IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA01/2014

In the matter between:

THE SOUTH AFRICAN POLICE SERVICE	**Appellant**
~~and~~And	
THE PUBLIC SERVICE ASSOCIATION OF SOUTH AFRICA	**First Respondent**
CAPTAIN MUNSAMY	**Second Respondent**
THE MINISTER OF SAFETY AND SECURITY	**Third Respondent**

Heard: **17 March 2015**

Delivered: **24 April 2015**

Summary: Affirmative action – employee substituted for appointment in order to address representivity – employee referring unfair discrimination dispute –

employee disputing the existence of the employer's equity plan – Labour Court finding equity plan non-existent and that no consultation took place for the adoption of the plan - evidence showing that extensive consultation took place with organised labour and that employer having equity plan – evidence also showing that employer's equity plan addressing classes of people victims of past unfair discrimination – employer equity plan seeking to fulfil the objectives as set out in *Barnard* and *Van Heerden* – appeal upheld with costs – Labour Court's judgment set aside and replaced with an order to the effect that the application is dismissed with costs.

Coram: Davis, Ndlovu JJA and Hlophe AJA

JUDGMENT

DAVIS JA

Introduction

[1] The Constitution of the Republic of South Africa Act 108 of 1996 expressly mandates that restitutive or affirmative action measures are to be part of our constitutional vision. Section 9(2) of the Constitution provides that "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." This case involves the implications of this constitutional guarantee.

[2] Second respondent applied for three posts at the level of superintendent in the organisation of appellant. Upon being denied promotion, he approached the court *a quo*, contending that the decision to deny him promotion was not in accordance with a legal defensible employment equity plan. Accordingly, the conduct of appellant constituted unfair discrimination. Whitcher AJ (as she then was) upheld

this application and directed the appellant to pay the amount of R 333 421.00 to second respondent within two months of delivery of her judgment. It is against this decision that the appellant has approached this Court on appeal.

Material facts

[3] Second respondent is an employee in the South African Police Service (SAPS). He applied for promotion from captain to superintendent in 2000 in respect of the following three posts:

1. Post 493 – SAPS Umlazi for the post of Superintendent, Commander CSC.

2. Post 459 – Area Commissioner Durban South, Superintendent Crime Prevention.

3. Post 463 – Area Commissioner Durban South, Superintendent Registry and Records Head.

[4] With regard to Post 493, second respondent was ranked fourth out of four candidates that were shortlisted. The successful candidate Captain Gumbi scored 64.31 and second respondent scored 59.28. The court *a quo* held that there could be no suggestion that Gumbi's appointment could be regarded as one based on race. Accordingly, it dismissed the application insofar as this post was concerned.

[5] Turning to post 463, the court *a quo* noted that second respondent was not shortlisted for this post. The court *a quo* thus dismissed this component of second respondent's case.

[6] On appeal, it became clear that these two posts were not central to the present dispute. The issue on appeal concerned the failure of appellant to appoint second respondent to post 459. I turn to deal with the case that second respondent brought before the court *a quo*, with particular reference to post 459.

Second respondent's pleaded case

[7] In his statement of case, second respondent said the following:

> 'Applicant was shortlisted by the Area Promotion Panel as the number 2 preferred candidate and on Schedule 2 dated 2000-05-22 recommended for post 459 due to the number 1 Dhanesar's pending criminal matters. However another attachment by the Area Panel form [sic] some unknown reason preferred Dhanesar as number 1 and applicant as number 2 candidates. The Provincial Promotion Panel changed the rankings in respect of Post 459 on 2000-05-30 and replaced Dhanesar with applicant with reason being "Munsamy more suitable qualified".
>
> The National Commissioner Ref 8/1/1 dated 2000-07-19 indicated that the Province could improve its representivity amongst:
>
> - Black males
> - Black females
> - White males
>
> This despite the fact that Ref 8/1/1 dated 2000-07-17 conceded that no EEP was in effect and that the numerical goals were calculated guesses. No indication existed as to where in which business units under Representivity existed in terms of the demographics of the Province. No Equity Plan existed at that time and applicants were evaluated in terms of suitability. In PSSS 1444 Advocate Balton ruled on similar facts where KD Singh was also preferred by the Provincial Panel as the most suitable candidate to the National office, and amended after Ref 8/1/1 dated 2000-07-17 from the National Commissioners office dictated otherwise that there was no equity plan in force at the time the panel sat. No proper plan existed that Indian males should score less than African males and be singled out. Supra rendered the process unfair.'

