REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

REPORTABLE

Case no: **C368/2012**

SOLIDARITY	First Applicant
P.J. DAVIDS	Second Applicant
CF FEBRUARY	Third Applicant
AJ JONKERS	Fourth Applicant
LJ FORTUIN	Fifth Applicant
GM BAARTMAN	Sixth Applicant
and	
DEPARTMENT OF CORRECTIONAL SERVIVES	First Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Second Respondent
THE NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES	Third Respondent
THE MINISTER OF LABOUR	Fourth Respondent

Case No: C968/2012

SOLIDARITY	First Applicant
DS MERKEURR	Second Applicant
TS ABRAHAMS	Third Applicant

DR JORDAAN	Fourth Applicant
JJ KOETZE	Fifth Applicant
DMA WEHR	Sixth Applicant
and	
DEPARTMENT OF CORRECTIONAL SERVIVES	First Respondent
THE MINISTER OF CORRECTIONAL SERVICES	Second Respondent
THE NATIONAL COMMISSIONER OF THE	
DEPARTMENT OF CORRECTIONAL SERVICES	Third Respondent
THE MINISTER OF LABOUR	Fourth Respondent

Heard: 24 April – 3 May 2013; 29 July – 5 August 2013

Delivered: 18 October 2013

Summary: Relief sought that employment equity plan not in compliance with EEA and Constitution; whether the application of the plan amounts to unfair discrimination; whether designated employers must take regional and national demographics into account when developing equity targets at all occupational levels of the workforce.

JUDGMENT

RABKIN-NAICKER J

[1] In these consolidated referrals the applicants seek an order declaring that the Employment Equity Plan (EEP) of the Department of Correctional Services (DCS):

1.1 Fails to satisfy the requirements of an employment equity plan within the contemplation of the EEA, in particular section 20; and/or

1.2 constitutes a contravention of the prohibitions on race, gender and/or sex discrimination within the contemplation of section 6 of the EEA and its application in respect of the individual applicants amounts to unfair discrimination.

[2] In the alternative, a declarator is sought that the DCS EEP is unreasonable and/or irrational, and so unlawful, within the contemplation of paragraphs (e) (iii), (f) (ii), and/or (k) of section 6 of PAJA and as a consequences to:

2.1 review and set aside as unlawful the decision of the relevant respondents to adopt, apply and implement the DCS EEP plan in the course of making personnel placement decisions.

[3] The applicants seek the following relief:

3.1 that the relevant respondents promote or appoint the individual applicants or where the posts have been filled grant them the benefits of protective promotion;

3.2 the ordering of appropriate financial compensation; and

3.3 an order directing the relevant respondents to take steps to prevent the recurrence of the alleged unfair discrimination.

[4] The individual applicants have all approached this court claiming that they have been unfairly discriminated against by virtue of not being selected for the posts they applied for. I am asked to consider whether the EEP is consistent with the EEA and in particular, whether regional/ provincial demographics must be taken into account by DCS in developing and applying an employment equity plan. Secondly, I am asked to evaluate whether the manner in which this EEP is implemented by DCS amounts to unfair discrimination, alternatively unlawful or unreasonable conduct. There is no suggestion on the submissions before me that the EEA is unconstitutional. Rather, the parties are agreed that it is a piece of legislation drafted to give effect to the Constitution, in particular to Section 9(2) of the Bill of Rights.

The DCS Employment Equity Plan

[5] The EEP at issue in this matter is that in force for the period April 2010 to December 2014. It was approved on 7 September 2010. It is a national plan and sets out what it terms *'Enforcement of Non Compliance'* in paragraph 2, which includes that:

" The National Commissioner shall be accountable for the implementation of the Employment Equity Plan within the department while the Minister will account to the National Assembly.

The Accounting Officer and Executive Management Committee must ensure that the responsibility to drive employment equity forms part of each manager's Perfomance Agreement and as a start, government targets approved by cabinet and given by the Presidency to all departments should be considered. Viz. (2% for PwD's[1] in all levels and 50%:50% at SMS Level[2])

The recruitment and selection process must be employment equity driven as a measure of ensuring that short listing and all appointments are informed by the EEP Plan and all RC's CDC's as well as the DC HRM must account for this.

