



Collaboration Space / UCT Equality Law Database / 2008

GORDON v DEPARTMENT OF HEALTH: KWAZULU-NATAL

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YEAR: 2008PLAINTIFF / APPLICANT / APPELLANT: APPELLANT: MARTIN GORDONDEFENDANT / RESPONDENT: RESPONDENT: DEPARTMENT OF HEALTH: KWAZULU NATALCOURT: SUPREME COURT OF APPEALCITATION: 2008 (6) SA 552; (2009) 1 ALL SA 30 (SCA), 2009 (1) BCLR 44 (SCA)POST / PRIOR ACTION:**PRIOR ACTION:**LABOUR COURT: GORDON v DEPARTMENT OF HEALTH, KWAZULU-NATAL (2004) 25 ILJ 1431 (LC), available at <http://www.saflii.org/za/cases/ZALC/2004/38.html>.LABOUR APPEAL COURT: GORDON v DEPARTMENT OF HEALTH, KWAZULU-NATAL, <http://www.saflii.org/za/cases/ZALC/2004/38.html>JUDGE(S): MLAMBO JA (SCOTT; CLOETE; MAYA JJA; LEACH AJA CONCURRING)GROUND(S) OF DISCRIMINATION: RACE, ARBITRARY GROUNDSSTATEMENT OF FACTS:

The appellant, a white male employee of the respondent applied for a promotion. Despite being recommended as the top candidate by the selection panel, the Provincial Public Service Commission (the commission) directed that the respondent appoint the black candidate. Its directive was based on the black candidate's 'academic qualifications, experience and the constitutional imperative to promote representativity in the public sector.' The respondent appointed the black candidate. It was uncontested that at the time of the promotion the respondent did not have an affirmative action plan/policy in effect.

Contesting the respondent's failure to appoint him, the appellant proceeded to the Labour Court claiming that the respondent had unfairly discriminated against him on the basis of race. He sought an order for a protective promotion. A protective promotion is regulated in terms of the Public Service Commission Staff Code. It provides that when an employee is prejudiced in the filling of a promotion post, such prejudiced employee must be placed in a position in which he receives all the benefits of the promotion as if he had been promoted. The appointment of the successful candidate remains unaffected.

The Labour Court dismissed the appellant's application. It found the appellant was not the most suitable candidate as his appointment would not have advanced the 'constitutional imperative' of equality and the promotion of representativity in the public sector. As such the conduct of the respondent did not amount to unfair discrimination. In addition it held that it was not a prerequisite for the respondent to have an employment equity plan/policy in place when appointing a black candidate.

The judgment of the Labour Court was taken on appeal to the Labour Appeal Court (LAC). The LAC dismissed the appeal. It did not engage in the reasoning of the Labour Court but focused on the non-joinder dispute. The appellant had omitted to join the promoted black employee as a party to the application. The LAC reasoned that if the appellant's claim was upheld, the promotion of the successful employee would be deemed a wrongful appointment. This vested such a party with an interest in the proceedings. The appellant's omission to join such party deprived such party of 'the opportunity to also have his say.' Accordingly the non-joinder of the promoted employee was fatal to the appellant's appeal, and as such the appeal was dismissed with costs.

The appellant proceeded to the Supreme Court of Appeal, appealing, with the leave of such court, against the judgment of the LAC.

In support of its claim for unfair discrimination the appellant relied on item 2(1)(a), read with item 2(2)(b), of schedule 7 of the Labour Relations Act 55 of 1958 (LRA). Item 2 has since been repealed and the comparable provision can be found in s 6 of the Employment Equity Act 66 of 1998.

ISSUE OF LAW:

- **Non-Joinder Dispute**

Whether the party that is alleged to be a necessary party has a legal interest in the subject-matter of the case, and whether such interest may be prejudiced by the judgment of the court

- **Unfair Discrimination**

Whether the appointment of a black candidate, instead of a white candidate who was found to be the most suitable candidate by the selection panel, justified by the employer as an appointment in furtherance of the constitutional imperative of the promotion of equality amounts to fair or unfair discrimination on the basis of race against the white candidate.

DECISION, RATIO AND OUTCOME (including minority judgment):

- **Non-Joinder Dispute**

The Supreme Court of Appeal (SCA) reversed the LAC's decision that the non-joinder of the promoted candidate was fatal to the appellant's appeal application. The SCA examined the reasoning and jurisprudence relied on by the LAC. It distinguished the identified case law from the facts of the case. With reference to case law, and contrary to the LAC, the SCA found that the 'order or judgment of the court is relevant' in determining whether a party who has not been joined has a 'direct and substantial interest in the subject matter of any proceedings'. It held that the LAC had incorrectly applied the reasoning of the cited case law. On the facts of the case the appellant requested an order for a protective promotion. This order did not affect the promoted candidate. The promoted candidate would only become a necessary party to the application when the requested order sought to have his appointment set aside and the appellant appointed. In such instance the order would 'profoundly and substantially affect his/her interests.

- **Unfair Discrimination**

Having reversed the LAC's decision, the SCA examined the merits of the appellant's allegation of unfair discrimination based on race. It was undisputed that at the time of the promotion the respondent did not have an affirmative action plan/policy. The respondent justified the appointment of the black candidate as 'designed to achieve the constitutional imperative of promoting equality and transforming the public sector.'

Examining case law the SCA held that the law requires that the achievement of equality, and affirmative action measures to be structured and planned in order to ensure its proper and fair achievement and implementation. Ad hoc decisions/actions directed at achieving representativity is impermissible. An affirmative action policy/plan/programme must be planned, structured and considered in light of the context in which it is to be applied, such as relevant demographics and deficiencies in representativity.

On the facts, the secretary of the commission failed to establish that it applied its mind to the implementation of affirmative action. The decision of the commission, which compelled the respondent to appoint a black candidate, was held to be ad hoc and arbitrary. The commission failed to establish a coherent basis for its decision, and to produce evidence of guidelines given to the respondent to address representativity in the recruitment process. There was no evidence that the appointment of the black candidate advanced representativity nor was there any factual basis presented which identified representativity as an issue. The SCA held that the random decision to appoint the black candidate fell outside the contemplation of s 9(2) of the Constitution, and was inherently arbitrary and as such unfair in terms of item 2(1)(a) of schedule 7 of the LRA.

At the time of selecting the candidate, and in the absence of an affirmative action plan/policy, the respondent was held to be bound by the Public Service Act. Such Act delineated the criteria to be applied when filling a public service post. The criteria excluded the consideration of race, with the ultimate criterion being the suitability of the candidate. On the facts the appellant satisfied the criteria in the Public Service Act. In addition the selection panel had determined the suitability of the appellant. These factors combined with the absence of an affirmative action plan/policy persuaded the Court that the failure to appoint the appellant amounted to unfair discrimination.

The SCA proceeded to reverse the decision of the Labour Court which held that it was not a requirement for the respondent to have an affirmative action plan/policy before appointing the black candidate.

The appellant had successfully proven that the respondent's failure to appoint him was "inherently arbitrary and therefore amounted to unfair discrimination which is an unfair labour practice as contemplated in item 2(1)(a)."

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZASCA/2008/99.html>

LABELS: