REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA24/2010

SOUTH AFRICAN POLICE SERVICES **Appellant**

and

SOLIDARITY OBO MRS R M BARNARD **Respondent**

Heard: **4 May 2011**

Delivered: **2 November 2012**

Summary – Labour Law – Failure by SAPS National Commissioner to appoint a recommended white female candidate not unfair discrimination; white males and females over represented in the level of the advertised post;

Constitution - Section 9 (2) not subject to subsection (1) but guarantees the right to equality;

Employment Equity Act – measure contemplated in Section 9(2) of the Constitution – Employment Equity Plan - based on the Employment Equity Act – similarly a measure contemplated in Section 9(2).

JUDGMENT

MLAMBO JP

Introduction

[1] The overarching issue raised in this appeal concerns the relationship between Section 9(1) and (2) of the Constitution.[1] The relevant provisions read:

> '(1) Everyone is equal before the law and have 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.'

[2] This Court is required to determine whether the Labour Court (Pretorius AJ) was justified in concluding that the restitutionary measures envisaged in Section 9(2) 'must be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality' found in section 9(1). The restitutionary measures at issue are the Employment Equity Act (EEA)[2] and the Employment Equity Plan adopted by the appellant in terms of the EEA, for purposes of its workplace.

[3] The appellant was ordered by the Labour Court to promote the respondent's member, Captain RM Barnard (Barnard) to a level 9 post of Superintendent. The appellant had specifically created and advertised the post. This appeal, with the leave of the Labour Court, is directed at that order.

[4] The primary issue before that court and consequently before us is whether the appellant unfairly discriminated against Barnard on the basis of race, namely, it did not appoint a white female to the post even though she was rated as the best candidate in the interviews. A further issue is whether the appellant's National Commissioner was vested with the prerogative not to fill the advertised post.

[1] Act no 108of 1996.
[2] Act no 55 of 1998.

Factual background

[5] Barnard, is a white female who commenced her employment with the appellant in 1989 and was thereafter promoted to the rank of Captain in 1997. She served as Branch Commander, Detective Services at the Hartebeespoort Station and was after some years, transferred to the National Evaluation Service (NES). In September 2005, the appellant advertised a non-designated post of Superintendent at salary level 9 in the NES. At that time Barnard was based in the Internal Audit division still at the rank of Captain and at salary level 8. She applied for the post, was shortlisted and interviewed with six other candidates. She was assessed as the best candidate during the interviews and was given a rating of 86, 67%. The next highest ratings were given to two white male candidates, Captains Oschmann and Aschendorf, with ratings of 74,17 and 72,92 % respectively. They were followed by four black male candidates of which Captain Shibambu was the best with a rating of 69,17. The interview panel expressed the view that the difference between Captains Barnard and Shibambu was too vast to recommend the latter as first choice candidate which, in their view would compromise service delivery whereas Barnard's appointment would 'definitely enhance service delivery.'

[6] However, after perusing the recommendation from the interview panel, Divisional Commissioner Rasegatla decided that the post would not be filled as 'appointing the first three preferred candidates will aggravate the representivity status of the already under represented Sub-section'. The upshot of this decision was that no recommendations for appointment were made to the National Commissioner and the post was not filled.

[7] On 11 May 2006, the same position was again advertised and Barnard again applied. She was shortlisted, interviewed and once more obtained the highest rating, i.e. 85.33% followed by Captains Mogadima and Ledwaba with ratings of 78% and 74,67% respectively. They are both black males. Once more Barnard was recommended for appointment by the interview panel. The recommendation was also supported by the Divisional Panel of which Divisional Commissioner Rasegatla was a member. The Divisional Panel

represented by Divisional Rasegatla sent the recommendation to the National Commissioner stating, *inter alia*, that

> 'The candidate [Barnard] is recommended as the panel's first choice candidate for the post. She has proven competence and extensive experience at National level in the CORE functions of the post and was rated the highest by the promotion panel... The appointment of the candidate will not enhance representivity on salary level nine but it will not aggravate the current Divisional representivity figures as she is already part thereof. Appointing the candidate on salary level nine will however create an opportunity to enhance representivity on salary level eight in respect of the overall representation of white females on that level...'

