IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN PORT ELIZABETH

REPORTABLE

Case number P02/07

In the matter between:

NATIONAL EDUCATION, HEALTH

AND ALLIED WORKERS UNION **1st Applicant**

MNYAMEZELI NTSIBA **2nd Applicant**

And

OFFICE OF THE PREMIER: PROVINCE

OF THE EASTERN CAPE **1st Respondent**

MICHELLE GOLIATH **2nd Respondent**

JUDGMENT

Molahlehi J

Introduction

1] In this matter the applicants claim that the first respondent in appointing the second respondent and not the second applicant(the applicant) commited an unfair discrimination against him in breach of the provisions of the Employment Equity Act 55 of 1998 (the

EEA). The relief sought is in the following terms:

"*(i) Declaring the non-appointment of the second applicant to the post of Senior Manager: Legal Support to be unfair labour practice in terms of section 186(2) (a) of the Labour Relations Act 66 of 1995.*

(ii) Declaring the preference of a female candidate to/over the Applicant, without signed Employment Equity Plan as an unfair discrimination and is in contravention of section 6 of Employment Equity Act 55 of 1998.

(iii) Declaring the appointment of the second applicant to the post of Senior Manager: Legal Support Services on the same terms and conditions applicable thereto on the date of the advertisement.

(iv) Alternatively awarding compensation to the second applicant . . ."

Background facts

2] The background facts in this matter are generally straight forward and common cause. The applicant who was at the time of the dispute employed by the respondent challenged his non appointment after

applying and being interviewed for the position of senior manager: legal support division of the respondent.

3] During January 2006, the respondent advertised three senior managers: legal support posts in two news papers with national circulation. The closing date for the submission of the application by people interested in those positions was set as 3rd February 2006. In addition to the requirement of degree qualifications the advertisement required the applicants to have extensive experience in the legal field associated with the public sector. The advert also specifically stated that; *"[t]he Provincial Administration of the Eastern Cape is an equal opportunity, affirmative action employer."* It was further stated in the same advertisement that, *"women and people with disability are encouraged to apply."*

4] The interviews of the shortlisted candidates were held on the 17th March 2006. The interviewed candidates were scored as follows:

1. Mboya 186
2. Kruger 184.67
3. The second applicant 171
4. The second respondent 163.6

5] The first and second candidates were recommended to fill two of the

advertised positions. The second applicant and the third respondent were recommended to fill in the remaining post. The third respondent was then recommended for appointment on the strength of employment equity and affirmative action considerations. The appointment of the third respondent was effected with the view to addressing the gender balance in the shared legal services division.

6] The applicant being unhappy with his non appointment lodged a grievance and it having not been resolved to his satisfaction referred a dispute concerning discrimination to the Commission for Conciliation, Mediation and Arbitration (the CCMA). Following the failure to resolve the dispute at conciliation the applicant filed a statement of case with this court.

Issues for determination

7] The issues for determination are set out in the pre-trial minutes as follows:

> "*4.1 Whether or not the respondent was at law entitled to affirm Goliath (the third respondent).*
>
> *4.2 Whether or not the respondent discriminated against the applicant within the contemplation of the Employment*

Equity Act.

4.3 Whether or not, and in the event that the respondent discriminated against the second applicant, the second applicant is as a consequence thereof entitled to the relief he seeks.

4.4 Whether or not the applicants were bound to join Goliath as a party to the proceedings."

8] The first and only witness of the respondent Mr Beningfield, a former employee of the respondent testified about the equity employment targets which the respondent had set for itself. He testified that the respondent under the leadership of the Premier of the Province had taken a decision to mainstream gender in the employment of senior females in the province. The employment equity policy was according to him adopted by the province initially included both the policy and the plan.

9] As concerning the facts of this matter Mr Beningfield testified that initially the second respondent did not apply for the advertised post and only one female applicant in the list of those who had applied had been shortlisted. There was a concern that this was likely to lead to failure to meet the equity plans of the province. It was for that

reason that it was decided to approach the second respondent and requested her to submit her curriculum vitae. After receipt of the CV the second respondent was invited to the interview.

10]Mr Beningfiled further testified that after the interview the interview panel found that the applicant and the second respondent were competent. The panel however recommended the second respondent because of gender and race considerations. The third respondent is a coloured female and the applicant is an African male. Had the applicant been appointed, the gender balance would not have been addressed, according to Mr Beningfield.

11] During cross examination Mr Beningfield conceded that the advertisement clearly stated that the faxing of CVs and late applications would not be allowed. He further conceded that the application of the second respondent was not received in terms of the requirements of the advertisement in that it was received after the closing date. When asked as to whether he sought authority to include the name of the third respondent amongst the applicants, he said that they were advised by the HR to include her amongst the applicants. He also stated that they believed that it was a policy imperative to have the third respondent head-hunted and thus

included in the short listing. He however conceded that there was nothing in the policy that gave the interviewing committee the power to head-hunt.

