as in the instant case the Fourth Respondent and the Applicant are both very experienced. Even the scores at the interview are very marginally apart.

48]The Applicant believes that his non appointment impaired his dignity because his personal circumstances were not dealt with and his application was not properly dealt with. His counsel actually argued that the Applicant was treated very shabbily. One understands the Applicant's non promotion for 15 years but this can hardly be categorised as undignified. He applied, was short listed but not appointed. All this points to the fact that his circumstances were considered. These include the fact that he is a White male who had applied for a level 12 position which happens to be saturated with White males. Equity is supposed to address the inequalities of the past. This is what happened in the present case.

49]I fail to understand how the Applicant's grievance was dealt with in a 'ritualistic' and insulting manner as suggested by Applicant's counsel in his closing arguments.

50]All relevant facts were considered including the Applicant's experience and qualifications. That is how, as I understand it, he was shortlisted and scored the highest points. He only lost because of the racial demographics at level 12.

Conclusion

51]I have considered the submissions of both counsels for the parties. I have perused the documentation of the parties and have found no bad faith in the actions of the Respondent herein.

52]I therefore am not persuaded that that decision not to appoint the Applicant, and to appoint the Fourth Respondent, was not made in accordance with the SAPS Equity plan. The SAPS selection panel diligently considered all the applicants who were short listed and came up with an equitable decision. The Application, therefore, stands to fail.

53]Both parties concede that costs should not follow the result. I agree with this approach in view of the continuing relationship between the parties.

54]In the circumstances, I make the following order.

1. The Application is dismissed.
2. There is no order as to costs.

Date of Hearing: 2011-06-02

2011-06-03

2011-07-06

Date of Judgment:

Appearances

For the applicant: Advocate Sutherland SC

Instructed by: Serfontein Viljoen & Swart Attorneys

For the respondent: Advocate Ngcukaitobi T

Instructed by: The State Attorney