IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case No.: JA 36/08

UNIVERSITY OF SOUTH AFRICA	**Appellant**
and	
E C REYNHARDT	**Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] In this matter respondent alleged that he was discriminated against by appellant on the grounds of race, in that the latter failed to appoint him in the position for he was the most suitable candidate. He contended that appellant had incorrectly applied its own employment equity policy to appoint a less qualified and hence unsuitable candidate to the position.

[2] The matter was referred to the CCMA where conciliation failed. It was then heard by Ndlovu AJ in terms of section 52(3)(a) of the Employment Equity Act 55 of 1998 ("the EEA"). Ndlovu AJ found in favour of the respondent and declared that the non appointment of respondent as Dean of the Faculty of Science from 1 April 2002 constituted unfair

discrimination against the respondent based on his race. Appellant was directed to pay respondent compensation in an amount which was equivalent to twelve months salary, calculated on the scale of Dean, applicable as at 1 April 2002, being R 356 484.00, together with damages of R 661 629.00. It is against this judgment that the appellant has approached this court on appeal.

The factual matrix

[3] The facts as stated in the statement of case provide an adequate basis by which to evaluate the dispute. Respondent was appointed as Dean of the Faculty of Science of appellant for a three year term commencing on 1 April 1999 and expiring on 31 March 2002. Upon the expiry of his term of office, nominations for the appointment of Dean were called for in accordance with the procedure for the appointment of a dean as set out in a circular of 18 January 2002. There were two nominations, being respondent and Professor G J Summers, who qualified as a black person in terms of section 1 of the EEA.

[4] A meeting of the Faculty of Science was held on 18 February 2002 at which the two candidates made presentations and answered questions. An opinion poll was then taken. Respondent received 79 votes in favour, and 10 members of the Faculty voted against him. Professor Summers enjoyed the support of 10 members of the Faculty and there were 76

votes against his appointment. A selection committee was convened on 21 February 2002 at which both candidates were interviewed. A majority found the respondent to be appointable but Professor Summers not to be appointable. Four members found both respondent and Professor Summers to be appointable, while two members found Professor Summers to be appointable and the respondent not to be appointable. Accordingly, the majority recommended that the respondent be reappointed as Dean of the Faculty. A minority report recommended the appointment of Professor Summers.

[5] On 22 March 2002, notwithstanding the recommendation and the earlier opinion poll, the Executive Director of Human Resources Mr Moloto informed respondent that the Council of appellant had decided to appoint Professor Summers as Dean of the Faculty of Science from 1 April 2002.

[6] Respondent pressed for the reasons for his non appointment to be reduced to writing. Finally, on 12 April 2002 Mr Moloto responded. The relevant portion of his letter reads:

> "*The recommendation of the Selection Committee was referred to the Council Committee on Human Resources on 19 March 2002 for consideration and final approval at the Council meeting of 20 March 2002.*

On the basis of the report of the Selection Committee, it came to the attention of the CCHR that there had been division on the matter of appointability by the Selection Committee. However, after interrogating the report of the Selection Committee, Council Committee on Human Resources found both candidates appointable and recommended to Council that on the basis of the Employment Equity Policy, Prof GJ Summers be appointed as Dean of the Faculty of Science from 1 April 2002 for a three-year term.

Council approved the recommendation of the CCHR on 20 March 2002."

[7] On 30 March 2002 Mr Moloto had asked the respondent to stay on as Dean until the return of the principal of appellant, Professor B Pityana, who was then abroad. Respondent replied thus:

"*I confirm that I wish to take early retirement upon the expiration of my current term as Dean of the Faculty of Science.*

However, with reference to the request to me by yourself made on the morning of 26 March 2002, I must state the following:

(a) Since my pension is dependent on the average of my last two years' salary, it would be to my financial disadvantage to stay on as a Professor of Physics. It is therefore crucial that, should I

elect to take early retirement, the effective date thereof should be 31 March 2002.

(b) I can therefore only agree to continue in employment if it is agreed that I continue on my current terms and conditions of employment until the matter has been resolved with Dr Pityana.

Should you not indicate otherwise to me in writing on or before close of business on 29 March 2002, I will assume that you accept the above.

Please note that I reserve my rights."

[8] Respondent tried to discuss this situation with the acting principal but his telephone calls were not returned. Finally, he had a meeting with Professor Pityana on 19 April 2002 but nothing was resolved.

