

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN PORT ELIZABETH**

CASE NUMBER: P 198/04

In the matter between:

James Patrick Baxter

Applicant

and

The National Commissioner:

Correctional Services

First Respondent

The Minister for Correctional Services

Second Respondent

JUDGMENT

CELE AJ

Introduction

- [1] This claim is about an alleged unfair discrimination which the applicant says was meted out to him when the first respondent failed to appoint him as a Director: Area Manager, Free State, and Goedemoed within the Department of Correctional Services. The applicant seeks an order of this Court to direct both respondents to appoint him to the said post retrospectively. In the alternative, he seeks to be granted a compensatory order. This claim is being opposed by both respondents.

Background facts

- [2] The applicant commenced employment with the Department of Correctional Services (the Department) on 17 November 1986 as a prison warder. At the time, he was based at St Albans Prison, near Port Elizabeth. He had acquired a matriculation certificate then. He subsequently received various promotions such as being a sergeant, a warrant officer and a captain, in terms of the old ranking system. In August 1997 he was then promoted to the rank of Deputy Director and performed functions of a Provincial Inspector. In 1998 he obtained a Diploma in Correctional Services Management.
- [3] Sometime in 1999 he was then transferred to Middeldrift, albeit temporarily, but before the end of that year the transfer was then formally confirmed. At that stage he was then in salary level 12, which he still held on the day he gave his evidence.
- [4] In January 2000, the Department put into action an Employment Equity Plan for itself. The plan was to be in line with the Employment Equity Act 55 of 1998. The process leading to the development of the Equity plan was seen by the Department as an opportunity to re-examine its employment policies and practices. The exercise was seen as affording the department, an opportunity to determine, by analysing the status quo, where the Department at that time was, where it needed to be, as well as what actions needed to be taken to achieve the all important objective of equality in its employment.
- [5] The examination identified was seen by the Department to be pointing to the existence of employment practices that would be considered discriminatory and as a result, necessitating the

designing of practices that would eliminate discriminatory barriers and providing equitable opportunities in its employment. Those measures were meant by the Department to improve in a meaningful way, the situation for individuals who, by virtue of belonging to and being identified with a particular group, found themselves unfairly affected by certain organisational practices.

[6] Because the objective of employment equity, within the Department was to expand employment opportunities of suitably qualified individuals in designated groups by eliminating discriminatory barriers, the Department did not regard their advancement as granting them an advantage but as the removal of a bias in favour of particular groupings.

[7] The purpose of the equity plan was intended by the Department to achieve equity in the work place by: -

- Promoting equal opportunity and fair treatment in the employment through elimination of unfair discrimination; and
- Implementing affirmative action measures to redress the disadvantages in employment experienced by the designated groups, in order to ensue their equitable representation in all occupational categories and levels in the workplace.

[8] In relation to the organisation size, the equity plan showed a matrix which indicated the occupational categories within the Department as well as the number of posts filled within those categories. Of the 34 282 posts which the Department had considered as affordable only 32 161 were filled. That indicated that 2121 posts were vacant as on 12 January 2000.

- [9] The equity plan was structured for a five year period, 2000 to 2004. The Departmental budget catered for the plan and in particular what was referred to as “current and projected personnel expenditure”.
- [10] On 20 May 2001, the first respondent placed an advertisement in the national newspapers inviting applications for various posts within the Republic of South Africa. One of such posts was the position of a Director: Area Manager, Free State (Goedemoed). Two hundred enthusiasts applied for this position, including the applicant. The applicant was one of the nine applicants who were short-listed and invited to attend the interviews. He was interviewed on 13 September 2001.
- [11] The selection panel appointed, was to conduct the interviews in accordance with the requirements of the Public Service Regulations, 1999 Part VII (D). It was constituted of: -
- Mr M. M. M Ngubo – Acting Chief Deputy Commissioner Corporal Services
 - Mr W. Damons – Provincial Commissioner – Free State
 - Ms D. Ratshikana – Area Manager- Krugersdorp
 - Ms N. Prinsloo – Psychometrist
- [12] As an Acting Chief Deputy- Commissioner, Mr Ngubo was at the time the second in charge, following after the National Commissioner of the Department. Ms Prinsloo was tasked with the duty of recording the interview proceedings. After each candidate had been interviewed, the panel would have a discussion pertaining to such candidate. Such discussion would be recorded under a subtopic termed: General Comments.

