A GREAT TRIUMPH *PAR EXCELLENCE* FOR NON-RACISM IN OUR JURISPRUDENCE

Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC)

1 Factual background

The applicants in this seminal judgment of the Constitutional Court were both Coloured males and females. As such they were denied promotion by the Department of Correctional Services in the Western Cape, a province in which there is a Coloured majority, on the basis that this population group was overrepresented in employment, in terms of the said Department's national demographics-based 2010 Employment Equity Plan (EE Plan).

Both the Labour Court and the Labour Appeal Court held that the Department's EE Plan was unlawful because it set numerical employment targets for the different racial groups that were based exclusively on the national demographic profile, without therefore taking into account the regional demographic profile, as it was obligated to do by virtue of section 42(1)(a) of the Employment Equity Act 55 of 1998 (EE Act), as it read at the time.

However, neither of the abovementioned Courts set aside the EE Plan as invalid, nor did they grant the remedies applied for. As a result, the applicants sought in an appeal to the Constitutional Court for appropriate relief.

2 The majority judgment of the Constitutional Court

The majority in a judgment, penned by Zondo J, (Moseneke DCJ, Jafta J, Nkabinde J and Van der Westhuizen J concurring) held:

Firstly, in relation to discrimination within designated groups, a correct interpretation of the EE Act was designed to achieve a particular constitutional objective that each and every workplace should be broadly representative of the population of South Africa. This required that all the specific subgroups falling under the general "Black" group must be equitably and fairly represented within all occupational levels of the workforce of the designated employer. It prohibited overrepresentation of one group over another. This also applied to gender representation (611H–612C par 49).

Secondly, as to whether numerical targets constitute quotas, it pointed out that a distinction must be drawn between a quota, which is prohibited by section 15(3) of the EE Act and a numerical target, which is not. The former was rigid and the latter flexible. The 2010 EE Plan made provision for

deviation from it, by virtue of deviation or departure from the targets in certain circumstances.

Therefore, once it was accepted that the 2010 EE Plan contained a provision for deviations from the targets of the Plan, then the targets, it was held, could not be said to be rigid. It was held that the correct approach was to consider the 2010 EE Plan holistically, including, it was argued, the provisions relating to deviations. Considered in this light, the deviations, it was held, were from those targets, and not separate from the EE Plan, as was held by the minority, per Nugent AJ (Cameron J concurring), which will be discussed below, and which form the main thrust and critique of this case note. The majority judgment therefore held that the applicants had failed to show that the targets in the 2010 EE Plan constituted quotas (612F–H par 51; 613B–C par 53; 613C par 57; 615F–G par 64).

Thirdly, as to whether the EE Plan constituted unfair discrimination, it was held that discrimination in making appointments without a lawful purpose for such, constituted unfair discrimination and an unfair labour practice. The Court held that the determination that the group concerned was already adequately represented or overrepresented must have a proper basis, which must be authorized by the statute. This meant a wrong basis would lead to wrong targets. In this regard it was fundamental to perceive that the Department was only using the national demographic profile to determine the level of representation of the different groups and not regional demographics as was required by the legislation, as explained below.

However, at the relevant time the Court held the law required that the Department was obliged to use the demographic profile of both the national and regional economically-active population. In fact, it did not take into account the demographic profile of the regional economically-active population, as it was obliged to do in accordance with section 42(a) of the EE Act. In this regard in was pointed out in *South African Police Services v Solidarity obo Barnard* (2014 (6) SA 123 (CC) par 53) that the EE Act "allows for proportionality, balance and fairness when it requires both national and regional demographics to be taken into account" (604C–D par 22). Also in a similar vein in *Minister of Finance v Van Heerden* (2004 (6) SA 121 (CC) par 44) the Constitutional Court held that the plan should not impose disproportionate burdens, or –

> "[constitute] an abuse of power or impose substantial and undue harm on those excluded from benefits, that our long-term constitutional goal would be threatened." (Quoted by Zondo J, 606H–I par 31).

