THE EQUALITY COURT'S VIEW ON AFFIRMATIVE ACTION AND UNFAIR DISCRIMINATION

Du Preez v The Minister of Justice and Constitutional Development 2006 5 SA 592 (EqC)

1 Introduction

So pervasive are the consequences of our segregated past that the need for reform to redress the resultant imbalances cannot be doubted. Affirmative action is the catalyst. There are inherent difficulties in applying affirmative action measures. These include, firstly, the means to ensure the objective and effective application of affirmative action, and secondly, the extent to which previously advantaged groups are to be excluded. The present case illustrates the difficulties that courts are faced with in a challenge by a member of a previously advantaged group against alleged unfair discrimination due to the implementation of affirmative action measures. It is the first reasoned judgment of the High Court sitting as an Equality Court in this regard and, for this reason, is of particular significance.

2 Facts

Proceedings were instituted in terms of section 4 of the Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter "PEPUDA"), after the Magistrates Commission (the 2nd respondent), a statutory body whose functions include ensuring the appointment of judicial officers (s 4(a) of the Magistrates Act 90 of 1993) failed to shortlist the applicant for the position of magistrate in Port Elizabeth. This was despite the complainant having met the minimum requirements for the position, namely an LLB degree or a *Diploma Legum*, and at least seven years' post-university experience in law.

It was common cause that the Employment Equity Act 55 of 1998 (hereinafter "EEA") was not applicable to magistrates, in that in terms of the Magistrates Act they are judicial officers, independent of the public service, and subject only to the Constitution of the Republic of South Africa, 1996. They do not work for the state and are therefore not employees as defined in the Employment Equity Act (see *Van Rooyen v The State* 2002 5 SA 246 (CC)).

The primary issue for determination between the parties was whether the criteria for shortlisting for posts of regional magistrates in Port Elizabeth

constituted, pursuant to the provision of section 13(2) of PEPUDA, fair discrimination. The complainant prayed for an order setting aside the criteria utilized to select suitable candidates to be shortlisted for the posts on the basis that the criteria were irrational, discriminatory and inequitable. He also prayed that the first and second respondent be ordered to re-advertise all the positions previously advertised during 2002 and 2003 and that the first and second respondents be directed to use criteria which were constitutionally sound and which did not constitute an absolute barrier to any prospective candidate as a result of race and/or gender.

The complainant had 19 years experience as a magistrate and held the degrees BJuris, LLB and Master of Public Administration, but was not shortlisted for the post of regional magistrate. Instead two black female candidates were shortlisted.

The three criteria that were used to compile a shortlist were experience as a magistrate (the parties agreed that a further criterion relating to experience in other legal occupations should for all practical purposes of the application be ignored, since it played no role in the shortlisting), qualifications, and race and gender. For each category a score was allocated. The scoring system was so constructed that the maximum which a white male could score was 5 points (3 for experience and 2 for qualifications). (Counsel for the applicant pointed out that, realistically speaking, the overwhelming majority of aspirant regional magistrates do not have the degree of LLM but generally only LLB.) The maximum number of points which a white male with the lesser degree could accumulate was 4. The minimum that other applicants could achieve was: black male 5 (1 for experience, 1 for qualifications and 3 for race); white female 5 (1 for experience, 1 for qualifications and 3 for gender); black female 8 (1 for experience, 1 for qualifications, 3 for race and 3 for gender). Black males and white females could score a maximum of 8 points (3 for experience, 2 for qualifications and 3 for race or gender). The maximum that a black female could score was 11 (3 for experience, 2 for qualifications, 3 for race and 3 for gender). The resultant position can be summarized as follows:

(a) white males with maximum points would score the same as black males and white females with minimum points;

(b) white males with only an LLB degree (presumably the majority of the prospective candidates) would automatically be outscored by all other categories of candidates;

(c) black males and white females with maximum points would score the same as black females with minimum points;

(d) black women with the minimum points would outscore all other categories of candidates with only an LLB degree.

