



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

**JUDGMENT**

Not Reportable

Case no: J 2145/14

**SOLIDARITY obo MEMBERS**

**Applicant**

and

**THE SOUTH AFRICAN POLICE SERVICE**

**First Respondent**

**THE MINISTER OF POLICE N.O**

**Second Respondent**

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

**Third Respondent**

**THE POLICE AND PRISONS CIVIL RIGHTS UNION**

**Fourth Respondent**

**THE SOUTH AFRICAN POLICE UNION**

**Fifth Respondent**

**Decided in Chambers**

**Delivered: 5 May 2015**

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**JUDGMENT – LEAVE TO APPEAL**

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**TLHOTLHALEMAJE, AJ**

*Introduction:*

- [1] This is an application for leave to appeal against the whole of the judgment delivered by this Court on 26 November 2014. In that judgment, Solidarity's application that it was entitled to be consulted by the first respondent under

section 16 of the Employment Equity Act<sup>1</sup> ('The EEA') prior to the adoption of its successive employment equity plans was dismissed with costs. The new Employment Equity Plan was scheduled to be implemented with effect from 1 January 2015.

- [2] The first to fourth respondents opposed the application for leave to appeal, whilst the fifth respondent had filed a notice to abide by the Court's decision.

*The grounds upon which leave to appeal is sought:*

- [3] Most of the contentions relating to the grounds upon which Solidarity seeks leave to appeal have been dealt with in the main judgment, and I do not intend to repeat same. These grounds are however summarised as follows:

3.1 The Court ought to have concluded that section 16 (1) of the EEA required an employer to take reasonable steps to consult and reach agreement on matters set out in section 17 of that statute, not only with the 'representative trade union representing members at the workplace', but also with 'its employees or representatives nominated by them;

3.2 The Court ought to have found that section 16 (2) required, in addition to consultation with the representative trade union or representative trade unions, consultation with employees, or their representatives that 'reflect the interest of employees from all occupational levels of the workforce, employees from designated groups, and employees who are not from designated groups;

3.3 The Court should have considered that 'representative trade unions' actuated by the principles of majoritarianism and bound to present the interests of the majority of their members are not able to represent and/or reflect the interests of all employees, and particularly that such representatives cannot be considered capable of representing the interests of non-designated employees where such employees constitute a minority group within the workplace and/or minority group within the representative trade union;

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<sup>1</sup> Act No 55 of 1998

- 3.4 The Court ought to have come to the conclusion that 'meaningful consultations' under the EEA, as amplified in the Code of Good Practice: Integration of Employment Equity into Human Resource Policies and Practices, required broad consultation that went beyond consultation with representative trade unions, in the interests of fostering workplace democracy and productivity;
- 3.5 The Court ought to have understood that the ordinary collective bargaining framework in existence within SAPS fails to give effect to the intention under the EEA that a broad range of interests and voices be represented in the proceedings preparatory of employment equity plans that serve the best interest of the employer and all employees;
- 3.6 The Court ought to have declined to afford primacy to the ordinary principles of 'voluntarism and majoritarianism' that apply in the context of the Labour Relations Act and which exists for reasons distinct from the principles of inclusion that are exhibited in the EEA;
- 3.7 The Court ought to have appreciated that the undeniable need for broader consultation than consultation with representative trade unions alone should axiomatically lead to the conclusion that a representative representing a significant number of employees, particularly where such represented employees are from the non-designated group, and must be included in the consultation process envisaged under section 16 and 17 of the EEA;
- 3.8 The Court ought to have held that SAPS was bound by the provisions of the Code of Good Practice: Integration of Employment Equity Into Human Resource Policies and practices, which required adaptation to the ordinary collective bargaining process to ensure that representatives from segments of the workforce whose interests are not properly represented by the representative trade unions are included in the consultation process that are preparatory to the adoption of an employment equity plan;
- 3.9 The Court ought to have appreciated that the participation in the process preparatory to the adoption of employment equity plans by

employees whose interest are not represented by representative unions would pose no threat to the existing collective bargaining process, in circumstances where the nature of consultations contemplated in sections 16 and 17 of the EEA falls outside the ambit of matters ordinarily considered to be within the ordinary collective bargaining structures;

- 3.10 The Court ought not to have made a cost order against the applicant when it sought to represent the interests of its members in consultations aimed at the development of a transformation programme within SAPS.

*The first, second, third and fourth respondents' opposition:*

- [4] It was submitted that Solidarity's application for leave to appeal had no prospects of success and that it should be dismissed on the grounds that:

4.1 Section 16 of the EEA can only be read in the context of other statutes, and there is no basis in law for this provision to be read in isolation. In this regard, it was submitted that this provision should be read with other provisions of Chapter 3 of the EEA; sections 12, 16, and 21 of the LRA.

4.2 Solidarity was not a representative trade union, and was therefore not entitled to be consulted unless it had been recognised. It has further failed to advance new argument or cogent criticism of the Court's findings.

4.3 Flowing from the decision by the Labour Appeal Court in *South African Police Services obo Barnard*<sup>2</sup>, which decision was upheld by the Constitutional Court in the same matter<sup>3</sup>, Solidarity was not sufficiently representative in the workplace.

