



CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Police Service v Solidarity obo Barnard

CCT 01/14

Date of hearing: 20 March 2014
Date of judgment: 2 September 2014

MEDIA SUMMARY

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.

Today the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. The appeal concerned whether the decision of the National Commissioner of the South African Police Service (SAPS) not to promote Ms Barnard to the position of superintendent in the SAPS National Evaluation Service (NES), constitutes unfair discrimination on grounds of race in contravention of section 9 of the Constitution and section 6 of the Employment Equity Act (Act).

Ms Barnard has been a member of the SAPS since 1989. In 2005 the National Commissioner advertised a position within the NES. Ms Barnard applied twice for this position. Despite being shortlisted, interviewed and recommended as the best suited candidate, she was unsuccessful on each occasion. This matter however, only concerns her second attempt. The National Commissioner's reasons for not appointing Ms Barnard were that it would not enhance racial representivity at that particular salary level and that since the post was not critical to service delivery, it was not necessary to fill the vacancy immediately.

The Labour Court found in favour of Ms Barnard. It held that the National Commissioner's decision was not a fair and appropriate method of implementing SAPS's Employment Equity Plan and that SAPS had not given sufficient reasons for the National Commissioner's decision thus did not discharge its onus to establish that the decision was rational and fair.

On appeal, the Labour Appeal Court found in favour of SAPS. It found that the implementation of restitutionary measures is not subject to an individual's right to

equality in terms of section 9(3) of the Constitution. Thus the decision not to promote Ms Barnard was not unlawful because the National Commissioner was not obliged to fill the advertised post.

The Supreme Court of Appeal reversed the Labour Appeal Court's decision, and found that Ms Barnard was discriminated against on the listed ground of race and that the SAPS failed to rebut the presumption of unfairness in this regard. It held that Ms Barnard thus suffered unfair discrimination in terms of section 9(3) of the Constitution and section 6(1) of the Act.

This Court grants SAPS leave to appeal. The Court is unanimous that the appeal should be upheld. In the main judgment by Moseneke ACJ, writing for the majority, (Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe J, Madlanga J and Zondo J concurring) held that the SAPS Employment Equity Plan is a restitutionary measure contemplated in section 9(2) of the Constitution and section 6(2) of the Act. He therefore found that the Supreme Court of Appeal misconceived the issues before it, as well as the controlling law. The Supreme Court of Appeal was obliged to examine the equality claim through the prism of section 9(2) of the Constitution and section 6(2) of the Act because the validity of the SAPS Employment Equity Plan was not under challenge by Ms Barnard. He found that the appeal in that Court was decided on the wrong principle. He also held that the other cause of action, the review of the National Commissioner's decision, was only raised for the first time on appeal and was therefore not properly before the Constitutional Court. He held that on the facts this cause of action was, in any event, without merit. Accordingly, he upheld the appeal and concurred in the separate judgment of Jafta J.

In a separate concurring judgment, Cameron J, Froneman J and Majiedt AJ emphasised the possible infringement of dignity in the implementation of restitutionary measures, and the importance of giving adequate reasons for decisions. They agreed with Moseneke ACJ that Ms Barnard had not brought a review challenge. However, they found that it was necessary to adjudicate Ms Barnard's claim that the National Commissioner's decision was at odds with the Employment Equity Act. They held that the appropriate standard by which to evaluate this claim was on the basis of fairness. In the application of that standard, the National Commissioner's reasons were important as the reasons provide evidence of whether the Employment Equity Plan was implemented fairly. The judgment held that the National Commissioner's reasons were sparse on why he thought service delivery was not a pressing concern and why he rejected Ms Barnard's application even though, as a woman, she is a member of a designated group. Ultimately, however, the judgment concluded that there is sufficient external evidence to show that the National Commissioner's decision was fair.

In a separate judgment, Van der Westhuizen J concurs with the outcome of the other judgments but tests the implementation of an affirmative measure differently. Relying on *Minister of Finance and Another v Van Heerden* [2004] ZACC 3 he finds that the decision not to appoint Ms Barnard, even though she is a woman and has therefore suffered past disadvantage, did not threaten the long-term constitutional vision of a non-sexist, non-racial society. In addition to an equality analysis, Van der Westhuizen J measures the impact that the implementation of an affirmative measure has on other

rights. In this regard, he considers the effect of the National Commissioner's decision on Ms Barnard's right to human dignity as well as on the public's right to safety and security through an effective police service. He provides an exposition of the right to dignity in our constitutional democracy and finds that any impact on service delivery and on Ms Barnard's dignity is justifiable in the circumstances of this case.

In a separate concurring judgment (Moseneke ACJ concurring), Jafta J agreed with Moseneke ACJ that the order of the Supreme Court of Appeal ought to be set aside and that of the Labour Appeal Court revived. He took the view that the Constitutional Court should not determine the cause of action relating to the review of the National Commissioner's decision which led to Ms Barnard being overlooked for a promotion. He reasoned that the claim that was brought before the other Courts was that of unfair discrimination and not the National Commissioner's decision. Jafta J reasoned that it was a principle of our law that a party must plead its cause of action in the court of first instance for parties to know what case they have to meet and what relief is sought against them. Here, Ms Barnard was seeking relief on a new cause of action. Ordinarily, it is not permissible in our law for a party to raise a constitutional complaint that was not previously pleaded.