



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

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

Case no: J 4180/01

In the matter between:

STONE, JAN EDMUND

Applicant

and

SOUTH AFRICAN POLICE SERVICE

Respondent

Date of trial: 13-15 July 2011

Judgment: 22 October 2012

Summary: (Unfair discrimination claim-promotion-employment equity plan adopted but not approved by Department of Labour – application of plan – final selection phase not shown to be fair – no proof that applicant suffered prejudice as a result of final selection phase – cause of non-appointment not proven to be on account of unfair racial bias)

JUDGMENT

LAGRANGE, J

Introduction

- [1] When this dispute arose in 2000, the applicant in this matter was a Captain who had initially been employed by the South African Police Services in 1984 and subsequently rejoined the service in 1990. Throughout his career he had worked at various Local Criminal Record Centres, and amongst other things had attended a number of forensic evidence training programs. In March 2000 he applied for a number of available posts. Had he been successful he would have been promoted from Captain to a Superintendent in the new position. The post in contention in this dispute was post 384 which was a Superintendent's position in the Local Criminal Record Centre, Pretoria Central.

The equity weighted two stage selection process

- [2] The promotion selection process was conducted in two stages without interviews being conducted. Firstly, the candidates were evaluated by an area evaluation panel. The area panel's assessment was then forwarded to a provincial panel, which then shortlisted candidates in terms of national directives issued by the National Commissioner.
- [3] During the first stage, a detailed 20 page report was drawn up on certain pertinent attributes of the applicant and a rating was attached to them. The attributes evaluated were the candidate's responsibility, knowledge and insight, human relations, management capability and productivity. The area panel rated the applicant very highly in respect of all these individual qualities and he achieved a score of 42 out of a potential 45. This rating identified him as a Class 1 officer.
- [4] At the provincial level, the second stage, the assessment of the applicant's suitability for the post was done in terms of prescribed criteria for which certain maximum points were allocated, namely:
- 4.1 the training skills, competence and knowledge necessary to meet the inherent requirements of the post (9 points);

- 4.2 posts occupied by the candidates, including his/her present post and station (9 points);
- 4.3 representivity (9 points);
- 4.4 the needs of the S A P S in terms of the strategic objectives and operational plan (9 points);
- 4.5 the particular circumstances of the candidate (9 points), and
- 4.6 acting in a higher post by the candidate and the period (10 points).

[5] In terms of circular 8/1/1 of 11 November 1999 headed 'Promotion: Members of the South African Police Service', it was stated that among other things:

- 5.1 promotions were subject to the availability of funds and where applicable the existence of vacancies;
- 5.2 the "transformation quotas for each rank" would be "strictly complied with";
- 5.3 the criteria and process to be followed for appointments regarding post promotions still had to be agreed on with employee organisations, which would be the subject matter of a later circular.

[6] A subsequent circular entitled 'Post Promotions: Members of the South African police service: Inspector to Captain and Captain to Superintendent and Equivalent Occupational Ranks' was issued on 23 December 1999. It announced, amongst other things, that posts had been set aside for the promotion of members who qualified. Vacancies were to be announced internally on computer and members were entitled to indicate their preference for up to 3 posts. They would not be interviewed for appointment but would be "identified for posts on the basis of their evaluation reports". Applicants who achieved the highest ratings during evaluation would "not necessarily be appointed and promoted in posts." The task of evaluation panels was to determine which candidates were suitable for promotion. Only those found suitable for promotion would be considered for the filling of posts. The provincial panels were required to make a recommendation "for the placement of a candidate in the post and motivate the recommendation. It further stated that "attention will also be

paid to representivity” in considering members for placement in advertised posts. Guidelines on this were to be provided at a later stage, after consultation with the recognised employee organisations. The provincial Commissioner was responsible for referring the particulars of "each successful candidate and the post for which he/she is recommended" to the National Commissioner for consideration. The recommendations would then be considered by a panel at head office which would make a recommendation to the National Commissioner for a decision. It was this circular which also identified the selection criteria cited in paragraph [4] above, which the provincial evaluation panel applied.

