



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR56/24

In the matter between:

SOUTH AFRICAN POLICING UNION obo SINGH

Applicant

and

SOUTH AFRICAN POLICE SERVICES

First Respondent

LT. COL MASHAU

Second Respondent

**COMMISSIONER FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

COMMISSIONER W. KRUGER N.O

Fourth Respondent

Heard: 30 April 2026

Delivered: 13 May 2026 (This judgment was handed down electronically by emailing a copy to the parties. The 13 May 2026 is deemed to be the date of delivery of this judgment).

Summary: Review application – unfair discrimination – principles of affirmative measures considered. The Commissioner gave a narrow definition of rationality – finding that the decision to appoint the unrecommended candidate was rational is unreasonable and reviewable.

JUDGMENT

MHAMBI, AJ

Introduction

- [1] The employee applicant (hereinafter referred to as “the applicant”) is represented by South African Policing Union, a trade union (SAPU).
- [2] The applicant applied for a position which was advertised by the South African Police Service (hereinafter referred to as “the first respondent”). The position was at Colonel level, Division: Technical Management: Biology: Quality Management National Head Office (the position). The applicant was shortlisted. Relevant in this matter is Taylor IH (Taylor) and Colonel Mashau (incumbent) (hereinafter referred to as the “second respondent”). Following the interview processes, the selection panel recommended the applicant as their first preferred candidate for appointment and in second place Taylor. Although the second respondent was in third place in terms of the hierarchy of the list, he was not recommended by the selection panel for appointment. However, the second respondent was appointed to the position, the justification for same was that the second respondent’s appointment was going to enhance the SAPS Employment Equity Targets.
- [3] Aggrieved by the decision not to be appointed, the applicant, through her labour union (SAPU), declared a dispute of unfair discrimination in terms of the Employment Equity Act¹ (EEA) at the Commission for Conciliation, Mediation and Arbitration (CCMA). Subsequent to the dispute being unresolved at conciliation, the parties consented to the arbitration in terms of section 10(6)(b) of the EEA. This Honourable Court has been approached in terms of section 145 of the Labour Relations Act² (LRA), specifically the

¹ Act 55 of 1998 (as amended).

² Act 66 of 1995.

applicant seeks to review and set aside the Arbitration Award dated 6 December 2023 (hereinafter referred to as “the award”).

Common cause of facts

[4] The following facts are common cause between the parties:

4.1 The applicant is an Indian female employed at the relevant time as a Lieutenant Colonel by the first respondent.

4.2 On 13 October 2022, the applicant applied for the position of Division: Forensic Services Section Commander: Technical Management, Biological Quality Management: National Head Office.

4.3 The applicant was shortlisted for interviews together with Taylor, the second respondent and others.

4.4 The panel scored the relevant candidate as follows:

4.4.1 The applicant scored 72.8%;

4.4.2 Taylor 71%; and

4.4.3 The second respondent 63.8%.

4.5 On the basis of the score, it is a common cause that the panel recommended two candidates, which are the applicant and Taylor.

[5] On or about October 2022, the moderation committee decided to ignore the decision of the panel by recommending a candidate that was not recommended by the selection committee and used the 10% rule and their justification is that the third respondent's appointment would enhance the SAPS affirmative action targets.

[6] On 14 October 2022, the division commissioner approved recommendation of the moderation committee, and the second respondent was appointed.

Key findings of the Commissioner

[7] In paragraph 24 of the Arbitration Award, the Commissioner found that:

‘It is clear from the case that the Respondent discriminate against the Applicant based on her race. It was not in dispute that she obtained the highest score and that based on her experience and performance during the interview, she would have been the best candidate for the position.’

[8] In paragraph 26 of the Arbitration Award, the Commissioner found that:

‘In other words it would not amount to unfair discrimination if the Respondent promoted the 2nd Respondent even if he was not the best candidate, if the decision was reasonable and with due regard to the instruction.’

[9] In paragraph 27 of the Arbitration Award, the Commissioner found that:

‘It was not disputed that the 2nd Respondent qualified for the position and that he was interviewed. He was scored and his score was within 10% of the Applicant’s score. Therefore, in terms of the guidelines, the 2nd Respondent was a suitable candidate.’