[6] The EEP makes reference to the following national numerical targets:-

18.1 9.3% Whites Population

18.2 79.3% African Population

18.3 8.8% Coloureds Population

18.4 2.5% Indians Population

[7] The EEP records that as of April 2007:

"Representation of Africans is quite significant and there is marked progress in the employment of females within the department. Down management of white colleagues in general is progressing well whist that of our Coloured colleagues is a bit slow. This aspect indeed requires some open mindedness."

[8] The 'limitations and shortcomings of the previous employment equity plan i.e. that of 2006-2009 is recorded in paragraph 12 of the EEP and includes the following:

[1] People with disability
[2] 50% gender representation among members of the Senior Management Service

"Recruitment and selection processes were not always EE Plan driven as some appointments that were made not compliant with the EE targets.

Moratorium on filling of vacant position has negatively affected progress on compliance with the Departmental EE Plan.

Exclusion of the Employment Equity Imperative from Managers' Performance Agreement to ensure compliance by senior managers and line managers.

The non commitment by delegated authority responsible for ASD [3] and DD [4] appointments.

[9] Paragraph 13 of the EEP provides that:

"I A National Employment Equity Pan will be developed and used by the entire department.

ii. Each Region has to develop an Employment Equity Implementation Plan aligned to the National Plan and the same applies to each management area/ Correctional Centre and Head Office.

iii. Each Business unit and Region shall develop its own implementation plan also due to the huge size of the organisation and to bridge loop holes identified in the previous plan as well as lessons learnt from cases lost by other departments."

[10] The EEP contains tables relating to employment equity targets at various levels of the workforce. The tables are explained, for example, in the following notes:

"At level 3 only Whites and Indians should be appointed. At salary level 4 only 9 African males, one African female and one Coloured male need to be

[3] Assistant Director
[4] Deputy Director

appointed to balance representation of the workforce. At level 5 only African females, Whites and Indians can be appointed."

"At level 13 African Males stand at 63 with a gap of -9 which indicates no African male should be appointed. 24 African females, 4 Coloured Females and 1 Indian Female need to be appointed at this level.

At level 14 only 3 African females and 1 white female need be appointed.

At level 15 only 2 African female and 1 African Male can be appointed. These calculations are based on 50%:50%[5] in line with Cabinet approval."

[11] The National Commissioner of the DCS has approved various recommendations which are listed in the plan including that " Advertisements must be specific of target group required (e.g. PwD's. Women and Racial Group)".

The EEP and the Employment Equity Act

[12] The applicants submit that the content of the DCS EEP is not consistent with the EEA as viewed through the prism of the Constitution. Nor they allege is it consistent with the personnel placement practices that ought to be adopted by DCS under the Public Service Act and the Correctional Services Act.

[13] Chapter III of the EEA deals with 'Affirmative action measures' i.e. the obligations of designated employers in terms of the EEA. Chapter V of the EEA deals with Monitoring, Enforcement and Legal Proceedings. The architecture of the EEA in respect to the administrative compliance route set out in Chapter V read with Chapter 111, as opposed to the Chapter 11 unfair discrimination route to this court, was exhaustively dealt with by the LAC in Dudley v City of Cape Town.[6]

[14] The genesis of the Dudley matter in the court a quo was a case with four components, involving allegations dealing with unfair discrimination,

[5] i.e. gender representivity at senior management service level
[6] (2008)29ILJ 2685 (LAC)

affirmative action, constitutional obligations and an alleged unfair labour practice.[7] Exceptions were taken to these causes of action.

[15] The findings of the court a quo in relation to two of the claims raised before it were the subject of the appeal to the LAC. In that matter Zondo JP (as he then was) held in respect of the first claim (and the exception thereto) as follows:

> "…..the conduct of a designated employer in failure to give a member of the designated group who has applied for employment preference to those candidates who are not members of the designated group in the filling of a post does not on its own constitute unfair discrimination."[8]

[16] In respect of the second claim (and the exception thereto) the LAC held that:

> "that it is not competent to institute proceedings in the Labour Court in respect of an alleged breach of any obligation under chapter III of the EEA, prior to the exhaustion of the enforcement procedure provided for in chapter V of the EEA."[9]

[17] In as far as it dealt with the issue of giving preference to a member of a designated group is concerned, the Dudley matter can be distinguished from this case which does not involve claims relating to whether the failure of selecting members for appointment to posts of a non-designated group over those of a designated group, amounts to unfair discrimination under the EEA.

