IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JS 164/03

In the matter between

THE MINSTER OF SAFETY AND SECURITY	**1st Applicant**
THE SOUTH AFRICAN POLICE SERVICES	**2nd Applicant**

and

KASAVAL GOVENDER	**Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. The applicants in this matter are the respondents in a case in which the respondent claims to have been unfairly discriminated against when promoting candidates to Commissioner's posts in a number of promotion rounds between February 2000 and June 2001. The respondent in this application and the applicant in the referral

of the unfair discrimination claim is, a Senior Superintendent, who unsuccessfully applied for these posts.

2. The applicant claims he was unsuccessful because the employer failed to adhere to its Employment Equity Plan and further claims to have been unfairly discriminated against in terms of section 6 of the Employment Equity Act 55 of 1996 on the basis of race, gender and/or political belief in all three rounds of post promotions. He also claimed that the failure to promote him amounted in the alternative to an unfair labour practice.

3. The relief the applicant seeks is retrospective promotion to the rank of Director backdated to 1st August 2010.

4. The interlocutory application was launched on 28 August 2003. It was set down for a hearing in 2005 but was postponed *sine die* by consent. For reasons which are not apparent, it was only next enrolled on 20 August 2010, but it seems the registrar failed to issue a notice of set down to the applicants and the matter was postponed to 19 October 2010, when it was finally heard.

5. The applications deal with various special pleas raised by the SAPS. In the event of any one of them being successful the respondent's path to trial will be blocked. The *in limine* objections all of which relate to the court's jurisidiction may be summarized as follows –

    5.1. The court lacks jurisdiction because aspects of the dispute referral process were irregular, namely:

        5.1.1. the referral of some or all of the disputes was late, in particular the disputes which the respondent alleges arose in February 2000 and June 2001, and

        5.1.2. the disputes mentioned were not referred for conciliation nor were they conciliated as required by the Equity Act.

    5.2. The respondent did not comply with the Employment Equity Act55 of 1998

in that he should first have used the compliance mechanisms of Chapter V of the EEA, which entails obtaining a compliance order from a Labour Inspector. Only if that compliance order is not implemented can the Director General of the Department of Labour approach the Labour Court for an order.

5.3. The SAPS has no vacancy for the post of Director and all the Directors' posts which were advertised and for which the applicant applied have been filled.The respondent ought to have joined all the other officers who were appointed to the post of Director.

5.4. The merits of these objections are considered below.

Evaluation of the Special Pleas

5.5. After failing to resolve his grievance about the promotions, the respondent referred the matter to the Safety and Security Sectoral Bargaining Council ('the SSSBC') on 28 February 2002. During that conciliation process the applicant became aware that he would have to refer the dispute to the Commission for Conciliation, Mediation and Arbitration because the dispute had a an unfair discrimination component, which the SSSBC did not have jurisdiction to deal with it.

5.6. The CCMA referral form referred by the applicant on 28 May 2002 describes the dispute as arising on 28 February 2002. However in summarizing the facts of the dispute, the respondent states: "*Employee applied for three rounds of post promotions without success. Realised at conciliation at SSSBC that matter related to unfair discrimination as well.*" (sic)

5.7. In his previous referral to the SSSBC on 2 January 2002, the applicant had identified the dispute as arising on 29 October 2010. It is not entirely clear why this date is identified, but it appears it may be linked to the response he got to an internal grievance he lodged with the respondent sometime after August 2001.

The time periods governing the referral of unfair discrimination disputes.

6. The dispute resolution process governing a claim of unfair discrimination in terms of section 6 of the Employment Equity Act 55 of 1998 ('the EEA') is governed by section 10 of the same Act. Section 10(2) states:

> *"Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination."*

7. Section 10(7) of the EEA provides that:

> *"The relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act, with the changes required by context, apply in respect of a dispute in terms of this Chapter.*"

12 The effect of this provision is that the acts or omissions that the respondent complains of all concern his non-appointment in the various rounds of appointments of Directors dating back to August 2001 and prior to that. He made a referral to the SSSBC in January 2002, which would have fallen within the six month period mentioned, except that the SSSBC was the wrong forum to deal with the matter and he only referred his dispute to the CCMA on 28 May 2002. As such even a dispute which had arisen at the end of August 2001 ought to have been referred in early March, making his referral to the CCMA approximately two months late. Obviously in respect of his earlier non-appointments the referral is that much later.

