



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 732/11

Not Reportable

In the matter between:

SOLIDARITY OBO LABUSCHAGNE

Applicant

And

COMMISSIONER OF THE SOUTH AFRICAN

REVENUE SERVICES

Respondent

Heard: 07 October 2014

Delivered: 14 May 2015

Summary: Claim unfair discrimination. Employment Equity Act – the requirement of the Equity Plan in applying affirmative action measure. Employment Equity plan serves as a guideline not to be rigidly applied.

JUDGMENT

MOLAHLEHI, J

- [1] The applicant in this matter claims that she was discriminated against unfairly by the respondent when the interview and selection process was extended and subsequently an African female appointed instead of her as white female. She claims an order declaring that:
- i. She was unfairly discriminated against after the first round of interviews on the basis of race, being a white female, whilst she was the most suitable candidate for the post.
 - ii. The respondent did not have an employment equity plan and in the absence of an employment equity plan("EE Plan"), the application of affirmative action was therefore irrational.
 - iii. The recruitment process followed by the respondent was not fair.
 - iv. The respondent did not take into account knowledge, skills attributes and experience in the making the appointment, and
 - v. The interview panel was not representative in terms of race, gender and culture.
- [2] This matter was heard on 07, 08 and 09 October 2014. The matter was then postponed *sine die* with the directive that the parties should file heads of arguments. It was also indicated in the directive that unless the Court directed otherwise the matter would be finalised on the basis of the heads of arguments submitted by the parties without the need for oral submissions.

Background facts

- [3] It is common cause that the applicant, Ms Labuschagne, applied for the post of Team Leader Administrators and Payroll Transaction Data which was advertised internally at grade 6 occupational level in the Centralized High Transactional Unit (CHUT), which is a unit of the department of human resources. The advertisement indicated that the employment equity of the respondent would be considered as part of the recruitment process.
- [4] It is also common cause that a number of employees applied for the post, consisting of a number of white and black females and males. There were six

candidates who were shortlisted and interviewed, consisting of African females, a coloured female and two white females.

- [5] It would seem that the outcome of the interviews was that the two white female candidates, the applicant and Ms Ferreira, a white female with disabilities, were to be recommended for appointment. It is apparent that the interviewing panel never formerly made a recommendation in this regard.
- [6] It is also apparent that consideration of the appointment of one the above two candidates was never made because Ms Visser, head of the CHUT caused the recruitment process to be extended. The extension of the process resulted in, two African females, Ms Madidimole and Ms Moore applying for the post.
- [7] The interview panel scored Ms Madidimole the highest and accordingly recommended her for appointment. The recommendation of the interviewing panel was accepted, resulting in the appointment of Ms Madidimole.

The applicant's case

- [8] As would appear from the above the essence of the applicant's case is that she was discriminated against simply because of her race. She testified that after the interviews, she was informed by Ms. Visser that she was the "best candidate" and would have been appointed in the first round of the interviews but for the fact that the respondent needed the position in question to be filled by an African female.

The Respondent's case

- [9] The respondent contended that it did not unfairly discriminate against the applicant and in support of that version it presented the testimony of two witnesses, Ms Kabele and Mrs Van Tonder (nee Senekal).
- [10] Ms Kalebe testified that the interviews were competency-based and that the candidates were presented with similar scenario-based questions. She also stated that after the interviews she met with Ms Visser and informed her of the recommendation that was to come from the interview panel which was that two candidates being recommended for appointment would be the applicant and Ms Ferreira.

