

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no. J 644/97

In the matter between:

Independent Municipal & Allied Workers Union

Applicant

AND

Greater Louis Trichardt Transitional Local Council

Respondent

JUDGMENT

MLAMBO J.

1. This is an application in which the applicant seeks to review and set aside a decision by the Respondent in terms of which it appointed Dan Masengana as its Town Treasurer. The broad grounds on which the application is based are that the appointment of Masengana is unfairly discriminative within the contemplation of schedule 7 item 2(1)(a) of the Labour Relations Act no.66 of 1995 ("the Act"), and further that the appointment is irregular.

Background

2. The post of Town treasurer was externally advertised by the Respondent in the print media. Requirements for consideration were that candidates should have a relevant B degree or equivalent qualification and should at least have a licentiate membership of the Institute of Municipal Treasurers and Accountants. In terms of the initial advertisement the close date was 10 February 1998 but no appointment was made even though five candidates were shortlisted.

2. The Respondent, decided on 25 March 1997, to re-advertise the post. Twenty two new applications were received and the Respondent's Executive Committee was requested to compile a short list of applicants with a view to conduct interviews with those shortlisted. After these interviews another short list was compiled and candidates were subjected to an internal test drafted by the Respondent's Town Clerk, who was the previous Town Treasurer. Mr Venter of the institute of Municipal Treasurers and Accountants evaluated both the test itself and the candidates.

3. The test results of the short listed candidates were:

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|----|----------------|---------|
| 4. | B Van der Berg | 79/120; |
| 5. | D Masengana | 44/120; |
| 6. | D M Kruger | 95/120; |
| 7. | R Madula | 50/120; |
| 8. | E K Ndleve | 62/120 |

The Test targeted the knowledge and experience of the candidates of local government, their merit and potential ability. From the five candidates a further short list of three candidates was compiled consisting of Mr Van der Berg, Mr Kruger and Mr Masengana. The Executive Committee could however not make a decision regarding the appointment, and the short list of three was referred to the full Council for a decision.

9. At the Council's meeting of 27 May 1997 the Chief Executive presented the three candidates as follows:

5.1 **Mr Van den Berg** had 12 years' municipal experience of which four were as a Town treasurer; He was a sub-accountant at Pietersburg/Polokwane and an accountant at the Development Board, and also an accountant at Ellisrus. Before that, for about six years, he had worked with the Receiver of Revenue and the banks at Eskom;

5.2 **Mr Kruger** started with the Respondent in January 1968 and was promoted to an accountant's position in 1974. In 1980 he was promoted to internal auditor and then Assistant Town Treasurer. He had been the Deputy Town Treasurer since 1983.

5.3 **Mr Masengana** had been an accountant with the Northern Development Corporation from 1994 until 1997. He worked for one month with the Thohoyandou Transitional Local Council as an assistant. He was with the JCI as an assistant accountant from 1991 to 1994, and he was with the Venda Development Corporation, also as an assistant from 1985 to 1991.

6. During the meeting of 27 May 1997 two motions were forwarded, one for the appointment of Kruger and the other for the appointment of Masengana. The two motions were then followed by an exhaustive debate by the Council. The majority of the Council decided that affirmative action should be the only criteria and accordingly Masengana was appointed as Town Treasurer. There is therefore no dispute that the only consideration in Masengana's appointment was affirmative action.

The applicant's submissions

10. Mr Haycock, on behalf of the Applicant, submitted that the Respondent did not comply with the provisions of the collective agreement on Equal Employment Practice and Affirmative Action for local government in the selection and appointment of Masengana. Mr Haycock submitted that the Respondent had failed to develop and implement an affirmative action programme and that no defined affirmative action programme was followed in the appointment of Mesengana. Mr Haycock further submitted that the collective agreement provided that the relevant labour market must consist of at least those individuals who have proficiency and/or skill to successfully perform the duties of the relevant post. In this regard Mr Haycock submitted that from Mesengana's curriculum vitae it was clear that he did not possess the necessary experience in local government to qualify for appointment.

11. Mr Haycock further submitted that the majority of the councilors of the Respondent did not apply their minds properly and fairly to the appointment of Masengana. He submitted that the council acted grossly irregular when it appointed Masengana simply because he is black and therefore was an affirmative action candidate thus ignoring merit and other requirements set out in the collective agreement.