[8] The National Commissioner [3] however did not approve the Divisional Commissioner's recommendation on the basis that the recommendation did not address representivity. He was further of the view that the post was not critical and that the non-filling thereof would not affect service delivery. He therefore did not make any appointment and called on the Divisional Commissioner to re-advertise the post in the next recruitment round and called on the latter to ensure that all efforts be made to address representivity when advertising and interviewing for the post.

[9] Barnard, obviously feeling that she had been unfairly treated by not being appointed, pursued an internal grievance and thereafter a referral to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation. She derived no joy out of those processes and her matter was escalated to the Labour Court by her union (Solidarity) who also represents her in this appeal. In the statement of claim lodged on her behalf, the case made out was essentially that she had been discriminated against because she is a white person, that she would not have been so discriminated had she not been white and that such discrimination amounted to direct discrimination on the basis of colour in terms of section 6(1) of the Employment Equity Act. This section provides:

[3] National Commissioner Jackie Selebi.

> '6 (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.'

[10] It was also asserted on Barnard's behalf that discriminating against her on that basis was unfair, that such discrimination was indefensible being unfair on any basis either in terms of the Employment Equity Act or any other conceivable basis. The relief sought on her behalf was *inter alia*, for a declarator that she had indeed been unfairly discriminated against on the basis of race in terms of section 6(1) of the Employment Equity Act and that the appellant be ordered to promote her to the rank of Superintendent retrospectively to 1 December 2005, that the appellant pay her damages in terms of section 50(2)(a)[4] of the Employment Equity Act equivalent to the monetary loss she suffered from 1 December 2005 to the date of judgment and that she be compensated in terms of the same provision in an amount deemed fit by the court as well as costs of suit.

[11] The Labour Court found that the failure to promote Barnard was a decision based on her race, that it constituted discrimination and that the appellant had failed to discharge the *onus* of showing that such discrimination was fair. It held further that the appellant had relied on the principal consideration of the numerical targets at salary level 9 as dictated by the Employment Equity Plan, with no apparent consideration of the fact that Barnard's appointment would have the mitigating effect of alleviating the underrepresentation of designated groups at salary level 8; that no consideration was given to her right to equality and dignity as well as to her personal work history and circumstances, and lastly, that the failure to appoint Barnard was unfair and therefore not in compliance with the provisions of the Employment Equity Act.

[12] The findings and conclusions of the Labour Court are informed by certain general principles that were conceived by the Labour Court in considering the matter. In the first place, the Labour Court stated that the Employment Equity

[4] Section 50(1)(a) of the EEA.

Act and Employment Equity Plan were to be applied in accordance with the principles of fairness and with due regard to the affected individual's constitutional right to equality. The Labour Court stated that it was not appropriate to apply 'without more' the numerical goals set out in the Employment Equity Plan as that approach was 'too rigid'.

[13] The Labour Court's second general principle, which is closely allied to the first, also seeks to elevate the right to equality of individuals, who may be adversely affected by the implementation of restitutionary measures, over the implementation of such measures. Expanding on this view, the Labour Court stated that 'as a matter of substance and procedure' Employment Equity Plans had to be effected with due regard not only to the right to equality but also to the dignity of such individuals. In keeping with this trend of thought, the Labour Court stated that it followed that the extent to which the implementation of Employment Equity Plans could discriminate or adversely affect individuals was limited by law in the sense that the application of the provisions of the Employment Equity Act had to be rational and fair and with due recognition of an individual's right to equality and dignity.

[14] The other principles the Labour Court espoused were that, where a post could not be filled due to the paucity of suitable candidates from an underrepresented category, promotion to a post should not 'ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group'; that there had to be a rational connection between the provisions of the Employment Equity Plan and the measures adopted to implement the provisions of that plan; and lastly that service delivery was a relevant factor to be taken into account in the implementation of Employment Equity Plans.

[15 The Labour Court went on to conclude that the evidence justifying the failure to appoint Barnard as well as the non appointment of either of the two recommended black candidates was minimal and that the failure to appoint either of the two black candidates could not be said to be a fair and appropriate method of implementing the appellant's Employment Equity Plan. On this basis, the Labour Court concluded that, having decided not to

implement the Employment Equity Plan by appointing either of the two black candidates, it was unfair in those circumstances for the appellant not to appoint Barnard, who was the "best and preferred" candidate and that this decision was irrational. For this reason the Labour Court concluded that the appellant had failed to discharge the *onus* resting on it regarding the fairness of its failure to appoint Barnard. In addition, the Labour Court found that the there was no evidence showing that Barnard's counterveiling right to equality was taken into account nor that the National Commissioner had considered Barnard's personal employment history which was found to be important by the Divisional panel. The Labour Court also found that the failure to appoint Barnard was also unfair as service delivery was compromised.