- [11] At the time the dispute arose the demographic representation in the human resources division of the respondent, according to Ms Kalebe was 51.4% white females, 19.9% African females and 7.3 % coloured females.
- [12] In responding to what she was told by Ms Kalebe, Ms Visser indicated that there was a need to extend the recruitment process for the purpose of identifying a black female. The recruitment and selection process was consequently extended and that was done in consultation with Mr Baloyi of human resources department.
- [13] In extending the recruitment process the respondent relied on the recruitment policy under clause 2.18 of the policy which provides:
- “b) All applicants have to adhere to the closing date for application as specified in the advertisement, unless a waiver has been granted by the Line Manager and the relevant General Manager.” (my underlining)
- [14] During cross-examination Ms Kalebe disputed that the appointment of Ms Madidimole was irregular. She contended that the applicant would not have been appointed because there was another candidate, Ms Fereira who was also recommended in the first round of the interviews.
- [15] The second witness of the respondent was Ms van Tonder, who at the time of the dispute was the employment equity manager and also the secretary of the employment equity committee (EE committee). She was also responsible for preparation of the EE plan.
- [16] Ms Van Tonder, testified that the EE policy of the respondent required senior managers, like Ms Visser, to ensure that the demography of the workforce was representative across all occupational levels. She also stated that the EE plan served to guide the managers on the issue employment equity.
- [17] According to Ms Van Tonder the EE plan which expired on 31 March 2010, was extended by the EE committee as a measure to ensure compliance with the Employment Equity Act (the EEA).
- [18] In terms of the EE report submitted to the department of labour by the respondent during January 2011, the respondent's demographics for grade 6

professional levels, were according to Mrs Van Tonder, as follows; 380 African females which is 20% and 386 white females which is 18.28%.

- [19] In relation to the appointment of Ms Madidimole, Mrs Van Tonder testified that that appointment addressed the under representation of black females at the specialist and management levels. She also testified that the plan which the applicant relied on, in contending that she was discriminated against, was the divisional plan which was not applicable at the time the dispute arose.
- [20] In response to what was put to her during cross-examination about representivity of African females in the organization Ms Van Tonder stated that the representation in the CHUT was “lily white” and that it was the responsibility of Ms Visser to ensure that that issue was addressed.
- [21] In relation to the powers of the EE committee to extend the EE plan, Mrs Van Tonder testified during cross examination that the extension was by consensus and that the Commissioner was part of that because there was a representative seating in that committee representing him.

The law

- [22] It is clear in terms of section 13 and 6 (2) of the EEA that a designated employer is obliged to make the workplace equitably representative of the designated groupings in the workplace and may seek to achieve that objective by use of discriminatory affirmative action measures. Section 13 of the EEA reads as follows:
 - “(1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act.
 - (2) A designated employer must -
 - (a) consult with its employees as required by section 16;
 - (b) conduct an analysis as required by section 19.
 - (c) prepare an employment equity plan as required by section 20; and
 - (d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.

[23] And section 6 [2] of the EEA reads as follows:

- “(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
- (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.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

[24] In developing and implementing the EE plan the employer has to ensure that it has in place policies or practice which are rationally connected to the objectives sought to be achieved. The objectives must be aligned to the constitutional values and ideals envisaged in section 9 of the Constitution which reads as follows:

- 1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 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.
- 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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

[25] In terms of the EEA an employer can develop an EEA plan that is operational for either one or five years. The employer is further required in terms of section 16 of the EEA to consult with all the designated and non-designated employees in the development and implementation of the EE plan.

Evaluation

- [26] The two key issues raised by the applicant in this matter are that; she was discriminated against when the first round of interviews was halted and then extended. The second point is that the respondent was not justified in applying the affirmative action measures to deprive her of the appointment to the position in question in the absence of an EE plan.
- [27] The other point raised by the applicant is that the recruitment process followed by the respondent was irregular and unfair. This is based on the fact that the recruitment process was extended after the completion of the first round of the interviews.
- [28] It seems to me apposite to deal first with the two other issues raised by the applicant in her pleadings. I will revert to the above issues later in this judgment.
- [29] The first issue in this regard is that the respondent in appointing Ms Madidimole did not take into account knowledge and skills, and experience into account. The case of the respondent on the other hand is that the appointment of MS Madidimole, was made on merit and the fact that she was an African female was an added bonus but not a decisive consideration in the overall decision to appoint her.
- [30] During cross-examination the applicant readily conceded that she did not question Ms Madidimole's qualification for the post and also that she was the better qualified person for the post. It is thus clear from the evidence that Ms. Madidimole was appointment on merit, as a candidate who scored the highest in the interview. The contention that the appointment did not take into account skills and experience accordingly falls away.