It was common cause that the shortlisting was done exclusively on the result of the score sheets (596D-597F).

3 Reasoning of the court and judgment

The court pointed out that equality among all people in South Africa lies at the heart of the Constitution (599B). Equality is guaranteed in the Bill of Rights in section 9 as follows:

> "9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) 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.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Parliament's compliance with the dictate contained in section 9(4) of the Constitution was the enactment of national legislation in the form of twin measures. Firstly the EEA and secondly PEPUDA. Both these acts flow from and give effect to section 9(3) of the Constitution.

Section 6 of PEPUDA provides that neither the state nor any other person may unfairly discriminate against any person. There is concordance in wording between this section and section 9(3) of the Constitution. Both provisions unequivocally proscribe unfair discrimination in any form, including race and gender.

The court held therefore that it would be improper and unfairly discriminatory to take such factors into account in the appointment of magistrates were it not for the Constitutional and statutory approval of persons disadvantaged by unfair discrimination (600C).

PEPUDA gives wholehearted recognition to affirmative action.

Section 14(1) of PEPUDA provides:

> "It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons."

Section 13 of PEPUDA read with the definition in section 1 thereof provides that if the complainant makes out a *prima facie* case of discrimination, not disproven by the respondent, then, if the discrimination took place on the prohibited grounds of race and gender, it is unfair, unless the respondent proves that it was fair (603G).

Section 14(2) provides the following in this regard:

"(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
(a) The context;
(b) the factors referred to in subsection (3);
(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned."

The court pointed out that these considerations do not supplant the test for the constitutionality of an affirmative action measure, but give substance to the test. All criteria are not applicable in all instances, nor do those that are relevant necessarily bear the same weight in the enquiry and each case is to be decided on its own facts and circumstances (604E-F).

Section 14(3) provides:

(3) The factors referred to in subsection (2)(b) include the following:
(a) Whether the discrimination impairs or is likely to impair human dignity;
(b) the impact or likely impact of the discrimination on the complainant;
(c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
(d) the nature and extent of the discrimination;
(e) whether the discrimination is systemic in nature;
(f) whether the discrimination has a legitimate purpose;
(g) whether and to what extent the discrimination achieves its purpose;
(h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
(i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to –
(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
(ii) accommodate diversity."

The court held that the shortlisting formula not only differentiated between the complainant and the other applicants, but also that the shortlisting criteria adopted discrimination on the grounds of race and gender because a disadvantage was imposed on the complainant that effectively withheld him from the benefit of being a regional magistrate in Port Elizabeth. This disadvantage was based on race and gender (605H).

The court, correctly it is submitted, rejected the contention on behalf of the respondent that although there was differentiation, there was no discrimination because the criteria used in the shortlist selection did not exclude the complainant in that there was no prohibition therein in respect of race and gender (605E-G).

The next question was therefore whether the respondents had proved that the measure was fair as envisaged in section 13 of PEPUDA.

The respondents contended that the discrimination was justified on the grounds that the Constitution enjoined them to have regard to the racial and gender composition of South Africa when judicial officers are appointed. Uncontested documentation was tendered to indicate that there was a real need for racial and gender diversification in the Port Elizabeth Regional Court bench (606C-D). The picture further emerged that the formulae for shortlisting in different districts varied significantly and that there was an obvious correlation between the composition of the various benches and the points allocated on the basis of race and gender in respect of each post. In one instance white males were favoured over all candidates because of the absence of white males on the regional court bench in that area. The court was therefore satisfied that the discrimination had a legitimate purpose (608C-D). It was the complainant's contention, however, that in the region of Port Elizabeth the application of the shortlisting formula in effect negated experience where a white male was in competition with other categories of candidates. In this regard reference was made to section 14(2)(c) (see above).