- [7] In the provincial panel assessment the applicant fared less well than he had at the area level, obtaining 44 points out of a potential 55. This gave him an aggregate points score of 86. No record was available to explain how points were allocated in terms of each of the above-mentioned criteria. The successful candidate Hara obtained an area level rating of only 28 which identified him as a class 3 officer but at the provincial level he obtained 52 points, giving him an aggregate rating of 80 points. However, as a result of a grossly negligent calculation error, Hara was wrongly credited with a score of 90 points, which placed him as the second highest rated candidate of the five shortlisted candidates.
- [8] Even with that erroneously inflated score, Captain Venter, a white female, obtained a higher aggregate score of 91. On the face of the aggregate points awarded, Venter ought to have been appointed, given that the second phase of assessment included a weighting of the assessment based on the race and sex of the candidate, and accordingly the final score ought to have represented an assessment which had already taken account of affirmative action objectives. We know from the provincial assessment criteria that representivity could account for 9 of the 55 points, meaning that up to 16% of the assessment score was based on race and sex.
- [9] As it happened, the applicant was not the only unsuccessful candidate who was unhappy with the process. Both Venter and a Captain Beukes also challenged their non-appointments to the post as unfair labour

practices. Their awards were referred to in the course of the evidence, but for the purposes of this matter, only Venter's award is of interest. In the case of Venter, she challenged the procedural irregularities of the process. It appears from the award that despite being rated most highly her name was removed from the short list of candidates because of a directive received from Head office during the process to the effect that the racial representivity after the first selection process did not achieve a high enough level, and needed to be improved. The award records the initial racial representivity level of recommended candidates to have been 59%, which then rose 70% after candidates like Venter were removed from the running. Although the award does not specifically mention the designated categories referred to under the term 'representivity' it appears to have concerned the ratio of black to white recommended candidates, where 'black' candidates included black, Indian and coloured candidates. This would be in accordance with other policy documents presented in the matter before me.

[10] Thus, apart from a built-in weighting for affirmative action purposes, which allowed individual candidates to be compared with each other, it appears that the employer had adopted the view that every round of appointments had to reflect the ratios it was striving for, irrespective of the outcome of the weighted assessment process. One consequence of this approach meant that an individual candidate's chances of appointment would not depend solely on an already weighted assessment process of the suitable candidates, but would be subject to an override having the result that otherwise successful candidates in the assessment process could be removed from contention until the desired racial ratio was achieved. As a result, if the outcome of the two stage assessment process resulted in recommended appointments of say 4 white candidates and 6 black candidates, one of the white candidates could be substituted with a previously unsuccessful black candidate to achieve the desired white:black ratio of 30:70.

[11] In this matter, there was no record provided of the provincial assessment phase even though records should have been kept. However the parties agreed in the pre-trial minute that no prejudice resulted from this. The

respondent also did not provide any clarity on what determined the applicant's exclusion from consideration *after* the provincial assessment phase was completed. A possible explanation lies in one of the justifications offered by the respondent, namely that the points allocated by the provincial panel rather than the aggregate points awarded to an individual determined the preferred candidate. The only alternative explanation is that because both he and Venter obtained a higher rating at the end of the weighted individual assessment process, the decision to prefer Hara over Venter and the applicant must have been a result of a subsequent process. At this juncture it must be noted that if the selection had been made on the basis of the equity weighted two stage process, based on the aggregate points scored, Venter and not the applicant would have been the successful candidate.

- [12] The applicant lodged a grievance following the appointment of Hara. What the applicant found offensive about Hara's appointment was that he believed Hara was a much inferior candidate to himself when his experience and qualifications were taken into account and felt that he had been unfairly discriminated against on grounds of race. Under cross-examination he modified these views somewhat. In response to his grievance, he was advised that the SAPS was required to address representivity in terms of its Employment Equity Plan ('the EEP') EEP and that Hara was appointed to post 384 in view of the fact that he was the better candidate who obtained higher points than the applicant. Before evaluating the merits of the applicant's case, the respondent's EEP needs to be outlined .

SAPS Employment Equity Plan

- [13] Although it was an issue of much dispute, it was in fact conceded by SAPS, that its EEP had not been approved by the Department of Labour at the time the round of appointments took place, in which the applicant participated. The adopted EEP was submitted to the Department on 1 June 2000 for approval. Nonetheless, SAPS argued that it did not have to have an approved plan in order to defend its failure to appoint the applicant on affirmative action grounds. This will be addressed later. For

present purposes the relevant features of the plan for this case are outlined below.

[14] SAPS EEP was adopted pursuant to a very broadly stated resolution 1 of 1998. The EEP was intended to apply for four years starting on 1 June 2000. The aim of the plan was “to implement affirmative action measures to ensure that suitably qualified persons from designated groups are equally represented in all occupational categories and levels of the workforce”. It also stated that: “Whereas the focus of employment equity is on black people, women and persons with disabilities, no employment policy or practice will be established as an absolute barrier to prospective or continued employment or advancement for persons not from designated groups.”

