




(1) Reportable: NO
(2) Of interest to other Judges: No



Signature

22 June 2026
Date

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: **C478/2024**

In the matter between:

SOLIDARITY OBO BENJAMIN, A

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

GPSSBC

Second Respondent

COMMISSIONER ZUKILE FIHLA N.O.

Third Respondent

Heard: 05 March 2026

Delivered: 22 June 2026

JUDGMENT

WHITCHER J

Introduction

- [1] This is a review application in terms of section 145 of the Labour Relations Act, 1995.
- [2] The application concerns the arbitrator's dismissal of Ms Benjamin's claim that the first respondent ('the respondent') committed an unfair labour practice in circumstances where *inter alia* the respondent's selection panel had strongly recommended her for promotion to the post of Provisioning Administration

Officer: Logistics Administration level 7 (Drakenstein Management Area) but the delegated authority (the Deputy Regional Commissioner) decided against her promotion because, in the delegated authority's view, the appointment would not be "in line" with the respondent's "EE targets". The arbitrator accepted the respondent's defence that its EEP "focusses" on national targets and in terms thereof Coloured females were over-represented in the occupational level, and, on that basis, held that the delegated authority's decision *aimed at compliance with the respondent's equity plan* did not constitute an unfair labour practice. Moreover, at the time of the arbitration, the post no longer existed.

Evidence and submissions adduced in the arbitration

- [3] The post in question was advertised with the closing date of 4 December 2020.
- [4] The following candidates were shortlisted and invited for interviews: Benjamin (C/F), Booysen (C/F); Dlova (A/F); Hlazo (A/M); Mdala (A/F), Mbooi (A/F); and Tomsana (A/F).
- [5] The delegated authority at time, the Acting Regional Commissioner, approved the shortlist.¹
- [6] The following candidates accepted the invitation and were interviewed: Benjamin (C/F); Tomsana (A/F); and Mdlala (A/F).
- [7] Following the interviews, the panel recommended Benjamin (C/F). The report dated 13 May 2022 recorded that "the strongly recommended candidate Ms Benjamin A (C/F) is in line with the Regional Equity targets of September 2021 and December 2021 and [is] more experienced and knowledge[able] in the field of work."
- [8] Mdlala and Tomsana were described as "suitable" candidates and respectively recommended as the 2nd and 3rd candidate.
- [9] The report was submitted to the *Regional* Coordinator: Special Programs: Western Cape Region and the *Regional* Head: Corporate Services: Western Cape Region and the delegated authority for their comments, and ratification.

¹ Ms. Benjamin's testimony to this effect was not disputed.

[10] The Regional Coordinator: Special Programs: Western Cape Region and the Regional Head: Corporate Services: Western Cape Region commented that in terms of the respondent's "EEP status report" for December 2021, Coloured females were over-represented by 21 and African females were over-represented by 373.

[11] The Regional Coordinator: Special Programs (Ms Mahlasela) nevertheless advised that:

"...the delegated official may appoint on merit as there were not suitable candidates found by the panel from the groups lagging behind".²

[12] However, on 30 May 2022, the Deputy Regional Commissioner (Ms Mvandaba), determined that:

All recommended candidates are not in line with EE targets, therefore the post is to be re-advertised".³

[13] Benjamin was not appointed to the post, and it was not re-advertised.

[14] Further to the above, Benjamin testified that she had performed the functions of the post in question when the incumbent was on sick leave and, at the time of the arbitration, she was still performing those functions.

[15] To the extent that equity targets was a relevant consideration, she referred to the contents of a document discovered by the respondent, titled '*Quarterly DCS Workforce Representivity Progress Report...September 2021: Salary Level 7*' (page 70).

[16] The document reflects two sections, the first titled '*Regional Employment Equity Implementation Gaps*' and the second titled '*National Employment Equity Gaps*'.

[17] In terms of the first, with reference to the Western Cape:

A/M and A/F are respectively over-represented by 62 and 99; W/M and W/F are respectively under-represented by 59 and 45; C/M and C/F are respectively

² Emphasis added.

³ Emphasis added.

under-represented by 12 and 48; and I/M and I/F are respectively over-represented by 2.

[18] Benjamin contended that the document indicates that provision is made for regional targets and since the post was a regional one, the respondent ought to have considered regional targets with reference to the Western Cape. In terms of those targets, as of September 2021, C/F were under-represented by 48 in the occupational level.