[18] However, the Dudley judgment does bind me in respect of its *ratio* that claims based on alleged breaches of obligations by designated employers as set out in Chapter III of the EEA may only come before this court after exhaustion of the Chapter V compliance procedures. In view of the fact that the applicants have not sought to proceed by means of the enforcement procedure contained in Chapter V of the EEA, read with the affirmative action obligations set out in Chapter 111, I am unable to grant a declarator that the EEP is in breach of the provisions of the EEA.

---

[7] Dudley v City of Cape Town (2004) 25 ILJ 305 (LC)
[8] At paragraph 54
[9] At paragraph 48

The prohibition against unfair discrimination

[19] The applicants have pleaded that this court has jurisdiction to hear their claim by virtue of the following:

> "s 6 of the EEA, which prohibits unfair discrimination against employees in any employment policies and/or practices, read with-
>
> s 10 (6) of the EEA, which grants parties the right to refer a dispute tothis honourable Court where a dispute remains unresolved after conciliation;
>
> s 49 of the EEA, which confers jurisdiction upon this honourable court to determine any dispute about the interpretation or application of statute; and
>
> s 157 (2) of the LRA, which confers jurisdiction on this Court where alleged or threatened violations of fundamental rights occur in employment and labour relations sphere."

[20] Section 6 of the EEA reads as follows:

> "6 Prohibition of unfair discrimination
>
> (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.
>
> (2) 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.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)."

[21] The EEA defines an employment policy or practice as follows:

"'employment policy or practice' includes, but is not limited to-

(a) recruitment procedures, advertising and selection criteria;
(b) appointments and the appointment process;
(c) job classification and grading;
(d) remuneration, employment benefits and terms and conditions of employment;
(e) job assignments;
(f) the working environment and facilities;
(g) training and development;
(h) performance evaluation systems;
(i) promotion;
(j) transfer;
(k) demotion;
(l) disciplinary measures other than dismissal; and
(m) dismissal."

[22] The EEP in issue falls within the above definition, and for the purposes of this case in particular, as an employment policy dealing with selection procedures. On this basis I am able to consider whether, in its application, it has unfairly discriminated against the individual applicants. I first consider certain of the submissions made on behalf of the parties, including Popcru, admitted as amicus curiae, below.

Submissions of the parties

[23] The submissions on behalf of the parties were substantial and I am grateful to the legal teams for their assistance to the court. Mr. Brassey, on behalf of the applicants submitted that the DCS is engaged in a policy of racial profiling in the setting of its equity targets and that such profiling is out of kilter with our

constitutional values. He submitted that one of the objectives of the EEA is to ensure that suitably qualified people from designated groups have equal employment opportunities[10]. A portion of the submissions on behalf of the applicants focusing on the selection process of persons for appointment underlines the approach taken on their behalf. I quote from this as follows:

> "Having 'equal employment opportunities' must mean that persons from designated groups are treated no differently from persons who are from non-designated groups[11] – the opportunities offered to persons from designated and non-designated groups must therefore be the same. The section certainly does not provide for 'greater employment opportunities' on the basis of a person falling within a designated group.
>
> Any person from a non-designated group, would ordinarily, be compared with fellow applicants on the basis of their relative virtues. No two applicants are the same, and therefore a nuanced balancing of the individual qualities persons possess is required in the decision-making process. In the same vein, when persons from designated groups are compared to persons from non-designated groups, such a balancing would have to be done to ensure that the employment opportunities offered to those from the designated groups do not exceed the employment opportunities offered to those from the non-designated group.
>
> This consideration operates equally, if not more so, where appointment decisions require a choice to be made between different persons who all fall within the designated group. This is the sentiment expressed in the white Paper on Affirmative Action in the Public service, which declines to accept a 'blanket solution' that must be applied in all circumstances and which calls for an assessment to be made in each

[10] In this regard he referred to section 15 of Chapter 3 of the EEA which provides in subsection (2) (c)that employers should make " reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer"
[11] i.e. white males

instance 'where a choice has to be made between competing members from different groups with (sic) the target group'."

