IN THE LABOUR COURT OF SOUTH AFRICA,

DURBAN

Not Reportable

Case no: D 285/15

In the matter between:

ETHEKWINI MUNICIPALITY	**Applicant**
And	
IMATU obo R NAIDOO	**First Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
MASIPA N.O.	**Third Respondent**

Heard: 10 May 2017

Delivered: 06 June 2017

JUDGMENT

Saloojee AJ

Introduction

[1] This is an application to review and set aside the third respondent's (the Commissioner's) award, which found that the applicant's failure to

promote Mr. Rubundran Naidoo (the employee) to be an unfair labour practice.

[2] The applicant also seeks to correct and replace the award with an order dismissing the referral, alternatively to refer the dispute back to the bargaining council for a new hearing.

[3] At the commencement of the hearing, Counsel agreed to confine the grounds of review to, whether the Commissioner's finding that the applicant applied the 2014 to 2018 Employment Equity Plan inconsistently in relation to the Employment Equity Plan for 2009 to 2013.

Background

[4] The employee is an Indian male who worked for the applicant for a period of 17 years. The employee had previously held the position of an Acting Manager from 2007 to 2011 and at the time of the dispute, the employee employed as a Senior Inspector.

[5] On 1 July 2013, the applicant advertised the position of Relationship Manager, which is a Level 15 position. The employee submitted an application for this position.

[6] The employee was interviewed for the position and on 11 October 2013 the employee was recommended for the position as he had achieved the highest score. However, the applicant's City Manager refused to accept the recommendation as the recommendation did not accord with the applicant's employment equity plan.

[7] The employee referred an unfair labour dispute to the second respondent for resolution. The Commissioner's award in favour of the employee is the subject of this review application.

Analysis

[8] The applicant's employment equity plan for 2009 to 2013 was applicable for the period 1 January 2009 to 1 December 2013. Upon expiration of this period, the applicant extended the application of this employment equity plan until a new plan was adopted.

[9] The applicant's employment equity plan for 2014 to 2018 came into effect on 1 September 2014.

[10] The applicant's ground of review takes issue with paragraphs 6.13 to 6.19 of the award. In these paragraphs the Commissioner noted the applicant deviated from its 2014 to 2018 employment equity plan in appointing an additional four Indian females in a demographic that already contained its maximum number and that the employee was refused a position where Indian males were over represented.

[11] The Constitutional Court stated in *Solidarity and others v Department of Correctional Services and others (Police and Prisons Civil Rights Union and another as amici curiae)*[1] that,

> "The important question that arises is, therefore, whether the *Barnard* principle applies to African people, Coloured people, Indian people, people with disabilities as well as women or whether its application is limited to White people. Ms Barnard was refused promotion on the basis that White people were already overrepresented in the occupational level to which she wanted to be appointed. This Court upheld this reason. The question is, therefore, whether an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people or Coloured people or Indian people, as the case may be, are already overrepresented or

[1] [2016] 10 BLLR 959 (CC) at para. 38 to 40

adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment. The question also arises whether the *Barnard* principle applies to gender with the result that a man or woman could be denied appointment to a position at a certain occupational level on the basis that men or women, as the case may be, are already adequately represented or overrepresented at that level.

In *Barnard*, Moseneke ACJ, writing for the majority, said:

> "The respondent accepted, as we must, that the Instruction gave the National Commissioner the power and discretion to confirm or forgo the recommendations made by the interviewing panel and Divisional Commissioner. He was not bound by the recommendations, particularly in relation to salary level 9 posts. The National Commissioner retained the power to appoint a candidate best suited to the objects of the Employment Equity Plan. The record shows that on several other occasions, the National Commissioner declined to fill up positions because suitable appointments, which would have addressed representivity, could not be made. Here, he exercised his discretion not to appoint Ms Barnard, even though she had obtained the highest score, because her appointment would have worsened the representivity in salary level 9 and the post was not critical for service delivery. Again, in his discretion, he chose not to appoint Mr Mogadima or Captain Ledwaba (Mr Ledwaba) even though their appointment would have improved representivity. I cannot find anything that makes his exercise of discretion unlawful."

In my view, the application of the *Barnard* principle is not limited to White candidates. Black candidates, whether they are African people, Coloured people or Indian people are also subject to the *Barnard* principle. Indeed, both men and women are also subject to that principle. This has to be so because the transformation of the workplace entails, in my view, that the workforce of an employer should be broadly representative of the people of South Africa. A

> workplace or workforce that is broadly representative of the people of South Africa cannot be achieved with an exclusively segmented workforce. For example, a workforce that consists of only White and Indian managers and, thus, excludes Coloured people and African people or a senior management that consists of African people and Coloured people only and excludes White people and Indian people or a senior management that has men only and excludes women. If, therefore, it is accepted that the workforce that is required to be achieved is one that is inclusive of all these racial groups and both genders, the next question is whether there is a level of representation that each group must achieve or whether it is sufficient if each group has a presence in all levels no matter how insignificant their presence may be. In my view, the level of representation of each group must broadly accord with its level of representation among the people of South Africa."

[12] Thus, the employee as an Indian male falls within the definition of the Barnard principle and he may be refused a position if his appointment would have worsened representation of Indian males in his level.

[13] In *Solidarity supra,* the Constitutional Court stated:

> "The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or

> adequately represented in that level. On the basis of the same principle an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level. However, that is if the determination that the group is already adequately represented or overrepresented has a proper basis. Whether or not in this case there was a proper basis for that determination will be dealt with later."

[14] The representation of a particular demographic at a particular level is in issue. However, at arbitration the applicant's Senior Human Resources Manager could not confirm the material issue that Indian males were over represented for senior management.[2]

[15] The applicant's Senior Human Resources Manager referred to the 2014 – 2018 employment equity plan, which reflects 100 positions available for Indian males in senior management and that 97 of these positions were filled.[3]

[16] This leaves three available positions in the applicant's quota of Indian males.

[17] The applicant's ground of review has to satisfy the test in *Sidumo and Another v Rustenburg Platimun Mines Limited and Another* [4] that the conclusion reached by the commissioner is one that a reasonable decision-maker could not reach.

[18] The Commissioner relied on the inconsistency between the applicant's appointment of four Indian females and the applicant's refusal to appoint the employee. The Commissioner's reasoning cannot be

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2 Transcribed Record, page 61 – 64

3 Transcribed record, page 61, line 12 to 14. Also see: page 51, Volume 3 of the pleadings bundle

4 [2007] 12 BLLR 1097 (CC) at para. 110

faulted as neither the Commissioner nor any of the witnesses were referred to the 2009 – 2013 employment equity plan. The applicant should have led evidence on its 2009 – 2013 employment equity plan.

[19] The 2009 – 2013 employment equity plan was material to the applicant's case at arbitration. However, the applicant did not lead evidence or cross-examine the employee on this plan.

[20] In *Head of the Department of Education v Mofokeng and others*[5], the Labour Appeal Court held that:

> …The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[21] In light of the evidence, the Commissioner evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

Conclusion

[22] In the circumstances, the applicant has not made out a case to review and set aside the Commissioner's award.

Order

[23] In the premises, the following is made:

1. The application is dismissed.

5 [2015] 1 BLLR 50 (LAC) at para. 1

2. The applicant is ordered to pay the first respondent's costs.

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YF Saloojee AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: J Nxusani SC

Instructed by: Hlela Attorneys

For the respondent: MMH Titus

Instructed by: Macgregor Erasmus Attorneys