The Court therefore held that the Department acted in breach of its obligation in terms of section 42(a), and as a result, unlawfully. This clearly meant that the overrepresentation relied upon by the Department to justify declining to appoint the Coloured and female individual applicants lacked a proper constitutional and legal basis. Consequently the Department was not able to justify the way it used race and gender in refusing to appoint them. For the same reason, the said Department was unable to show that the discrimination was "rational and not unfair or was otherwise justifiable", as is contemplated in section 11(1) of the EE Act. Considering the relevant legal and factual circumstances the conclusion reached by the Court was unequivocal that the Department's refusal to appoint the Coloured male and

female individual applicants, amounted to unfair discrimination and unfair labour practice (620A–E par 78–79; 620G–621E par 81–83).

Lastly, in this regard, the Court had to devise an appropriate remedy. It wisely decided that, instead of invalidating the entire EE Plan, it would be appropriate to rather focus on the specific decisions that were adopted for its advancement and relating to which the applicants had legitimately complained, and to declare those decisions invalid and set them aside, together with "any appropriate order that would be just and equitable in the circumstances", as provided for in section 50(2) of the EE Act (621C–I par 83–85).

3 The minority judgment of Nugent AJ, (Cameron J, concurring)

Nugent AJ, has penned a powerful and indeed penetrating minority judgment giving a different assessment in regard to the kindred issues of "quotas" which are prohibited and "numerical targets" which are allowed.

In this regard, he disagrees fundamentally with the majority judgment of Zondo J, stating that what the latter classifies as numerical targets "have the look and characteristics of quintessential quotas" (628D par 108). In this regard he presents a more sophisticated and nuanced argument, which it is submitted, is preferable to that set out by Zondo J. Nugent AJ, defines a quota as "an allocation that is in some sense due" (628D–E par 108).

He explains what Zondo J, classifies as numerical targets are, on closer and more careful examination, quotas because the National Commissioner has only a certain limited discretion to depart from them, and also because they lack the essential flexibility of numerical targets. He postulates in this regard that the accommodation of special cases to EE Plan, does not turn the quotas into numerical targets. In this regard Nugent AJ, states that "[t]he critical enquiry is not whether there are special cases that are excepted from the Plan, but instead whether there is scope for flexibility when the Plan is applied to non-excepted posts" (629G–H par 113).

The gravamen, however, of Nugent AJ's argument, in contrast to Zondo J's one, is that allowing the National Commissioner merely to deviate in specified circumstances from the quota, does not turn the latter into numerical targets. Nugent AJ disagrees and gives an example by stating when the National Commissioner "deviates to appoint doctors he is not implementing the plan – he is excepting doctors from it" (629G–H par 113). This does not constitute the flexibility essential when the plan applies to non-excepted posts. Therefore, according to Nugent AJ, "[t]he exception of special cases from the ambit of the Plan does not seem to me to be flexibility" (630 C–D par 116). Instead he relies on Moseneke ACJ's explanation of what "flexibility" means in *South African Police Services v Solidarity obo Barnard (supra*) to the effect that:

> "[Section] 15(4) sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an employment equity policy or practice that would establish an *absolute barrier to the future or continued employment or*

> *promotion of people who are not from designated groups."* (Par 42; author's own emphasis).

The criterion of that there must not be an *absolute barrier to the future or continued employment or promotion of people who are not from designated groups* set out above, is fundamental to an equitable and just jurisprudence in relation to affirmative action (author's own emphasis). Its importance cannot be overemphasized.

Also of considerable significance: Nugent AJ's emphasis is not on flexibility only but also on rationality. In this regard he argues that demography does not only entail race, although he concedes that "[f]or powerful historical reasons the statute has focussed on race and gender as markers of employment equity" (631E par 121). However, he asserts cogently that to calculate demography "all characteristics of the population that are relevant must be brought into account and not only some" (631 par 122). Not to do so would produce a result that is irrational, which is not countenanced by the law (632A par 122).

What Nugent AJ is actually postulating is that the enquiry should not be obsessed by race and race alone. This would be irrational, and that rationality is a fundamental requirement in this regard. So, for instance, class and affluence may, *inter alia*, also be relevant factors. Nugent AJ (632C par 123) quotes from Cameron J, Froneman J and Majiedt AJ in *South African Police Services v Solidarity obo Barnard* (par 94), who stated:

> "We agree that rationality is a 'bare minimum' requirement. It can hardly be otherwise. In our law all exercises of public power must at least be rational."