[13] After all the eight candidates who attended the interview for the post in question had been interviewed on 13 September 2001, the panel recommended that the applicant be appointed with effect from 10 October 2001 or on the date of assumption of his duty in the position of the Director: Area Manager: Goedemoed. The position was a salary level 13 post. The document which Ms Prinsloo produced as a recordal of the interview proceedings was identified as: Memorandum re: Filling of externally advertised post.

[14] The memorandum was then forwarded to the Director Equity, Ms Makhuza, for her consideration. She recommended the appointment of the applicant and forwarded the memorandum to the Acting DC Human Resource Manager Mr Mahoje with the following remarks:

“The appointment of the recommended candidate may be effected in view of the motivation presented. The fact that necessary skills and expertise to perform the job cannot be compromised for the sake of getting the targets right is of utmost importance”

Mr Mahoje declined the recommendation and then forwarded the memorandum to the National Commissioner with the following remarks:

“Not recommended.

The issue of equity should first be addressed properly, that can be done by visiting the gross lists. Reasons noted in the deviation are not convincing enough”

[15] In considering the memorandum, the National Commissioner cycled both Approved/Not approved and made the following remarks:

“Can we advertise this post and ask everyone else even those who had not applied to apply + new applications be encouraged

Urgent”

Dated 10/01/2001

[16] The applicant waited for a while for the results of the interview but these were not forwarded to him. He then met Mr Ngubo at the airport and had a brief discussion with him. After that meeting, he went through the internal processes to request the reasons for his non-appointment but he received no response. He then instructed an attorney to pursue the matter. In the meantime, the position in question was re-advertised. He applied for it again but was not short-listed. One Mr B. S. Lenkoe was appointed to the position with the effect from 1 November 2003. Mr Lenkoe has since been transferred to another position and one Mr Richard Elliot Marcus was subsequently transferred, without a promotion, to the position in question. Mr Marcus undertook to abide by the decision of the Court.

[17] The applicant then made a written request for the record of the interview process, in terms of the Promotion of Access to Information Act 2 of 2000. It was on 4 February 2004 that the applicant received reasons for his non-appointment for the 2001 position. The reasons are:

“1. The applicant did not possess suitable qualifications and experience in comparison with the other candidates who were recommended for appointment;

2. That the selection committee's recommendations did not address the Department's Equity Target;
3. That guided by section 95 of the Correctional Services Act 8 of 1959 read with the Public Service Regulations of 2001, Part VII (D) (8) the first Respondent decided to re-advertise the position of the Area Manager, Goedemoed"

[18] The decision of the National Commissioner aggrieved the applicant. A dispute concerning unfair discrimination arose between the applicant and the Department. The applicant referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation. The dispute was not capable of resolution and a certificate of none resolution was issued by the CCMA to the applicant with the remark that he might refer the dispute to this court.

Evidence

[19] There are documents which the parties handed in as exhibits. They included:

- (i) the applicant's bundle,
- (ii) three memoranda; one of which related to the applicant; the second related to the appointment of one Mr Coetze on 26 August 2002 and the third, to the appointment of Mr Joseph on 10 January 2002.

The applicant was the only witness in his case while four witnesses were called for the respondents. It will be convenient to revisit the evidence which unfolded during the trial in accordance with the incidents it related to. Such incidents are identified as: -

- (a) Qualification and the experience of the applicant
- (b) The equity plan
- (c) Discrimination.