[15] In terms of the EEP, certain targets were set. In 2000 the identified target ratio designated:non-designated members were 50:50 at management level and 60:40 at other levels. Importantly, the plan also specified that “recruitment at all levels for the duration of the plan” would be:

15.1 male (70 %) , female (30%), and

15.2 non-designated group (30%), designated group (70%).

[16] Provision was also made in the plan for the development of an employment equity plan for each of 20 divisional and provincial so called ‘business units’. There was no evidence presented to suggest that this was in fact done and the targets referred to in the circulars and in the minutes of the National panel all seemed to be nationally determined targets.

[17] Somewhat confusingly, a directive issued on 3 March 2000 stated that:

“3.3....In order to promote representivity, the following guidelines are laid down which have to be achieved as far as possible taking into consideration the composition of Province/Divisions at present.

3.3.1 50%/50% in terms of gender

3.3.2 70%/30% in terms of race”

- [18] These figures were reiterated as the desired targets when the National evaluation panel convened under the auspices of the National Commissioner's office to scrutinise the recommendations from Divisions and Provinces, but in the subsequent deliberations the panel decided:

"... That the panel will strive towards the following ratios to enhance representivity:

100% - 70% males

30% females

70% Blacks (Africans, Indians, Coloured)

- 70% males

- 30% females

30% whites

- 70% males

- 30% females"

- [19] After the provincial assessments had been submitted, the view from the office of the Divisional Commissioner was that representivity of members of designated groups could still be improved. In a letter to the Provincial Commissioner of Gauteng, the Divisional Commissioner mentioned that in respect of the 341 posts advertised only 247 out of 626 candidates from designated groups were recommended. In improving the figure, the Commissioner directed that the numerical goals as set out in the EEP had to be used 'as a guideline'. If the number of advertised posts mentioned in the letter is considered, then 72,4 % of those posts would have been filled by candidates for designated groups. Why this was considered unsatisfactory given the targets identified in the EEP, is unclear.

- [20] Nonetheless, what is clear is that when the National panel came to consider the recommendations for promotions in Gauteng at its meeting on 12 and 13 July 2000, it reached the following conclusion: "The Panel is not satisfied with the movement in addressing representivity. The recommendations are referred back with the emphasis on black males."

- [21] Neither the applicant nor the respondent's witness, Mr P J Ramathoka, provided any insight into what took place when the recommendations were referred back to the provincial panel for reconsideration in the light of the National Panel's direction. The only document shedding any light on what should have happened is a circular issued on 7 July 2000 in which the National Panel's unhappiness with representivity is reiterated and the divisional and Provincial panels were directed to strive to achieve the goals set out in the EEP.
- [22] Other than referring to targets, no guidance was given as to how these panels were to go about substituting candidates from designated groups for recommended candidates from nondesignated groups. The only guidance provided in the circular concerned the type of motivation that had to be given in cases where greater representivity could *not* be achieved. In those cases, the panel was asked to provide explicit reasons why candidates from designated groups had not been recommended.
- [23] By the time the National panel reconvened on 10 and 11 August 2000, it was satisfied that the desired improvements, at least in respect of racial representivity, had been achieved. The summary record of the discussion on the position in Gauteng read: "Assistant Commissioner Prinsloo indicates that there was a major shift with regards to the race composition. The gender issue is however still to be addressed. It is accepted."

Evaluation

- [24] The applicant's complaint is that he was unfairly discriminated against on grounds of race when Hara was appointed because he was the better candidate objectively speaking and Hara was only appointed because of his race.
- [25] The respondent's defence was that it did not act arbitrarily when selecting candidates. The rationale for its choice of Hara as opposed to the applicant has a number of strands. Firstly, it said that it was operating in terms of an approved employment equity plan adopted pursuant to resolution 1 of 1998 and consequently any racial bias was justified in terms of that plan. In this sense its defence was not very different from that

advanced by the employer in the case of ***Gordon v Department of Health: Kwazulu-Natal (2008) 29 ILJ 2535 (SCA)***.¹ Secondly, it argued that since Hara obtained the highest marks of all candidates at the provincial level he was in fact the preferred candidate. Lastly, the respondent contends that, in any event, achieving the highest ratings during evaluation was no guarantee of appointment because the ultimate decision was made by the National Commissioner and not by the evaluation panel. Each of these justifications are considered below.