Nugent AJ also points out that the purpose of the EE Act is representivity in the workplace in order to ensure that

> "employment opportunities are accessible to people where they live. The objective of the EE Act is most certainly not to induce racial migrations to accommodate the statistics" (632 par 125).

This viewpoint categorically excludes the notorious proposition by Jimmy Manyi, a prominent ANC spokesperson, contained in the statement, discussed more fully below, that Coloured people are overconcentrated in the Western Cape and need to move to other provinces. (See report "Jimmy Manyi makes racial statements concerning Coloured people" (2011-03-03) *The Times* https:www.zapiro,com/cartoons/110303tt (accessed 2016-11-24)).

It is submitted that Nugent AJ's approach to quotas and numerical targets is both rational and flexible, and in effect is two-dimensional and as a result, preferable to the one-dimensional one advocated by Zondo J. Metaphorically, it is submitted, it reflects the wisdom of Solomon, as will be discussed further below.

4 Commentary

The Constitutional Court judgment summarized above, which addresses crucial employment equity and labour-relations issues is indeed a landmark one. On behalf of Coloured employees of Department of Correctional

Services, the trade union Solidarity sponsored this seminal case, which involved a veritable battle royal with the employer, the said Department, which had spanned several years. What was at stake, as indicated above, was the question whether the regional demography in the Western Cape, and not merely national one, should be used when applying the Correctional Services EE Plan. It was hailed in the media as a singular victory for the Coloured employees concerned. (Mahlakoana "'Landmark' ruling in equity case hailed" 16 July 2016 *Saturday Star*). In the context, demography deals with population distribution according to, *inter alia*, race. The national demography of South Africa reflects that Africans dominate by nearly 80% and the minorities which constitute just over 20%, whereas the regional demography of the Western Cape reflects the Coloureds constituting nearly 50% of the population (see *South African Survey 2014/2015* 12; *South African Survey 2013/2014* 22).

The approach of the said Department, as explained above, was that, although the applicants who were Coloured persons, residing in the Western Cape, where there are a high proportion of Coloured persons, it was not necessary to consider the regional demography, and it insisted dogmatically on applying exclusively the national demography in a manner that lacked rationality. This was to the manifest disadvantage of Coloured persons in the Western Cape.

In this historic and cogent judgment, Zondo J, was concerned that justice be done to the individual applicants and therefore declared that:

> "Considerations of justice and equity dictate that the individual applicants concerned should be paid remuneration applicable to the posts to which they were unfairly denied appointments. The payments of this remuneration must be with effect from which they would have been appointed to the posts if they were not denied appointment." (623E–F par 91).

It is submitted that there is no doubt that this judgment will have a significant impact on other Government Departments, both national and provincial. Solidarity has already indicated that it will be using the judgment against the South African Police Service, where a number of posts have been frozen, awaiting the decision of the Constitutional Court in relation to a Correctional Services case (*Solidarity obo Members v South African Police Service* [2016] 7 BLLR 671 (LC)).

This judgment is a singular victory for non-racism, which is enshrined in our Constitution. Furthermore, the legendary Freedom Charter declared that "The rights of the people shall be the same regardless of race, colour or sex." Section 1 of the Constitution declares that it is based on the values of inter alia: "non-racialism." Section 9 states that the State may not unfairly discriminate directly or indirectly on, *inter alia*, "race, culture, language and birth."

Non-racialism forms a golden thread that is woven into the warp and woof of our Constitution and body politic. It is submitted that non-racism is therefore a fundamental principle that is intrinsic to the unity of the human family. It is the essence of a true humanity and authentic democracy.

The judgment is also a triumph for diversity and the protection of vulnerable minorities, be they Coloured, Indian or White groups, against

domination by Africans. Such domination would be of a racial nature, and would be anathema to the non-racism espoused in the Constitution.

From time to time such racial domination has been advocated by certain politically-important persons. So, for instance the viewpoint of Jimmy Manyi, an ANC spokesperson, referred to above, who unashamedly declared in a highly-publicized and notorious comment in 2011, that Coloured people are overconcentrated in the Western Cape and need to move to other provinces to find jobs elsewhere, and that in KwaZulu-Natal Indians are bargaining their way to the top (see report "Jimmy Manyi makes racial statements concerning Coloured people" 3 March 2011 *The Times* https:www.zapiro,com/cartoons/110303tt (accessed 2016-11-24); "Jimmy Manyi a racist – Trevor Manuel" 2 March 2011 *News 24* http://www.news24.com/SouthAfrica/Politics/Jimmy-Manyi-a-racist-Trevor-Manuel (accessed 2016-11-24)).

