



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, IN PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 288/10

In the matter between:

ADHIP SINGH

Applicant

AND

MEC: EASTERN CAPE DEPARTMENT

OF AGRICULTURE

First Respondent

MS SM MZANTSI

Second Respondent

Heard: 13 March 2013

Delivered: 12 December 2013

Summary: The employer's failure to show valid reason for not appointing the best candidate constitutes unfair discrimination.

Discrimination in terms of section 6 of the Employment Equity Act 55 of 1998.

JUDGMENT

LALLIE J

- [1] The applicant was employed by the first respondent as a Manager: Asset Management on 1 April 2007. In July 2008, the first respondent set in motion the process of recruitment for the post of Senior Manager: Asset Management and Senior Manager Account Services. The applicant applied for the position of Senior Manager: Asset Management. He was interviewed and subjected to competency assessment during September and October 2008. On 1 November 2008, Mr Mbokoto (Mbokoto) was appointed to the position of Senior Manager Account Services. After reading a letter from the Head of Department congratulating Mr Booi (Boor), Ms Mbangi (Mbangi) and Mbokoto on their appointment to senior positions, the applicant made enquiries about the outcome of his application. He was eventually informed that although he had been recommended by the interview panel as the best candidate, the MEC appointed the second respondent Ms Mzantsi (Mzantsi), the second best candidate in an attempt to meet employment equity targets. Mzantsi resumed her duties on 1 April 2009 as Senior Manager: Asset Management. In these proceedings, the applicant is challenging his non-appointment to the position of Senior Manager: Asset Management (the disputed position) on grounds of unfair discrimination based on gender.

Was the applicant discriminated against unfairly?

- [2] Unfair discrimination at the workplace is prohibited by section 6 (1) of the Employment equity Act 55 of 1998 (the EEA) which provides as follows:
- ‘Prohibition of unfair discrimination.-(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour , sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, language and birth.’
- [3] It is common cause that the applicant’s discrimination claim is based on gender in in that he was the best candidate but the first respondent preferred a female candidate. The applicant sought to rely on a specified ground of

discrimination. He has, therefore, established discrimination and it is presumed that the discrimination is unfair.¹ The first respondent had the onus of justifying the discrimination: It sought to rely on section (2) (a) of the EEA which provides that taking affirmative action measures consistent with the purpose of the EEA is not unfair discrimination. In *Gordon v Department of Health: Kwazulu Natal*,² the court made it clear that to justify the failure to appoint a candidate who complied with stipulated requirements, it must be shown that the non-appointment was fair.

- [4] It was not in dispute that the finance branch of the first respondent required an equal number of male and female senior managers. The first respondent's witness, Ms Shithelali could not assist in proving that it was justified on the basis of the EEA to discriminate against the applicant because she joined the Eastern Cape Department of Agriculture (the Department) in March 2009. The decision recommending the applicant to the position was signed by the HOD on 13 January 2009. The MEC's approval is unsigned and undated. Ms Shithelali was unable to shed the light on the equity plans on which the MEC's decision was based. She could not tell whether the decision was taken by the MEC. Her evidence did not assist in proving the Department's defence.
- [5] Mr Mandeane joined the Department in 1 February 2009. His position is similar to Ms Shithelali as he could give no admissible evidence on the employment equity plans used as the basis not to appoint the applicant to the disputed position. Similarly, he could not testify to the veracity of the allegation that the decision not to appoint the applicant was taken by the MEC. He had no knowledge of the procedure followed in appointing Booi, Mbokoto and Mbangi to Senior Management positions as he had not joined the Department when they were appointed.
- [6] Ms Mhatu (Mhatu) who was the General Manager Corporate Service and responsible for the implementation of gender equality at the Department at the time of the applicant's non-appointment attempted to justify the Department's choice. She signed the document recommending the applicant's appointment

¹ See *Hsrksen v Lane NO and Others* 1998 (1) SA 300 (CC)

² [2008] 11 BLLR 1023 (SCA) at para 28.

to the disputed position. She wrote a memorandum dated 18 December 2008 to the CFO reminding her of the Department's duty to reach 50/50 in terms of men and women at Senior Management Level by end of March 2009. She further pointed out that the branch had two females and three males, namely, Mbokoto, Msizi and Booi and intimated that the next appointment should be that of a female to reach the expected 50/50. She was, however, unable to explain the full departmental equity employment plan for the period 2008/9 – 2010/11 as she had not obtained the explanatory notes to the document. She conceded that Mbokoto's appointment increased males in senior management in the Department while Mzantsi's appointment helped the branch achieve 50/50 and increased the number of females in the province. She testified that the equity documents used by the MEC to appoint Mzantsi did not form part of the first respondent's bundle. They were neither tendered as evidence nor discovered notwithstanding requests by the applicant. As the documents the MEC relied upon in purportedly taking the decision not to appoint the applicant were not tendered as evidence, the first respondent has not succeeded in the proving his defence that the applicant's discrimination was based on the application of its employment equity plan.