As a result of the manner in which the points were allocated under the various heads (see the explanation above), such experience in effect counted for nought in the case of a white male competing against any other category of persons (609F-G). Since the complainant's experience had no consequence, no equitable assessment of the merits of his application was possible. In regard to the shortlisted candidates, other criteria including legal knowledge, leadership, management skills and language proficiency were also considered. The narrow shortlisting formula ignored these criteria and was therefore inconsistent with the second stage of the procedure. The court held that as a consequence a white male candidate was not only prejudiced but that it was also not in the interests of society which requires that the regional courts function at the highest achievable level of efficiency (610D-E).

The court concluded that the effect of the committee's shortlisting formula was to raise an insurmountable obstacle for the complainant and that there was therefore an absolute barrier to his appointment (610D-E). Since the discrimination was built into a departmental policy, it was systematic in nature (see s 14 (3)(e)).

The court concluded accordingly that the respondents had failed to prove that the discrimination was fair. The shortlisting criteria were set aside and the first and second respondents were ordered to re-advertise the positions for Regional Court Magistrate, Port Elizabeth.

4 Discussion

The present case is important since it was handed down by a High Court sitting as an Equality Court and rendered in terms of PEPUDA. The Equality Courts function on two levels and are staffed by judges and magistrates who have been specially trained as presiding officers in Equality Courts for a region. Every High Court is an Equality Court in its jurisdictional area and

one or more magistrate's courts is designated by the Minister as Equality Courts for a region. Scant authority is available regarding the prohibition of unfair discrimination and the effect of affirmative action in PEPUDA. The court accordingly adopted the approach followed by the Labour Court in terms of the Equity Act. In this regard the court held as follows:

> "[T]he two acts are sufficiently close for authority on the one to be of assistance in the interpretation and application of the other …" (605B-C).

The court warned, however, that "care must be exercised for the reason that the very fact of the closeness of the two enactments may cause authority on the one to be subtly misleading in the construction and application of the other" (605B-C).

What is important is that the court, like the Labour Court, adopted the test for unfair discrimination set out in *Harksen v Lane NO* (1998 1 SA 300 (CC)). This approach is logical, since both the EEA and PEPUDA flow from and give effect to section 9(3) of the Constitution.

In regard to the consideration of affirmative action in the context of unfair discrimination it is important to note that the court pointed out that although the similarity of the wording of section 14(1) of PEPUDA and section 9(2) of the Constitution is striking, the difference in wording is also significant (601E-G). In terms of section 9 of the Constitution the approval of affirmative action measures in the constitution translates into a declaration to the effect that such measures are not unfair discrimination. In *Minister of Finance v Van Heerden* (2004 25 *ILJ* 1593 (CC)) the Constitutional Court held that affirmative action measures do not attract a presumption of unfairness once it is proved that they satisfy the requirements of section 9(2) of the Constitution. The Constitutional prohibition of discrimination and the intention to promote equality are complementary, because both are aimed at ensuring the full enjoyment of rights. The concept of equality accordingly goes beyond the mere formal equality which requires identical treatment. Substantive equality recognizes that systematic disadvantage still persists and acknowledges that the taking of restitutionary (affirmative action) measures does not necessarily establish *prima facie* unfair discrimination.

An important consideration in the present judgment was that the shortlisting criteria established an absolute barrier to the complainant as a result of race and/or gender. The court accepted this argument and held that the respondents had failed to prove that the discrimination had been fair.

It is submitted that the criteria did not necessarily establish a general absolute barrier. Had there been no candidates from the designated groups the complainant would have been shortlisted. Moreover, a white male candidate with the complainant's experience and a LLM would have been shortlisted together with the two black female candidates.

It is also instructive to note that the formulae for shortlisting in different districts varied significantly and that there was an obvious correlation between the composition of the different benches and the points allocated on the basis of race and gender in respect of each post.