[24] The crux of Mr Moerane's submissions on behalf of the respondents' was as follows:

24.1 Section 20(1) of the EEA provides that a designated employer must prepare and implement an employment equity plan with the intention to achieve reasonable progress towards employment equity;

24.2 The DCS employed national and not regional targets for its EEPs because the First Respondent is defined as a national department under Schedule 1 issued in terms of section 7(2)(a) of the Public Service Act, 103 of 1994;

24.3 The targets in the current EEP are based on the mid-year population estimates for South Africa for the year 2005 as determined by Statistics South Africa;

24.4 The EEP is not based on race and gender profiling that is in conflict with any provisions of the Constitution or the EEA;

24.5 The EEP ensures the implementation of affirmative action measures to redress disadvantages experienced by designated groups of persons to ensure that there is equitable representation of suitably qualified persons (from designated groups) in all occupational categories and levels of DCS;

[25] The amicus approach is supportive of the above. Popcru submits that the case is about the proper approach to implementing affirmative action at all occupational levels of the workplace. Further they point out that even on the EEP, the applicants' respective racial groups are considerably over-represented. They describe the Coloured community (together with the Whites) as "a previously advantaged community in the Western Cape in comparison to the African population."

Evaluation

[26] I first consider whether the 'equal opportunities' argument can lead the court to find that the applicants have been unfairly discriminated against in terms of section 6 of the EEA. It is important to remind ourselves that in terms of that statute, when one refers to a 'non-designated group' we are talking in substance about white men without disabilities. The stance taken on behalf of the applicants however it is dressed, and with whatever eloquence it is stated, essentially rejects the principle of affirmative action measures to redress the injustices of our past. The court is urged to take on board a jurisprudential approach which puts individuals in their personal capacities as the bearers of equality rights. As Mr. Brassey who led the legal team for the applicants explained in an article responding to the promulgation of the EEA:

> "Liberals (and I count myself as one) shrink from the task of making group based comparisons. We prefer to focus on the individual. This is not because we are opportunistic, but because we recognize how value-laden these assessments are and how hurtful they can be. They make us very uncomfortable, and we seek to sterilize them so as to forestall unproductive enquiries of the sort The Bell Curve made notorious. Our abiding desire is to wish groups away and make the individual the basis of comparison. We want to deconstruct the social construct.
>
> The proposed Act, which is not liberal, forces us to break cover, however. It obliges us to make precisely the comparisons we consider so complex and odious. The veil is lifted and the debate, we are told, must proceed. Most of us shrink from engaging in it, but a few hardy souls feel the field cannot be deserted without a fight. They soon discover the price: they are immediately pilloried as racist and they

recoil, literally dumb-struck. Therein lies an irony, and it is exquisite: those who, from the best of motives, would be silencers now find themselves in the position of the silenced. ”

[27] Happily for those he represents, Mr Brassey has been far from silenced. The use of the words “to protect and advance……. categories of persons disadvantaged by unfair discrimination” in section 9(2) of the Constitution is submitted by him to have been chosen very carefully, because categories of persons are not ‘groups’ endowed with legal personality but individuals with a common denominator as far as their identities or experiences are concerned. The protection or advancement envisaged by section 9(2) is for the benefit of persons as individuals he argues. However, in my judgment the substantive approach to equality which our Constitution protects, which includes redress for those who have suffered institutional and systematic discrimination belies such an interpretation.

[28] Section 9 of the Constitution provides:

'Equality

(1) Everyone is equal before the law and has 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.

(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.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of ss (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in ss (3) is unfair unless it is established that the discrimination is fair.'

[29] I must be guided by the jurisprudence of the Constitutional Court in understanding the import of section 9 (and in particular section 9(2)) which informs the EEA. In Minister of Finance and Another v Van Heerden[12] the Constitutional Court[13] comprehensively set out its approach to the equality clause and in particular section 9 (2) *inter alia* as follows:

> ""Equality and unfair discrimination
>
> [22] The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.
>
> [23] For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person'.

[12] 2004(6) SA 121 (CC)
[13]

[24] Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality - a duty which binds the judiciary too.

[25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.

[26] The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact. Of this Ngcobo J, concurring with a unanimous Court, in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others observed that:

'In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.'

Restitutionary measures

[28] A comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of s 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law. On the other hand, s 9(3) proscribes unfair discrimination by the State against anyone on any ground including those specified. Section 9(5) renders discrimination on one or more of the listed grounds unfair unless its fairness is established. However, s 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. Restitutionary measures, sometimes referred to as 'affirmative action', may be taken to promote the achievement of equality. The measures must be 'designed' to protect or advance persons disadvantaged by unfair discrimination in order to advance the achievement of equality.

