

**Reportable**



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Case no: J 2450/12

In the matter between:

**SOLIDARITY**

**FirstApplicant**

**THEODORE REYNEKE**

**Second Applicant**

**SANET SCHONVELDT**

**Third Applicant**

and

**SOUTH AFRICAN NATIONAL BLOOD SERVICE**

**Respondent**

**Heard: 20 September 2012**

**Delivered: 25 September 2012**

**Summary: Application for urgent interdict preventing respondents from filling posts. Applicant unable to show that application urgent. Struck off roll for lack of urgency**

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**JUDGMENT**

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GUSH J

- 1] The applicants in this matter filed a notice of motion seeking relief in what is referred to as three parts: the first part of the notice of motion, Part A, is brought as a matter of urgency for interim relief “pending the final end and determination of the relief sought in part B alternatively Part C”. (sic). The notice of motion reads:

**PART A**

1. That the rules of this honourable court be dispensed with and that this matter be heard in this post is one of urgency:
2. Pending the final end and determination of the relief sought in part B alternatively part C interdicting and restraining the respondents from permanently filling any of the positions vacated and in the space creation strategy; and/or affecting the promotion of any applicant to those positions and/or taking any further steps aims at permanently filling the positions, including, but not limited to constituting an interview panel, conducting interviews, selecting recommended candidates for appointment and/or recommending candidates for employment in the position.
3. Authorising-
  1. The applicant amplified his papers in order to secure final relief;
  2. The respondent to apply, on notice to the applicants for the variation or placement of this interdict in the event of good cause being shown.
4. Costs in the event of opposition.
5. Alternative relief.”

**PART B**

**TAKE NOTICE FURTHER THAT** if the applicants are unable to resolve this matter to their satisfaction by means of processes contemplated by the employment equity act 55 of 1996, they intend to make application on the date and at a time to be determined by this honourable court

ought to be arranged by with the registrar for an order-

- 1 interdicting the respondents from excluding any applicant for a position on it starts early on the basis of his or her race;
- 2 costs of suit;
- 3 alternative relief;

### **PART C**

**TAKE FURTHER NOTICE THAT**, the applicant intends filing an application for declaratory order within 15 days of the date of hearing of this application, which will be brought on a semi-urgent basis and in which application the applicant will seek the following relief:

- 1 Declaring the advertisements (recruitment/interviewing processes) dated 24 August 2012, and or any similar advertisement, which excludes any person solely on the basis of his or her race to be invalid and not in accordance to the employment equity act and the constitution.
- 2 That the respondents are ordered to withdraw the advertisements as set out above and all persons irrespective of their race to apply.
- 3 Costs of suit;
- 4 Alternative relief;" (sic)
- 5 Given the specific relief sought in parts B and C it is difficult to fathom exactly what course of action the applicants intend following should they succeed in obtaining the order envisaged by part A viz interim relief pending "the final end and determination of the relief sought in part B

alternatively part C”.

- 6 The interim relief that the applicants seek is an order “interdicting and restraining the respondent from permanently filling any of the positions vacated under the space creation strategy; and/or effecting the promotion of any of the applicants to those positions and/or taking further steps aimed at permanently filling the positions, including, but not limited to constituting an interview panel, conducting interviews, selecting recommended candidates for appointment and/or recommending candidates for employment in the position” (sic)
- 7 First applicant is a registered trade union and the second and third applicants are employees of the respondent and members of the first applicant. The first applicant in bringing this application purports to act in its own interest; on behalf the second and third applicants; in the interests of its members generally "who, as employees of the respondent, have suffered actual or potential prejudice the consequence of the employment practices currently being pursued by the respondent"; and in the public interest.
- 8 The background to this application is that on 23rd July 2012 the respondent issued a “communication” to all staff advising them that the respondent’s board had decided to implement its "Employment Equity (EE) Space Creation Project".The communication records that "EE Space Creation is defined in the EE strategy and plan ... mak[ing] it attractive and possible for white

employees aged 55 years or older in executive, senior and middle management levels to leave the organisation to create opportunities for black managers to assume their roles.”

9 The communication continues to state that "the purpose of implementing the Space Creation at Executive Senior and Middle Management levels is based on the need to make progress of these critical levels towards the achievement of our transformation targets and goals and to acquire and retain that talented these critical levels in SANBS”

10 On 20<sup>th</sup> August 2012 a further communication was issued by the respondent listing those employees who had elected to take retirement and detailing the posts that they held. The communication further notified all staff that a recruitment process in respect of these posts was to commence.

11 The applicants attached to their replying affidavits an affidavit by a representative of the trade union HOSPERSA, Mr. Pierru Marx, who states therein that “we” received on 23 July 2012 the document entitled "Employment Equity/Space Creation Strategy” and on 20 August 2012 received the further communication. Mr Marx states categorically that during the roadshow which took place on 21 August 2012 the respondent made it clear “that no whites would be considered for any of these positions”. It is clear from this affidavit that HOSPERSA was aware of the respondent’s intentions on 21 August 2012 before the advertisements for the posts were published.

12 On 24 August 2012 the respondent advertised,

internally, the positions detailed in the communication of 20 August 2012 which advertisements included the following note: "This is an Affirmative Action vacancy and only AA candidates (African, Indian, Coloured and Chinese) should apply". The closing date for these advertisements was 31 August 2012.