[16] The findings and conclusions made by the Labour Court are supported by the Respondent who asserts that we should not interfere with the Labour Court's judgment and order as that the Labour Court properly dealt with the issues it was confronted with.

Appellant's case

[17] The appellant has defended the National Commissioner's decision not to promote Barnard on the basis that the recommendation for her appointment did not address representivity. A further basis advanced in defending the decision not to appoint her was that the National Commissioner had the sole prerogative not to fill the post which, it was reiterated, was not critical to be filled. The essence of the argument is that the court had erred in finding that restitutionary measures had to yield to Barnard's right to equality and dignity; that the Court had failed to understand and appreciate that affirmative action by its nature was discriminatory and was intended to accord preferential treatment to persons from designated groups; that the Court employed individual rights of equality and dignity to trump the principle of affirmative action which had the effect of gutting in contravention the clear objects and import of affirmative action *per se*; that the Court had been misdirected in failing to find that the non appointment of Barnard was fair and consistent with the objects of the Employment Equity Act.

[18] The appellant further argued that the Labour Court had failed to appreciate that the appellant's Employment Equity Plan and National Instruction 1 of 2004 clearly decreed that the fact that a candidate obtained the highest rating in an assessment or was recommended for appointment did not establish any right or legitimate expectation on the part of that candidate to be appointed to any advertised post, that white males and females were, in any event, over represented in level 9, where the advertised post was located, and that the National Commissioner had in fact withdrawn the advertised post, subsequent to rejecting the Divisional panel's recommendation to appoint Barnard.

The amicus

[19] The Police and Prisons Civil Rights Union (POPCRU) intervened as *Amicus Curiae* and also advanced a number of submissions. The essence of the argument advanced by the *amicus* is that the right to equal protection and benefit of the law is limited by restitutionary measures such as those aimed at addressing equitable representation in the workplace. The argument in this regard is that the Employment Equity Act is a measure 'by which the right to equality is justifiably limited with a view to addressing the effects of unfair discrimination of the recent apartheid the past'; that the Employment Equity Act, through the Employment Equity Plan, is a measure to achieve equality in the workplace by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workplace. The *amicus* further argued that it was clearly inconceivable to suggest, as the Labour Court did, that an individual's right to equality supersedes the implementation of constitutionally conceived measures such as an Employment Equity Plan.

Evaluation

[20] Although extensive argument was also advanced by the parties in relation to affirmative action, the matter has, in my view, little to do with the legitimacy of affirmative action, but more with the implementation of such a programme in circumstances where persons from non designated groups are adversely affected thereby. The issue, in other words, is whether the implementation of equity orientated measures should be stifled in the event that such

implementation will adversely affect persons from non designated groups. This was in essence the overriding conclusion of the Labour Court.

[21] I consider it proper to first devote attention to the finding made by the Labour Court that the failure to appoint Barnard amounted to unfair discrimination. In the usual sense, an act of unfair discrimination presupposes the preference of one person over another(s) and which is unfair. In *Harksen v Lane NO and Others,*[5] the Constitutional Court, set out the test for determining whether differentiation amounts to unfair discrimination:

> '[u]nder section 8(2) [now section 9(2) of the Constitution] requires a two stage analysis. Firstly, the question arises whether the differentiation amount 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 that are defined in section 8(2) which by virtue of section 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.' [Footnote omitted]

[22] This statement illustrates the point I have already made that when one talks of discrimination; that is one is in fact, alleging that a differentiation of some sorts between and/amongst people has taken place. On the facts of the case before us, there is no evidence of such differentiation. We are here dealing with a matter where no action by way of appointment took place, meaning that no overt differentiation occurred. The discriminatory conduct accepted by the Labour Court is not the conventional type in the *Harksen* sense, i.e. of preferring someone over another(s). It is the omission, *per se*, to appoint Barnard on the basis that she is a white person. It is not necessary to decide this particular issue and I express no firm view either way. However, for purposes of this matter I am prepared to accept that it is possible to discriminate by failing to appoint a person where preference or differentiation is not at issue. I consider that the important issue is to determine if such

[5] 1998 (1) SA 300 at para 45.

discrimination was unfair within the contemplation of section 6 of the Employment Equity Act as found by the Labour Court.