The purpose of the discrimination was therefore legitimate. It is submitted further that the goal of representivity was also pursued in a rational manner. The shortlisted candidates were not unsuitable as was the case in *Public Servants Association of SA v Minister of Justice* 1997 18 *ILJ* 241 (T) and, unlike the position in *Coetzee v Minister of Safety and Security* (2003) 24 *ILJ* 163 (CC) the respondents would not have made no appointments if there were no candidates from the designated groups. The complainant would have been shortlisted, and, in all probability, would have been approved.

What is significant is that there were minimum requirements that all candidates had to meet in regard to experience and tertiary education. The candidates from the designated groups were therefore suitably qualified and they were not recommended only because they were black and female. The remarks in *Stoman v Minister of Safety and Security* (2002) 23 *ILJ* 2020 (T) are instructive in this regard:

> "Some tension may in certain situations exist between ideals such as efficiency and representativity, and a balance then has to be struck. Efficiency and representativity, or equality … should not be viewed as separate competing or even opposing aims. They are linked and often interdependent. To allow equality or affirmative actions to play a role only where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a history of unfair discrimination. The advancement of equality is integrally part of the consideration of merits in such decision-making processes. The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable in responsible positions cannot be justified."

In the event that, for example, there is a complete absence or very few qualified "black" males and females who have applied in comparison to a majority of white individuals, it would seem that loosening these restrictions would be necessary in order to accommodate a larger number of "whites". This could for example, run hand in hand with community development or apprenticeship schemes, in order to ensure the future availability of skills from the desired designated group. Conversely, where there is a larger pool of qualified black people, an effort should be made to ensure that a demographically proportionate number of individuals find employment.

The prevailing representation of various groups within the workforce should also be considered. In this instance, 9 of the 13 magisterial positions were already occupied by white males. Under such circumstances the poor representation of various groups certainly requires remedying. This flows from the need to take positive measures to achieve the desired ratio, due to the fact that the prevailing posts have already been filled by other categories of employees. It should be borne in mind that in as much as the Equality Act, and the Employment Equity Act, discourage such harsh measures as an "absolute barrier", there cannot be said to be a direct prohibition on such a measure. This, one could argue, flows from the reasoning that in some "reasonable circumstances" a "solid" attempt must be made to ensure that a certain group finds representation in the workplace. If applicants don't satisfy the requirements established (as in this case, qualifications and experience)

and such applicants cannot reasonably be accommodated, it follows that for the sake of the continuance of effective services, those of other groups must be called to fill these positions. The previously discussed considerations should therefore be taken into account.

It is also submitted that a method of scoring to determine shortlisted candidates is not necessarily unfair provided such a method is rational and only allows suitably qualified candidates to be shortlisted. It is submitted that such an approach is in fact honest to the candidates from non-designated categories. There is no pretence that they will be considered when, in fact, they will not be as a result of the constitutionally supported concept of substantive equality.

This view seems bleak for candidates in the complainant's position, but it is a generally accepted principle that affirmative action is a temporary measure and will come to an end once its goal is achieved (Dupper and Garbers "Affirmative Action" in Strydom (ed) *Essential Employment Discrimination Law* (2004) 262). The authors state:

> "The goal of affirmative action, according to the Constitution, is the achievement of equality in the sense of the equal and full enjoyment of all rights and freedoms. Once this goal (equality) is achieved, the rationale for the measure to achieve it (affirmative action) falls away, in which case continued efforts in the interest of affirmative action might well be regarded as unfair discrimination" (Dupper and Garbers 262).

5 Conclusion

Affirmative action measures promote substantive equality in the workplace. The goal of these measures must, however, be presented rationally, and affirmative action cannot be an absolute defence in unfair discrimination cases. It is however, inevitable that the non-designated category of employees (*ie* white males), may be discriminated against as a result of these measures. Courts should guard against reverting to the formal notion of equality, because of the unfortunate consequences that these measures, of necessity, have on the non-designated group of employees.

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