



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG.

JUDGMENT

Not Reportable

Case no: JS 469/12

SOLIDARITY

First Applicant

J.P.L VAN DER WALT

Second Applicant

J.E STONE

Third Applicant

N. LE ROUX

Fourth Applicant

and

SA POLICE SERVICES

First Respondent

**THE MINISTER OF SAFETY AND
SECURITY N.O.**

Second Respondent

**THE NATIONAL COMMISSIONER OF
THE SA POLICE SERVICE N.O.**

Third Respondent

SOUTH AFRICAN POLICING UNION

Fourth Respondent

**POLICE AND PRISONS CIVIL RIGHTS
UNION**

Fifth Respondent

**THE SAFETY AND SECURITY
BARGAINING COUNCIL**

Sixth Respondent

Decided in Chambers.

Delivered on: 13 August 2015

RULING - LEAVE TO APPEAL

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The initial dispute before the Court concerned whether the Second to Fourth Applicants had been unfairly discriminated against in not being selected for promotion in accordance with the new ranking structure within the First Respondent (SAPS) as implemented in terms of a Collective Agreement, which was concluded under the auspices of the Sixth Respondent between SAPS, POPCRU and SAPU.
- [2] The dispute had then by agreement between the parties, metamorphosed into whether the Collective Agreement was valid and constitutional. The dispute in respect of the individual applicants was then separated from the main dispute. The applicants' main contention was that the promotion of members pursuant to the Agreement was by reference to race and gender quotas, to the exclusion of other relevant factors. It was also contended that the Agreement was in contravention of the provisions of sections 9(3) of the Constitution¹ and those of the Employment Equity Act.
- [3] In a judgment handed down on 2 April 2015, the following order was made;
- (i) The application as brought by the First Applicant (Solidarity) is dismissed.
 - (ii) The First Applicant is ordered to pay to the First, Third and Fifth Respondents, the costs of this application.
 - (iii) Solidarity may approach the Registrar of this Court for a set-down date in respect of the matter concerning the individual applicants.
- [4] On 28 April 2015 The applicants lodged an application for leave to appeal against the judgment. The application was lodged simultaneously with an application for leave to appeal to the Constitutional Court. By agreement between the parties, the submissions in regard to the application in this court were held in abeyance pending the outcome of the Constitutional Court's decision.

¹ Constitution of the Republic of South Africa, Act no 108 of 1996

- [5] The Constitutional Court considered the application for leave to appeal. In an order dated 27 May 2015, the application was dismissed as it was not in the interests of justice to hear it at that stage. The First, Second, Third and Fifth Respondents opposed this application for leave to appeal.

The legal framework:

- [6] When considering an application for leave to appeal, the issue is whether there are reasonable prospects that the Court of appeal may take a different view on the matter². In *S v Smith*³ Plasket AJA observed that:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

- [7] As it was further pointed out on behalf of the Fifth Respondent, in terms of section 17(1) of the Superior Courts Act 10 of 2013, leave to appeal may also be granted if there is some compelling reason why the appeal should be heard.

The grounds for leave to appeal:

- [8] Part A of the Collective Agreement confirmed the introduction of two new ranks within SAPS with effect from 1 April 2010. It set the level at which the ranks of Lieutenant, Captain, Major and Lieutenant-Colonel were to be filled and the principles underpinning the process. Annexure "B" to the Agreement set out the criteria for promotion from rank to rank in accordance with the new ranking system.

² *National Union of Metal Workers of South Africa v Jumbo Products CC* 1996 (4) SA 735 (A) at 742B

³ 2012 (1) SACR 567 (SCA) at para [7]

- [9] The applicants' main contention was that Agreement was unlawful, and breached the provisions of the Constitution and the Employment Equity Act. It was further submitted on their behalf that the court *a quo* misdirected itself in finding that the legitimacy of the SAPS' employment equity plan had been confirmed by the Constitutional Court in *Barnard*.⁴ In this regard, it was submitted that the judgment of the Constitutional Court in *SAPS v Solidarity obo Barnard*⁵ did not concern the validity of the South African Police Service ('SAPS') employment equity plan, and one of the reasons why the Court declined to grant Capt Barnard relief in that case was that the SAPS employment equity plan had not been impugned.⁶
- [10] It was further submitted on behalf of the applicants that the vexed questions concerning the appropriate standards to be applied to instruments alleged to be affirmative action measures manifestly warrant the attention of the Labour Appeal Court. The attainment of substantive equality and the appropriate means of doing so without infringing upon the dignity of those excluded from the benefits of restitutionary measures is one of the most important issues facing our society today. To this end, it was contended that the public interest in receiving clarity on these issues was manifest.
- [11] Submissions made on behalf of the First, Second, Third, and Fifth Respondents were to the effect that there are no reasonable prospects that another court might come to a different conclusion than that of the court *a quo* on the same facts. In this regard, it was submitted that authorities of the Constitutional Court and the Labour Appeal Court had made determinative pronouncements on the questions at hand, and there was no reason why the matter should enjoy the attention of the Labour Appeal Court.
- [12] Having responded in detail to the applicants' submissions insofar as the judgment was attacked, it was submitted further on behalf of the First to Third Respondents that there was no inherent public interest in allowing this matter to be heard by the LAC, as the issues of principle which lie at its heart have been resolved by the Constitutional Court and the LAC.