13 As mentioned above, the dispute referral to the CCMA referred to all three rounds of appointments. The respondent filed a condonation application in respect of the late referral of the unfair discrimination dispute with the CCMA on or about 26 June 2002. In his affidavit he made it clear that his dispute referred to all three rounds of promotion. The condonation application was unopposed by SAPS, and on 4 October 2002 was granted.

14 The applicants never sought to review the condonation ruling which accordingly still stands. Belatedly, they now try to attack the effective validity of that ruling as a gateway to the further dispute resolution procedures in the LRA. The first basis of attack is to suggest that the condonation ruling is so unclear because it is not apparent from the ruling which of the promotion disputes the commissioner was considering. Accordingly they argue no reliance can be placed on it as a basis for the dispute to proceed to conciliation.

15 They argue further that the ruling does not indicate it was the intention of the condoning commissioner to permit the applicant to refer all the disputes to the Labour Court and consequently the respondent has failed to establish that the Labour Court has jurisidiction to hear the matter.

16 Having regard to the available evidence of the preliminary procedures, the respondent's referral form to the CCMA was sufficiently clear to indicate that his complaint referred to more than one round of promotions. In this affidavit in support of his condonation application he set out in more detail the various rounds of promotion under consideration namely those advertised in February 2000 (posts 589,590,591,592 and 530), February 2001 (posts 1060 and 1061), and May or June 2001 (post 1150). The fact that the condonation ruling does not specifically refer to these disputes, does not in my mind mean that the ruling cannot be relied on when it seems very clear which appointment disputes the applicant was referring to in his application..

17 The applicants also contend that because the respondent alleged in his referral that the dispute arose on 28 February 2002, that is patently incorrect because the acts or omissions on which his unfair discrimination claim is based arose prior to that when SAPS failed to appoint him to the various posts he had applied for. However, based on the content of his affidavit in support of his application for the late referral of the dispute, it is difficult to see how the commissioner who granted condonation could have been misled by the date on the referral form. In any event, if he had not applied his mind to the matter before him that was a matter for review and no review of the condonation ruling was instituted.

18 In the circumstances, in the absence of the condonation being set aside, that ruling must stand.

19 However, the applicants also argue that the pre-requisite of conciliation under the EEA is a substantial one and the mere fact that the matter has been set down for conciliation and a certificate of outcome was issued is not a sufficient basis for the unfair discrimination case to be referred to the next phase in the LRA's dispute resolution process. They appear to base this on the wording of section 10 (5) and (6) of the EEA. The imperative expressed in section 10(5) of the EEA is identical to that expressed in section 191(4) of the LRA, namely that the commission "*must attempt to resolve the dispute through conciliation"*.

20 The only difference between the procedures is that under section 191(5) the dispute may be referred to arbitration or adjudication once 30 days have passed or a certificate of outcome issued, whereas section 10(6) refers to the referral taking place if conciliation remains unresolved after conciliation.

21 In this matter it is clear no conciliation did take place. The commissioner who issued the certificate of outcome on 1 January 2003 indicated that the statutory time period of 30 days for conciliating the dispute had expired and accordingly a certificate of non-resolution was issued. Although both the EEA and the LRA clearly intend that conciliation of disputes should occur, the EEA dispute resolution procedure merges with that of the LRA in that Section 10(7) of the EEA stipulates that the provisions of Parts C and D of the Chapter VII of the LRA apply to a dispute under the EEA with the necessary changes required by the context. If the drafters of the EEA had not intended the provisions of 135(5) to apply to the the conciliation stage of disputes, it is reasonable to suppose it would have been expressly excluded rather than incorporated. In the circumstances, I do not believe it was the intention of the EEA that as dispute could fester at the conciliation stage indefinitely merely because the conciliation process had not been attempted, any more than it was the intention in the LRA.

22 In conclusion I do not see any obstacles in the referral process of this matter to the Labour Court save that the unfair labour practice claim relating to promotion cannot be adjudicated by the court.

Jurisdiction over the unfair discrimination claim.