The Respondent's submissions

12. Mr Mahlase, appearing for the Respondent, argued that the Respondent was empowered in terms of Schedule 7 Part B Item 2(2) of the Act to adopt and/or implement employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination.

13. Mr Mahlase further argued that the Respondent as a local authority established in terms of the Local Government Transitional Act no 209 of 1993 had to be in line with that Act's main objectives of promoting and restructuring local government into non-racial and inclusive bodies. He argued that the Respondent's councillors properly applied their minds to the appointment of Masengana. He also submitted that the Respondent's decision to appoint Masengana was in keeping with the Constitution of the Republic of South Africa Act no. 108 of 1996. ("the Constitution").

14. Mr Mahlase further argued that the Respondent's decision was not unreasonable and as such not reviewable. He argued that courts should exercise restraint when tasked with reviews of a local authority decision which involves public policy.

The relevant provisions of the Act

15. Item 2(1)(a) of schedule 7 provides:

‘For the purpose of this item, an unfair labour practice means any unfairact or omission that arises between an employer and an employee, involving the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.’

Item 2(2)(b) of Schedule 7 provides:

**‘For the purposes of sub-item (1)(a)-
an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories 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’**

13. In turn Clause 9 of the Constitution provides:

“9(1) Everyone is equal before the law and has the right to equal protection an benefit of the law.

9(2). Equality includes the full and equal enjoyment 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.

9(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.

9(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.”

Furthermore clause 195(1)(i) of the Constitution provides:

“Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.”

14. It is apparent from the statutory and constitutional provisions cited that unfair discrimination is outlawed. It is equally apparent that an employer, more particularly in the public service is empowered to adopt employment practices and policies that are designed to achieve the adequate advancement of persons or groups previously disadvantaged by unfair discrimination. One of such policies is affirmation action.

Case Law

15. The need for programmes such as affirmative action in this country in view of our history of past unfair discrimination is recognised in a number of court decisions and numerous writings. In **President of the Republic of South Africa & Another v Hugo 1997(6) BCLR 708 (CC) at 729F-H** Goldstone J said:

“In section 8(3), the Interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on

the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”

16. In **Public Servants Association v The Minister of Correctional Services & Others**

(unreported) Labour Court case no: **J 174/97** the court, after citing a passage from

Shabalala & Others v The Attorney - General of the Transvaal and Another 1996 (1) SA

725 CC, said at page 16:

“Viewed from this angle therefore it is clear that the Constitution aims to redress historical inequities and imbalances. It requires as a constitutional imperative that the Public service be broadly representative of the South African community. The attainment of this constitutional objective, in particular in the public service would be impossible without a programme of affirmative action.”

17. Affirmative action however should not be applied in a arbitrary and unfair manner. The caution and constraint with which affirmative action should be applied is recognised by

Cheadle & Others in **“Fundamental Rights in the Constitution”, 1997 (Juta) 1st edition** at page 60 where, in relation to section 8(3) (a) of the Interim Constitution no 200 of 1993 which has essentially been retained by clause 9(3) of the Constitution, the following is said:

“The interpretation of s 8(1) apart, S 8(3)(a) is designed to insulate from judicial review those measures designed to benefit individuals or groups who have been disadvantaged by unfair discrimination. Provided that the corrective measures comply with the internal requirements of section 8(3) (a), those measures will not be subjected to the rigours of section 33(1). The clause does have internal requirements. The use of the word “designed” clearly imports that there must be a rational connection between the means employed and the objects of the measures. The measures can only be directed to

those groups or categories that are “disadvantaged” by unfair discrimination.”

18. Du Toit & Others in **“The Labour Relation Act of 1995” Butterworths, (1998) 2nd**

edition, echo the same sentiments. At page 441 the following is stated:

“Measures are permitted if they are ‘designed’ to achieve the purposes set out in item 2(2)(b). The word ‘designed’ suggests that more than mere intention is required, though not necessarily that the measures should be likely to achieve their purpose. Section 9(2) of the Constitution must be read as permitting only those corrective measures which do not unduly prejudice the individuals or groups who are disadvantaged as a result.”

19. There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

19.1 there must be a policy or programme through which affirmative action is to be effected;

19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

20. In the court’s view there are good reasons for these requirements. These requirements ensure that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme.