12]The applicant called one witness to support his case, Mr Kheleketha who at the time of the dispute was a manager in the HR department. He testified that after the closure of submission of the applications a meeting was held between senior managers of the respondent. A day after that meeting he received instruction from his manager that he should include two other names in the list of the shortlisted candidates.

13]According to Mr Khelekheta the process which the respondent ought to have followed once it realised that it would not be able to achieve the gender equity was the following:

a. Either to continue with the interview despite the indication that the gender equity would not be addressed or,
b. Stopped the process and re-advertised the post and if suitable candidates were found after that than conduct head-hunting.

14]Mr Khelekheta testified that the approach adopted by the respondent of including the name of the third respondent after the closure of the application had never happened in the workplace of the respondent.

15]Mr Khelekheta conceded that at the time females as a designated group were underrepresented in the section in which the second respondent was appointed in. At that stage there was a need to affirm both white and coloured females in the unit. He also conceded that ultimately what the respondent did by including the third respondent after the closure of the applications was in line with what is envisaged in the recruitment policy and specifically the clause dealing with skills search.

16]In relation to the numerical and non-numerical goals Mr Khelekheta conceded that the category of employees most necessitating transformation intervention were coloured both males and females in the Eastern Cape Province.

Legal frame work applicable evaluation

[17] The case of applicant has to be weighed within the two main aspects of the EEA, namely prohibition of unfair discrimination and the duty of a designated employer to implement affirmative action measures and an equity plan. Affirmative action measures are defined in section 15 as 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. There is no dispute that the first respondent is a designated employer.

The affirmative action measures as envisaged in s15 (2) includes:

> *"(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 ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and 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."*

[18] *In Harksen v Lane N.O. 1997(11) BCLR 1489 (CC)* the court held that:

"One of the factors in determining whether discrimination measure has an unfair impact was to determine the nature of the provisions and the purpose sought to be achieved by it".

In explaining how a remedial or restitutionary measure may as a factor have a discrimatory import the court had the following to say:

"[51] In order to determine whether the discriminator provision has impacted on complainants unfairly, various factors must be considered. These would include:

(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question…

(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination

has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

These factors, assessed objectively, will assist in giving "precision and elaboration" to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair."

[19] The above has been interpreted as saying that the remedial measures are not necessarily beyond the bounds of scrutiny to determine its fairness. The Constitutional Court has subsequent to *Harksen* drawn a distinction between a remedial measures that meet the requirements of s 9 (2) of the Constitution and those that do not attract the presumption of unfairness including those that do not comply but which could still be found to be fair in terms of s9(3) of the Constitution.

[20] It should be noted that the promotion of non remedial objectives through affirmative actions are not necessarily prohibited by the provisions of s 9(2) of the Constitution. Where the affirmative action measure is used for purposes of the objectives specified in s9 (2) of the Constitution then it is for the employer to show that the non-remedial objective was necessary for operational requirement and that justified the preferential treatment.

Section 9(2) of the constitution reads as follows:

> *"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."*

[21] The case of the applicant as I understood it is mainly based on the complaint that he was discriminated against because an irregular process was followed in the appointment of the second respondent. The essence of his case is that the process followed in selecting the second respondent was irregular in that the submission of the CV's for the application for the position was already closed at the time the third respondent was invited to submit her CV.

[22] The applicant does not however dispute that the respondent has a right

to embark on a targeted recruitment in the selection and appointment of its employees. His argument is that in the event where the respondent has initiated the recruitment process by way of advertising, the targeted recruitment can only be utilised after that process i.e. the advertising process is complete and no suitable candidates could be found or by way of stopping the process if it is apparent that the objective of finding a candidate that would address the equity objectives is not found in those who had applied.

[23] In support of his contention that the appointment of the second respondent was irregular, the applicant relied on the decision of the then industrial court in *George v Liberty Life Association of SA 1996(8) ILJ 986(IC).* The interpretation he gives to that decision is that an employer can not deviate from procedures that it had agreed upon without good reasons.

[24] The decision in the *George's* case was based on the unfair labour practice in terms of s46 (9) of the 1956 Labour Relations Act. The case pleaded by the applicant in the pleadings is that the respondent was not entitled to affirm the third respondent because the respondent did not have an affirmative action policy in place. The plea in this respect is formulated in terms of section 20 of the EEA which

requires designated employers to prepare and implement an equity plan. In this respect the plea is formulated as follows:

> "30 *In terms of section 20 of the EEA a designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workplace."*

[25] The applicant could not sustain the plea, as his and only witness, Mr Khelekheta conceded when cross-examined that the respondent had an employment equity plan whose objective was to make progress towards employment equity at the workplace. The respondent's equity plan includes the provincial targets of females in management; numerical and non-numerical goals/objectives and targets and workplace analysis. The provincial targets as at the time this dispute arose for females at senior management level was 50% and the current status then was 34%. In the equity plan the respondent had set out the relevant statistical information revealing the profiles of divisions, level of race, gender and disability as informed by its affirmative action policies.