[8] In a supplementary pre-trial minute of 21 November 2011, the parties agreed that the issues that the court was required to decide were the following:

> 'Whether the selection process was fair, objective, reasonable and justifiable?
>
> Whether the Employment Equity Plan and/or the numerical goals / targets were objective, reasonable, justifiable, and in line with the provisions of the Employment Equity Act?
>
> Whether respondents' affirmative action policy was fair, objective, reasonable and justifiable and in line with the provisions of the Employment Equity Act.
>
> Whether the respondent unfairly discriminated against the applicant on the grounds of race in failing to and/or refusing to appoint the applicant to any one of the disputed posts namely post numbers 493, 459 and 463.

[9] The core answer to these questions which was provided in the judgment of Whitcher AJ is reflected in the following conclusion:

> 'In the circumstances, the respondent has failed to prove that the discrimination against the applicant was in line with an employment equity plan that had been the subject of proper consultation and that the measures relied upon to de-select the applicant were permitted by the employment equity plan relied upon.'

[10] In support of this finding, Whitcher AJ found that appellant's witnesses had been unable to provide the court *a quo* with any evidence other than their "say so" to the effect that the equity plan upon which appellant averred that it based its decision had been the product of proper consultation. In the view of the learned judge *a quo*: "It is unthinkable that no corroborating documentary evidence would be available to sustain such a claim". Further, appellant's claim was directly:

> 'contradicted by the letter of 29 May 2000 from the KZN province to the national office. This letter makes it clear that, as at the 29 May 2000, one day before the Interim Plan was submitted to the Department of Labour, no reliable workforce or demographic profile of the province had been prepared or consulted on and that there had been no consultation on affirmative action measures and numeric goals relevant to the province. It was only by the end of the year 2000 that the

province anticipated that these issues would have been compiled and consulted on.'

Evaluation

[11] In his most able argument to the court, Mr Maenetje SC, on behalf of appellant, noted that the critical dates for the resolution of the present dispute were 12 and 13 July 2000, 31 July 2010 and 11 August 2000. In particular, on 12 and 13 July 2000, the National Panel for Promotions within SAPS met to consider recommendations from various business divisions, principally in the provinces, in respect of candidates that were to be appointed. During this meeting, Regional Commissioner Stander briefed the Panel as to the history of SAPS' appointment policy. On 27 June 1997, an affirmative action policy for SAPS had been agreed upon in the Safety and Security Sectorial Bargaining Council. Of particular importance was a paragraph in the policy entitled "Targets, Quotas and Timeframes". It reads as follows:

> 'In order to manifest commitment to this policy and constitutional responsibility, the South African Police Service shall strive to reflect the demographics of the country in all occupational classes and at all levels of the organisation at national and provincial levels, in terms of race and gender. Persons with disabilities shall be accommodated in terms of their abilities, and the nature of services rendered by the Service.
>
> To this end, certain mechanisms are required, of which the most important is the setting of attainable goals for the organisation which, in turn, will reflect the minimum requirement for representivity set by the Government.
>
> Therefore, the Service shall strive to attain a minimum fifty (50) percent Black people at management level by the year 2000. During the same period, women shall comprise at least thirty (30) percent at middle and senior management levels. Within ten (10) years, people with disabilities shall comprise at least two (2) percent of the Service. In order to meet the objectives of this document, the Service shall strive to attain representativeness which reflects the population

distribution based upon the 1996 National Populations Census, by the year 2005.'

[12] On 13 March 2000, a further circular was generated, headed "Post Promotions – Members of the South African Police Service: Captain to Superintendent". In particular the following key statements were contained in this letter:

> 'For the purposes of deployment and to promote representivity in the South African Police Service, applicants must note the fact that although they may indicate their preferences for specific posts, the successful candidates can be offered any other advertised post on the same level if the candidate has indicated it as such on the annexure B. If a post is not filled for some reason or another, the post will be re-advertised. In order to promote representivity, the following guidelines are laid down which have to be achieved as far as possible taking into consideration the composition of the Provinces/Divisions at present.
>
> 50% / 50% in terms of gender
>
> 70% / 30% in terms of race…
>
> To consider the applications for posts, panels must be convened at provincial/divisional level under the chairmanship of at least a director. Care must be taken that the panels are representative as far as race, gender and disability are concerned. Taking also into account the Strategic Objectives and Operational Plan of the South African Police Service, the panels must make a recommendation for the placement of a candidate in a post. Full minutes must be kept. Please note that one selected member per recognised employee organisation having observer's status may attend the proceedings. However, these representatives may not take part in the proceedings.
>
> The criteria for the selection of the candidates are as follows:
>
> 1. The training, skills, competence and knowledge necessary to meet the inherent requirements of the post.
>
> 2. Posts occupied by the candidate, including his/her present post and station.

3. Representivity

4. The needs of the SAPS in terms of the strategic objectives and operational plan.

5. The particular circumstances of the candidate

6. Acting in a higher post by the candidate and the period

7. Evaluation report of the candidate – the marks allocated.'

[13] On 1 May 2000, the then National Commissioner of SAPS submitted an "Interim Employment Equity Plan". He stated "the plan will undergo further consultation processes which may necessitate changes. The finalised plan will be submitted to your Department on or before 30 June 2000." In this plan, it was made clear that there should be a 60% appointment from persons drawn from the designated groups for the year 2000 and 70% for the year 2001.

[14] At a meeting of the National Panel held on 12 and 13 July 2000, the minutes reflected that it had been decided that SAPS would strive towards the following ratios to enhance representivity:

'It was decided that the panel will strive towards the following rations to enhance representivity:

100% - 70% male

30 % females

70% Black (African, Indians, Coloured)

- 70% male

30 % females

30% Whites

- 70% male

30 % females

[15] It should be noted that representatives of organised labour were present at this meeting. At this meeting, it was also agreed that "the demographics as provided by the 1996 census (should) be used as a guideline to indicate whether a positive move towards reaching … the numerical goals were brought about." Significantly, as far as KwaZulu-Natal was concerned, the minutes recorded the following: "Although it was evident that a major attempt was made to reach the target, the recommendations are referred back to the Province with the emphasis on black male, white female and black female". (sic)

[16] As Major General Brown, a member of the Provincial Promotion Panel (KwaZulu-Natal) testified, the Provincial Panel understood clearly that the reference to "black male and black female" meant African male and African female candidates.

[17] On 19 July 2000, a letter was generated by Divisional Commissioner Stander to the Provincial Commissioner of SAPS, KwaZulu-Natal in which the following was said:

> 'It is clear from your recommendations that your Province is but one of a few which really endeavoured to reach the desired outcome. However the representivity level of black males, black females and white females can be improved. The numerical goals as set out in the Employment Equity Plan as attached must be used as guideline.'

Post 459

[18] With this background, it is now possible to turn to the appointment process relating to Post 459. Second respondent was considered to be an appropriate candidate in terms of the shortlist. He was initially shortlisted as the second candidate after Mr J Dhanesar, whom the area selection panel regarded as the best candidate. According to General Brown, when the panel found out that Mr Dhanesar had a pending criminal case against him and thus could not be

promoted, it decided to replace Dhanesar with second respondent. However, in light of the recommendation by Divisional Commissioner Stander that "the representivity level of black males and black females and white female could be improved", the Provincial Panel re-evaluated the recommendation. Captain Zakwe had also been shortlisted for post 459 as number four of the preferred candidates. He had scored 60.70 points compared to second respondent's 62.47 points. According to Major General Brown:

> 'Then if you look at Zakwe he also had a period where he was the station commissioner's clerk and Support Services. So equally they both had an administrative background. But then if you see his title here was the Commander of Crime Prevention and he was already ensuring that he was performing in the Pinetwon area, cooperation between the police service and the community. So he was actual fact already in that field.
>
> WHITCHER AJ of Crime Prevention? --- Yes.
>
> MR MAENETJE So if I may ask you then, was there much to choose between them other than that the area had ranked them differently as far as you were concerned conducting the review? --- NO, we as the review felt that Zakwe was in actual fact currently doing the function which he had applied for. And Munsamy had the necessary background, but he was not active in that field at that moment.
>
> And the recommendations that you made to national were those accepted by national? --- Yes
>
> And as a whole? --- As a whole?'

[19] Significantly, when second respondent testified, he confirmed that Zakwe was appointable.

> 'Now do you accept with the basic proposition that all – if you look at page 70 – all of the shortlisted candidates 1 to 4 are considered by area to be appointable to that post, would you agree with that? --- That's correct.

> [Break in recording] recommendations were considered, that is the review, when they conducted the review at provincial level, Zakwe was already active in crime prevention, was in an acting post in crime prevention, you recall that? --- No, I cannot recall that.
>
> You can't recall that? Well, that's what Brown said, do you have any reason to dispute that? --- No, I don't.
>
> Yes, you don't dispute it, yes. Just that it doesn't, the recording won't pick up when you shake your head, so you do have to say. --- I say yes.
>
> Yes. And you also heard the evidence of Brigadier Marais yesterday that by the time that Zakwe passed away he had been promoted twice to the rank of full colonel, do you recall that? --- It wouldn't have been twice, once.
>
> I thought that [break in recording] yes, now, and he also testified that there would have been a performance assessment before he was promoted to the position of full colonel. Or, that is, performance would have been taken into account. Is that something you recall, or not recall? --- Because he had to undergo an interview process for that rank, so it could have been done then.
>
> Yes. So, there would have been an assessment of his performance before he gets a position of full colonel? --- That's correct.'

Second respondent's case

[20] Ms Allen, who appeared on behalf of second respondent, contended that the employment equity plan submitted by the KwaZulu-Natal Province at the end of May 2000 had made it clear that it had not, at that time, completed its workforce profile and was thus unable to set justifiable numerical targets.

> 'Human resources Management has however began [sic] the workforce profiling process. Once this had been completed the Equity Plan, especially with regard to setting of numeric targets will be formulised.'

She noted that it was only by the end of 2000, that KwaZulu-Natal anticipated that it would have compiled a demographic profile of SAPS KwaZulu-Natal.

Accordingly, in the absence of accurate data from which numerical targets could be established, Ms Allen submitted that the numerical targets which had been set by KwaZulu-Natal could not be objectively defended as a legitimate basis for the deselection of second respondent from the post into which he had been initially recommended; that is post 459.

[21] Ms Allen also attacked the reliability of a document dated 19 July 2010 entitled "Numerical Goals – KwaZulu-Natal Demographics". She noted that the goals which had been contained in this document for salary levels 9 and 10 were irrational. For example, in 2000, it was recorded that there were 284 posts; 95 held by Indian men, 14 by African men and 132 by White men. For the year 2001, 479 posts had to be filled of which 145 would be African men, 17 Indian men and 164 White men. In her view, this set of numerical targets was manifestly irrational in that it would result in a significant increase in appointments of white men and an extremely significant decline in posts held by Indian men. In short, the plan could not be justified and any promotion based thereon was not congruent with the relevant law.

[22] It is to these questions that I now turn.

Evaluation

[23] To recall the dispute which was defined in the supplementary pre-trial minutes, the issues which the court *a quo* was required to decide were the following:

> '1. Whether the selection process was fair, objective, reasonable and justifiable?
>
> 2. Whether the Employment Equity Plan and/or the numerical goals/targets were objective, reasonable, justifiable, and in line with the provisions of the Employment Equity Act?
>
> 3. Whether respondents' (appellant's) affirmative action policy was fair, objective, reasonable and justifiable and in line with the provisions of the Employment Equity Act?

4. Whether the respondent unfairly discriminated against the applicant on the grounds of race in failing to and/or refusing to appoint the applicant to any one of the disputed posts namely post numbers 493, 459 and 463.'

[24] Stripped to its essentials, the court *a quo* was required to determine the legality of appellant's employment equity plan and whether appellant's decision not to promote second respondent into post 459 could be justified in terms of the plan.

[25] The Employment Equity Act ('the Act')[1] was the subject of recent interrogation by the Constitutional Court in *SAPS v Solidarity obo Barnard (Barnard).*[2] The Court noted that the Act contained important objectives, including the elimination of unfair discrimination at the workplace and the implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce which was representative of the South African people. In terms of s13(1) of the Act, a designated employer was obliged to take affirmative action measures. Section 15 of the Act mandates that affirmative action measures must be designed to ensure that "suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels". Section 15(3) of the Act provides that the measures directed to affirmative action may include preferential treatment and numerical goals but must exclude quotas.

[26] Second respondent's case had essentially been pleaded on the basis of an absence of an employment equity plan. The evidence clearly indicated that a contrary conclusion was justified. I readily accept that the document entitled Numerical Goals proved impossible to comprehend. But that alone does not mean that there was not an employment equity plan with which the appellant had worked. The Review Board Summary of 31 July 2000 made this perfectly clear with reference to post 459 where the following appears:

[1] 55 of 1998.
[2] 2014 (10) BCLR 1195 (CC).