[9] On 25 April 2002, respondent referred the dispute to the Commission for Conciliation Mediation and Arbitration ('CCMA'), alleging that he had been unfairly discriminated on the grounds of race. Notwithstanding this referral, further conversations took place with members of appellant which culminated in a response from Professor Pityana, to the effect that respondent's pursuit of an action against appellant at the CCMA militated against a settlement of the dispute. Accordingly, Professor Pityana reluctantly had to support respondent's application for early retirement.

The key findings of Ndlovu AJ

[10] The evidence which was placed before the court *a quo* indicated that appellant had established a target ratio of 70%: 30% (blacks: whites) respectively for senior appointments (Dean and Vice Dean) which was based on national demographics and with the aim of addressing the problem employment inequity. Appellant's case was, in effect, that the employment of Professor Summers was seen as part of the implementation of a transformation process, particularly because appellant was looking for a 'coloured academic' to be appointed at the level of dean.

[11] Ndlovu AJ examined the evidence as to the progress achieved by appellant in the achievement of its target. In his view, on the evidence, it 'turned out to be a proven fact … that at the time Professor Summers was appointed the ratio was already 75% : 25% in favour of black dean's over white deans which meant that the target of 70% : 30% had already been reached and surpassed. Upon Professor Summers appointment the ratio was further increased to 80% : 20% in favour of blacks…"

[12] It had never been appellant's case that Professor Summers was a better qualified candidate than respondent; to the contrary. Ndlovu AJ thus found that as appellant's equity targets had already been met, there was no justification for the appointment of Professor Summers. Accordingly he held that respondent had been unfairly discriminated on the basis of race

when he was not appointed as Dean of the Faculty of Science for a second term, effective from 1 April 2002.

[13] Ndlovu AJ went on to say that as respondent had only been officially informed that his application as Dean has been unsuccessful on 15 April 2002:

> "*It was shameful of the respondent (appellant) that it did not even have the courtesy to inform the applicant, as soon as it had decided on the matter, that his application was unsuccessful*".

[14] The learned judge then awarded respondent an amount of R 661 629.00, being the difference between what respondent would have received on his retirement as Dean and what he would have received as a professor, together with amounts in respect of unpaid leave and service bonuses. In addition:

> "*I am satisfied that the circumstances of this case justified the award of compensation that reflects a punitive element. It seems to me that the award equivalent to the applicant's 12 months' salary on the Dean's salary scale would be just and equitable in the circumstances*."

Appellant's case

[15] Mr Van der Westhuizen, who appeared on behalf of the appellant, did not take issue with the finding that respondent was a superior candidate and that, absent justification based upon appellant's equity plan, the appeal would have to fail. In his view, the equity plan which was adopted by appellant served the purposes of section 2 of the EEA, which sets out, as the purposes of the Act, the achievement of:

> "*Equity in the workplace by –*
>
> *(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination;*
>
> (b) *implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupation categories and levels in the workplace*."

Accordingly, if the appointment of Professor Summers was made in terms of the purposes of the Act, then, pursuant to section 6(2) thereof, it could not be unfair discrimination to take affirmative action measures consistent with this purpose; that is the appointment of Professor Summers.

[16] Mr. Van der Westhuizen correctly noted that the court *a quo* did not have difficulty with the appellant's policy or plan regarding employment equity but rather with its implementation.

[17] In his view, the objective facts revealed the following composition of senior appointments:

1. The position of 19 March 2002 (in the Faculties of Law and Theology and Religious studies there were vacancies and Prof Reynhardt was still the Dean in the Faculty of Science):

   1.1 Level of Deans

2 White Deans	50%
2 Black Deans	50%

   1.2 Level of Vice Deans

3 White Vice Deans	33.3%
6 Black Deans	66.6%

   1.3 Category of Deans and Vice Deans

5 White persons	38.46%
8 Black Persons	61.54%

2. The position on 1 April 2002 (In the Faculty of Law Prof Mare was acting and Prof Summers and Prof Maluleka with their terms as Deans):

