REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

In the matter between: Case no: C 368/12

SOLIDARITY	**Applicant**
and	
DEPARTMENT OF CORRECTIONAL SERVICES	**First Respondent**
MINISTER OF CORRECTIONAL SERVICES	**Second Respondent**
NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES	**Third Respondent**
MINISTER OF LABOUR	**Fourth Respondent**
IN RE:	
SOLIDARITY	**First applicant**
PJ DAVIDS	**Second applicant**
CF FEBRUARY	**Third applicant**
AJ JONKERS	**Fourth applicant**

LJ FORTUIN **Fifth applicant**

GM BAARTMAN **Sixth applicant**

and

DEPARTMENT OF CORRECTIONAL SERVICES **First Respondent**

MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES **Third Respondent**

MINISTER OF LABOUR **Fourth Respondent**

AND

In the matter between: Case No C 986/12

SOLIDARITY **First applicant**

DS MERKEUR **Second applicant**

TS ABRAHAMS **Third applicant**

DR JORDAAN **Fourth applicant**

JJ KOTZE **Sixth applicant**

DMA WEHR **Seventh applicant**

and

DEPARTMENT OF CORRECTIONAL SERVICES **First Respondent**

MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

NATIONAL COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES **Third Respondent**

MINISTER OF LABOUR **Fourth Respondent**

Heard: **31 January 2014**

Delivered: **6 February 2014**

Summary: High Court rule 49(11) – enforcement of order pending appeal.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application in terms of High Court rule 49(11) read with Labour Court rule 11(3) to implement a court order pending appeal.

[2] On 18 October 2013 Rabkin-Naicker J made the following order::

> "The first respondent [the Department of Correctional Services] 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".

[3] The applicant, Solidarity, appealed against portions of that judgment. The Department cross-appealed. Solidarity sought an undertaking from the Department that it would, in the interim, give effect to the judgment, especially in the process of interviews and appointments to positions affecting the individual applicants and the filling of 195 new positions advertised in the press. The Department refused. On 17 January 2014 the State Attorney responded to correspondence from Solidarity's attorneys and said that:

> "No instruction has been issued regarding use of National [*sic*] or regional racial demographics targets in its appointments.
>
> As you know, the judgment of her Ladyship Ms Justice Rabkin-Naicker has been appealed and cross-appealed by both parties, our client is under no

obligation to comply with it in law as its legal implications has been suspended" [*sic*].

[4] On 23 January 2014 Solidarity launched this application, to be heard as one of urgency, asking the Court to implement the judgment pending the appeal and cross-appeal.

Background facts

[5] This application, and the judgment of Rabkin-Naicker J, arises from the employment policies of the Department of Correctional Services. The Department's view is that its Employment Equity Plan, issued in terms of the Employment Equity Act[1], prescribes that national demographic figures be used for the recruitment, appointment and promotion of employees. Therefore, it uses national numerical targets of 79,3 % Africans, 8,8 % Coloureds, 9,3 % Whites and 2,5% Indians for appointments at various levels.[2]

[6] In her judgment, Rabkin-Naicker J ruled that the clear meaning of s 42 of the EEA is that both regional and national demographics must be taken into account. That asserts the right of those who comprise black persons in terms of the EEA – including those classified as "coloured" during the apartheid era – to benefit from the restitutionary measures created by the EEA and derived from the right to substantive equality under the Constitution.

[7] Leave to appeal and to cross-appeal was granted on 29 November 2013. Solidarity delivered its notice of appeal on 10 December 2013 and the Department delivered its notice of cross-appeal on 12 December.

[8] Solidarity was concerned that the continued application of national demographic statistics in the personnel placement decisions of the Department pending the appeal process would result in it making placements on considerations found not to have been legitimate by this

[1] Act 55 of 1998 (the EEA).

[2] These racial categorisations stemming from the repealed apartheid-era Population Registration Act are used by the Department to ensure compliance with its interpretation of the Employment Equity Act; it is inevitable to refer to the same categorisation in this ruling.

Court. The effect of this, the deponent to the founding affidavit pointed out, would be to outlive the appeal process.