21. In **Motala & Another v University of Natal 1995 (3) SA BCLR 374 D** the court refused to interfere with an affirmative action policy which contained different selection criteria for African and Indian students. The court found that the policy was in fact designed to achieve the adequate protection of a group of persons disadvantaged by unfair discrimination. The court further stated that the policy selection criteria which compensated for a discrepancy due to certain disadvantages to a race were not discriminatory within the meaning of clause 8(1) and 8(2) of the Interim Constitution. Item 2(2)(b) of schedule 7 of the Act is couched in the same language as clause 9(2) of the Constitution and clause 8(3) of the Interim Constitution. Therefore item 2(2)(b) has the same internal requirements as those two clauses in the Constitution and the Interim Constitution. It therefore remains to consider whether the Respondent has an affirmative action policy or programme in place which complies with the set internal requirements.

Does the Respondent have an affirmative action policy or programme

22. Is there such a policy in place and applied by the Respondent. A document that could shed light in this regard is the Agreement on Equal Employment Practice and Affirmative Action which was signed by all stakeholders on 15 August 1994. The preamble to this agreement reads:

“The parties to this agreement acknowledge the need to:

Implement comprehensive affirmative action, training and development strategies to redress historic and existing inequalities, imbalances, prejudices and injustices in the workplace;

ensure equal employment opportunity practices in local government;

enforce the right of fundamental equality and opportunity between men and women in employment as well as the right of every person to be protected against employment discrimination on the grounds of race, gender, ethnic or social origin, colour, sexual orientation, age disability, religion culture or political affiliation; and to

transform local government to a non-racial, non-sexist institution and provide redress to disadvantaged people.”

23. This agreement was signed by employer organisations representing councils on the one hand and unions representing employees on the other. The agreement envisages a number of issues and structures being addressed at each individual local authority:

23.1 The agreement provides that “a clearly detailed, specific and feasible affirmative action programme will be formulated, implemented and monitored to redress imbalances and discrimination”. Employees and their representatives would be involved in the formulation process.

23.2 The agreement also provides that local authorities and their employees have the right to determine their own affirmative action goals and time tables, realistic in and suitable to their unique circumstances.

23.3 The agreement provides for in depth analysis and evaluation by individual local authorities for instance, with regard to the process of the affirmative action, as well as the nature of the relevant labour market, and the specific circumstances of each local authority especially when setting goals and time tables. The agreement also stresses the need for

research and analysis especially regarding the existing internal labour force, at each local authority, as well as the extent of integrated employment already in existence. Analysis is also required of the local authority in terms of divisions where affirmative action should enjoy priority. Further, the agreement provides for the identification of broad numeric objectives with regard to the various disadvantaged groups for post categories, levels and divisions in the local authority linked to realistic time tables.

23.4 The agreement provides for the establishment at each local authority of an affirmative action steering committee to monitor the implementation of the objectives, principles, strategies and procedures of the agreement.

24. It is clear therefore that the Agreement on Equal Employment and Affirmative Action envisages further steps by individual local authorities such as the Respondent. The most important of these is the formulation of an affirmative action programme. There is no dispute that the Respondent adopted this agreement during a meeting on 8 October 1996. There is further no dispute that the further action plans envisaged in this agreement have not been carried out or implemented by the Respondent. In a nutshell the Respondent has done nothing envisaged by the agreement. In my view therefore the Respondent cannot even begin to consider affirmative action in appointments before it has complied with the agreement.

25. In the absence of an affirmative action programme specifically designed in terms of the collective agreement any appointment on purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be

tested. In a nutshell the appointment of Masengana cannot be justified on affirmative action grounds. Simply put the Respondent cannot find refuge in item 2(2)(b) of schedule 7 of the Act. The court therefore must consider if the appointment of Masengana can be justified on other grounds. It is also necessary to consider if Masengana's appointment did not discriminate unfairly against other applicants on any basis.

In casu it is common cause that:-

25.1 Masengana was one of three applicants from what may be referred to as a group disadvantaged by unfair discrimination.

25.2 Masengana scored the lowest of the other two black applicants and further scored the lowest of all the applicants in a test which formed part of the interview process.

25.3 Masengana lacked the necessary experience in local government which experience was possessed by other candidates.

25.4 The sole criteria applied by the Council in the appointment of Masengana was the colour of his skin hence the attempt to bring it under Affirmative Action.