[23] The Labour Court was driven to this conclusion on the basis of its reasoning that it was Barnard's race that dictated the failure to appoint her which, in the court's view violated the provisions of the Employment Equity Act. It is opportune to now consider the central logic of the Labour Court's reasoning regarding the relationship between individual rights to equality and the implementation of employment equity orientated measures. It is apparent from the reasoning of the Labour Court that the court adopted a two pronged approach to the issue. In the first place the court's attitude is that the implementation of employment equity measures must yield to an individual's right to equality and dignity where such individual is adversely affected by the implementation of such measures. In the second place the Labour Court espoused the approach that any decision based on employment equity legislation and/or plans must be rational and fair especially where such implementation affects others adversely. This is essentially the same argument though posited differently, the essence of which is that the right to equality supersedes other considerations such as, in this case, the implementation of employment equity orientated measures.

[24] Any debate about the right to equality and the implementation of restitutionary measures is bound to achieve very little, if anything, without a contextual consideration of that right and the need for restitution. It is one thing to restate the provisions of the Constitution and other related legislation on the topic such as the Employment Equity Act, and quite another to give meaning to that language. The facts of this case illustrate how easy we can miss the point of why our Constitution enshrines the right to equitable treatment yet sanctions inequitable conduct. Section 6(2) of the Employment Equity Act decrees this as follows: '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.' The *Harksen* test alluded to above is also clear that there are justifiable instances of discrimination under the Constitution.

[25] The contextual importance in this case is the reality with which the appellant was confronted as to how the designated and non designated groups were represented in its workforce. In this regard it is common cause that white employees were overrepresented in level 9. It is also common cause that the appellant's Employment Equity Plan was cognisant of this factual dynamic and made specific provision for the creation of posts calling for the appointment of persons from designated groups i.e blacks to achieve equitable representation demographically. Contextually therefore the reality in the appellant's workforce required corrective intervention as decreed in the Constitution. The appellant had adopted an Employment Equity Plan to achieve this. With this contextual understanding, one must therefore interrogate the interview and divisional panels' recommendation that Barnard be appointed in full awareness of the fact that she was a white person yet the Employment Equity Plan called for appropriate representivity. It is this recommendation, as already pointed out, that, though rejected by the appellant, found favour with the Labour Court on the basis of its principle that Barnard's right to equality, coupled with the adverse effect of not appointing her, demanded that she be appointed.

[26] It is misconstrued, in my view, to render the implementation of restitutionary measures subject to the right of an individual's right to equality. This point was ably advanced by counsel for the appellant and the *amicus*. A contrary approach would, in my view, defeat the very purpose of having restitutionary measures in the first place, as such implementation will always fall short, due to the reality that there will always be adverse effects on persons from non designated groups. The relegation of restitutionary measures on the basis laid down by the Labour Court cannot be countenanced as I will show shortly.

[27] The essence of restitutionary measures is to guarantee the right to equality for the reason that, without such measures, the achievement of equitable treatment will continue to elude us as a society. The Labour Court (Waglay J as he then was) commented, in *Jacobus J P Harmse v City of Cape Town,*[6] that the implementation of employment equity orientated measures is a duty

[6] (2003) 24 ILJ 1130 LC.

placed upon designated employers by the Employment Equity Act which also provides them with affirmative action as a defence against claims of unfair discrimination. Commenting on that decision, Prof Carole Cooper[7] states that employment orientated measures 'do not amount to an exception to equality but are integral to its achievement' which is in essence 'substantive equality'.[8]

[28] The statement by our Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*.[9] illustrates this eloquently:

> '[t]he commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution. That provision makes it clear that under our Constitution "[e]quality includes the full and equal enjoyment of all rights and freedoms". And more importantly for present purposes, it permits "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". These measures may be taken "[t]o promote the achievement of equality".
>
> But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will in equitably after some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goals we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.' [Footnote omitted]

[29] The point is aptly driven home in another Constitutional Court decision, *Minister of finance and Another v Van Heerden*,[10] that:

> '[A] comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9. Section 9(1)

[7] Cooper C The Boundaries of the Employment Equity 2003 vol 24 *ILJ* 1307-1314.
[8] Cooper at 1308.
[9] 2004 (7) BCLR 687 at paras 75-76.
[10] [2004] 12 BLLR at 1181 (CC) at paras 28 and 31.

