



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Solidarity and Others v The Department of Correctional Services**

**CCT 78/15**

**Date of hearing: 3 November 2015**

**Date of judgment: 15 July 2016**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Friday, 15 July 2016 the Constitutional Court handed down its judgment in an application for leave to appeal against a decision of the Labour Appeal Court. The decision of the Labour Appeal Court related to a dispute between Solidarity and the Department of Correctional Services (the Department) about the validity of the 2010-2014 Employment Equity Plan (2010 Employment Plan) of the Department as well as the Department's refusal to promote or employ certain employees.

For the period 2010-2014 the Department had adopted the 2010 Employment Plan that contained targets based on the demographic profile of the national population issued by Statistics South Africa in 2005. The Department had also used that demographic profile to assess the level of representation of the various racial and gender groups within its workforce. Using that demographic profile, the Department had concluded that Coloured persons and women were overrepresented at certain occupational levels.

The Department advertised certain vacant posts. Among those who applied were the 10 individual applicants in this case, who are all members of Solidarity. One of them is a White person while the rest are Coloured persons. When most of them were recommended for appointment, the Department refused to appoint them. In regard to the only White candidate among the individual applicants, the Department said that White persons were already over represented at the relevant occupational level. In regard to male individual applicants, the Department said that Coloured persons were already overrepresented at the relevant occupational levels. In regard to the female individual applicants, the Department said that women were already overrepresented at the occupational levels.

Solidarity referred an unfair labour practice and unfair discrimination dispute to the Labour Court for adjudication. It contended that the 2010 Employment Plan did not comply with among others section 42 of the Employment Act and was therefore invalid. Before it was amended, section 42 obliged a designated employer to take into account the demographic profile of not only the national but also the regional economically active population in assessing whether the designated groups were equitably represented and in setting the targets for its employment equity plan. Solidarity also contended that the targets contained in the 2010 Employment Plan were not numerical targets but quotas which are outlawed by the Employment Equity Act.

Solidarity also contended that the Department's decisions not to appoint the individual applicants constituted unfair labour practices and acts of unfair discrimination based on race and gender and should be set aside and the individual applicants should be granted appropriate relief. The Department contended that it was entitled to use only the demographic profile of the national population because it is a national department. It also argued that its 2010 Employment Plan complied with the Employment Equity Act. It further contended that it was entitled to have refused to appoint the individual applicants because they all belonged to categories of people that were already overrepresented at the occupational levels to which they had sought to be appointed.

The Labour Court concluded that the Department's 2010 Employment Plan did not comply with the Employment Equity Act in so far as its numerical targets did not take account of the demographic profile of the regional economically active population but did not declare the 2010 Employment Plan invalid. It rejected Solidarity's contention that the 2010 Employment Plan contained quotas and not numerical targets. Despite the fact that the Labour Court found that the Department was obliged to have taken into account the demographic profile of both the national and regional economically active population in setting its numerical targets, it did not grant the individual applicants any individual relief. It also rejected the contention that the Employment Plan was invalid.

In the Constitutional Court, Justice Zondo, in whose judgment Moseneke DCJ, Jafta J, Khampepe J, Nkabinde J and van der Westhuizen J concur, rejected Solidarity's contention that the targets contained in the 2010 Employment Plan were quotas. He found them to be numerical targets which were applied with flexibility. He also concluded that candidates from designated groups were also subject to the so-called Barnard principle. That is the principle that an employer may refuse to appoint a candidate who falls within a category of persons e.g. women, Coloured or Indian or African persons who are already adequately represented at a particular occupational level. Justice Zondo held that, since the 2010 Employment Plan had run its course, there was no need for it to be held to be invalid. However, Justice Zondo held that the Department had acted in breach of its obligations under section 42 of the Employment Equity Act in not taking into account the demographic profile of the regional and national economically active population but simply using the demographic profile of the national population in assessing the level of representation of the various groups and in setting the numerical targets for its 2010 Employment Plan. He held that the Department used a wrong benchmark – one that was not authorised by the Employment Equity Act. He held that this meant that the Department had no justification for using race and gender to refuse to

appoint the individual applicants and that, therefore, the decisions not to appoint most of the individual applicants constituted acts of unfair discrimination.

The Court made an order that the Coloured individual applicants who were denied appointment even though they had been recommended must be appointed to the relevant posts if those posts have not been filled or were filled but are presently vacant and the appointment should be with retrospective effect to the dates when the individual applicants should have been appointed. This means that they must also be paid the difference in backpay between what they have been earning in the posts which they occupy and what they would have earned over the period if they had been appointed to the posts to which they were previously denied appointment.

With regard to those individual applicants who had applied for the posts that remain filled to-date, the Court ordered that their remuneration should be placed at the level at which it would have been if they had been appointed to the posts and this should be with retrospective effect to the dates when they would have been appointed had they not been denied appointment. Three of the individual applicants were unsuccessful in their appeal. They are Mr PJ Davids, Mr AJ Jonkers and Ms LJ Fortuin. In the case of Mr Davids, his appeal failed because he is a White person and the Department demonstrated that White persons were overrepresented at the occupational level to which he had sought to be appointed. In the case of Mr Jonkers, his appeal failed because he had not been recommended for appointment. In the case of Ms Fortuin, her appeal failed because, although she was initially denied appointment, later she was appointed to the position that she had applied for. The Court made no order as to costs.

In a separate judgment, Nugent AJ (Cameron J concurring) agreed with the main judgment's finding that the 2010 Employment Plan was unlawful for its failure to take account of the regional profile of the population, as required by section 42(1)(a) of the Employment Act. Nugent AJ held that, even without the requirement of that section, the relevant profile of the population included its distribution, not merely its racial proportions, and the failure to bring that to account was irrational and thus unlawful. He held further that the 2010 Employment Plan imposed quotas on appointments, which is prohibited by the Act, and on that ground, too, the 2010 Employment Plan was unlawful.