[19] In its defence, the respondent called two witnesses, Ms Reddy: Assistant Director HR and Ms Mahlasela: Regional Coordinator: Special Programs (*supra*).

[20] According to Reddy, the respondent's employment equity framework included both regional and national targets. She stated: "in line with our employment equity plan, we do have regional and national targets because there may be specific demographics in a specific region, but that regional targets are limited to [inaudible] levels".

[21] She said that the post in question no longer exists because some time after the above recruitment process, it was determined that a procurement post at Goodwood Correctional Centre was required rather than the post in issue. She said there was no mischief in this decision – it arose because operational needs in supply chain management. The Goodwood post was advertised on 30 September 2022.

[22] Mahlasela testified that a new equity plan which "focussed on national targets for the positions of PSA and [inaudible...]" was adopted in October 2021 following consultation with 'labour' and, in terms thereof, C/F were over-represented by 21 in the applicable occupational level.

[23] She referred to a document titled '*Progress Report: Workforce Profile – December 2021 (Quarter 3) Read with approved EE plans 2021 to 2024*' (page 71). The contents record that:

A/M are under-represented by 258; A/F are over-represented by 373; W/M are under-represented by 66; W/F are over-represented by 4; C/M are under-represented by 49; C/F are over-represented by 21; and I/M and I/F are respectively under-represented by 20 and 5.

[24] When it was put to her that page 70 (*supra*) had been applicable because the post was a regional post and the advertisement and closing date for applications had been November/December 2020, she maintained that page 71 (*supra*) was the applicable guide/targets.

[25] She confirmed the recommendation she made to the delegated authority regarding the appointment of Benjamin, namely that:

“The delegated official may appoint on merit as there were not suitable candidates found by the panel from the groups lagging behind”.⁴

[26] She confirmed that, according to the selection panel’s report, the panel had considered regional targets. The reports states:

“The strongly recommended candidate Ms Benjamin A (C/F) is in line with the Regional Equity targets of September 2021 and December 2021...”

[27] She also confirmed that the list of shortlisted candidates had been approved by the relevant authority.

[28] In response to a question posed by the arbitrator, she suggested that where a candidate for promotion falls within a group that is already adequately represented, the delegated authority may appoint on merit “based on the urgency of filling the post”.

[29] In cross-examination, it was pointed out to her that the EEP documents discovered by the respondent do not reflect the alleged agreement, namely that labour agreed that from October/December 2021, the “focus” will be only on national targets.

[30] As to the delegated authority who decided that Benjamin should not be promoted, she was not called as a witness to explain her decision, which had been vaguely recorded as:

“All recommended candidates are not in line with EE targets, therefore the post is to be re-advertised”.

Analysis

⁴ Emphasis added.

[31] The Labour Appeal Court in *Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Other* provided the following test for assessing the fairness of a decision to promote, or not to promote, an employee:

“...Courts and arbitrators should be reluctant to interfere with an employer’s decision to refuse promotion. They will do so only when the decision or reasoning is assailable because there is evidence that the employer acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acted in bad faith. But equally, where there is no rational relationship between the decision not to promote, the purpose of the promotion and the information upon which the impugned decision is based, interference with the decision will be justified. Because there is ordinarily no right to promotion, arbitrators and courts should hesitate before appointing the aggrieved employee to the post. Such deference, however, will be less compelling where the employer has unfairly discriminated against an employee or acted otherwise egregiously. Likewise, the remedy of reinstatement might be appropriate where it will cause no prejudice to another successful candidate because the post is vacant; or the employee proves that but for the unfair conduct he, or she, would have been appointed.”

[32] As to the implementation of affirmative action measures, this court in *Ethekwini Municipality v Nadasen & others*⁵ held that fairness is the standard by which implementation of an equity measure/EEP is to be determined (see also *SAPS v Solidarity obo Barnard* in which the Constitutional Court held that affirmative action measures must be rationally implemented and that numerical targets cannot be applied in an absolutely rigid manner).