23 The applicants rightly claim that to the extent that the respondent's unfair discrimination claim relies on a right to enforce an employer's employment equity plan such a claim is not one that an individual employee can raise in the wake of the decision Dudley v City of Cape Town & another (2008)) 29 ILJ 2685 (LAC). Essentially that case re-affirmed the principle laid down in the judgment in the court a quo that it was not competent to pursue an individual claim based on unfair discrimination on account of the employer's failure to adhere to an employment equity plan until the enforcement provisions provided in chapter V of the EEA had been exhausted. This matter is so old not even the judgment in the court a quo had been handed down when the matter was referred to the Labour Court and at least until the decision of the LAC on 21 August 2008, the outcome on this issue could not have been known as there was another Labour Court decision to the contrary.[1]

24 To overcome this potentially fatal defect the applicant was constrained to argue that his unfair discrimination claim does not relay on a claim under Chapter V of the EEA relating to a failure to give effect to affirmative action measures but an unfair discrimination claim in terms of chapter II of the EEA.

25 An examination of the respondent's claim as set out in his statement of claim reveals significant reliance on allegations that his applications would have been more favourably considered if the employer had adhered to its provincial Employment Equity Plan. Thus he points out that he would have been seventh rather than fourteenth in line for appointment to one of nine 'generic posts' of Deputy Area Commissioner in Guateng available to sixteen shortlisted candidates including himself. Similarly he appears to allege that if the applicants had stuck to the plan he would have been preferred for appointment in posts 591 and 563. He maintains also that given his slightly higher score than successful candidates for posts 593, 597,598 and 616 he ought to have been the preferred candidate if representivity was taken into account. Similarly, for post 592 he asserts that the SAPS did not adhere to the Employment Equity Plan for the service. Similar complaints are reflected in his statement of claim in relation to his non-appointment in posts 1061 and 1060.

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

26 In summary, it is a pervasive feature of his claim of being unfairly discriminated against in the various promotions that if SAPS had applied its Employment Equity plan properly he would have been successful in one or more of the promotions. Moreover, in setting out the legal conclusions he seeks to establish for his claim, he characterizes his claim in the following terms;

> "*9.2.1 It is the contention of the Applicant further that the Second Respondent unfairly discriminated against the Applicant in failing to adhere to the Employment Equity Plan of the South African Police Service, when promoting candidates during the mentioned rounds of post promotions.*
>
> *9.2.2 The Applicant further avers that the Second Respondent unfairly discriminated against him on the basis of race, gender and/or political belief in all thee of the mentioned rounds of post promotions in terms of section 6 of the Employment Equity Act.*"

27 What the above submission reveal is that his primary claim appears to have been based on the failure to give effect to Employment Equity Plans. The applicant is right that he does say that he relies on section 6 of the Employment Equity Act, but nowhere do the facts alleged in his statement of claim make out a case other than one based on the Employment Equity Act, rather than one based on his race or political beliefs or one of the other types of impermissible discrimination.

28 Accordingly the applicants' special plea that the Labour Court does not have jurisdiction to hear this matter because it relies on the non-enforcement of the provisions of Chapter V of the EEA, when there is no evidence that the enforcement mechanisms of the EEA for such a claim have already been exhausted, must succeed.

Non-Joinder

29 To the extent that this is still an issue, I am satisfied, based on the authority of the judgment in ***Gordon v Department of Health*** **2008 (6) SA 522 (SCA)** at 529, [10] where Mlambo, JA made it clear that the successful appointee whose suitability for the post is indirectly challenged by the unsuccessful employee who argues he or she was the most suitable candidate, has no legal interest in the matter where the relief sought is directed against the employer for compensation.

Costs

30 There is an ongoing relationship between the parties and the referral by the applicant cannot be said to have been *mala fide* or frivolous, particularly in the light of the considerable and understandable disappointment he suffered in the various positions he applied for.

Order

31 Consequently,

a) The applicants' special pleas are all dismissed save for the special plea that this court does not have jurisdiction to hear the respondent's unfair discrimination claim is upheld on the basis that he ought to have exhausted the dispute resolution provisions provided for disputes relating to Chapter V of the Employment Equity Act. 55 of 1998.

b) The Labour Court also has no jurisdiction to hear the respondent's unfair labour practice claim which falls with the jurisdiction of the Commission for Conciliation, Mediation and Arbitration

c) In consequence of the successful special pleas raised above, the respondent's referral of his alleged unfair discrimination claim is dismissed.

d) No order is made as to costs

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 19 October 2010

Date of judgment: 16 November 2010

Appearances:

For the applicants: Mr A Mosam instructed by the State Attorney

For the respondent: Ms M Joubert instructed by Mitchell and Kruger Attorneys