These statements were patently racist at the time and made inroads into our commitment as a nation to non-racialism. They are now also unconstitutional by virtue of the judgment that is the subject of this note as discussed above.

Secondly, in this regard, it was reported in the media (Jennie Evans "Indians are Black people too, judge candidate tells JSC" 8 October 2015 *News 24*) that, while questioning Judge Shyam Gyanda in an interview for the vacant KZN High Court deputy judge-president position at a meeting of the Judicial Services Commission, Mr Julius Malema stated that Indians dominated every sphere of life in KwaZulu-Natal, "particularly economic and judicial". Malema went on to asked "[d]o you think that the appointment of a deputy judge-president, if we were to consider an African person, would be in line with transformation of the judiciary?" This statement is also manifestly divisive and violates our commitment to non-racism, as enshrined in the Constitution.

5 Conclusion

This Constitutional Court judgment makes it categorically clear that there is no place for racial domination in our constitutional dispensation or body politic. It is also a great triumph for diversity and the philosophy of constitutionalism. Once again the Constitutional Court has demonstrated that it is world-class and has delivered an exemplary judgment that promotes democracy in no uncertain terms in South Africa.

In the preface to Nugent AJ's minority judgment, which in effect adds a second dimension to the equality jurisprudence involved, he refers to a catena of cases that have shaped our equality jurisprudence. (These are, *inter alia*, *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); *South African Police Services v Solidarity obo Barnard supra*; *Minister of Finance v Van Heerden supra*.)

Each of these judgments has made an important contribution to realizing "the transformational aspirations of the Constitution" (624J par 97). The difficulties facing us as a nation in relation to transformation are "profound and must not be underestimated" (*Bel Porto School Governing Body v*

Premier, Western Cape supra par 7). This is the position bearing in mind that what we are trying to achieve is not mere formal equality, but "substantive equality" (*South African Police Services v Solidarity obo Barnard supra* par 29).

In realizing this kind of sophisticated equality "due care not to invade unduly the dignity of all concerned" (*South African Police Services v Solidarity obo Barnard supra* par 30–31). This important imperative requires that "balance must be brought to bear" (626C–D par 101) in weighing up all the relevant considerations. In this regard Van der Westhuizen J, emphasized that "it must be pointed out that equality can certainly mean more than representivity" (*South African Police Services v Solidarity obo Barnard supra* par 149).

All of these outcomes mean that what is actually required is not "only cold and impersonal arithmetic" (626 F–G par 102). This was the essential critique of the Department of Correctional Services EE Plan, which made virtually exclusive use of "a series of arithmetic tables" (627 par 105).

The *Solidarity* judgment, which is the subject of this case note, raises profoundly interesting jurisprudential issues. It most certainly, it is submitted, is not the last word on these seminal issues, which have important constitutional and political consequences. It advances, as explained above, the cardinal value of non-racism in the understanding and application of our Constitution and has defused, it is submitted, a tense political situation, given notorious expression to Jimmy Manyi, referred and contextualized above, relating to minority groups in our body politic and their rights.

Although transformation involving employment equity must be rational and fair within the context of the Constitution and the EE Act, it must be pointed out that it is not necessarily always painless, as explained in *Bel Porto School Governing Body v Premier, Western Cape* (par 7):

> "In order to achieve the goals set out in the Constitution, what has to be done in the process of transformation, will at times weigh more heavily on some members of the community than others."

Also according to *South African Police Services v Solidarity obo Barnard* (par 29):

> "We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged." (Quoted by Nugent AJ, 625G–H par 99).

The above quotation is apt since in *Solidarity* it was the fate of Coloured warders, who were indeed discriminated against, that was at stake. What is ultimately required is a judicious balancing of conflicting interests. Truly the wisdom of Solomon is required and it is submitted Nugent AJ's judgment epitomizes this to a greater extent and Zondo J's to a lesser extent.

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