(a) **Qualification and experience of the applicant**

[20] The applicant filed a copy of a newspaper advertisement where the post in question was advertised. It appears therein that the applicants for the post were to have, *inter alia*, an appropriate recognised Degree/Diploma coupled with extensive relevant experience. Practical experience in the Department would serve as a recommendation. His evidence was that the Diploma in Correctional Services Management, which he had, was one such academic qualification the advertisement made reference to. No evidence to the contrary was led by the respondents. It was further the evidence of the applicant that he had amassed enough relevant experience over the years for the position in question. He said the job description of the post he held at Middledrift, where he was based at the time of the application, was the same as that of the position in question. He conceded that the two posts differed in terms of the volume of work which was to be done. The evidence of the respondents, as given by the Regional Commissioner: Deputy Director-General: Free State, Mr Moleko Modise was that duties of the post in question were significantly different from the duties of the post held by the applicant. Because of the attitude I have in this aspect, I need not detail his evidence. I merely want to refer again to the “General Comments” and to “Reasons for deviating from the Equity Plan” as it appears in the memorandum where the appointment of the applicant was recommended by the interview panellists. These are stated thus:

“General Comments

Mr Baxter has a good understanding on what this position entails. He appears to be very systematic in his approach when it comes to managing this management area. The candidate has sound experience in managing a farm prison and has initiated several activities at his previous management area that also included a farming prison. He has a good understanding of the strategic objectives of the department. Mr Baxter has sound knowledge pertaining to human resource related matters and financial matters. A perfect example is his approach in addressing the unions to come up with a win-win solution. Mr Baxter has knowledge about unit management and the impact of overcrowding and how to address the issue. He also believes in sound relations with the community to enhance the image of the Department of Correctional Services and more specifically the prison at Goedemoed. The candidate is familiar with what is required to improve productivity at the management Area of Goedemoed.”

“Reasons for deviating from the Equity Plan

The panel recommended Mr Baxter because he presented himself better than the other candidates in the interviews that were held for the position. The candidate excelled in all aspects of the interview. He has all the skills and knowledge that is required from the incumbent of this position. In addition Mr Baxter has sound experience in managing a farming prison such as Goedemoed to improve productivity.”

[21] These remarks by Ms Makhuza, the Director Equity, were specifically endorsed by Mr Ngubo who was at the time, the second in command, as he came after the National Commissioner.

(b) The equity plan

[22] The applicant appeared to be taking a neutral position on whether the Department had an equity plan which it was using, to fall in

line with the Employment Equity Act no. 55 of 1998. In his evidence, he questioned the status of a document which was handed in by the respondents as, an exhibit, entitled: Employment Equity Plan (2000-2004): National Department of Correctional Services. He pointed out that the document had not been signed by the parties as it ought to have been. He conceded though, that there was a need in the department, as in all other state departments to address issues of equity. He conceded further that fair discrimination might be done.

[23] The evidence of the respondent was that the employment equity plan which was handed in, was the official document of the Department which was in use to address issues of equity. It was conceded, at the instance of the respondents, that the document failed to show the year to year adjusted targets which had to be archived. The figures to be archived, stayed the same in the entries of each year, were:

- | | |
|---------------------|-------|
| 1. White males | - 742 |
| 2. African males | - 927 |
| 3. Coloured males | - 280 |
| 4. Indian males | - 115 |
| | |
| 1. White females | - 107 |
| 2. African females | - 362 |
| 3. Coloured females | - 38 |
| 4. Indian females | - 49 |

[24] It was the respondents' case that every memorandum had to be submitted to Ms Makhuza as the Director, Equity who in turn had to consider whether, in terms of the equity plan; she was to

recommend the appointment of the candidate. Statistical records of the racial and gender composition of the relevant groupings of the Departmental employees would then have been made available to her. One of such records would be an equity certificate of representivity in terms of the Department's employment equity plan. As a comment on such certificate, she would then endorse whether the appointment of such candidate was or was not in line with the equity plan. Where it would not be in line, she had to give reasons for deviation from the plan.

- [25] The certificate indicated the current status of the management area. This would depict the racial and general composition of the management staff of the Department. In the case of the applicant, it was the respondent's case that there was a gap of a Black male, which was therefore explained to mean an appointment of a Black Man was favoured by the equity plan at the time. On the certificate, Ms Makhuza endorsed, on 19 September 2001, that the White, Indian and Coloured categories of persons were fully represented on the salary level in question. The statistical information on the certificate related to the then current information, either of the management area or of the province. Ms Makhuza was unable to explain why differently worded certificates were used. She did say thought that she had to look at the national and not the provincial target figures. The certificate has a hand written comment. The handwriting is very similar to that of the commissioner. The comment reads:

“Mr Mahoje

Kindly provide motivation for deviation from the province's equity plan.”

- [26] It would appear from the comment and from the reading of the certificate that, the commissioner was initially given the certificate with no motivation given for the deviation. Mr Mahoje would then have given the certificate back to Ms Makhuza who then supplied such reasons, on 21 September 2001.
- [27] Ms Makhuza said that it depended on the statistical records as the memorandum came to her whether a particular candidate fitted the profile required by the equity plan.
- [28] The evidence of the applicant was that the application of the equity plan, as suggested to him by counsel for the respondents was arbitrary and unfair. He used the case of one Mr Joseph who, like him, was a coloured male that was appointed into a similar position but for Umtata, only four days after his application was declined by the Commissioner. The memorandum for Mr Joseph was also handed in.
- [29] The post for Mr Joseph was advertised on 15 July 2001 whereas that of the applicant was advertised on 20 May 2001. Interviews for Mr Joseph were conducted on 28 August 2001 while those for the applicant were conducted on 13 September 2001. The Commissioner signed both memoranda on 10 January 2002.
- [30] In his evidence, Mr Mahoje said he could not recommend the appointment of the applicant as no cogent reasons were given by Ms Makhuza for a deviation from the equity plan. He also said that another reason was that he had by then, recently recommended the appointment of Mr Joseph by deviating from the equity plan.

[31] In attacking the application of the equity plan, the applicant said that Mr Ngubo was the custodian of equity, Mr Ngubo had recommended the appointment of the applicant as he was (Mr Ngubo) a member of the interview panel. In his evidence, Mr Ngubo said that during the interview, the panellists did not have the equity plan with them. He said that, even though Mr Mahoje reported to him, it was within his rights to recommend that the applicant be not appointed. Mr Ngubo said that his role was limited to that of being an interview panellist in this matter.

(c) Discrimination

[32] The evidence of the applicant was that he had the relevant qualifications and experience for the position he had applied for and that his non-appointment was due to being discriminated in terms of his race. He produced a table of the racial break-down of Directors and Commissioners in the Department, who were stationed in the Free State Province as in January 2002. There are seven posts listed with the Deputy Commissioner being a Coloured male. There are four African males and one African female in the position of directors. The seventh post is of a director and the one he had applied for. He said that if he had been appointed, he would have been the only Coloured director in the Province. He said that the discrimination was unfair.

[33] Mr Modise, a Deputy-Director-General, testified for the respondents. He said that he was the Department's Regional Director for Free State Province within Goedemoed Prison falling under him. He said that the duties of a Director are significantly different from that of a Deputy-Director. Among the differences, he said that a director had a much bigger budget to run and a bigger

team of personnel to manage. The tenor of his evidence appeared to suggest that, as he did not directly say so, that the non appointment of the applicant was due to lack of suitable experience. That was the attitude which counsel for the respondents took throughout the hearing of the matter. Even though she recommended the appointment of the applicant, the evidence of Ms Makhuza was that the equity plan was a consideration, on whether he was appointed into the position or not. Mr Mahoje said that he did not find enough reasons for the deviation from the equity plan.

Submissions by the parties

[34] Mr Kroon appeared for the applicant as Mr Gqemana appeared for both respondents.

Brief submissions on the facts

[35] Mr Kroon submitted that this matter was distinguishable by the following circumstances:

1. The person who was discriminated against was a member of the previously disadvantaged group.
2. The position was however not filled by the preferred race, in this case a black male.
3. Notwithstanding the fact that the position needed to be filled as soon as possible, it took more than two years to do so.
4. The Department, on its version, was only short of its “numeric targets” by a single black male.
5. A purported deviation from the equity plan was endorsed on the strength of a recommendation from the Director of equity.