[33] Based on Benjamin’s grounds of review, the test in *Sidumo* dictates the resolution of the controversy, i.e. was the decision one to which no reasonable arbitrator could come on the legal principles listed above and the evidence and issues that served before the arbitrator? At the heart of the exercise is a fair

⁵ (2021) 42 ILJ 1480 (LC).

reading of the award in the context of these factors and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion/s is/are untenable is a review and setting aside warranted.⁶

- [34] As indicated earlier on, in rejecting Benjamin's claim, the arbitrator accepted the respondent's defence that its EEP "focussed" on national targets and in that regard Coloured females were over-represented in the applicable occupational level, and on that basis held that the delegated authority's decision *aimed at compliance with the respondent's equity plan* could not constitute an unfair labour practice. Moreover, the post no longer existed.⁷
- [35] To my mind, the arbitrator's reasoning and conclusion is untenable in the context of the following material factors.
- [36] Firstly, Benjamin, as she was enjoined to do, established a *prima facie* case. She established that (i) she met all the requirements of the post; (ii) she had acted in the post and at the time of the arbitration hearing, she was still performing the functions associated with the post; (iii) following an enquiry by a panel of adjudicators, it was determined that she was the best candidate for the post and the panel "strongly recommended" her promotion; (iv) an authorising official had advised the delegated authority that she can be promoted on merit "*as there were not suitable candidates found by the panel from the groups lagging behind*"; (v) under cross-examination, Reddy agreed that the respondent's EEP provides for regional targets; and in that regard, the documents discovered by the respondent indicated that just seven months prior to the decision of the panel, C/F were under-represented by 48 in the occupational level.
- [37] The respondent's rebuttal failed to establish that the delegated authority, in arriving at her decision, considered the strong recommendation of the selection panel (a body specially mandated to, and best suited to, assess the suitability of candidates) and considered her fellow authority's advice.

⁶ *Makuleni v Standard Bank of South Africa Ltd and Others* (2023) 44 ILJ 1005 (LAC).

⁷ Emphasis added.

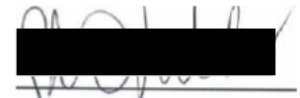
- [38] The evidence instead indicated that the delegated authority considered only numerical targets, and at that, questionable targets. In this regard, while Mahlasela claimed there had been an “agreement” to “focus on national targets”, she failed to substantiate this claim in the face of Reddy’s evidence was that the respondent’s EEP provided for regional targets.
- [39] Even if it had been reasonable to accept Mahlasela’s claim, the rebuttal offered no evidence that when the delegated authority made her decision not to promote Benjamin and re-advertise the post, she had determined that there were realistic prospects of finding a suitable candidate to fill the position from within the ranks of the under-represented group.
- [40] In the context of the facts that served at the time, common sense and fairness had dictated that numerical targets was a neutral factor, and therefore the selection fell to be determined on merit.
- [41] For all these reasons, a reasonable arbitrator would have found that the employer’s decision not to promote Benjamin to the post was irrational, capricious and unfair.
- [42] As to the fact that the post no longer exists, that was an irrelevant consideration. The decision not to promote Benjamin was not based on supply chain management’s decision that it instead needed a procurement post at Goodwood, an event which occurred long afterwards.
- [43] The question now is the appropriate remedy and whether to remit this issue to the bargaining council. Given the need for finality and my view that I have sufficient facts to make an appropriate order, I see no reason for a remittal.
- [44] Benjamin contends that she is entitled to ‘protected promotion’. I questioned her counsel about this because I know of no legal basis in common law or statute for such a concept. He provided none. As indicated in *KwaDukuza Municipality v SALGBC and Others* (2009) 30 ILJ 356 (LC) so-called protected promotion is merely a disguised form of compensation. Accordingly, the issue comes down to the quantum of compensation.
- [45] Given the finding that a reasonable arbitrator would have found that the employer’s decision not to promote Benjamin to the post was irrational,

capricious and unfair, in my view Benjamin is entitled to compensation equivalent of 12 months remuneration calculated at her rate of remuneration on the date the unfair labour practice arose, which was 30 May 2022.

[46] As to costs, in my view Solidarity is entitled to their costs on account of the respondent's weak defence.

[47] I therefore make the following order:

- (a) The award of the third respondent is reviewed and set aside and substituted with an award that the first respondent committed an unfair labour practice when it decided not to promote the applicant (Benjamin) to the post of Provisioning Administration Officer: Logistics Administration level 7 (Drakenstein Management Area).
- (b) The first respondent is ordered to pay Benjamin compensation equivalent of 12 months remuneration calculated at her rate of remuneration on the date the unfair labour practice arose, which was 30 May 2022.
- (c) The first respondent shall pay Solidarity's costs in these proceedings.


Benita Whitcher

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: D Groenewald, instructed by Serfontein Viljoen & Swart

For the First Respondent: J Swanson, instructed by State Attorney, Cape Town