[9] Solidarity's attorneys wrote to the Department, the State Attorney, the Acting National Commissioner and the Western Cape Regional Commissioner on 22 October and 4 November 2013 – i.e. before either party had applied for leave to appeal – to seek assurances that the Department would abide the court order. There was no response to the first letter. On 6 November 2013 the State Attorney replied:

> "The appointment of suitably qualified persons that will finally be made will be in accordance with the Constitution, the law and with due regard to the judgment of her Ladyship Madam Justice Rabkin-Naicker".

[10] Solidarity took some comfort from this undertaking. On 4 December 2013 – leave to appeal having been granted – its attorneys wrote to the State Attorney and sought its confirmation that the undertaking would remain in place pending appeal, especially having regard to the judgment of the Supreme Court of Appeal in *Solidarity obo Barnard v South African Police Services*[3] handed down on 28 November 2013. That judgment clarified aspects of the application and interpretation of the Employment Equity Act.

[11] The State Attorney did not respond. Solidarity's attorneys wrote to them again on 7 January 2014. They referred to "recent media reports" from which it appeared that the Department intended to use national demographic targets in all appointments and not to abide by the judgment pending appeal. They pointed out that it appeared that no coloured applicants would be included in the learnership enrolment program for 2014. They asked for a response by 10 January 2014. It was not forthcoming. The State Attorney only responded on 17 January 2014 and made it clear that it would not comply with the order pending appeal, as its operation was suspended. Solidarity then launched this application.

[3] [2013] ZASCA 177.

Rule 49(11): the legal principles

[12] It is trite that the effect of a judgment is suspended pending appeal. But rule 49(11) of the High Court rules makes provision for the court to direct otherwise. A similar procedure has been adopted by this Court, for example in *Booysen v The Minister of Safety & Security and Others.*[4]

[13] High Court rule[5] 49(11) reads as follows:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

[14] The rules of the Labour Court have no similar provision. Rule 11(3) provides, though, that:

> "If a situation for which these rules do not provide arises in proceedings or contemplated proceedings, the court may adopt the procedure that it deems appropriate in the circumstances."

[15] Thus, in *National Police Services Union v National Commissioner of the National Police Services & others,*[6] the court held that it is not precluded from achieving the same result as that contemplated by rule 49(11) of the Uniform Rules.

[16] In exercising the discretion whether to implement the order pending the appeal, the court must normally have regard to the factors discussed in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd:*[7]

16.1 the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal if leave to execute were to be granted;

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[4] Case no C 60/2008 and C 307/2009 (unreported, 2 May 2012).

[5] GNR.48 of 12 January 1965: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa ("the Uniform Rules").

[6] (1999) 20 *ILJ* 2408 (LC) para [14].

[7] 1977 (3) SA 534 (A) at 545 E-G.

16.2 the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal if leave to execute were to be refused;

16.3 the prospects of success on appeal, including more particularly a question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgement but for some indirect purpose, e.g. to gain time or harass the other party; and

16.4 where is the potentiality of irreparable harm and prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.

[17] I shall consider each of these factors. But before I do so, I need to consider two issues that I raised with counsel in argument: that is, whether it would not have been more appropriate for Rabkin-Naicker J, who heard the matter initially and is *au fait* with the facts and evidence, to hear this application; and secondly, the question of urgency.

[18] The first question is easily disposed of. It is, as Mr *Moerane* said, a question of convenience and not of law. Both counsel were satisfied that there is nothing in law barring me from hearing this application. Neither could I find anything in the rules. This application is separate from the application for leave to appeal, that would ordinarily be decided by the presiding judge.[8] I remain of the view that it would have been preferable for the judge who presided over the hearing and who decided on the applications for leave to appeal and to cross-appeal, to hear this application, steeped as she is in the background and facts of the case and the considerations she took into account when granting leave to appeal and to cross-appeal; yet there is nothing barring me from hearing this application and I considered it to be in the interests of the justice to hear the matter, senior counsel having been flown to Cape Town at considerable cost to both parties to argue the matter on Friday 31 January 2014.

[8] Rule 30.