[36] Mr Gqemana submitted that there was a gap for a black male for the relevant salary level and management area. He submitted that the evidence of Ms Makhuza was of utmost importance in the matter, as an advisor to the National Commissioner on issues of equity. He said that, her duty was to check whether the recommendation was in line with the equity target as reflected in the persal print out.

Brief submissions on legal principles

[37] Mr Kroon submitted that affirmative action should not be applied in an arbitrary and unfair manner. He referred me to **Independent Municipality and Allied Workers Union v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC)** and to some cases therein cited. He also made a reference to a publication, “Dismissal, Discrimination and Unfair Labour Practices” by John Grogan (First edition) at pages 103 and 105. There are further references which he placed reliance on.

[38] Mr Gqemana on the other hand, pointed out, in his submission that, it was conceded by the applicant that the respondents were entitled to set out affirmative action measures in line with the Employment Equity Act number 55 of 1998. He referred to the provisions of section 6 of the Equity Act. Similarly with him, there are further references he relied on.

Analysis

[39] Part VII D 5 of the Public Service Regulations, 1999 reads:

“The selection committee shall make a recommendation on the suitability of a candidate after considering only –

- (a) information based on valid method, criteria or instruments for selection that are free from any bias or discrimination;
- (b) the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;
- (c) the needs of the department for developing human resources;
- (d) the representatives of the component where the post is located; and
- (e) the department’s affirmative action programme.”

[40] D7 then reads: -

“When an executing authority does not approve a recommendation of a selection committee, she or he **shall** record the reasons for her or his decision in writing.”

[41] The provisions of Part VII D5 would appear to be some of the considerations which members of the interview panel, as a selection committee, had to take into account while they were conducting interviews. The selection committee would then have to record the reasons for its decision with reference to the criteria mentioned in Part VII D5 to comply with regulation Part VII D6 of the regulations and then make a recommendation to the executing authority, in this case the National Commissioner.

[42] From the evidence, which was tendered during the trial of this case, and from the record of the proceedings, the only document which the selection committee and the executing authority used, in the processing of an application, once interviews were held, was the

memorandum. The very last entry of each memorandum had provision for the Commissioner to endorse whether he or she approved or did not approve of the appointment of the recommended or not recommended candidate. In respect of both Mr Coetze and Mr Joseph, the Commissioner cancelled the writing “not approved”. In respect of the applicant however, the commissioner recycled both approved / not approved. Ex facie this document therefore, the commissioner neither approved nor disapproved of the appointment of the applicant. If the intention of the Commissioner was to disapprove the appointment of the applicant, he had to record the reason for that decision. No such reasons were recorded by him in compliance with Part VII D7 of the regulations. This regulation is couched in peremptory terms, which meant that the Commissioner had no discretion to decide not to give reasons. His failure so to do therefore, amounted to a gross irregularity on his part.

[43] One comment which the Commissioner made though, was to pose a question whether they could re-advertise the position and he asked every one else, even those who had applied to re-apply and new applicants to be encouraged. He then endorsed the matter as urgent. The post was indeed re-advertised and some one else was appointed into it. It is from these circumstances that the decision of the Commissioner could be inferred.

[44] The request by the Commissioner, which was addressed to Mr Mahoje to provide motivation for deviation from the province’s equity plan, meant that the commissioner’s decision to appoint or not to appoint the applicant also depended on such motivation. Otherwise he would not have asked for it. Such motivation had to

relate to the province's and not the national equity plan, as the Commissioner requested.

[45] The undisputed evidence of the applicant was that in the Free State Province, the appointment of a Coloured male was favoured. In complying with the Commissioner's request for the motivation for the deviation from the province's equity plan, Ms Makhuza should have realised then that, in truth, there was no need for such deviation as the appointment of a Coloured male was favoured. On the contrary she concentrated on the national instead of the provincial statistical records. She erred. Such error had prejudicial consequences for the applicant. In the light of the evidence which Mr Mahoje gave, he himself would, in all probabilities, have recommended the applicant, had the correct statistical records of the Free State Province been used. The use and interpretation of the equity plan by Departmental Officials, in my view, was unfair in the circumstances of this case.