[10] In paragraph 28 of the Arbitration Award, the Commissioner found that:

‘On the other hand the Respondent did not comply with their own national instruction. The Moderation Committee recommended a person that was shortlisted and not recommended. The Divisional Commissioner appointed a person that was shortlisted and not one of the recommended candidates.’

[11] In paragraph 29 of the Arbitration Award, the Commissioner found that:

‘On a strict reading of the National Instruction the correct approach would have been to re advertise the post if the Divisional Commissioner decided to reject the recommendation and if there were no other recommended candidates. However, the non-compliance of this part of the national instruction did not mean that the decision not to promote the Applicant amounts to unfair discrimination. In terms of the guidelines the Divisional Commissioner was permitted to appoint the Applicant. It was, however, still his discretion. I cannot find that it was irrational for the Respondent not to promote the Applicant in circumstances where there is another suitable

candidate that would enhance the employment equity profile of the Respondent.'

Legal framework for review

[12] Section 6(1) of the EEA provides as follows:

'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, birth or on any other arbitrary ground.'

[13] Section 6(2)(a) of the EEA provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA.

[14] The Commissioner's approach appears to be premised on the application of the defense in section 6(2)(a) of the EEA in that despite his findings in paragraph 28 of the Arbitration Award that *"On the other hand the Respondent did not comply with their own national instruction."* Further, in paragraph 29 of the Arbitration Award that *"It was not disputed that the 2nd Respondent qualified for the position and that he was interviewed."* Without any doubt the Commissioner' correctly found that the appointment of the second respondent was an unfair affirmative measure and his justification, which I view it to be incorrect, is that *"... the non-compliance of this part of the national instruction did not mean that the decision not to promote the Applicant amounts to unfair discrimination."* This reasoning in any imagination cannot be said to be consistent with the purpose of the EEA.

[15] The EEA was enacted to give effect to section 9(2) of the Constitution of the Republic of South Africa, 1996. Section 6(1) of the EEA protects employees from unfair discrimination based on a listed ground including race and gender.

[16] Section 6(2) of the EEA provides that it is not unfair discrimination to take affirmative action measures, if they are consistent with the purpose of the

EEA. In other words, employers may discriminate against employees if the discrimination achieves affirmative action measures.

- [17] If the fairness of a discriminatory practice is challenged, an employer may raise section 6(2)(a) of the EEA as a defense.³
- [18] Affirmative action is not an absolute defense. In cases where an employer asserts section 6(2)(a), the court or Commissioner must interrogate the fairness of the decision and scrutinize the decision of an employer.⁴ This includes an assessment of the process followed by the employer and the reasons given by the employer for favouring one employee over another.
- [19] An employer's affirmative action measures must be grounded in its employment equity plan.⁵
- [20] In *Ethekweni Municipality v Nadesan and Others (Ethekweni)*,⁶ this Court (per Whitcher J) considered the seminal constitutional case of *South African Police Service v Solidarity obo Barnard (Barnard)*⁷ and rejected the notion that a validity adopted employment equity plan was an absolute defense for a claim of unfair discrimination.
- [21] Logically, if section 6(2)(a) was an absolute defense, aggrieved employees would be disenfranchised and deprived of any recourse to challenge arbitrary, irrational and unfair conduct at the hands of the employer.
- [22] The Court proposed a guide for arbitrators in determining section 6(2) disputes. The starting point is the rationality test. The adjudicator of the unfair discrimination claim should satisfy himself/herself that the decision was rational. If the employment equity plan is declared rational, it is presumed fair unless it is rebutted by fairness considerations.
- [23] The fairness considerations include the following:⁸

³ *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC).

⁴ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).

⁵ Section 15 of the EEA.

⁶ *Ethekweni Municipality v Nadesan and Others* (2021) 42 ILJ 1480 (LC).

⁷ *Barnard* (id fn 8)

⁸ *Ethekweni* (id fn 7) at para 39.