[29] Section 9(1) provides: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' Of course, the phrase 'equal protection of the law' also appears in the 14th Amendment of the US Constitution. The American jurisprudence has, generally speaking, rendered a particularly limited and formal account of the reach of the equal protection right. The US anti-discrimination approach regards affirmative action measures as a suspect category which must pass strict judicial scrutiny. The test requires that it be demonstrated that differentiation on the grounds of race is a necessary means to the promotion of a compelling or overriding State interest. A rational relationship between the differentiation and a State interest would be inadequate. Our equality jurisprudence differs substantively from the US approach to equality. Our respective histories, social context and constitutional design differ markedly. Even so, the terminology of 'affirmative action' has found its way into general use and into a number of our statutes directed at prohibiting unfair

discrimination and promoting equality, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. But in our context, this terminology may create more conceptual and other difficulties than it resolves. We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of 'suspect categories of State action', and of 'strict scrutiny'. The Afrikaans equivalent 'regstellende aksie' is perhaps juridically more consonant with the remedial or restitutionary component of our equality jurisprudence.

[30] Thus, our constitutional understanding of equality includes what Ackermann J in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another calls 'remedial or restitutionary equality'. Such measures are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.

[31] Equality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular s 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 underprivilege, the constitutional promise

of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow….

[32] Remedial measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of s 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9(2).

Onus of proof and s 9(2)

[33] It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in s 9(3), pass muster under s 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of s 9 is internally inconsistent or that the provisions of s 9(2) are a mere interpretative aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly. Secondly, such presumptive unfairness would unduly require the Judiciary to second-guess the Legislature and the Executive concerning the appropriate measures to overcome the effect of unfair discrimination."

[30] Given that there is no attack on the constitutionality of the EEA and section 6 in particular, I must find on the basis of the jurisprudence of our highest court that affirmative action measures in conformity with the purposes of the EEA are those that meet the requirement of substantive equality. I reject the notion that the restitutionary measures the EEA promotes amount to equal opportunity for designated groups to compete with the prime beneficiaries of past systemic and institutionalised discrimination. It is noteworthy that no claim was made in the submissions before me that a level playing field had

been reached for the enjoyment of these equal opportunities. Of course no such submission would withstand scrutiny. If one looks at the Statistical Release in the wake of Census 2011, the skewed distribution of employment opportunities among men and women per population group is described as follows:

> "The labour absorption rate among black African men was 40,8% compared with 75,7% among white men, while the LFPR among black African women was 28,8% compared with 62,5% among white women…In terms of the other population groups, the labour absorption rate among men in the coloured population group was 52,0% and among women in that group it was 42,3% Among the Indian/Asian population group, the absorption rate was 64,9% among men and 43,9% among women."

[31] I note also that in rejecting the 'equal opportunities' argument by the applicants, I am following the decision in **SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae)**[14] in which Mlambo JP(as he then was) held that the Labour Court clearly misconstrued the purpose of the employment equity orientated measures in that case by decreeing that their implementation was subject to an individual's right to equality and dignity.[15]

[32] I now turn to consider whether those of the applicants who are black persons for the purposes of the EEA and members of the coloured community in the Western Cape[16], have been unfairly discriminated against by virtue of the selection and appointment process of DCS, a process guided by the EEP, amongst other policies. It is not necessary for me to look at the specific facts and circumstances of each one of these applicants qua members of a designated group. It is common cause that they faced a selection process for particular posts which process did not take regional demographics into account for the purposes of its equity objectives.

[14] (2013) 34 ILJ 590 (LAC)
[15] At paragraph 56
[16]

[33] The interpretation clause of the EEA reads as follows:

"3 Interpretation of this Act

This Act must be interpreted-

(a) in compliance with the Constitution;

(b) so as to give effect to its purpose;

(c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and

(d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation."

[34] The purpose of the EEA is expressed as follows:

"2 Purpose of this Act

The purpose of this Act is to achieve 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."

[35] The meaning of affirmative action measures is dealt with in section 15 of the EEA as follows:

"15 Affirmative action measures

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

(a) measures to identify and eliminate employment barriers,

including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups."

[36] Section 42, mentioned above deals with enforcement of compliance orders and reads as follows:

42 Assessment of compliance

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor."