> proclaims that everyone is equal before the law and have the right to equal protection and benefit of the law.... However section 9(2) provides for the achievement of full and equal enjoyment of all rights and freedoms and authorises legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination....
>
> Equality before the law protection in section 9(1) and measures to promote equality in section 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes... However, what is clear is that our Constitution, and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.'

[30] On the basis of this discussion, it is clear that the Labour Court erred in treating the implementation of restitutionary measures as subject to the individual conception of a right to equality. This is more so as this approach promotes the interests of persons from non designated categories to continue enjoying an unfair advantage which they had enjoyed under apartheid. Treating restitutionary measures in this manner is surely bound to stifle legitimate constitutional objectives and result in the perpetuation of inequitable representation in the workplace.

[31] The Employment Equity Act, being legislation enacted to further the objectives of section 9 of the Constitution, was conceived in recognition of the need to take restitutionary action and measures as a means of addressing the adverse effects of apartheid based discriminatory practices in the employment sphere. There is recognition in the preamble to the Employment Equity Act that

> 'as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for

certain categories of people that they cannot be redressed simply by repealing discriminatory laws.'

In addition the purpose of the Act is clear, as it seeks to

'[A]chieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce'.[11]

[32] The Employment Equity Act in fact reiterates the language of section 9 of the Constitution in section 6 (1) and (2) cited earlier. Furthermore the Employment Equity Act makes provision for the adoption of Employment Equity Plans, as the appellant did, as a means of achieving the objective of equitable representivity in the workplace. In this regard Section 20 provides:

'(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce. (2) An employment equity plan prepared in terms of subsection (1) must state – (a) the objectives to be achieved for each year of the plan; (b) the affirmative action measures to be implemented as required by section 15(2); (c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals; (d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals; (e) the duration of the plan, which may not be shorter than one year or longer than five years; (f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity; (g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan; (h) the persons in the workforce, including senior managers, responsible for

[11] Section 2 of the Employment Equity Act.

> monitoring and implementing the plan; and (i) any other prescribed matter. (3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's (a) formal qualifications; (b) prior learning; (c) relevant experience; or (d) capacity to acquire, within a reasonable time, the ability to do the job. (4) When determining whether a person is suitably qualified for a job, an employer must- (a) review all the factors listed in subsection (3); and (b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors. (5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience. (6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act.'

[33] The essence of Section 20 is that a designated employer must develop and adopt an Employment Equity Plan that focuses on its workplace. Importantly the section gives a designated employer the power to use its Employment Equity Plan to adopt recruitment measures that seek to bring equity in the ranks of its employees and to redress the under representivity of certain categories of employees in its workplace. The appellant is such a designated employer and it had, before the onset of this matter, adopted an Employment Equity Plan which it applied when filling vacancies thereafter. The advertised post at the centre of this dispute is one such vacancy. The appellant's Employment Equity Plan was, before its adoption, the subject of consultations in the appellant's workplace. It is correct that Solidarity did not participate in the consultations and preparation of the appellant's Employment Equity Plan as it was not sufficiently representative in the appellants' workplace but POPCRU, the *amicus* in this appeal, was involved.

[34] An Employment Equity Plan is equally a measure, like the Employment Equity Act, as contemplated in section 9(2) of the Constitution. It is therefore a constitutionally mandated tool in a designated employer's hands to ensure compliance with the injunction to ensure and achieve equitable employment practices and representivity.

[35] The Foreword to the appellant's Employment Equity Plan begins with the statement –

> 'The Employment Equity Act, act no 55 of 1998, promotes equal opportunity and fair treatment in employment through the elimination of unfair discrimination in any policy or practice in the workplace, and ensures the implementation of Affirmative Action measures to redress disadvantages experienced by designated groups to ensure their equitable representation in all occupational categories and levels.'

[36] The plan binds all employees of the appellant as it was adopted as a collective agreement[12] under the auspices of the Safety and Security Sectoral Bargaining Council. In fact, the plan has never been subjected to any legal challenge. Solidarity in particular had not taken issue with this Employment Equity Plan at any stage prior to or during these proceedings. Some of the important contents of the plan relate to the setting of numerical goals for up to five years. In this five-year period, the plan's objective was that representation at all categories and levels should be in line with the national demographic.