> '06122876 Munsamy M was initially recommended for the post. The panel reconsiders the applications in order to address representivity and the numeric targets as set out in the Employment Equity Plan. The panel concurs to focus on the target groups as indicated in Head Office minute 8/1/1 dated 2000-07-19.
>
> 06017631 Zakwe VH is recommended for the post.'

[27] Whatever the reliability of the Numerical Goals – KwaZulu-Natal Demographics document might have been, it was not disputed in any of the evidence placed before the court *a quo* that Indian males had been over represented at the relevant level within the Province. Furthermore, it is clear from the minutes to which I have made reference that the decision to appoint Captain Zakwe was in order to address the under representation of African males at the relevant level and thus to enhance representivity.

[28] The court *a quo* found that appellant had failed to prove that discrimination against the second respondent "was in line with the employment equity plan that had been the subject of proper consultation and that the measure relied upon to deselect the applicant were permitted by the employment equity plan relied upon".

[29] The first reason offered by the court *a quo* was not part of second respondent's pleaded case. There was nothing in the pleaded case which suggests that second respondent was relying on s16 of the Act which places an obligation on a designated employer to take reasonable steps to consult in an attempt to reach agreement on an employment equity plan. Courts should not stray beyond the cause of action as pleaded. (See *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at paras 17 and 18). But even if the point was pleaded, regrettably, the court *a quo* appeared to have ignored the following paragraph which was contained in the Interim Employment Equity Plan. It read thus:

> 'CONSULTATION

> The consultation process has been structured in such a fashion that there has been consultation at all levels. In every business until an internal consultation process with employees and/or their representatives has taken place. External to the business units the Transformation committee through its Affirmative Action Task Team is being utilised as consultation forum. At National level the Safety and Security Sectorial Bargaining Council is being used for consultation purposes. It must be noted that due to the ever changing nature of the environment and work force movement, the consultation process will be continuous throughout the life span of the Employment Equity Plan.'

[30] This paragraph should be read with another piece of evidence which was in the record, namely the South African Police Service Employment Equity Plan Report 1 June 2000 – 31 December 2004 which sets out in considerable detail the consultation which took place insofar as the plan was concerned. If that was not enough, further evidence was provided by Colonel Ramathoka. He testified how organised labour was consulted during the process of the development of the plan. All of this had taken place before the plan had been signed off on 1 June 2000 by former National Commissioner Selebi. None of this evidence was contested under cross-examination.

[31] In summary, there was no basis by which the court *a quo* could have concluded that the plan was defective for want of consultation. Furthermore, to the extent that the court *a quo* found that there was no consultation with regard to a "non-existent plan", the evidence showed compellingly that indeed there was an equity plan and it was upon the terms of this very plan that the decision not to appoint second respondent had been predicated.

[32] This finding leaves two further questions, namely whether the plan itself was objective, reasonable and justifiable in terms of the Act and, secondly whether the appellant was justified in terms of the plan to decide not to appoint second respondent to post 459.

[33] In *Barnard* case, *supra* the majority of the Court appeared to take the view that any challenge to the implementation of a decision which was the subject matter

of the dispute, could be resolved in terms of principle of legality which would "require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure."[3]

[34] Moseneke ACJ then continued:

> 'Ordinarily, irrational conduct in implementing lawful projects attracts unlawfulness. Therefore, implementation of corrective measures must be rational'.[4]

[35] The *Barnard* decision turned on the implementation of a legitimate restitution measure; that is the measure itself was not attacked in that Barnard accepted that the Employment Equity Plan in question was a valid affirmative action measure.[5] Hence as Cameron and Froneman JJ and Majiedt AJ said in *Barnard*:

> 'We must therefore determine whether the National Commissioner's decision not to appoint Ms Barnard was a fair implementation of the Plan. In doing so, we examine both the objective facts of the case and the reasons the National Commissioner gave for his decision.'[6]

[36] In the present case, to the extent that the plan was attacked, the majority judgment in *Barnard* reminds us that the test as to whether a restitution measure is compatible with the Constitution is as follows:

> 'The measure must:
>
> (a) target a particular class of people who have been susceptible to unfair discrimination;
>
> (b) be designated to protect or advance these classes of persons; and
>
> (c) promote the achievement of equality.'[7] [Footnote omitted]

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[3] *Barnard* at para 39.
[4] *Barnard* at para 39.
[5] *Barnard* at para 52.
[6] *Barnard* at para 102.
[7] *Barnard* at para 36.