Hara's points ranking

[26] The respondent effectively conceded that there was an arithmetic error in the calculation of Hara's aggregate points. Clearly once the error is eliminated Hara had an aggregate of 80 points compared with the applicant's 86 points. When the respondent originally justified Hara's appointment, it partly explained it by way of saying that Hara was the better candidate of the two because he had obtained higher points.

[27] At the trial it was argued that only the points allocation made by the provincial evaluation panel carried any weight, but no evidence was led in support of this contention. The form on which the respective scores of the regional and provincial evaluation panels were recorded and totalled, suggests that it is more probable that the aggregate score was the one that was considered relevant. It seems most likely on the evidence that when the respondent said that Hara was the better candidate, it was relying on the erroneous score.

[28] That erroneous score was not the result of any racial bias in the scoring process, but rather the result of gross negligence on the part of the person completing the form. That might have given rise to a separate complaint under the unfair labour practice regime.

¹ At 2541-2,[7] the Mlambo, JA, as he then was, characterised the case thus: "*The CCMA had ruled that the Department of Justice had committed an unfair labour practice by not appointing the appellants and instead appointing employees who were alleged to have been far less experienced.*"

The Department of Justice had justified its appointment of the successful appointees on the basis that it was advancing representativity in the department. That is the stance of the respondent in this case."

Employment equity plan justification

- [29] However, even when the respondent cited Hara's points as a reason for appointing him, it was also clearly of the view that affirmative action considerations were relevant to the choice of Hara as the successful candidate rather than any of the others who were shortlisted. At the trial it sought to justify the selection of Hara on the basis that it was not necessary that he be the best candidate but only that he was suitable. Ramathoka referred in this regard to s 15(2)(d)(i) of the EEA, which lists as one of the requirements of affirmative action measures implemented by designated employer that they should include measures "to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce" (emphasis added). Under cross-examination, the applicant conceded that Hara would qualify as a suitable candidate for the post, though clearly not the best in his view.
- [30] However, the applicant complained that the respondent never explained the weighting attached to race in the evaluation process and in any event argued that the respondent could not rely on its employment equity plan as it had not yet been approved by the Department of Labour at the time it was applied to his application for promotion in 2000.
- [31] Regarding the second issue, in *Gordon's* case, the provincial health department had no plan or policy of affirmative action, and the successful candidate was appointed simply on the basis that his appointment would promote representivity. The SCA held that his appointment could not constitute a policy or practice "*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*", which was a precondition for defending an appointment on the basis of race prior to the EEA.² But nowhere in the SCA decision did the court say that only an employment equity plan which had been approved by the Department of Labour in terms of the EEA could provide a defence to an unfair discrimination claim.

² At 2551-2,[22]

Moreover, the current wording of the EEA does not suggest this is a pre-requisite. Section 6(2) of the EEA reads:

“(2) It is not unfair discrimination to-

- (a) take affirmative action measures consistent with the purpose of this Act; or*
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*

[32] The purpose of the EEA set out in section 2 reads:

The purpose of this Act is to achieve equity in the workplace by-

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and*
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”*

[33] Nowhere in these provisions is it suggested that only affirmative action measures approved by the Department of Labour in terms of the EEA could provide a defence to an unfair discrimination claim.

[34] On the first issue, Ramathoka could provide no clarity on whether Hara had been credited with nine points for representivity at the provincial evaluation stage. However, I do not think that it would have taken the matter any further if he could have confirmed the precise number of points awarded to Hara under this criterion for the following reason. Assuming that Hara had been awarded the maximum number of points for representivity, the fact of the matter is he obtained a lower aggregate number of points than the applicant did. It follows therefore that the preference he was afforded over the applicant and Venter could not have

been a result of the allocation of representivity points at the provincial evaluation stage. Equally, it follows that if Hara was given preference on the basis of affirmative action criteria, it could only have occurred when the National panel directed the provincial panel to increase the representivity of designated groups among the recommended candidates for promotion.

[35] As mentioned above, it is unclear how the provincial panel decided which non-designated recommended candidates should yield to designated candidates who had not been recommended, but who were nonetheless suitably qualified for promotion. The respondent ought to have explained how that process was done fairly.³ In the absence of any evidence that the process of eliminating recommended candidates from the non-designated group and substituting them with suitable candidates from the designated group was a fair process, it is not unreasonable to conclude that the method of substituting nondesignated recommended candidates with designated candidates who had not been recommended might have been arbitrary. It is the respondent to bore the onus for proving that it was fair.