Was the extension of the recruitment process irregular?

- [31] It is common cause that after the interview process was extended other employees were invited to apply. In this regard two candidates applied, were shortlisted and interviewed. One of them, namely Ms Madidimole, was successful.
- [32] The respondent contended that the extension of the interview process was allowed by the recruitment policy. It is clear from the reading of the recruitment policy and specifically clause 2.2 thereof, that it was never intended for the recruitment policy to be as rigid as suggested by the applicant but rather that it would serve as a guideline.
- [33] The approach adopted by the respondent in extending the recruitment process is similar to that followed in *NEHAWU and Another v Office of the Premier of the Eastern Cape and Another*,¹ where the court found that the policy was a guideline and could be deviated from when necessary. The view that the respondent's recruitment policy is not rigid and serves as a guideline find support in clause 2.2 of the policy which reads as follows:

“In line with SARS strategic intent, core values and relevant legislative provisions the following serve as guiding principles for the recruitment and selection process with the organisation.”

- [34] The authority to extend the recruitment process can be inferred from clause 2.18 of the policy which is quoted above. Accordingly, the facts as they stand do not support the proposition that the extension of the recruitment process was irregular and unfair.

Did the respondent have an EE plan at the time the dispute arose?

- [35] The applicants contended that the respondent did not have an EE plan at the time the dispute arose. They also questioned the authority of the EE committee to extend the expired EE plan. The applicant further contended that the EE plan can only become operational once adopted by Exco or the Commissioner.

¹ (2011) 7 BLLR 68 (LC).

- [36] To this extent the applicants submitted that in extending the 2007/2010 plan the respondent acted contrary to the provisions of Section 23 of the EEA which reads as follows:

"Before the end of the term of its kind employment equity plan, a designated employer must prepare a subsequent employment equity plan."

- [37] The applicant relied also on both the case of *SA Police Services v Solidarity obo Barnard*,² and *Gordon v Department of Health: KwaZulu-Natal*,³, in contending that she was discriminated against because the respondent did not have an approved EE plan.
- [38] In *Barnard*, the Constitutional Court held at paragraph [40] of its judgment that:
- " . . . Designated employers must ensure that suitably qualified employees from designated groups are equally represented in each working category of the designated employer. The Act requires that an employment equity plan must be devised and approved. Affirmative action measures must be taken in accordance with an approved employment equity plan."
- [39] In *Gordon*, the SCA held that:
- "It has to be pointed out, as appears from the cases cited, that the policies, plans and/or programs involved there were crafted in consideration of the context, such as identifying relevant demographics and the gaps in representivity that had to be addressed through affirmative action. This was not the case here nor was the application of affirmative action one of the criteria applicable in the selection of candidates. These are issues that would have been catered for in a specially formulated plan, policy or programme which would have provided the basis of the appointment. Clearly, the appointment was an ad hoc and arbitrary act. It can never in itself amounts to a measure within the contemplation of section 8(3) or section 9(2) which clearly require something much more than an ad hoc act. The appointment was not a measure in itself and was clearly inherently arbitrary and therefore unfair as contemplated in Item 2(1)(a)."

² (2009) 1 ALL SA 39 (SCA).

³ 2008 (29) ILJ 2535 (SCA).

[40] The other case which the applicant relies on in contending that she was unfairly discriminated against is that of *Mgomezeleni Zamile MCMillan v Gauteng Department of Finance*,⁴ where the Gauteng Department of Finance refused to appoint the employee after he was so recommended by the interviewing panel. In that case the Court found per Modise AJ, that it was apparent from the facts that in refusing to implement the recommendation of the interviewing panel the department had relied on what was said by the Premier in his opening of the parliament speech. He is recorded as having said that by 2009 women should constitute 50% of senior management. The facts of that case are clearly different to those of the present. In that case the employer in refusing to appoint the candidate recommended by the interview committee relied not on any plan but what was said in the opening address of Parliament by the Premier.