[37] It is important to also note that in the Employment Equity Plan, the numerical goals for level 9 of the National Evaluation Services Section, where the advertised post was located, was that by the end of 2006, there should be 10 African males and six African females at that level and one white male and one white female. Furthermore, the plan made provision that in order to achieve these numerical goals, eight and six level 9 posts were to be made available for the appointment and/or promotion of African males and black candidates respectively. Notably no posts were made available for the promotion/appointment of white candidates. Rigid or not, these numerical targets represent a rational programme aimed at achieving the required demographic representivity *status quo* required by the Employment Equity Plan.

[38] The over representivity of white males and females is itself a powerful demonstration of the insidious consequences of our unhappy past. White

[12] In terms of Section 23 of the LRA.

people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks. The over representivity of whites in level 9 is a stark reminder of our past and indeed the present and yet another wake up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution.

[39] It must also be pointed out that the role of Employment Equity Plans is also to ensure that decisions as to who is to be appointed in the context of affirmative action are not arbitrary or haphazard and do not occasion unfairness. The Supreme Court of Appeal, in *Gordon v Department of Health: KZN*[13] stated that any appointment made on the basis of affirmative action had to be in terms of a plan to avoid such arbitrariness. The application of such plans therefore cannot be relegated as suggested by the Labour court.

[40] National Instruction 1 of 2004 must also be brought into this discussion. This is an instruction issued by the National Commissioner to address the issue of representivity in the recruitment practices of the appellant. That instruction is a regulation issued by the appellant to regulate its recruitment practices with particular emphasis on representivity in its workplace. Its express purpose is 'to regulate the promotion process (including fast track promotions) within the defined career paths of employees up to salary level 12'. In terms of this regulation, the fact that a candidate obtains the highest rating and is recommended for promotion does not establish any right to be promoted. Furthermore, this regulation is clear that the National Commissioner is under no obligation to fill an advertised post and that he may, in his discretion either direct that a post be re-advertised or promote a candidate from the preference list other than the recommended candidate. Additionally, the selection of a candidate must be based among other things, upon suitability and employment equity considerations that are in line with the appellant's Employment Equity Plan. Clearly the National Commissioner also had in mind

[13] 2008 (6) SA 522 (SCA) at para 23.

this policy when he decided not to approve the recommendation to appoint Barnard.

[41] It remains to consider the Labour Court's conclusions that the failure to appoint Barnard was irrational and compromised service delivery, based on its view that by failing to appoint either of the two black candidates, the National Commissioner had failed to implement the Employment Equity Plan. In this regard, the Labour Court agreed with the interview and divisional panels' statement that Barnard's promotion to level 9 would enhance representivity efforts in level 8. Of course, it is strange that the National Commissioner did not appoint either of the two black candidates who were by all accounts appointable. In my view this failure owes much to the National commissioner simply focussing his mind on the recommendation to appoint Barnard. Clearly he was at liberty to appoint either of the black candidates, both of whom had passed the assessment with high ratings. This however cannot, on any conceivable basis, be regarded as a failure to implement the Employment Equity Plan.

[42] Furthermore, the point must be that, on the facts before us, the appointment of Barnard would not have advanced the quest for representivity in the appellant's workforce in level 9. It is also fanciful, to say the least, that her appointment in level 9 would have enhanced representivity in level 8. This would have aggravated the over representivity of white employees in level 9 and would have represented a step backwards and in direct violation of a clear constitutional objective. On the other hand, failing to appoint either of the black candidates does not translate into a justification of Barnard's claim, as a white female to be so appointed. As I point out above, appointing her would fly in the face of the employment equity orientated measures applicable in the appellant's environment and would have aggravated the overrepresentation of whites in level 9. In fact, the black candidates had an unquestionable claim to be appointed over Barnard in keeping with the Employment Equity Plan and she has readily conceded this point. Discriminating against Barnard in the circumstances of this case was clearly justifiable.

