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IN THE LABOUR COURT OF SOUTH AFRICA**HELD AT JOHANNESBURG****CASE NO: J412/13****DATE: 2013-02-28**

In the matter between

SOLIDARITY obo VAN DER WALT AND OTHERS

Applicants

and

SOUTH AFRICAN POLICE SERVICE AND OTHERS

Respondents

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J U D G M E N T**STEENKAMP J:**

This is the judgment in the matter heard at 12:00 today. It is an application for urgent relief *pendente lite* pending the determination of two matters pending before this Court.¹ I shall refer to those two matters, that is a discrimination claim under case JS 469/12 and an attack on the SAPS Employment Equity Plan under case J 879/12, as

20 the main disputes.

The application has been brought on very short notice. The respondents, that is the SAPS and the Minister of Safety and Security, have been given little more than one clear day's notice of these

¹ The Notice of Motion initially framed the relief sought in the form of a rule *nisi*. Mr Grogan clarified it to say that the applicants sought interim relief in the form of an interdict *pendente lite*, and not as an interim order pending a return day. The matter was argued on that basis and the order I made is granted on that basis.

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proceedings. The first question to be addressed, and the main leg on which Mr *Mosam*, for the respondents, based his attack, is that of urgency.

In order to consider the question of urgency, I shall briefly refer to the background leading to this application. On 5 April 2011, the parties to the Safety and Security Sectoral Bargaining Council adopted a collective agreement termed Resolution 2 of 2011. That agreement provides for a once-off promotion process for the promotion of police officers. The contentious part of that agreement is that among the

10 selection criteria for promotion was the following:

"Representivity: the representivity guidelines and number of posts [are] the baseline for the filling of the posts, provided that that in the case of same race group only, male members may supplement the shortfall of female members."

The applicant, that is Solidarity, argues that the agreement is expressly race-based because it provides that the most senior members "per each race group" must be considered for promotion.

Arising from that agreement, a promotion process was implemented as from 20 April 2011. The applicant union and its

20 individual members lodged grievances that remained unresolved. They then lodged the main cases to which I have referred. What gave rise to this application is that the SAPS have now indicated that it is embarking on a second phase of implementation. That was spelt out in a letter dated 18 February 2013 from the National Commissioner of the SAPS, Riyah Phiyega, all SAPS commissioners in which she stated that:

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"Flowing from SSSBC Agreement 2/2011 dated 5 April 2011 and in view of your recommendations received, I have great pleasure in announcing that the promotion of the members mentioned in the attached list of names and to the ranks as indicated, have been conditionally approved with effect from 1 March 2013.

The promotions will only become effective after compliance with the following conditions..."

And certain conditions then follow. The applicant union says that the list of names only came to its knowledge on 21 February 2011; 10 that is uncontested. It therefore appears that unless interdicted, the promotions, that it appears have already been conditionally approved, will take effect tomorrow, 1 March 2013. In those circumstances, when the applicant union learnt of this state of affairs and became aware of the attached list, it wrote to the Minister, NE Mthethwa, and the National Commissioner, MV Phiyega, the very next day, 22 February 2013. It referred to the second phase of promotion in terms of SSSBC Agreement 2 of 2011 and stated:

20 "We confirm that we have been informed by our members employed by the SAPS that the new list of appointments to the rank of Lieutenant and Major have been made available. Unfortunately, yet again, it seems that the SAPS has followed a strict mathematical approach in populating these positions by making use of the 2006 mid-year population estimates in allocating only certain amounts of posts per each race and gender group.

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"It is Solidarity's submission that the aforementioned amounts to nothing other than a quota system (which is prohibited by law), that the application thereof leads to an infringement of the right to equality and dignity of the minority groups, that it effectively sets an absolute barrier for promotion, and that it contradicts the Constitutional provisions by which the SAPS is governed.

"Take further note that Solidarity has already filed legal papers (under case JS469/12) regarding the first phase of promotions, in which the legitimacy of SSSBC Agreement 2 of 2011 is attacked and we accordingly request your urgent undertaking that the current promotions will be held in obedience until the court has made a final ruling in the aforementioned case. Your urgent response by no later than Monday the 25th of February, close of business, will be appreciated."