- [7] Mhatu conceded that the minute presented to the MEC recommending the applicant's appointment was misleading in that there were in fact three female and two male senior managers in the branch and not three males and two females as reflected in the minute, on 29 December 2008 when the recommendation was made. The applicant's evidence that employment equity targets were not considered when Booi was appointed to the senior managerial position which had been held by Mbokoto without formalities having been followed was unrefuted. Mhatu conceded that if that was the case the applicant's non-appointment for employment equity reasons was unfair.
- [8] Mr Grobler for the applicant made it very clear early in the proceedings that the document purportedly signed by the MEC appointing Mzantsi constituted hearsay evidence in the absence of the MEC's oral evidence. He made this submission persistently. The MEC did not testify. The document in which the

MEC purportedly appointed Ms Mzantsi is neither signed nor dated. None of the witnesses who testified led evidence to the effect that they were present when the MEC made the recommendation. Ms Laher for the first respondent argued that the applicant should have challenged the MEC's conduct in review proceedings and that nothing turned on his failure to sign the document or testify in these proceedings. I do not agree. A party that bears the onus to prove the fairness of discrimination is required to do so by leading admissible evidence.

- [9] In *Mgobhozi v Naidoo NO and Others*,³ it was held that notwithstanding the Labour Court's obligation to deal with fairness in the context of fair dismissal that does not mean that it has a general equitable jurisdiction with regard to the admissibility of evidence. Admissibility of evidence is, therefore, governed by principles and legislation. In determining the admissibility of hearsay evidence, the court relied on section 3 of the Law of Evidence Amendment Act 45 of 1998 (the Evidence Act) which provides as follows:

'Hearsay evidence.- (1) subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

- (a) Each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
- (b) The person upon whose credibility the probative value of such evidence depends, himself testified at such proceedings ;or
- (c) The court, having regard to-
 - (i) the nature of the proceedings;
 - (ii) the nature of the evidence;
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;

³ (2006) 27 ILJ 786 (LA) at para 16

- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interest of justice.

(4) For purpose of this section-

“Hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

“party” means the accused or party against whom hearsay evidence is to be adduced, including prosecution.’

[10] The document appointing Mzantsi falls outside the realm of dismissible hearsay evidence as no valid reason was given for the MEC’s failure to testify. In the absence of the MEC’s evidence, the first respondent proffered no reason for not appointing the applicant when he was the best candidate and recommended for the appointment. The applicant was, therefore, unfairly discriminated against on the basis of gender.

[11] The applicant sought to be appointed to the position of Senior Manager: Asset Management with effect from 1 November 2008, the date when the parallel post of Senior Manager Account Services was filled.

[12] In response to the applicant’s request for information regarding the post of Senior Manager: Asset Management, he had applied for, Mandeau provided the applicant with four documents. The first is the memorandum allegedly approved by the MEC for Mzantsi’s appointment as Senior Manager: Asset Management. For reason already given I have concluded that no evidence was led to prove that the appointment was approved by the MEC. The second is the memorandum in which Mhatu reminds the CFO of the Department’s goal to reach the 50/50 target in terms of men and women in Senior Management by end of March 2009. She intimated that the CFO’s branch had

two females and three males. She further stated that the following appointment must be of a female person in order to reach 50/50 target as expected. Mhatu conceded that the memorandum is not factually correct as on the date, it was written the branch had three female and two male Senior Managers. The appointment of a male, the applicant in particular would have assisted the first respondent achieve the 50/50 target in the branch. The third is a memorandum in which Mhatu impresses upon the CFO the need to achieve gender equality targets by March 2009. Mhatu recommended the applicant instead of Mzantsi. In her capacity as the General Manager: Corporate Services she only paid lip service to gender equality in the Department when the opportunity to recommend a competent female candidate presented itself. She only mentioned that ideally a female should have been appointed. The recommendation made by the first respondent's officials is valid and binding. The fourth document is a memorandum in which the Director General reminds all HODs of the Executive Council decision that before employment offers are made to prospective SMS candidates, information regarding the impact of the possible appointment on the equity profile of the Department is forwarded to his office for validation, with the view to achieve the 50/50 provincial target set for 2009. No evidence was led to the effect that the Director General was informed before Mbokoto and Booie were appointed of the impact of their appointments on equity targets. Mandeane concluded the letter of 16 April 2009 by informing the applicant that his office was in the process of locating the documentation relating to the withdrawal of the disputed post previously as well as the documents relating to the non-appointment to the disputed post on a four months' contract as advertised previously. The applicant was never favoured with the information.

- [13] Under cross-examination, Mhatu testified that she was aware that the disputed post was advertised in 2007 and 2008 but had no idea why it was re-advertised. The first respondent had no valid reason for not appointing the applicant to the disputed post on 1 November 2008 at the time Mbokoto was appointed to the post of Senior Manager: Corporate Account Services as the positions were advertised at the same time. The applicant and Mbokoto were interviewed and assessed for competence at the same time. Fairness,

therefore, requires that they should have been appointed at the same time in the absence of evidence justifying the delay in filling the disputed position.

[14] I could find no reason for costs not to follow the result.

[15] In the premises, the following order is made

15.1 The appointment of Ms Mzantsi to the post of Senior Manager: Asset Management instead of the applicant constituted unfair discrimination.

15.2 The first respondent is ordered to appoint the applicant to a position similar to the position of Senior Manager: Asset Management with effect from 1 November 2008.

15.3 The first respondent is ordered to pay the applicant the difference between what he would have earned had he been appointed to the post of Senior Manager: Asset Management on 1 November 2008 and what he actually earned for the period 1 November 2008 to the date of his appointment to the position similar to the position of Senior Manager: Asset Management.

15.4 The first respondent is ordered to pay the applicant's costs.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate Grobler

Instructed by: Drake Flemmer and Orsmond (E.L) Inc

For the First Respondent: Advocate Laher

Instructed by: The State Attorney

LABOUR COURT