CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/04

LILIAN DUDLEY Applicant

versus

THE CITY OF CAPE TOWN First Respondent

IVAN TOMS Second Respondent

Decided on : 20 May 2004

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal directly to this Court from a decision of the Labour Court upholding an exception to the applicant's statement of case. Dr Lilian Dudley, the applicant, a black woman who is a medical doctor, unsuccessfully applied to the City of Cape Town, the first respondent herein, for the position of Director: City Health. That position was offered to the second respondent, Dr Ivan Toms, a white man who is also a medical doctor. The applicant subsequently challenged the appointment of the second respondent. The ensuing dispute was eventually referred to the Commission for Conciliation, Mediation and Arbitration, where it could not be resolved. The applicant then brought an application in the

Labour Court seeking, amongst other things, an order setting aside the appointment of the second respondent and appointing her to that position.

[2] In her statement of case, the applicant alleged that failure to appoint her to the position of Director: City Health constituted unfair discrimination, an unfair labour practice, a breach of the "affirmative action" provisions of the Employment Equity Act ("the EEA")[1] and a breach of the City's constitutional obligations, such as those created, amongst others, by sections 9(1) and 9(2) of the Constitution.[2] These allegations rested principally upon the alleged breach of the "affirmative action" provisions of the EEA.

[3] The City of Cape Town took an exception to the statement of case on various grounds but mainly on the ground that "affirmative action" under the EEA is not available to an individual employee for use as a sword in the prosecution of a claim based on "affirmative action". The Labour Court upheld the exception holding, amongst other things, that the EEA does not establish an independent individual right to "affirmative action" and that there is no right in respect of such a claim of direct access to the Labour Court.

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[1] Act 55 of 1998.

[2] Section 9(1) of the Constitution states that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

And section 9(2) of the Constitution states that:

> "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."

[4] The present application for leave to appeal is the sequel. The time allowed for the filing of notice to oppose has expired. None has been filed. The applicant has also applied to the Labour Court for leave to appeal to the Labour Appeal Court ("the LAC"). That application is conditional upon this Court refusing leave to appeal directly to it. The Court decided to deal with the matter summarily under rule 19(6)(b).[3]

[5] This application for leave to appeal is out of time by some five days. The applicant is also seeking an order condoning the late filing of this application. Having regard to the period of delay and the explanation therefor, the delay in filing this application should be condoned.

[6] There can be no question that the EEA is a statute that was enacted to give effect to the constitutional right to equality by, amongst other things, eliminating unfair discrimination in the field of employment.[4] And its interpretation and application will ordinarily raise a constitutional matter.[5] The application for leave to appeal raises important questions concerning the interpretation and the application of

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[3] Rule 19(6)(b) of the Rules of the Constitutional Court states that:

> "Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself."

[4] Preamble to the EEA.

[5] See *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 14-16; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 15.

the EEA, in particular, its "affirmative action" provisions. But in deciding whether to grant leave to appeal directly to this Court it is necessary to consider whether it is in the interests of justice to do so.

[7] In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. A factor which will always be relevant is that direct appeals deny this Court the advantage of having before it the judgments of the LAC on the matters in issue.[6] Other factors include the importance of the constitutional issues raised, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success.[7]

[8] In urging this Court to grant leave to appeal, the applicant alleges that the application for leave to appeal raises matters of substance that affect all designated employers and employees across the country. In addition, the applicant alleges that given the importance of the constitutional issues raised, a direct appeal to this Court will obviate any delay and result in the saving of time and costs. No doubt these are relevant considerations in an application for leave to appeal directly to this Court. But they are not decisive. They must be weighed against the need to ensure that the LAC, as the appellate court in labour matters, has had the opportunity to express its views on important labour issues such as those involved in this case.

[6] *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) at para 32.

[7] Id

[9] The LAC is a specialised appellate court that functions in the area of labour law. Both the LAC and the Labour Court were established to administer labour legislation. They are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence.[8] Effect must be given to this by ensuring that these courts are not bypassed in matters that fall within their jurisdiction unless there are compelling reasons to do so.

[10] The EEA is one of the statutes that fall within the jurisdiction of the Labour Courts. This Court will no doubt benefit from the views of the LAC, an appellate court, in labour matters.

[11] The applicant has drawn attention to the fact that there are now two conflicting decisions of the Labour Courts on the question whether affirmative action can found a cause of action under the EEA. The other case is that of *Harmse v City of Cape Town*[9] where the Court answered the question in the affirmative. The applicant submits that it is important that clarity and certainty be obtained on this question as soon as possible. What is important is that the LAC has yet to consider the issue. This conflict must, in the first instance, be resolved by the LAC which is an appellate

[8] *NEHAWU* at para 30 and *NUMSA* above n 5.

[9] [2003] 6 BLLR 557 (LC).

court in labour matters. There is no suggestion that the LAC cannot deal with this matter speedily.

[12] In all the circumstances the need to have the views of the LAC on the matters raised by this application outweighs other considerations. We make it clear, however, that we express no view on the prospects of success. And we draw attention to the remarks made in *Mkangeli and Others v Joubert and Others*,[10] in which this Court said:

> "This Court may refuse leave to appeal directly to it, not because the appeal lacks prospects of success, but because it considers the matter to be one which ought properly to be dealt with by the Supreme Court of Appeal before it is called on to consider hearing the matter. Where that is the case, an order refusing leave to appeal directly to this Court does not preclude the litigant from approaching this Court again for leave to appeal after the Supreme Court of Appeal has disposed of the matter either by way of a judgment, or by refusing the petition for leave to appeal. Should that happen, this Court will consider the application on its merits in the light of the decision of the Supreme Court of Appeal. It is against this background that the application for leave to appeal in the present case has to be considered."[11]

These remarks apply equally to the present application.

[13] In the result the following order is made:

(a) The applicant's failure to comply with Rule 19(2) of the Rules of this Court is condoned;

[10] 2001 (2) SA 1191 (CC); 2001 (4) BCLR 316 (CC).

[11] Id at para 7.

(b) The application for leave to appeal directly to this Court is refused.

(c) There will be no order for costs.

Chaskalson CJ, Langa DCJ, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J, Yacoob J.