   2.1 Level of Deans:

4 Black Deans	80%
1 White Dean	20%

   2.2 Level of Vice Deans

6 Black Vice Deans	66.6%
3 White Vice Deans	33.3%

2.3 Category of Deans and Vice Deans

10 Black persons	66.6%
4 White persons	28.57%

3. The situation if Prof Reynhardt had been appointed instead of Prof Summers:

3.1 Level of Deans

3 Black Deans	60%
2 White Deans	40%

3.2 Level of Vice Deans

6 Black Deans	66.6%
3 White Deans	33.3%

3.3 Category of Deans and Vice Deans:

9 Black persons	64.29%
5 White persons	35.71%

[18] The essence of Mr Van der Wetshuizen's argument can be summarised thus: On 1 April 2002, if the category of Deans and Vice Deans was taken together, appellant had met its target. However, were it to have appointed respondent rather than Professor Summer, appellant would have created a situation where the composition of the senior staff would no longer have reflected the equity target. Accordingly, appellant was justified in making the appointment that it did, in order to maintain what had been found to be a justifiable target.

Evaluation

[19] The starting point for an evaluation of appellant's case is to be found in sections 5 and 6 of the EEA, which provide thus:

> "*5.* ***Elimination of unfair discrimination****. – Every employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice.*
>
> *6.* ***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, culture, language and birth.*
>
> *(2) It is not unfair discrimination to-*
>
> *(a) take affirmative action measures consistent with the purpose of this Act; or*
>
> *(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*
>
> *(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).*"

[20] The key test, in these disputes is that of unfair discrimination and this was settled by the Constitutional Court in Harksen v Lane N.O. 1997 (4) SA 1 (CC) at para 53:

> *"(i) does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
>
> *(ii) If the differentiation amounts to "discrimination" does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."*

[21] On the basis of this test, once respondent could show that he had been discriminated against on the grounds of race, an issue which was not disputed, the onus fell upon appellant to satisfy the court, on a balance of probabilities, that the discrimination was not unfair.

[22] The question that compounds the difficulties in cases, such as the present dispute, turns on an interrogation of the relationship between the general equality protection and the recognition of the need for remedial measures, perhaps inappropriately referred to as affirmative action.

[23] The relationship between section 5 and section 6 of the EEA, poorly drafted as these sections are as indeed is much of the Act, nonetheless must be read in terms of section 9(1) and (2) of the Republic of South Africa Constitution Act 108 of 1996 ("the Constitution"). In short, although it employs different words, the EEA, in order to be constitutionally compliant, has followed the architecture of the Constitution to the effect that section 9(2) of the Constitution recognises 'legislative and other means designed to, protect or advance persons, or categories of persons disadvantaged by unfair discrimination in order to achieve equality.

[24] The problem with regard to the relationship between equality and constitutionally mandated remedial measures is described by Henk Botha ('Equality, Plurality and Structural Power' 2009 (25) SAJHR1) as follows:

> "*It is one of the great paradoxes of South Africa's constitutional transition that the Constitution commits us to a non-racial and non-sexist society, and yet recognises that we can eradicate discrimination and redress disadvantage only if we remain conscious of the deep racial and sexual fault lines characterising*

our society. On the one hand, the Constitution is determined to free individuals from the shackles of narrow social categories which have, in the past, been used to determine their identities and circumscribe their life chances. On the other hand, it authorises affirmative action programmes which are based on these very categories, and filters complaints of unfair discrimination through categories such as race, sex, gender, sexual orientation, disability and religion."

[25] In particular, the relationship between sections 9 (2) and the anti discrimination provision, section 9(3) and, hence the observations concerning these relationships as articulated by Botha, was examined by Moseneke J (as he then was) in Minister of Finance and another v Van Heerden 2004 (6) SA 121 (CC) at para 33:

"*It seems to me plain that if restitutionary measures, even based on any of the grounds of discrimination listed in s 9(3), pass muster under s 9(2), they cannot be presumed to be unfairly discriminatory. To hold otherwise would mean that the scheme of s 9 is internally inconsistent or that the provisions of s 9(2) are a mere interpretive aid or even surplusage. I cannot accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect*

category that may be permissible only if shown not to discriminate unfairly."

In this passage, Moseneke J captures the idea that the drafters of the Constitution chose the route of restitutionary measures to guide the country towards the destination of a transformed society in which race and gender would no longer be employed as obstacles towards the attainment of the prefigured egalitarian society. Equality is the foundational principle but remedial measures are needed for its achievement.

[26] Moseneke J went on to examine the requirements of section 9(2) of the Constitution. In order to determine whether a measure falls within the section, a threefold enquiry is mandated:

1. Does the measure target personal categories of persons who have been disadvantaged by unfair discrimination.
2. Is the measure designed to protect or advance such persons or categories of persons.
3. Does the measure promote the achievement of equality.