26. Unfair discrimination is outlawed. The Constitutional Court in **Harksen v Lane N.O & Others 1998 (11) BCLR 1489(CC)** stated at paragraph 45 that:

“The determination as to whether differentiation amounts to unfair discrimination under s 8(2) requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to ‘discrimination’ and, if it does, whether, secondly, it amounts to ‘unfair discrimination’. It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in s 8(2), which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the

discrimination is not unfair.”

27. Considering the concept of an unfair labour practice in the context of unfair

discrimination Landman J in **Kadiaka v Amalgamated Beverage Industries (1999) 20 ILJ**

373 (LC) at paragraph 35 said:

“The Act seeks in my view to ensure that employers provide equal opportunities for employment to all job seekers. This it does by striking down practices which constitute an unfair labour practice. The object is to establish fair labour practices founded on the absence of unfair discrimination. In order for there to be equal opportunities, the act prohibits unfair discrimination on the basis of the listed grounds or on arbitrary grounds.”

28. Seady AJ sitting in this court also considered the same issue in **Leonard Dingler**

Employee Representative Council & Others v Leonard Dingler and Others (1998) 19

ILJ 185 (LC). She stated that the onus is on the employer to provide an explanation that

discrimination, once proven, is legitimate. At page 28 of the judgment she says:”**Given that**

considerations of legitimacy and rationality must be measured in testing fairness, it is

the employer or some other respondent who can and should provide this explanation.

The employer must show that the object of the practice or policy is legitimate and that

the means used to achieve it are rational and proportional.”

29. In casu the Respondent states that it acted fairly when it appointed Masengana as Town

treasurer. It states that Masengana “is well qualified within the meaning of the Equal

Employment Practice and Affirmative Action. The main defence, therefore, proffered by the

Respondent regarding the appointment of Masengana is that it was empowered by item 2(2)

(b) of schedule 7 of the act and that it complied with this provision in appointing Masengana.

30. This explanation is in more ways than one lamentable. Firstly it has already been pointed out above that Masengana's appointment cannot be sustained under item 2(2)(b) of schedule 7. The explanation also fails to disclose what other criteria were considered by the Respondent when it decided to appoint Masengana as Town treasurer. There is no indication whether merit, qualifications or the potential to develop played any role. This court accepts that the overwhelming majority of candidates previously disadvantaged by unfair discrimination would lack the necessary experience possessed by those advantaged by past unfair discrimination. Therefore, where affirmative action is a consideration, experience will remain relevant but not determinative. The overriding requirement in such cases is the potential to develop and perform. This will also, inevitably, not make merit determinative though it also will remain relevant.

31. For affirmative action to succeed and help achieve the desired objective merit and experience would remain relevant in so far as the applicants previously disadvantaged by unfair discrimination are concerned in their own group. In other words the successful candidate should be the best out of the group previously disadvantaged by unfair discrimination. I say this for the simple reason that if the playing field is levelled, i.e. where all groups are considered, candidates from groups previously disadvantaged by unfair discrimination will always come second especially if one considers experience. Candidates previously advantaged by unfair discrimination invariably possess the necessary experience

which candidates from groups previously disadvantaged by unfair discrimination would not normally possess. In view of this situation it would be prudent therefore in affirmative action appointments to consider the qualification and potential to develop as crucial and that successful candidates from previously disadvantaged groups are the best from those groups.

32. In the appointment of Masengana it is not clear what criteria were considered save that he is black. It is not clear why he was preferred to the other two black candidates who scored higher than him in the test. There is no explanation that sets out whether he was found to have potential to develop or perform the work which would justify his appointment. It appears justified therefore to conclude that the decision to appoint Masengana cannot be justified on any other basis. It has not been demonstrated in what way was Masengana the best candidate for the post of Town Treasurer when compared with the other candidates. It therefore appears justified to conclude that the decision to appoint Masengana as Town Treasurer discriminated unfairly in an arbitrary manner against other candidates in terms of item 2(1)(a) of schedule 7 of the Act. The Respondent has therefore committed an unfair labour practice.

33. The order of the court is therefore:

16. The decision of the Respondent to appointment Masengana amounted to an unfair labour practice within the meaning of Item 2(1)(a) of schedule 7 of the Act.
17. The appointment of Masengana to the position of Town Treasurer is set aside.
18. The Respondent is ordered to pay the applicant's costs.

MLAMBO J.

Date of judgment: 16 July 1999.

For the applicant: Mr Haycock instructed by Savage Jooste & Adams Inc.

For the respondent: Mr Mahlase of Mahlase, Nonyane attorneys.