- 23.1 The extent of the under-representivity;
- 23.2 The extent of the relative difference in performance scoring;
- 23.3 The amount of time the aggrieved party has been expected to act in the vacant position;
- 23.4 The subjective experience of the aggrieved employee as an affront to her dignity, status and morale; and
- 23.5 External effects on persons other than the complainant for instance, the impact of the non-appointment to service delivery.⁹

[24] Even if the practical guide in *Thekweni* was not to be followed, it is clear from case authority that a section 6(2)(a) enquiry involves more than a checklist exercise where an adjudicator simply matches the decision made by an employer to identified goal or target in the employment equity plan.

[25] A reasonable Commissioner must scrutinize the decision to appoint an affirmative action candidate against reasons provided in order to arrive at a conclusion about rationality. This Court in *Ethekweni* referred to this enquiry as an assessment of the “internal factors”, which comprise the following:¹⁰

‘Internal factors deal with the validity and scope of the equity plan, its internal logic, rationality and compliance with the EEA and the factual accuracy of the information the decision-maker relied upon.’

[26] For instance, in *Barnard*, the Courts scrutinized the decision of the employer to implement affirmative action measures against the requirements of the job, and the decision given by the employer not to appoint the preferred candidates.

[27] In *Barnard*, the Constitutional Court ultimately determined that the decision of the National Commissioner not to appoint Barnard was not unreasonable because the post was not critical, her non-appointment would not have sacrificed service delivery, the National Commissioner’s decision did not

⁹ See: *Barnard* (id fn 8).

¹⁰ *Ethekweni* (id fn 7) at para 36.

amount to undervaluing Barnard's competence when weighed up against the need for representativity, the National Commissioner did not apply the employment equity measure too rigidly so that it amounted to job reservation when he declined to appoint her, and Barnard was well aware that her application was subject to the application of affirmative action measures that might preclude her for attaining the position even where she to emerge as the most meritorious candidate.

- [28] Similarly, in *Monyakeni v SSSBC and Others*¹¹ the Labour Appeal Court considered the procedural and substantive fairness of the promotional dispute. It considered the procedural defects in the process the SAPS undertook when considering the candidates.
- [29] This exercise was also conducted in *Solidarity obo Louw v South Africa Police Service and Others*.¹²
- [30] Rationality is not obvious or presumed. It does not simply flow from the adoption of an employment equity plan. This is necessarily so because even in our unfair labour practice jurisprudence, an employer's discretion is subject to judicial scrutiny.
- [31] It is clear from the above that a Commissioner's duty in respect of section 6(2) of the EEA disputes goes beyond the mere location of the decision made by the employer within the ambit of an employment equity plan. This would result in an unmitigated deference to the employer's decision without scrutinizing the fairness of that decision.
- [32] Put differently, in order to discharge his duties, a Commissioner must interrogate the affirmative action measure against the impact of the decision of the aggrieved candidate, the requirements of the job, the procedure followed in the recruitment process and whether the decision was taken maliciously, or in an arbitrary manner, etc.

¹¹ *Monyakeni v SSSBC and Others* (JA 64/13) [2015] ZALAC 17 (19 May 2015).

¹² [2012] 6 BLLR 637 (LC).

[33] Section 6(2)(a) of the EEA does not insulate an employer's conduct, because irrational conduct in implementing a lawful project attracts unlawfulness.

[34] Section 11(1) of the EEA provides as follows:

‘(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

(a) did not take place as alleged; or

(b) is rational and not unfair or is otherwise justifiable.’

[35] The Commissioner, in paragraph 29 of the award, also referred to rationality, and appears to have found that rationality was established on the basis that a measure which enhances the employment equity profile is inherently rational.

[36] The formulation of the rationality principle was dealt with in *Carephone (Pty) Ltd v Marcus NO*,¹³ a full bench of the Labour Appeal Court put the question in the following terms:

‘Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at?’

[37] Decisions must be rationally related to the purpose for which the power was given. Otherwise, they are in effect arbitrary and inconsistent with this requirement.

[38] The Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*,¹⁴ held that the question whether a decision is rationally related to the purpose for which the power is given calls for an objective enquiry. Otherwise, a decision viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good

¹³ 1999 (3) SA 304 (LAC) at para 37.

¹⁴ 2000 (2) SA 674 at paras 85-90. By notice in the Gazette prescribe the rules referred to in section 56 (3) (c), as well as the forms to be used and the particulars to be furnished in connection with notice of occupational injuries and diseases, claims for compensation or any other form or matter which he or she may deem necessary for the administration of this Act.”

faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle. Rationality in this sense is a minimum threshold requirement applicable to exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent.