Urgency

[19] Mr *Moerane* argued that the application was not urgent and should either be dismissed or struck from the roll. In response Mr *Brassey* referred to *Airy and Another v Cross-Border Road Transport Agency and Others.*[9] In *Airy,* the Court expressed the view that a rule 49(11) application is not hit by High Court rule 6(12) (analogous to Labour Court rule 8). It is an interlocutory application (dealt with in Labour Court rule 11) and thus one which may be brought on notice and set down at a time assigned by the registrar or as directed by a judge. In terms of Labour Court rule 11(4), when dealing with interlocutory applications, "the court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act". One of those objects is the effective resolution of labour disputes.[10]

[20] But in any event, it cannot be said that any urgency in this case was self-created. Solidarity initially got comfort from the undertaking by the State Attorney to give effect to the judgment of Rabkin-Naicker J. When it sought an assurance from the State Attorney that the undertaking stood pending appeal, it was not forthcoming. The State Attorney waited for more than a month before responding to Solidarity's attorneys. And when it did, refusing such an undertaking, Solidarity launched this application within four days.

[21] The urgency of the matter is also brought about by the imminent implementation of learnership enrolments for 2014 of some 194 applicants and the appointment of 195 other employees. From the Department's initial response and statements to the press, it was apparent that no coloured applicants would be considered. It was only at the hearing of this matter on Friday 31 January that Mr *Moerane* handed up some documents, unaccompanied by any affidavits, suggesting that the Department would deviate from its stated policy to take only national demographics into account and would in fact consider 50% of the learnerships for coloured applicants.

[9] 2001 (1) SA 737 (T) at para [16].

[10] LRA s 1(d)(iv).

The balance of convenience

[22] The balance of convenience in this case lies with the applicants. As Pillay J said on the facts of the case in *N v Government of the Republic of South Africa*[11], "it is simply no skin off the respondents' noses to comply with the order pending the appeal".

[23] This much is clear from the documents belatedly offered up by the Department's counsel at the hearing of this matter. Those documents were elaborated upon, at the Court's request, in a supplementary answering affidavit delivered on Monday 3 February 2014. In terms of a request for exemption assented to by the National Commissioner – and contrary to the State Attorney's "instructions" embodied in its letter of 17 January 2014 – it appears that the Department has indeed approved a deviation from its Employment Equity Plan for, at least, the distribution of the learnership enrolment group for 2014 in the Western Cape. Those candidates must report for training this month, February 2014. It initially seemed that no coloured people would be eligible for learnerships; in terms of the "deviation", the proposed distribution list comprises a "race distribution" of "Africans 40 %, Coloureds 50 % and Whites 10 %".[12]

[24] Surprisingly, the regional commissioner of the Western Cape states in his answering affidavit filed on 3 February 2014 that he had already approved a memorandum on 2 December 2013 that proposed the following:

24.1 9,3% of the 194 posts for the Learnership programme be reserved for whites;

24.2 2,5 % of the posts be reserved for Indians; and

24.3 The remainder of the 194 posts be distributed equally between Africans and Coloureds, i.e. 50 % each.

[25] The national commissioner – the third respondent – approved the deviation referring to a "race distribution" of "Coloureds 50 %" on 23

[11] 2006 (6) SA 568 (D) at 572.

[12] Despite the fact that these numbers make no provision for Indians, an accompanying memorandum to "all area commissioners" states that : "The following Management areas must include applicant [sic] of Indians [sic] race in their totals as follows: Pollsmoor 2, Voorberg 3, Brandvlei 2, Breede River 2.

January 2014, a week before this application was heard. Quite apart from the fact that the EEA does not allow quotas or "reserved allocations", it is quite inexplicable why the regional commissioner and the Department only placed these facts before the Court after the Court had requested a supplementary affidavit from them at the hearing on Friday 31 January 2014. In their initial answering affidavit, filed on 30 January 2014 – almost two months after the regional commissioner had made his recommendation and a week after the national commissioner had approved it – they simply reiterate that they refuse to give the undertakings that Solidarity asked for. Even more surprisingly, the respondents now say that appointments in respect of the other 195 posts that were advertised in the press will be made "with due regard to the judgment of the court *a quo* that is currently under appeal at the instance of both parties."

[26] Should the court order be implemented pending appeal, service delivery will not be adversely affected. That much is now implicitly conceded by the respondents in the belated averments made in the supplementary answering affidavit filed at the Court's request. In the light of that, it is surprising that the respondents resisted this application. On the other hand, should permanent appointments be made with regard to national demographics only, coloured employees and applicants for appointment will be irreparably compromised. That pertains not only to the learnership enrolments, but to all other appointments and promotions.

The relevance of the parties' merits on appeal

[27] As the court pointed out in *South Cape*[13], I must take into account the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgement but for some indirect purpose, e.g. to gain time or harass the other party.