[27] To the extent that this test is relevant to the present dispute, reference should be made to the third requirement, namely whether the measure promotes the achievement of equality. In this connection, Moseneke J said:

"*[t]he 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.*" para 44

[28] Appellant's case was based on the commendable aim of redressing historical imbalances and ensuring that the staff of a critical tertiary institution would more broadly reflect the demography of South Africa than had manifestly been the case throughout the country's racist past. For this reason, targets of 70: 30 had been set.

[29] Appellant's employment equity program contained another important provision which read as follows:

"*3.* ***Occupational categories and level where***

> ***demographic profile satisfactory****:*
>
> *In the event where your department/operational unit has achieved a state of balance in a way, please do not bother yourselves to try and do anything then. The University will have to consider applying the principle of the 'most suitable candidate' as and when vacancies have to be filled in such categories and levels. The principle of 'preferential treatment' in view of affirmative action considerations shall not apply in such incidences. The monitoring process will take care and ensure that we do not create skewness again in applying the principle*."

[30] On the appellant's own equity plan therefore, once appointments had been made which achieved the proclaimed equity target, the principle of preferential treatment was no longer to be followed and appointments were to be made exclusively on the respective merit of the relevant candidates. In itself this fits into the overall idea of equality and its promotion as captured in the Constitution.

[31] In this case, no evidence was placed before the court by appellant to the effect that the respective merits of the two candidates could justify the appointment of Professor Summers over respondent. This point was

conceded by appellant throughout the papers and again by appellant's counsel at the hearing before this Court.

[32] It is important to emphasise, given the importance of employment equity programmes to the transformation of South African society that the resolution of this dispute does not turn on the constitutionality of appellant's equity plan. That plan passes muster in terms of the analysis that I have undertaken. The problem for appellant is that the plan provides expressly when remedial measures are no longer necessary. In other words, this case turns upon an application of appellant's plan to the facts of the case.

[33] To return to appellant's argument. It amounted to the following: When the equity target is reached, a selection of a candidate on merit alone can only take place if the particular appointment does not alter the ratio of black to white appointments; that is that the ratio does not fall below that provided for in the equity plan. But, on appellant's own version, the target had been reached at the time the appointment of Professor Summers was to be made.

[34] To the argument that, had respondent been appointed, the required ratio would have then been reduced below the target, there are at least two

responses. Firstly, when the appointment of Professor Summers was made, there was another vacancy, that is for the position of Dean of Law. Professor Mare was then the acting Dean of the Faculty of law. In the event that the racial composition of deans and vice deans fell below the targeted ratio, when appellant came to appoint the Dean of Law, it would have been required again to apply the principles of its equity programme and thus would not have been free to appoint purely on merit in terms of clause 3.

[35] Secondly, appellant's case was flawed, not because of a commendable policy but because of the manner in which it sought to implement its policy in this case. Once the target had been achieved, its own policy announced to all its employees that remedial measures would no longer apply in the making of further appointments. When the appointment of the Dean of Science was made, the required ratio had been achieved and clause 3 of the plan was then triggered. In the event that respondent had been appointed, the equity programme would then have been applicable to the appointment of the next candidate; in this case in respect of the deanship of the Faculty of Law. In summary, appellant failed to correctly implement its particular programme.

Compensation

[36] Respondents cross-appealed against the refusal of the court *a quo* to award interest on the amount awarded in terms of Prescribed Rate of Interest Act 55 of 1975. No reasons were given for declining this particular claim. There does not appear to be any reason why interest should not have been so awarded, together with the award of compensation of damages.

[37] For these reasons therefore the following order is made:

1. The appeal is dismissed.
2. The cross-appeal is upheld and it is ordered that interest at the prescribed rate of 15, 5% is awarded on the amounts awarded to respondent as from the date on which the matter was referred to the CCMA, being 20 March 2002.
3. The appellant is ordered to pay the costs of this appeal.

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DAVIS JA

JAPPIE JA

REVELAS AJA Concur

APPEARANCES:

For the appellant: G.L. Van der Westhuizen

Instructed by: Macrobert Inc

For the Respondent: Adv. J. Hiemstra SC

Instructed by: Hannelie Basson Attorneys

Date of Judgement: 25 May 2010