[37] Two subsections of section 42 deserve to be emphasised for our purposes. These are the following relevant factors to assessing compliance with the Act:

> **"(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-**
>
> **(i) demographic profile of the national and regional economically active population;"**

[38] The selection process in DCS is premised on an understanding that the constitutionally mandated EEA allows for the disregard of regional

demographics when targets are set for the advancement of designated groups by a national employer. We have seen that the EEA itself plainly refers to both national and regional demographics being taken into account for the purpose of compliance with the EEA. The EEA provides in section 54 that:

> "(1) The Minister may, on the advice of the Commission-
>
> (a) issue any code of good practice; and
>
> (b) change or replace any code of good practice.
>
> (2) Any code of good practice, or any change to, or replacement of, a code of good practice must be published in the Gazette."

[39] There are two Codes of Good Practice that have been promulgated in terms of the EEA. The first Code of Good Practice dated November 1999 was issued in respect of the 'Preparation, implementation and monitoring of employment equity plans'.[17] The second Code of Good Practice was promulgated in August 2005 on the Integration of employment equity into Human Resource Policies and Practices.[18] Neither of these codes were referred to by the parties. On a reading of these it is apparent that they contain certain conflicting provisions.

[40] The 1999 Code which has not been repealed provides that:

> "8.4 Numerical goals
>
> 8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.

[17] CODE OF GOOD PRACTICE: PREPARATION, IMPLEMENTATION AND MONITORING OF EMPLOYMENT EQUITY PLANS (GN R1394 in GG 20626 of 23 November 1999)
[18] CODE OF GOOD PRACTICE ON THE INTEGRATION OF EMPLOYMENT EQUITY INTO HUMAN RESOURCE POLICIES AND PRACTICES (GenN 1358 in GG 27866 of 4 August 2005)

8.4.2 In developing the numerical goals, the following factors should be into consideration-

- The degree of under-representation of employ employees from designated groups in each occupational category and level in the employer's workforce;
- present and planned vacancies;
- the provincial and national economically active population as presented in form EEA 8;
- the pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;
- • present and anticipated economic and financial factors relevant to the industry in which the employer operates;
- economic and financial circumstances of the employer;
- the anticipated growth or reduction in the employer's workforce during the time period for the goals;
- the expected turnover of employees in the employer's workforce during the time period for the goals; and
- labour turnover trends and underlying reasons specifically for employees from designated groups." (my emphasis)

[41] Form EE8, part of the First Code of Good Practice, reads as follows:

"EEA8

ANNEXURE 1: DEMOGRAPHIC DATA

Demographic profile of the national and regional economically active population

WHAT IS THE PURPOSE OF THE DEMOGRAPHIC PROFILE OF THE NATIONAL AND REGIONAL ECONOMICALLY ACTIVE POPULATION AND WHERE TO FIND THEM?

Statistics South Africa provides demographic data using Labour Force Surveys from time to time. The Labour Force Surveys (LFS) that is [sic] normally released quarterly provides statistics on the national and provincial Economically Active Population (EAP) in terms of race and gender. Employers can access this information directly from Statistics South Africa. This information must be used by employers when consulting with employees, conducting an analysis and when preparing and implementing Employment Equity Plans."

[42] The 2005 code provides in part that:

> "Developing a workforce profile and setting numerical targets for equitable representivity
>
> 5.3.9. A workforce profile is a snapshot of employee distribution in the various occupational categories and levels. Under-representation refers to the statistical disparity between the representation of designated groups in the workplace compared to their representation in the labour market. This may indicate the likelihood of barriers in recruitment, promotion, training and development.
>
> 5.3.10. Collection of information for the workforce profile is done through an employee survey. It is preferable for employees to identify themselves to enable the employer to allocate them to a designated group. Only in the absence of an employee's self-identification, can an employer rely on existing or historical data to determine the employee's designated group status.
>
> 5.3.11. <u>The workforce profile should indicate the extent to which designated groups are under-represented in that workforce in occupational categories and levels. This should be compared to the Economically Active Population at national, provincial or regional, or metropolitan economically active population or other appropriate benchmarks. Employers should set numerical targets for each occupational category and level informed by under-representation in the workforce profile and national demographics. The extent of under-representation revealed by</u>

the workforce profile represents the ideal goal reflected as the percentage for each occupational category and level for that workplace.

5.3.12. Employers, employees and trade unions should prioritise the least under-represented groups within the workforce. For example, an employer in the consultation process should focus more on the areas where the most imbalances appeared during the audit and analysis.