[41] The case of the respondent in the present matter is that the appointment of Ms. Madidimole was in line with the EE plan which was at the time in place. It is contended in this regard that at the time of the appointment that the representivity of white females was 51.4% as opposed to 19% of African females in the CHUT unit. The appointment of Ms. Madidimole improved the representation of the African females moved to 21% in the unit.

[42] The issue of the existence or otherwise of the EE plan arises because of what has been stated in the case law and in particular the Constitutional Court in the case of Barnard where it is said that:

“[36] The test whether a restitution measure falls within the provisions of section 9(2) is threefold. The measure must-

- (a) target a particular class of people had been susceptible to unfair discrimination;
- (b) be designed to protect or advance those classes of persons;
- and
- (c) promote the achievement of the quality.

[37] Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Sections 6(2) of the Act, whose object is to echo section 9 (2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however,

⁴ (2015) 3 BLLR 308 (LC).

does not oust the court's power to interrogate whether the measure is a restitution measure within the scope of the empowering section 9(2)."

[43] In my view the applicants contention that in extending the 2007/2010 EE plan the respondent did not satisfy the requirements of the EEA is an approach which is highly technical and places emphasis on form rather than substance. As stated earlier EEA requires that a designated employer, such as the respondent, should have an EE plan. The EEA further requires the designated employer to consult with the representative unions on the development and the implementation of the EE plan. It is further provided under section 23 of the EEA that the employer must prepare a subsequent EE plan before the end of the existing plan. The case of the applicant seems to be that the extension of the 2007/2010 plan did not amount to the adoption of the EE plan.

[44] Although section 23 requires a plan to be developed before the expiry of an existing plan the legislature does not prohibit the employer together with the consulting parties from the extending the old plan. The plan could as indicated above be for a year or five years. In the present instance it is apparent that the plan was for three financial years, 2007/2010. It was less than 5 years.

[45] It has not been disputed in the present instance that the 2007/2010 EE plan was extended in consultation with the relevant parties by the EE committee. This was done in accordance with the terms of reference the EE committee which provides:

"Purpose

The EE and SD committee is a platform created for consultative purposes as required by EE and SD legislation. Consultation may be defined as join problem-solving exercise with the parties striving to reach consensus where possible". It should be noted that problem-solving is something distinct from bargaining and that the final decision, where consensus cannot be reached resides with the employer. The said Committee is tasked to oversee and influence all Employment Equity and Skills Development related matters at national level."

[46] The terms of reference of the EE committee provides that:

"To be consulted on the following:-

- The analysis of employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups.
- The preparation, implementations, and monitoring the national Employment Equity Plan and in particular affirmative action measures (including numerical goals);

[47] The fact that the extended plan was not formally adopted by Exco or the Commissioner, does not in my view, take the case of the applicant any further. It is not disputed that Exco was represented when the resolution was taken. There is also no evidence that Exco or the Commissioner disapproved of the extension of the plan by the EE committee.

[48] In my view, the extension of the EE plan by the EE committee resulted in the 2007/2010 plan being a new plan which the respondent used as a guideline in the recruitment process that gave rise to the present dispute. It has not been disputed that the representation of white females at grade 6 in the CHUT unit was disproportionate to that of African women. Accordingly the appointment of Ms Madidimole was reasonable, objective and fair. Thus the evidence before me does not show that the approach adopted by the respondent as being inherently arbitrary.

[49] In the circumstances I find that the applicant failed to make out a case of unfair discrimination. I do not however, believe that it would in the circumstances of this case be fair to allow costs to follow the results.

Order

[50] In the premises, the applicant's claim is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court Johannesburg

Appearances:

For the Applicant: Mr P Maserumule of Maserule Inc.

For the Respondent: Mr P Groenewald of Serfontein, Viljoen & Swart Attorneys.

Labour Court