No such undertaking was forthcoming. Solidarity therefore once again wrote to the Minister and the National Commissioner on 26 February, noting that they have not received any response to their earlier letter. Given the urgency of the matter, they raised the matter again and requested, once again, that phase two of the SSSBC Agreement 2 of 2011 be held in abeyance until the main case has been adjudicated.

Once again, the union did not receive the courtesy of a response. It then launched this application on an urgent basis on 27 February. And as I have already stated, clarity is urgently needed before tomorrow, 1 March. In those circumstances, it cannot be said

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that any urgency is self-created; the matter is self-evidently urgent. And much as this Court would have preferred more time to deal with it, it has to be considered on that basis.

As far as the applicant's prospects of success in the main application is concerned, it is not for this Court to make a definitive ruling on an issue as contentious as this. Suffice it to say that, as Mr *Mosam* readily conceded, the case law with regard to the implementation of agreements such as this and whether employment equity plans that constitute an absolute barrier to the promotion possibilities of certain race or gender groups is far from clear. The applicant has set out in its uncontested founding papers that, viewed mathematically, the SAPS Employment Equity Plan means that if there are 100 available promotion posts, preference will be given to "Africans" until 80 are filled, irrespective of how many "White," "Coloured", and "Indian" applicants otherwise qualify in terms of the plan; they will only be considered for the remaining 20 posts until the quotas for their respective groups are filled.² This brings us to the Orwellian scenario where an Indian woman, for example – a member of a designated group on two counts -- stands a chance of 1.23 out of 100 of being promoted, irrespective of her merits and experience, ostensibly in the pursuit of employment equity and the constitutional right to equality.

² Of course, these distinct sub-categories harking back to the apartheid-era Population Registration Act do not exist in the Employment Equity Act, Act 55 of 1998 (the EEA). The EEA refers to "designated groups", meaning "black people, women and people with disabilities". And "black people" is a generic term which means Africans, Coloureds and Indians.

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Mr Grogan, for the applicants, referred in his argument to a judgment that was handed down two weeks ago by Shaik AJ in this Court under case JS566/11, that is *Naidoo v Minister of Safety and Security and the National Commissioner of the SAPS*³, delivered on 15 February 2013. In that case, this Court in a very lengthy judgment spanning 232 paragraphs gave a comprehensive overview of the relevant legal principles, and quoted with approval from the judgment of the Constitutional Court where Justice Moseneke, writing for the majority, said in *Minister of Finance v Van Heerden* [2004] 12 BLLR 10 1181 (CC) paragraph [27]:

"This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systemic underprivilege which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainant in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical responses in

³ [2013] ZALCJHB 19.

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our evolving democratic society."

Shaik AJ also added (at paragraph [133] of *Naidoo*) that the construction of using proportional representation of the population, as the SAPS is doing in this case, is at odds with section 42(a)(i) of the Employment Equity Act that refers to the 'demographic profile of the national and regional economically active population'.

Furthermore, in paragraph [158], Shaik AJ noted:

10 "The very purpose of employment equity is to redress the effects of past discrimination suffered by members of a designated group. Its purpose is not to create new *de facto* barriers to employment."

And at paragraph [220]:

"In this context, it is crass to limit women, and in the case of the applicant, to deny her altogether, the opportunity for advancement, even though she puts her life on the line to render public service to our country."

I should add that it may appear that the Labour Appeal Court in the recent case of *SAPS v Solidarity obo Barnard* [2013] 1 BLLR 1 (LAC), may be read to have come to a different conclusion. However,
20 the ratio of the LAC in that case can be found in summarised form in paragraph [47] of the judgment, where Mlambo JP says:

"The Labour Court clearly misconstrued the purpose of the employment equity orientated measures by decreeing that their implementation was subject to an individual's right to equality and dignity. This misconception is highlighted in this case where

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the individual concerned is a white woman, whose group was overrepresented in level 9, and who was clearly advantaged by past unfair discriminatory laws. Importantly, she did not hope to be appointed as there were two appointable black candidates from designated groups. She was also aware that black candidates were targeted for the post for which she applied and which target was within the conscripts [sic] of National Instruction 1 of 2004."