[43] National Instruction 1 of 2004 provides another basis pointing to what the National Commissioner should have done in this matter. Section 5 (7) states that the National Commissioner is under no obligation to fill an advertised post. Section 13 (7) further states that, if the National Commissioner does not approve the promotion of a recommended candidate, he or she is at liberty, if he deems it necessary, to promote another candidate of his choice from the list of recommended candidates submitted by the panel or direct that the post be re-advertised. It is clear from this provision that the National Commissioner has a discretion regarding what to do with the recommendation that came to him. In *SA Police Service v Zandberg and Others,* [14] the Divisional Commissioner overlooked the appointment of a recommended candidate on the basis that the appointment did not address representivity and appointed a second best candidate from a designated group, the court held that the panel had the power merely to make recommendations. Further, the power to appoint was vested in the divisional commissioner, who was entitled to deviate from the panel's recommendation. His deviation in this instance was found to be rational and justifiable. This view was confirmed by the Labour Appeal Court when this decision was appealed against.[15]

[44] I should also point out that the statement advanced by the Labour Court that there must be a rational connection between the equity plan and its objectives was not raised as an issue requiring determination. That issue arises if there is a legal challenge to the plan which was not before this Court. A reading, however, of the appellant's Employment Equity Plan demonstrates that the plan was crafted with due consideration of rationality and reasonableness. It is a plan that was drafted with due regard to the appellant's workplace dynamics and identifies the gaps requiring attention as well as providing for a programme of action that is time bound regarding the closing of the gaps identified. The issue rather is whether there is a rational connection between the transformational goal of promoting the achievement of equality by ensuring equitable representation of designated groups in all occupational

[14] (2010) 31 ILJ 1230 (LC) at 1237 A-C.
[15] Unreported judgement DA18/2010.

categories and levels in the appellant's workforce on the one hand and the means used to achieve that goal on the other hand.

[45] It cannot be argued on the facts of this matter that the appellant's Employment Equity Plan seeks the appointment of only black employees irrespective of other criteria. One of the criteria set out in the plan is the suitability of candidates. That to me suggests that should a black candidate be unsuitable that candidate will not be appointed. This is also defined in National Instruction 1. Clearly, as was aptly argued by counsel for the *amicus,* the Employment Equity Plan does not sanction mediocrity or incompetence. Manifestly this was not the case with the two black candidates in this case.

[46] The Labour Court's conclusion that the failure to appoint Barnard compromised service delivery is also misconstrued. The National Commissioner is the accounting officer of the appellant and is the only person who is answerable regarding service delivery matters. It is not open to a court to 'second guess' a decision that not filling a post will or will not compromise service delivery. In this case the National Commissioner, as the responsible accounting officer, decided not to fill the advertised post which he subsequently withdrew. In any event, I am of the view that the National Commissioner was the only person well-placed to determine if service delivery would be compromised by the failure to fill the post and his decision that this would not be so is unassailable. Frankly speaking that is his prerogative and should he be incorrect in so deciding and imperil service delivery as a result, he is answerable to his accounting authority, being the Minister and ultimately to Parliament. The National Commissioner is similarly answerable in that manner should he fail to achieve the targets set out in the Employment Equity Plan. Our role as courts is to determine if any conduct, alleged to be based on an Employment Equity Plan, for instance, is justifiable in terms of that plan such as we have here. It is not open to a court to dictate to the National Commissioner that he is compromising service delivery and should fill a post.

Conclusion

[47] The Labour Court clearly misconstrued the purpose of the employment equity orientated measures by decreeing that their implementation was subject to an individual's right to equality and dignity. This misconception is highlighted in this case, where the individual concerned is a white woman, whose group was overrepresented in level 9, and who was clearly advantaged by past unfair discriminatory laws. Importantly she did not hope to be appointed as there were two appointable black candidates from designated groups. She was also aware that black candidates were targeted for the post for which she applied and which target was within the conscripts of National Instruction 1 of 2004.

[48] Insofar as the issue of costs in concerned, it is my view that the matter raised important questions regarding our Constitution as well as the applicability of employment equity orientated measures. For this reason, it appears justified to make no order as to costs.

[49] In the circumstances, it appears eminently justifiable to uphold the appeal and the following order is granted:

1 The appeal is upheld

2 The order of the Labour Court dated 24 February 2010 is set aside and in its stead the following order is granted

'1. The application is dismissed;

2. There is no order as to costs.'

3 There is no order as to costs.

_____

Mlambo JP

Davis JA and Jappie JA concur in the judgment of Mlambo JP

APPEARANCES:

FOR THE APPELLANT:	Messeres N Cassim SC, W Mokhari SC and Barnard Lecoge
	Instructed by the State Attorney Johannesburg
FOR THE RESPONDENT:	Mr JG Grogan
	Instructed by Serfontein, Viljoen and Swart Attorneys
FOR THE AMICUS:	Mr Ngalwana
	Instructed by Grosskopf Attorneys