[37] This three stage test recalls the earlier judgment of the Constitutional Court in *Minister of Finance and another v Van Heerden.* (*Van Heerden*)[8] In that case, Moseneke J (as he then was) said that, firstly, a measure in order to be constitutionally compatible must target persons or categories of persons who had been disadvantaged by unfair discrimination.[9] Secondly the measure must be designed to protect or advance the persons or and categories of persons who have been disadvantaged by unfair discrimination and must be reasonably capable of obtaining the desired outcome.[10] Thirdly, the measure must promote the achievement of equality. This requires an assessment as to whether the measure 'will in the long run promote the achievement of equality'.[11]

[38] Manifestly, in the present case, appellant's employment equity plan was targeted toward addressing the past and, in particular, classes of people who had been susceptible to past unfair discrimination. The plan was thus designed to protect and advance the employment's applications of these classes of persons.

[39] A further question arises in this case in that second respondent was also part of a designated group. And that can make the question of testing an employment equity plan all the more difficult.

[40] I accept as do Cameron, Froneman JJ and Majiedt AJ in their judgment in *Barnard, supra,* that these issues raise transformative tensions between the equality entitlement of an individual and the equality of society as a whole and further the competing claims of members of a designated group, albeit with somewhat different histories. All too often, we search for reconciliation instead of understanding that in a country as rich in diversity and as complex in history as is ours, we may have to live with contradiction. However, in the final analysis in negotiating a justifiable path through this contradiction, Moseneke J in *van Heerden* reminds us of the following:

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[8] 2004 (6) SA 121 (CC).
[9] *Van Heerden* at para 48.
[10] *Van Heerden* at para 41.
[11] *Van Heerden* at para 44.

> 'It is also clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. Central to this vision is the recognition that ours is a diverse society, comprised of people of different races, different language groups, different religions and both sexes. This diversity, and our equality as citizens within it, is something our Constitution celebrates and protects. In assessing therefore whether a measure will in the long term promote equality, we must bear in mind this constitutional vision. In particular, a measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.'[12]

[41] The goal as set out in s9(2) of the Constitution is to promote a vision of a non-racial, non-sexist society. The measures envisaged in s9(2) are to be directed to this end. The Act seeks to vindicate this vision by ensuring that the equity plan which is implemented cannot impose quotas and must ensure the advancement of suitably qualified candidates from designated groups (ss15(1) and (3)). But within this framework, the purpose of the Act is to promote equal opportunity and fair treatment in employment and to redress the structural forms of racism and sexism which have produced such widespread disadvantage. This goal is an imperative if we are to construct a nation in the image of the Constitution.

[42] Africans throughout South Africa's racist history suffered the most sustained and egregious forms of discrimination. The evidence presented in this case, which stands uncontradicted reveals the pernicious effect thereof. At all applicable levels of the organisation, Africans were hopelessly underrepresented. The plan sought to ensure that restitution took place in order that a broadly non-racial police force could emerge in KwaZulu-Natal, one that was not predicated on previous historical patterns.

[43] While there may be difficult cases where competing claims within designated groups will vex a court with great anxiety, in this case the difference in scores between Captain Zakwe and second respondent was insignificant. Furthermore,

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[12] *Van Heerden* at para 44.

it was common cause that Captain Zakwe had the necessary ability to perform in the post with distinction.

[44] In conclusion, there can be no basis by which to justify a conclusion that there was no plan, that the plan did not seek to fulfil the objectives as set out in the judgments in *Barnard* and *Van Heerden supra* and that the implementation of this plan to the facts of this case resulted in second respondent suffering unfair discrimination. For these reasons, all of the basis upon which the court ***a quo's*** judgment was predicated must be found to be incorrect.

[45] For this reason, the following order is made:

1. The appeal is upheld with costs.

2. The order of the Labour Court is set aside and replaced with the following order:

   The application is dismissed with costs.

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Davis JA

Ndlovu JA and Hlophe AJA concurred

APPEARANCES:

FOR THE APPELLANT AND	
THIRD RESPONDENT:	Mr NH Maenetje SC
	Instructed by State attorney, Johannesburg
FOR THE FIRST AND	
SECOND RESPONDENTS:	Ms K Allen
	Instructed by Norton Rose Fullbright, Durban