5.3.13. Numerical targets will contribute to achieving a critical mass of the excluded group in the workplace. Their increased presence and participation will contribute to the transformation of the workplace culture and to be more affirming of diversity. Employers are required to make reasonable progress towards achieving numerical targets to achieve equitable representation. This means that an employer should track and monitor progress on a regular basis and update its profile continuously to reflect demographic changes."

---

[43] In addition to the two Codes, administrative regulations have been promulgated in terms of the EEA[19] and these provide in part as follows:

"(5) When a designated employer conducts the analysis required by section 19(1) of the Act, the employer may refer to-

(a) Annexure 1 (EEA8), for demographic data; and

(b) Annexure 2 (EEA9), which contains the definitions of occupational levels.

(6) A designated employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of Act as a guide when collecting information and conducting the analysis required by section 19 of the Act."

[44] Annexure EE8 is again reproduced in 2009 as follows:

[19] GENERAL ADMINISTRATIVE REGULATIONS, 2009 (GN 736 in GG 32393 of 14 July 2009)

"EEA8

ANNEXURE 1: DEMOGRAPHIC DATA

Demographic profile of the national and regional economically active population

WHAT IS THE PURPOSE OF THE DEMOGRAPHIC PROFILE OF THE NATIONAL AND REGIONAL ECONOMICALLY ACTIVE POPULATION AND WHERE TO FIND THEM?

Statistics South Africa provides demographic data using Labour Force Surveys from time to time. The Labour Force Surveys (LFS) that is [sic] normally released quarterly provides statistics on the national and provincial Economically Active Population (EAP) in terms of race and gender. Employers can access this information directly from Statistics South Africa. This information must be used by employers when consulting with employees, conducting an analysis and when preparing and implementing Employment Equity Plans." (my emphasis)

[45] Looking at the two Codes and the administrative regulations and given that the two Codes contain conflicting provisions in respect of the need to take regional demographics into account, the court must prefer those provisions which support the provisions of the EEA and the Constitution. In my judgment the clear meaning of section 42 of the EEA which guides the administrators of the EEA on how to gauge compliance with it, is that both regional and national demographics must be taken into account. I stress that the fact that national demographics must factor into all employment equity plans provides for a safeguard recognising that is was the African majority in this country that were most severely impacted by the policies of apartheid. However, that regional demographics must be also considered, asserts the right of all who comprise black persons in terms of the EEA to benefit from the restitutionary measures created by the EEA, and derived from the right to substantive equality under our Constitution.

[46] Where the selection and recruitment process derived from the employment equity policy of the DCS takes no cognisance whatsoever of the regional demographics of the Western Cape, this amounts to discrimination which is not protected by section 6(2) of the EEA or section 9(2) of our constitution. It is therefore unfair.

[47] This is a case in which much emotion has been felt and expressed. The painful history of our country has been revisited. Counsel on both sides have referred to this history . The preamble to our Constitution enjoins us all to be guided by the following fundamental principles:

> "'We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people."

[48] The necessity of restitutionary measures is part and parcel of a healing process. There have been many opinions expressed on our history during the course of this trial. I wish to add to these by emphasising that it was the policy of successive white minority governments in our country to 'divide and rule' black South Africans, a policy which was long founded in British colonial policy. The Constitution's injunction to heal the divisions of the past cannot contemplate law or conduct which add salt to the wounds caused by the divide and rule policy of by-gone eras. Bringing about the unity of the African, Coloured and Indian communities to usher in the constitutional democracy we enjoy was not an easy project given the stratagems that were employed to divide them. One of the principles espoused to achieve the goal of unity of the disadvantaged at the time was "Freedom is indivisible"[20] This principle conforms with the aims of our Constitution and must surely guide the implementation of restitutionary measures while we build our society towards the attainment of a healed nation.

[49] In as far as the failure to appoint the one applicant who is not a member of a designated group is concerned,[21] the background to Mr. Davids approaching this court was as follows:

49.1 He is employed as a Senior Correctional Officer in the component CC Staff Support at Centre Level. He commenced employment in the DCS on 1 December 1986.

49.2 On 23 and 26 July 2010, the DCS advertised the position of Assistant Director: Human Resources Administration , Allendale Management Area, Western Cape Region on 23 and 26 July – a level 8 position for which he applied.

He was shortlisted with four other candidates and he was recommended for appointment as the first and only candidate but was not appointed.