[28] It is apparent that this Court need not consider the prospects of success on appeal (or cross-appeal) in any detail, but only whether it is *bona fide.*

[13] *Supra*.

And Rabkin-Naicker J has already ruled that there is a reasonable prospect that another court may come to a different conclusion. Given the recent judgment of the Supreme Court of Appeal in *Barnard*, the applicant's prospects of success on appeal must be good; the respondents' prospects on cross-appeal maybe less so.

[29] In *Ncube v Department of Home Affairs and Others*[14] Pickering J quoted with approval the following dictum of McEwan J in *Sorec Properties Hillbrow (Pty) Ltd v Van Rooyen:*[15]

> "The Court, in proceedings of this nature, is not called upon to enquire into the whole case or to attempt to evaluate the prospects of success on appeal. Only of the Court is satisfied that the appeal has minimal prospects of success or is hopeless, then the Court will take that fact into account and may draw the inference from it that the appeal was noted *mala fide*, or for the purposes of delay."

[30] This is not such a case. The balance of convenience, coupled with the prospects of success, favours the granting of the order sought in terms of High Court rule 49(11).

The relief sought

[31] Solidarity initially sought two orders pending finalisation of the appeal:

31.1 That the order of Rabkin-Naicker J of 18 October 2013 be implemented and enforced; and

31.2 that the respondents be interdicted and restrained from permanently appointing any person other than the third ((TS Abrahams) and sixth (DMA Wehr) applicants to the positions of SCO: Unit Manager: Breede |River Management Area and Chief Artisan: Production Workshop: Drakenstein Management Area respectively.

[32] At the hearing, Mr *Brassey* abandoned the interdictory relief sought in subparagraph 2.

[14] 2010 (6) SA 166 (ECG) at 171.

[15] 1981 (3) SA 650 (W) at 657H-658B.

[33] The Department raised the objection that, should the interim relief sought in subparagraph 1 be granted, it could be hamstrung because the appeal process "could take years". Firstly, that seems unlikely, now that the Labour Appeal Court – and not the Supreme Court of Appeal – is again the final court of appeal in labour matters.[16]

[34] Secondly, the Department's fears may be assuaged by the relief that I intend to provide, which will include an order to the effect that either party may approach the court to re-enrol the matter for variation or consideration afresh pending the final decision on appeal. Such an application may also be prompted by the outcome of the Constitutional Court's judgment in the pending further appeal from the SCA in *Barnard.*[17]

Conclusion

[35] I am persuaded that the balance of convenience favours Solidarity. There can be no prejudice, much less irreparable harm, to the Department, were it to take both national and regional demographics into account in any appointments pending appeal. Indeed, it has belatedly undertaken to do so in any event.

Costs

[36] That leaves the question of costs. As Pickering J stated in *Ncube*[18]*,* the general principle in applications of this nature is that, in the event of the application succeeding, the costs should be made costs in the appeal. Despite Mr *Brassey*'s plea that the respondents should be ordered to pay the costs in this application, I am not persuaded that I should deviate from that principle. Even though the respondents' opposition is somewhat surprising, given the concessions in their supplementary affidavit that run counter to their previous unwillingness to abide by the judgment *a quo*, this is an interlocutory skirmish in a broader debate that raises significant issues of public policy and Constitutional principle. In law and fairness, I

[16] By virtue of s 168(3) of the Constitution, as amended by the Constitution Seventeenth Amendment Act, 2012, that came into operation on 23 August 2013.

[17] *Supra.*

[18] *Supra* at 172.

do not think it is a case where this Court should deviate from the general principle outlined above.

Order

[37] In the result I make the following order:

37.1 Pending the finalisation of the appeal and cross-appeal under case number CA 23/13, the respondents are ordered to implement and enforce the order granted by this Court (per Rabkin-Naicker J) on 18 October 2013.

37.2 The parties may approach the court at any stage to re-enrol this application and may, on good cause, apply to vary or rescind the order.

37.3 The costs of this application are to be costs in the appeal.

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Steenkamp J

APPEARANCES

APPLICANT:	M S M Brassey SC (with him MJ Engelbrecht) Instructed by Serfontein Viljoen & Swart, Pretoria.
RESPONDENTS:	M Moerane SC (with him B Lecoge) Instructed by the State Attorney, Pretoria.