- [39] The Commissioner gave the notion of rationality a narrow meaning; equating it with whether or not the decision enhanced the SAPS's employment equity profile, and not giving consideration to the notion that irrationality may also relate to the procedure followed in reaching the decision.
- [40] Consequently, the Commissioner misconceived the nature of the inquiry that he was required to undertake in relation to rationality, in that the inquiry ought to have extended to whether there was irrationality relating to the procedure leading up to that decision.
- [41] In circumstances where Mashau was not a recommended candidate and ought thus not have been in the running for consideration at all, the decision to apply the 10% rule in relation to Mashau, and to appoint him, was irrational (at a procedural level). The decision by the moderation committee is in clear breach of clause 10 (f) of the SAPS National Instruction¹⁵ which reads as follows:

'The National Commissioner, Divisional Commissioner or Provincial Commissioner may, with regard to recommendations received for promotion to be considered by him or her, designate a moderation committee under the chairpersonship of a Deputy National Commissioner, Deputy Provincial Commissioner or Component Head, to consider the recommendations and to advise him or her on the recommendations for promotion. The moderation committee may review the recommendations and the chairperson of the moderation committee must submit the recommendations, any applicable reports and the reasons for its review of the recommendations, if applicable, to the Commissioner who designated the moderation committee.'

¹⁵ 3 of 2015

- [42] I intend to agree with the Commissioner that in the event that the applicant or the second recommended candidate were not suitable for appointment, the correct approach in terms of the National Instruction was to readvertise the position.¹⁶
- [43] The Commissioner thus failed to take into account considerations relating to efficiency of the service and made no reference thereto in the award.
- [44] In short, the Commissioner failed to appreciate and apply the principles that the notion of rationality in section 11 (1)(b) of the EEA extends to procedural rationality, and that considerations of efficiency were relevant.
- [45] As a result, the Commissioner ultimately arrived at a decision that a reasonable decision maker could not have come to in dismissing the applicant's unfair discrimination claim.¹⁷

Appropriate relief

- [46] In view of my finding above that the decision by the Commissioner to dismiss the applicant's claim for unfair discrimination is not a decision that a reasonable Commissioner would have reached.
- [47] I now turn to the question of appropriate relief. In terms of section 158(1) of the LRA, the Labour Court has discretion to award compensation in circumstances contemplated by the LRA.
- [48] Having considered the evidence *in toto* led during the arbitration proceedings and the fact that the applicant in the course of pursuit of the dispute *in casu* was promoted to the position of Full Colonel which position she sought in this current litigation.
- [49] The Commissioner's conclusion that the non-promotion of the applicant is not irrational despite the fact that the Commissioner conceded in paragraph 28 of the Arbitration Award that the first respondent failed to comply with its own

¹⁶ See Arbitration Award, para 29.

¹⁷ See Arbitration Award, para 30.

policy, that finding alone is unreasonable and is not a decision that a reasonable Commissioner would have made with the same set of facts.

[50] As a result, the award must be set aside. The Commissioner's irregularities are that they result in a misconceived decision which no reasonable decision maker could reach on the material that was before him. In exercising my discretion and given that the complete record of the arbitration proceedings is before me, I have decided to substitute the Arbitration Award rather than remitting the matter back to the CCMA for fresh hearing and award compensation as ordered below.

The costs

[51] This Court has a wide discretion in awarding costs. I am of the view that this is a matter where the interest of justice would be best served by making no order as to costs.

[52] In the premises, the following order is made:

Order

1. The Arbitration Award issued by the third and fourth respondents under the above case number is reviewed and set aside in its entirety.
2. The first respondent's failure to promote the applicant constitutes unfair discrimination.
3. The first respondent is ordered to compensate the applicant with full payment of the salary of a Colonel which is equivalent to six months.
4. The amount is to be paid to the applicant by 30 June 2026.
5. There is no order to cost.

M. H. Mhambi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv. L. Zikalala

Instructed by : Makhanya Attorneys Inc.

For the Respondent : Adv. T.N. Phefadu

Instructed by : State Attorney, Pretoria