[46] The application of the equity plan logically leads to the conclusion that the Department used differentiation based on race and gender in the appointment of directors in the case before me. The evidence of the respondents, in my view, has helped the applicant in proving that discrimination based on race and gender was used by the Department in this case. The use of an equity plan was a clear pointer to "affirmative action" being at play in considering an appropriate candidate for appointment in this matter. The result, which flows from this, is that a *prima facie* case of unfair discrimination is established in favour of the applicant. See South African Labour Law Volume 1 by Thompson and Benjamin at CC1-60.

- [47] I entertain no doubt of there being a need for such programmes as an equity plan in a state's department in this country due to its unfair discriminatory system of the past order. In section 8 (3), the interim Constitution contained an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of the past discrimination – See **President of the Republic of S A & another v Hugo (1997) 6 BCLR 708 (CC) at 729F-H.**
- [48] Affirmative action should not be applied in an arbitrary and unfair manner – See **Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council.**
- [49] In the application of the equity plan and therefore affirmative action, it was incumbent on the respondents to show that they acted fairly. The evidence produced during the trial proved the arbitrariness there was in the implementation of the equity plan. The statistical records relied on by Ms Makhuza were, by her own admission, arbitrary. They were not co-ordinated with those of the office of the Commissioner whose decision, at any given time impacted on such records. This was unfair.
- [50] I have, in my Judgment, referred to reasons given by the Commissioner for not appointing the applicant. Those reasons were given in the memorandum of the applicant as the Commissioner was bound to do. They are all sharply contradicted by remarks which were made in the “General Comments” of the interview panellists and by the “Reasons for deviating from the equity plan” as given by Ms Makhuza. I find it unnecessary to have to make any further comments in relation thereto.

[51] At the end of the hearing of this matter, the status of the equity plan became questionable. The reason for this was that the document which was handed in by the respondents had not been signed by any parties, at the adoption of the plan. However a copy of a document entitled: “Resolution reached in the Departmental Bargaining Council; 28 June – 02 July 1999: DCS: Head Office” was handed in. The document purports to deal with new five-year employment equity targets for the Department of Correctional Services. Officials of four organisations signed the document. This suggests to me that a five-year equity plan was adopted for application by the Department. There was undisputed evidence of the respondents that there is a directorate of equity. It took part in the consideration of the appointment of management officials of the Department. I accept this evidence.

[52] A proper conspectus of all evidential material properly made available to me, informs me that the failure of the Department to appoint the applicant was based on unfair discrimination.

Relief sought

[53] The applicant is asking to be placed in a position which he would have been in, had he not been unfairly discriminated. The position he sought has since been taken by Mr Richard Elliot Marcus after Mr Lenkoe who was appointed to the position in question was transferred. It would not, in my view, be in the interest of justice to order that either the appointment of Mr Lenkoe or the transfer of Mr Marcus to the position in question be set aside. The approach adopted by Van Rooyen AJ in **Dunn v Minister of Defence and others 2006 (2) SA 107**, although it was in a different setting, appears to me to accord with the justice of this case.

[54] It is, in my understanding of the relief sought by the applicant, that recourse can be had to section 158 (1) (a) (iii) of the Act. An order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act, will in my view, accord with justice of this case.

[55] The following order will consequently issue:

The Department of Correctional Services, by hand of its executing authority, is directed to ensure that James Patrick Baxter receives the same salary and benefits, dated back to 10 January 2002 with interest calculated at 11% per annum which he would have received had he been appointed to the position Director: Area Manager, Free State Goedemoed – with salary post level 13 on 10 January 2002. In the implementation of the order, the Department may grant the applicant protective promotion as provided for in the Public Service Act, 1994 as amended.

The respondents are to pay the costs of this matter.

CELE AJ

DATE OF HEARING: 13 MARCH 2006

DATE OF JUDGMENT: 19 MAY 2006

Appearances

For the Applicant : Mr Kroon (Advocate)

Instructed by : **DRAKE FLEMMER &
ORSMOND INC**

For the Respondent: Mr Gqamana (Advocate)

Instructed by : **THE NATIONAL COMMISSIONER
CORRECTIONAL SERVICES**