4.4 Solidarity's arguments as to the reason it should be consulted ignored the principles of majoritarianism, and erroneously assumes that the SAPS' consultation process excluded other employees.

<sup>2</sup> (2013) 34 ILJ 590 (LAC) at para [33]

<sup>3</sup> *South African Police Services v Solidarity obo Barnard* [2014] ZACC 23 (CC)

- 4.5 Solidarity cannot be an effective player in the consultation process and it will merely place a disproportionate burden on SAPS and encourage proliferation of trade unions. It did not have sufficient members to justify recognition at the workplace and participation at the level of the SSSBC.
- 4.6 SAPS's consultation process was sufficiently broad-ranging, and to the extent that Solidarity had never applied to be a recognized union, its members were consulted under the umbrella of "All Employees of SAPS".
- 4.7 Solidarity has never been consulted in relation to the preparation and implementation of any SAPS' employment equity plan since 2001, and after three such plans have been prepared and implemented, Solidarity has not stated what it had done between 2000 and 2010 to be consulted in relation to the three plans.
- 4.8 If Solidarity wishes to be recognized as a representative trade union, it ought to challenge the threshold set at the level of the SSSBC.

*The legal framework in regards to applications for leave to appeal:*

- [5] To a large extent, in view of the new Employment Equity Plan having been adopted and implemented in January 2015, the application and the leave to appeal may be regarded as being moot. Be that as it may, the Court will nevertheless deal with the application before it.
- [6] It is trite that in considering such applications, the Court *a quo*, other than a consideration of the importance of the matter, should also take into account whether there are reasonable prospects that another Court (on appeal) may come to a different conclusion as reached by it. This test was described by Corbett CJ in *National Union of Metal Workers of South Africa v Jumbo Products CC*<sup>4</sup> in the following terms:

*"In such a case the enquiry is whether there are reasonable prospects of success, ie whether there is a reasonable prospect that the Court of appeal may take a different view and hold the trial Judge to have been wrong (see S*

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<sup>4</sup> 1996 (4) SA 735 (A) at 742B

*v Ackerman en 'n ander 1973 (1) SA 765 (A); Botes and Another v Nedbank Ltd 1983 (3) SA 27 (A), at 28 D)*”

- [7] The test was also amplified by Petse, ADJP (as he then was) in *Minister of Safety and Security and Another v Madyibi*<sup>5</sup>, who had held that:

*“In giving consideration to the issues at hand I am enjoined by judicial authority to take due cognisance of the test which is of application in matters of this nature. Judicial authority requires of a Judge considering an application for leave to appeal to reflect dispassionately upon the decision sought to be appealed against and decide whether or not there is a reasonable prospect that the Appeal Court may come to a different conclusion. This necessarily requires of me to disabuse my mind of the fact that I was of the view when I delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto’.*

- [8] Having had regard to the submissions made by Solidarity in support of this application, I am not convinced that a basis have been laid for a conclusion to be reached that the Labour Appeal Court may take a different view and conclude that Solidarity is sufficiently representative for the purposes of consultation in respect of the Employment Equity Plan in section 16 of the EEA.
- [9] Solidarity contends that the Court ought to have understood that the ordinary collective bargaining framework in existence within SAPS fails to give effect to the intention under the EEA, that a broad range of interests and voices be represented in the proceedings preparatory of employment equity plans that serve the best interest of the employer and all employees, yet it has not challenged the very same collective bargaining framework as it exists. There is no basis upon which this Court can decline to afford primacy to the ordinary principles of ‘voluntarism and majoritarianism’ that apply in the context of the Labour Relations Act and I fail to appreciate the persistent contention that the provisions of the EEA should be treated as distinct and divorced from those of the LRA.

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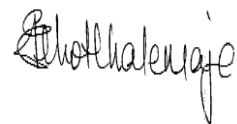
<sup>5</sup> (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

[10] It is appreciated that the judgment is of significance consequence and importance. There is however no basis for a conclusion to be made that the judgment handed down concerned complex issues of the law, and even if this was the case, and as correctly pointed out on behalf of the first to fourth respondents, most of the issues raised in Solidarity's submissions in this application or in the main application before the Court *a quo* have either been dealt with by the Labour Appeal Court or the Constitutional Court in the *Barnard* matters.

[11] Having dispassionately assessed Solidarity's submissions in this application, and further having had regard to those made on behalf of the first, second, third and fourth respondents, I am not convinced that there are reasonable prospects that another Court may come to a different conclusion on the issues raised. I have also had regard to the submissions made in regards to the cost order made in the main judgment, and I am satisfied that such an order was appropriate in the circumstances. Accordingly, the application for leave to appeal should be dismissed. The respondents who opposed this application sought a cost order in the event that the application was not granted. Having had regard to considerations of law and fairness however, I am of the view that a cost order should not follow the results.

*Order:*

- i. The application for leave to appeal is dismissed.
- ii. There is no order as to costs.



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Tlhotlhalenajie, AJ

Acting Judge of the Labour Court of South Africa

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