[36] If the only candidates under consideration were the applicant and Hara, it would then it would not have been unreasonable to conclude that the respondent had failed to demonstrate that the applicant was not unfairly prejudiced by the re-evaluation of the provincial panel's recommendations with a view to ensuring greater representivity. In that case, it might be possible to conclude that the employer had failed to demonstrate that the applicant had been fairly passed over in favour of Hara at the final stage.

[37] But the factual situation confronting the court is more complicated. We know from the points obtained by Venter, Hara and the applicant following the original eprovincial panel evaluation that Venter ought to have been

³ Thus, in ***Solidarity obo Barnard v SA Police Service*, (2010) 31 ILJ 742 (LC)** Pretorius AJ said, at 755,[25]:

"25.1 The provisions of the Employment Equity Act and an employment equity plan must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality. It is therefore not appropriate to apply, without more, the numerical goals set out in an employment equity plan. That approach is too rigid. Due consideration must be given to the particular circumstances of individuals potentially adversely affected. In this regard the need for representativity must be weighed up against the affected individual's rights to equality and a fair decision made."

the preferred candidate. Even if the respondent has failed to establish that at the final selection stage it acted fairly in terms of the EEP, it does not follow that if it were not for that, the applicant would have been appointed, since the first contender for the post would have been Venter.

[38] It is true, that it was part of the applicant's case that the mere allocation of any points for representivity was in and of itself unfairly discriminatory. So, when it was put to him that Venter was the more deserving candidate than himself, his response was that since she had also been given an unknown number of points under the criterion of representivity on account of her sex, he would have had a similar complaint if she had been appointed rather than him. I cannot see that an affirmative action program which allocates a number of points for representivity to candidates as part of the overall evaluation to arrive at a recommended candidate must be *per se* unfair. Provided the points are allocated consistently, and do not have the effect of barring persons from non-designated groups from consideration, it has the advantage of allowing suitable candidates to be compared against one another taking uniform account of equity considerations.

[39] It is so that the respondent did not provide a breakdown of how the nine points attributable to representivity were allocated at the second stage of the evaluation process. Its failure to do so, might well have provided some ground for the applicant to complain that there was no evidence to support a claim that, equity considerations were fairly applied. However, as stated above, it is clear that the outcome of the second stage evaluation did not determine why the applicant was not selected, unless one accepts that the outcome was determined solely on the basis of the erroneous score attributed to Hara, in which case unfair discrimination does not arise as the cause for his complaint.

[40] If the allocation of points did not determine Hara's selection, and even though the respondent did not prove that it acted fairly in terms of the EEP when it decided to appoint Hara, it does not follow that the applicant was unfairly discriminated against because it cannot be said that he was prejudiced in the sense that he most probably would have been appointed in the absence of such action by the respondent. In the circumstances, I

am not satisfied that the applicant has demonstrated a causal link between the respondent's failure to prove it acted fairly under the EEP at the final selection stage, and his non-promotion to post 384.

Discretion of the National Commissioner

[41] The gravamen of this case relates to whether or not the respondent was entitled to rely on its EEP and whether the applicant was unfairly discriminated against when he was not appointed as a result of a racial preference being applied. The role played by the National Commissioner in making a final decision is intimately and inextricably bound up with the direction made by the National panel and its endorsement of the re-evaluation made by the provincial panel. No other evidence was led on the distinct role played by the National Commissioner. It must be assumed he simply endorsed the final recommendations made. His decision also stands to be justified with reference to the affirmative action measures adopted by SAPS. Accordingly, this point bears no further separate consideration since it has been addressed in the discussion of the final recommendations adopted by the National panel.

[42] In conclusion, I am satisfied that even though race played a significant part in the appointment of Hara to the post, the applicant has not established that this resulted in unfair discrimination against him.

Order

[43] The failure of the respondent in 2000 to promote the applicant to post 384 at the rank of Superintendent, and its appointment of Captain S J Hara to the post instead, cannot be ascribed to unfair discrimination against the applicant on account of race⁴ in terms of s 6 of the Employment Equity Act, 55 of 1998. Accordingly, the applicant's claim that he was unfairly discriminated against when Captain Hara was appointed to the said post is dismissed.

[44] No order is made as to costs.

⁴ The original order read in court erroneously referred to "race or sex" and is varied accordingly.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Mr. H GERBER instructed by Mitchell & Kruger Attorneys

RESPONDENT: Mr. RM ARENDSE SC and Mr. Kgomotso Ramalefe instructed
by the State Attorney, Johannesburg