It does not appear to me in the short time available to me that the Court in *Barnard* specifically considered the question of an absolute barrier to promotion. On the other hand, in another recent case decided by my brother Lagrange J, in *Solidarity v Department of Correctional Services* [2012] 11 BLLR 1163 (LC), he had to deal with an application for an interdict *pendente lite* that is for all intents and purposes on all fours with the one before me today. And in that case, he found when discussing the existence of a *prima facie* right, and I quote from paragraph [24]:

"In terms of section 15(2)(d) of the EEA, measures to ensure equal opportunities for suitably qualified individuals from designated groups and to achieve equitable representation in the workplace may include numerical targets and preferential treatment, but may not adopt quotas. What appears to have happened in this instance is that even when no suitably qualified person from a designated category was available, the [employee] could not be appointed. Thus, even when the employment equity

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plan could not achieve the objective of appointing a suitably qualified person from a designated group, the employee's race was an insuperable obstacle to his appointment.

It would seem on this basis that the [employee] might well have been discriminated against solely on the basis of his race and not for the purpose of advancing a suitably qualified person from a designated group pursuant to the legitimate aims of an employment equity plan."

And in those circumstances, he found that a *prima facie* right
10 had been established. It is in the same context that I must consider whether the applicant in this case has established a *prima facie* right. The test is a well-known one repeated by Lagrange J in the *Correctional Services* judgment and set out by the Appellate Division, as it then was, in the well-known case of *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton*, 1973 (3) SA 685 (A) at 691 C-G. That is that the applicant must establish a *prima facie* right even if open to some doubt. It is patently clear that the applicant in this case has established at least a *prima facie* right, given the authorities that I have referred to.

Turning to the question of an alternative remedy, it may
20 theoretically be said that the applicants have an alternative remedy, that is to challenge the implementation of phase 2 of the Resolution after the fact. However, that would be highly impracticable and would mean that a process affecting more than 1 000 employees would have to be undone *ex post facto*. That remedy is more apparent than real.

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The same consideration applies to the question of irreparable harm. There is no doubt that the applicants will suffer harm if the second phase of the process is implemented. The question is whether that is irreparable. It may be said that it is not irreparable in that they can challenge it after the fact. However, as Lagrange J said in *Correctional Services* at paragraph 26:

10 "The [employee] comes to court at this juncture in order to prevent the Department filling the post in the meantime. He contends that if the post was filled in the interim, it would mean that even if he were successful at trial, he could not actually be appointed to the post, that at best he could expect a so-called 'protected promotion' in terms of which he could be promoted to the equivalent salary rank of the post but could not obtain the benefit of the further experience gained by actually performing the work."

20 The same considerations apply in the case before me. That is also intertwined with the balance of convenience. This is not a case where, if the interdict were to be granted, service delivery would be affected. The same SAPS officials will continue to do the same work at the same rank that they presently occupy. Were the second phase to be implemented as from tomorrow, that would simply mean a translation in rank. It would not mean that service delivery would be enhanced in any way.

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For all of these reasons, the application for interim relief *pendente lite* should be successful. With regard to costs, it appears from my discussion under the heading of "urgency" that the applicant union tried its level best to ensure an undertaking from the Minister and National Commissioner of the SAPS before turning to this Court for urgent relief. No response was forthcoming; the union was left with no other option. In those circumstances, the first to third respondents should be ordered to pay the applicants' costs jointly and severally. The only regret that the Court expresses is that those costs will inevitably be

10 paid by the taxpayer.

In conclusion then, an order is granted in the following terms:

1. The applicant's non-compliance with the rules of this court pertaining to time periods and service is condoned and the matter is heard as one of urgency in terms of rule 8.

2. An interdict *pendente lite* is issued in the following terms:

- 2.1 The first and third respondents are interdicted and restrained from appointing any individuals in the ranks of Lieutenant, Major or Captain in terms of SSSBC agreement 2 of 2011 until the court has handed down judgement under case numbers JS469/12 and J 879/12.

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- 2.2 The applicant is granted leave to supplement its statement of claim under case number JS 469/12 and its founding affidavit under case number J879/12

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to the extent necessary in the light of subsequent developments and the respondents are granted leave to respond thereto.

2.3 This order operates as an interdict *pendente lite* pending finalisation of the court proceedings under case numbers JS 469/12 and J 879/12.

3. The first, second and third respondents are ordered to pay the costs of this application jointly and severally, the one paying, the other to be absolved.

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STEENKAMP J

APPEARANCES

APPLICANTS:

John Grogan

Instructed by Serfontein, Viljoen & Swart.

RESPONDENTS:

Afzal Mosam

Instructed by the State Attorney.