13 The applicants' founding affidavit is deposed to by a Mr. Dirk Groenewald on behalf of the first applicant. The second and third applicants merely filed confirmatory affidavits. Groenewald in his affidavit does not suggest that any of the applicants were unaware of the contents of the two communications dated 23 July 2012 and 20 August 2012. Neither does Groenewald suggest that the applicants had not attended the roadshows or that they did not understand what the respondent had according to Marx apparently made clear at the roadshow viz "that no whites would be considered for any of these positions".

14 Marx's affidavit is in direct contrast with paragraph 15 of Groenewald's affidavit where he states "the communiqué was followed up by a roadshow in which some effort was made to explain the contours of the strategy. The [respondent] was careful, however, to give no detail on the numerical goals and targets it envisaged"

15 Neither the second nor the third applicant applied for any of the posts that were advertised nor is it alleged that they were disturbed by what they had been told by the respondent at the roadshow.

16 There can be no doubt that in the absence of any

explanation by the second and third applicants why they did not apply for any of the post when they were advertised, or at least register their concern at the time the respondent made it clear that it intended filling these posts with black candidates, the second and third applicants clearly did not seriously consider themselves candidates for the positions advertised by the respondent pursuant to its space creation strategy or for that matter application of the strategy to be discriminatory unfair and unlawful. Had they done their disquiet would have manifested itself at the time the announcements were made and the advertisements published.

17 In such circumstances the application may well have been urgent.

18 Groenewald offers no explanation why the first applicant who expressly acts in this matter “in its own interests, the interests of the second and third applicants; and **its members generally as employees of the respondent...**”(my emphasis), (unlike HOSPERSA), were unaware of the fact, as is stated by Marx, that the respondent had made it clear during the roadshow that no whites would be considered for any of these positions and why they waited until 13 September to file this application. The second and third applicants likewise offered no explanation.

19 It is common cause however that none of the applicants reacted to either of the communications nor did they react to the respondent's clear message delivered at the roadshow that the their

intention was at all times to fill the vacated posts with black candidates.

20 Groenewald explains that, seemingly in an attempt to justify the applicants' failure to respond timeously to the application of the "Employment Equity/Space Creation Strategy" and to justify urgency, only some six and seven days respectively after the closure of the applications for the vacant posts the second and third applicants suddenly decided that the process was discriminatory unfair and unlawful and that they were eminently qualified for positions that had been advertised.

21 With the dawning of this realisation, Groenewald explains, the second and third applicants invoked the help of the first applicant. The first applicant insisted in lodging grievances on behalf of the second and third applicants and demanded the withdrawal of the advertisements.

22 On or about 11 September 2012 the respondent dismissed the second and third applicants' grievances and in essence refused to withdraw the advertisements.

23 The applicants then proceeded to file this application.

24 The first and most important consideration is whether or not the applicants' application is urgent. It is not necessary to determine at this stage whether the applicants have established the right they seek to have "vindicated" or whether the balance of convenience favours them. As far as an

alternative remedy is concerned the applicants papers certainly do not establish the absence of alternative remedy,

25 Apart from opposing the application on the grounds that it was not urgent the respondent in its founding affidavit, almost hysterically, raises a vast number of technical issues including for example, disputing the first applicant's status as a registered trade union.

26 In similar vein, and equally unnecessarily, the respondent sought, in an ill-conceived application filed when the matter was called, to strike out certain affidavits and allegations in the applicants applying affidavits including surprisingly the affidavit of Marx. The respondent would have been better advised to have concentrated on the merits or demerits of the applicants' application as opposed to its unnecessary reliance on technical issues and spurious "application to strike out".

27 In so far as it is necessary the respondent's application to strike out is dismissed.

28 Mr Mooki who appeared for the respondents argued, correctly, that the staff to whom the communications addressed could have been under no misapprehension as to the purpose of the space creation exercise and implementation of the space creation strategy. Even if in the unlikely event that they had been in doubt after the issue of the first communication in July, they were on the strength of the applicants own papers it was made abundantly clear at the roadshow on the 21 August

2012 that the respondent's intention was to fill the vacant posts with black candidates.

29 Likewise, when the internal advertisements were published on 24 August 2012 the note at the foot of the advertisement served only to confirm what had been made clear at the roadshow.

30 The applicants offer no explanation for their inaction and lack of response to the communications, announcements and explanation of how the application of the policy was being implemented, other than a suggestion that they did not understand the communications; and therefore for the delay in bringing this application. Any urgency that existed would, at best for the applicants, have existed at the time of the roadshow and the publication of the advertisements.

31 In the circumstances I am not satisfied that the applicants have established that the application is urgent. In the circumstances I make the following order

- a. the application is struck off the roll for want of urgency;
- b. the applicants are ordered to pay the respondent's costs the one to pay the others to be absolved

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D H Gush

Judge

APPEARANCES

APPLICANTS: MSM Brassey SC assisted by MJ Engelbrecht  
Instructed by Serfontein Viljoen and Swart

RESPONDENT: O MOOKI  
Instructed by Cowan Harper Attorneys