[26] The argument of the non existence of the affirmative action plan having been disposed of what seems to remains for determination is

the complaint about the targeted recruitment processes.

[27] As indicated earlier in this judgement, the case of the applicant was not that the targeted recruitment was not permissible but that it was not properly done. In dealing with this issue and the broader issue of the alleged discrimination it should be borne in mind that the applicant led only one witness, Mr Khelekheta. The applicant did not himself testify. It is also important to bear in mind the number of concessions made by Mr Khelekheta and in particular the fact that if the respondent did not affirm the third respondent on the basis of gender, the division in question would have had less than 20% representivity. Without the affirmation of the 3rd respondent the division would have had six senior managers who were males. Even after the appointment of the third respondent the division still remained below 40 % in terms of representivity.

[28] Turning back to the issue of procedural complaint by the applicant, I agree with Mr Wade for the respondent that the core of the case so far made by the testimony of Mr Khelekheta has to do more than anything else with the complaint about the procedural aspect of how the recruitment of the third respondent was effected. That does indeed pose a challenge to the case of the Applicant as this court jurisdiction

is limited to adjudicating over discrimination claims in terms of the provisions of the EEA. I also agree that no case has been made in terms of the allegation of discrimination.

[29] It is common cause that the third respondent scored less points than the Applicant. It has however not been disputed that the affirmation action policy of the first respondent was rational and goal directed which made the targeted recruitment in the circumstances of this case appropriate. The targeted recruitment was directed at affirming a coloured female with the view to addressing both the gender and the racial imbalance at that particular time.

[30] The version of Mr Khelekheta is that the procedure followed in the appointment of the second respondent was irregular in that the respondent did not follow the provisions of the recruitment Policy: Eastern Cape Provincial Administration. When cross-examined why he regarded the procedure as irregular Mr Khelekheta said that the first respondent ought to have either stopped the recruitment process or completed it and if no suitable candidate was found to then embark on a targeted recruitment. He could not however point out in the policy a provision supporting his version. It should be noted that the policy on recruitment is in a form of a collective agreement.

[31] The version of the applicant is unsustainable if regard is had to the structure of the recruitment policy. The structure of the recruitment policy does not even support any possible inference that the parties intended the process contended by Mr Khelekheta.

[32] In my view the Applicant's case would still have been unsustainable even if Mr Khelekheta's assertion about the procedure was correct. He asserted that the policy was rigid in terms of the procedure he set out for the purposes of targeted recruitment. According to him the respondent could not under any circumstances deviate from the provision of the policy. This is unsustainable if regard is had to the stated purpose of the policy. The purpose of the policy is stated at the very beginning of that document as follows:

> "*The purpose of this policy is to provide guidelines to be followed when recruiting candidates for employment in the Eastern Cape Provincial Departments. This is in line with relevant legislation and applicable guidelines pertaining to recruitments. The uniqueness and the needs of the province formed the basis on which the policy is formulated."*

[33] I have already stated that the structure of the policy does not support

the contention of the Applicant in as far as recruitment procedure is concerned. In terms of the recruitment the policy is divided in three stages. Stage 1: Advertising; Stage 2: Interview and Stage 3 Appointments. The targeted recruitment and affirmative action both form part of Stage 1 of the policy. In terms of targeted recruitment which is part of Stage 1: Advertising, the policy provides as follows:

> *"**Skills search (Head-Hunting)** – the individually based method of recruitment can be used to seek suitable candidates for positions where difficulty is experienced to recruit them as well as candidates from historically disadvantaged groups. The same normal recruitment procedures still apply when an individual is head-hunted. This method will be applied as a last resort with all attempts through open recruitment have failed."*

[34] The case put forward by the applicant is that before embarking on targeted recruitment or head-hunting the respondent needed to stop at Stage 1 and stop the process or complete Stage 1 and 2 before embarking on that process. The applicant contends that the Respondent ought to have done this even though it was clear from the short-listing that the affirmative action objectives would not be

achieved through completing the Stage 1: Advertising process of the recruitment policy.

[35] The process was also attacked by the Applicant on the basis of lack of authorisation by the Director General. According to Mr Khelekheta he had to send a written motivation to the Director General for him to have authorised the targeted head hunting recruitment. There is nothing in the policy that says that the authority of the Director General is required before embarking on targeted recruitment.

There is also nothing in the policy the requires authorisation for target recruitment to be writing. There is however evidence by the Respondent that the Director General or his designate was in the meeting where the approach to embark on the targeted recruitment was approved.

[36] In the light of the above I am of the view that the Applicant's claim stands to fail. I do not however believe that the cost should in law and fairness follow the result.

[37] In the premises the Applicant's claim of unfair discrimination is dismissed with no order as to costs.

Molahlehi J

Date of Hearing : 6 & 7 September 2010

Date of Judgment : 2 February 2011

Appearances

For the Applicant : B. Z. Mjebeza

Instructed by: NEHAWU

For the Respondent: Adv. R.B. Wade

Instructed by: State Attorney