⁴ Judgment paras 33 – 34.

⁵ *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 ('Barnard').

⁶ *Barnard* at paras 51 - 52. See also para 83.

- [13] The Fifth Respondent's main submissions were that the measures taken in the implementation of the Collective Agreement did not amount to unfair discrimination; that the applicants had not challenged the Employment Equity Plan of the numeric targets set therein. Furthermore, it was submitted that contrary to the applicants' arguments, the measures taken did not propagate 'automatic preference', 'absolute preference', or 'preferential treatment'.

Evaluation:

- [14] Most of the contentions relating to the grounds upon which the applicants seek leave to appeal have been dealt with in the main judgment, and there is no point in burdening this judgment with the same issues. Equally so, the First, Second, Third and Fifth Respondent's submissions in opposing the application are issues that were also to a large extent dealt with in the main judgment.
- [15] The issue however is whether there are reasonable prospects that the Labour Appeal Court may come to a different conclusion on the issues raised. Most of the issues as correctly pointed out on behalf of the Respondents opposing the application were indeed dealt with by the Constitutional Court in *Barnard* and by the Labour Appeal Court.
- [16] It was correctly acknowledged on behalf of the First, Second and Third Respondents that the issues raised in this application are important, *albeit* was contended that they are not novel as the relevant law was settled. Central however to the dispute leading to the main judgment was whether Collective Agreement propagated the population of the positions in accordance with the new ranking structure in a rigid manner; whether the selection for promotion were made within 'silos' defined by race and gender and thus resulting invariably with quotas; and whether the scheme of the Agreement taken as a whole was arbitrary and had resulted in unfair discrimination.
- [17] When considering applications of this nature, the Labour Court should be mindful of the cautionary note sounded by Davis JA in *Martin and East (Pty) Ltd v NUMSA & others*⁷ where he stated that:

⁷ (2014) 35 ILJ 2399 (LAC)

“Before I conclude there is a further comment I wish to make. I indicated that the events in this case took place in 2010. The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court a *quo*, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted. There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal “no-man’s-land” and have to wait years for an appeal (or two) to be prosecuted. This was a case which should have ended in the labour court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the Court a *quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions. I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes.”

[18] Bearing the above caution in mind, the Labour Court is also reminded by the words echoed in *Minister of Safety and Security and Another v Madyibi*⁸ 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

⁸ (1034/2004) [2008] ZAECHC 180 (30 October 2008) at para 20

delivered my judgment that it was supportable both on the facts of the case and the law applicable thereto”.

- [19] The Collective Agreement as a measure designed to achieve equality in the population of ranks within SAPS has gained momentum as a result of challenges to its validity and constitutionality by the applicants from its inception. The applicants have persisted with their view that the Agreement on its own has the consequences of achieving undesirable results.
- [20] Inasmuch as I am in agreement with the respondents that most of, if not all of the legal arguments and challenged have been settled, and even though I am satisfied that the issues were exhaustively canvassed in my judgment, the implementation of the Collective Agreement as a part of an equality seeking measure will always remain impugned in the light of the applicants' approach that on its own, the Agreement remains susceptible to a constitutional challenge.
- [21] There are competing interests insofar as there is a need to populate the SAPS ranks in accordance with the provisions of the Agreement. SAPS and its members as represented by POPCRU and SAPU have a right to have the Agreement implemented and to put an end to the long standing conundrum of populating ranks. The applicants on the other hand have a right to ensure that the implementation of the Agreement does not encroach on their constitutional rights to equality. To this end, having reflected dispassionately upon my judgment, and notwithstanding my view that the judgment is supportable both on the facts of the case and the law applicable thereto, I am reluctantly of the view that there are reasonable prospects that the Labour Appeal Court may take a different view on the matter, and that the case cannot be categorised as hopeless.

Order:

- i. The application for leave to appeal against the judgment handed down on 2 April 2015 is granted.
- ii. The costs of this application are to be costs in the appeal.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa.

LABOUR COURT