[20] A phrase first coined by Mahatma Ghandi and later utilized in forging unity between the African , Indian and Coloured communities in the Congress Alliance.
[21] Pieter Johannes Davids

49.3 After considering a request for deviation from the EEP, the Director; Equity recommended that that the region re-advertise the position and that consideration be given to the headhunting of a candidate that would meet the requirements of the EEP.

49.4 On 2 February 2011, the Acting Deputy Commissioner: Human Resource Management recommended that the position be re- advertised.

49.5 The National Commissioner confirmed the above recommendation on 9 September 2011.

49.6 The position was filled after a short-listing and interview process during February 2012.

49.7 Mr Davids had re-applied for the position but had not been short-listed.

49.8 Mr Davids referred the matter to the CCMA for conciliation.

49.9 On 5 March 2012. The CCMA issued a certificate of non-resolution and the matter was referred to the Labour Court for adjudication.

49.10 Mr Davids' appointment was declined because his appointment was not in line with the EEP as white males were over-represented at that level.

[50] Mr Davids claim that he was the subject of unfair discrimination cannot succeed for at least the following reasons:

50.1 Mr. Davids is not a member of a designated group;

50.2 White males were over-represented at the level he applied for a position;

50.3 The **Barnard** matter, which binds this court, held that affirmative action measures are to do with substantive equality and not individual rights to equality and dignity;

50.4 **Barnard** is also authority for the proposition that persons in the position of the national commissioner of DCS have the discretion to keep posts vacant in order to comply with appointing suitably qualified members of designated groups in line with their employment equity plan;

[51] I have not recorded the testimony of all the witnesses in this matter. Nor have I found it necessary for the purposes of this judgment to deal with the evidence of the expert witnesses which would have been more relevant to an adjudication in the wake of the Chapter V route. I wish to emphasise that my failure to record the parties' testimony should in no way be seen as reflecting it was not keenly heard by this court. Given the remedy I consider appropriate and the fact that essentially most of the facts regarding the non-appointment of the individual applicants was common cause, it was simply not necessary to do so.

[52] The trial was an emotional one for those who gave evidence on both sides. A particular issue that I wish to stress is that the loyalty of the employees to their department, on the part of witnesses on both sides in this matter, was palpable. This must form a good basis for the DCS to move forward.

[53] The EEA allows for proportionality, balance and fairness when it requires both national and regional demographics to be taken into account. I trust that the DCS and its employees can ensure the appropriate targets are set, factoring in this requirement.

[54] In as far as relief to be granted is concerned, I have not deemed it necessary to consider the prayer for review of the decision to adopt and implement the EEP in terms of PAJA. This was not pursued in any depth in the submissions

before me. Further, the provisions of section 7 of the PAJA were not taken into account by the applicants. [22]

[55] In terms of section 50(2) of the EEA:

> "(2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-
>
> (a) payment of compensation by the employer to that employee;
>
> (b) payment of damages by the employer to that employee;
>
> (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees."

[56] I have found that the individual applicants who are black employees in terms of the EEA have suffered unfair discrimination in that the selection process utilised to decide on their applications for appointment to various posts was premised on the understanding that regional demographics do not have to be taken into account in setting targets at all occupational levels of the workforce in DCS. This policy and practice is not in line with the affirmative action measures referred to in section 6(2)(a) of the EEA. In my judgment the most appropriate relief for the court to order in these circumstances is one that will benefit all employees of DCS in the Western Cape who are black employees of the DCS and members of the coloured community in the future.

[57] Given the nature of the legal issues at stake in this matter I do not consider it appropriate to order costs. I therefore make the following order:

[22] i.e. that internal remedies in other statutes must first be exhausted before the application of PAJA and that a claim in terms of PAJA must be brought within the time stipulated in section 7(4)

[1] The First Respondent is ordered to take immediate steps to ensure that both national and regional demographics are taken into account in respect of members of designated groups when setting equity targets at all occupational levels of its workforce.

[2] There is no order as to costs

_____

H.Rabkin-Naicker

Judge of the Labour Court

Appearances:

On behalf of the Applicants: MSM Brassey SC with MJ Engelbrecht instructed by Serfontein Viljoen & Swart

On behalf of the Respondents: MTK Moerane SC DB Ntsebeza SC BM LegogeN Mbelle Instructed by the State Attorney

For the amicus: V Ngalwana F Karachi instructed by Marais Muller Yekiso